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UNFOUNDED ACCUSATIONS OF RACISM AS WORKPLACE DISCRIMINATION: *SOLIDARITY OBO K V WESTERN CAPE EDUCATION DEPARTMENT AND OTHERS* [2024] ZALCCT 59

MARIUS VAN STADEN★

ABSTRACT

This case note examines a Labour Court judgment concerning unfounded accusations of racism in the workplace, focusing on the intersection between misconduct and discrimination. The case raises important questions about the interpretation of the Employment Equity Act 55 of 1998 and employer liability for discriminatory conduct. Through analysis of the court's reasoning, this note identifies three significant problematic elements: the failure to recognise unfounded accusations of racism as inherently discriminatory, an overly technical approach to employer liability under s 60, and a questionable treatment of the severity threshold for harassment. Drawing on established jurisprudence, the analysis demonstrates how the judgment diverges from existing legal principles regarding workplace discrimination. The note argues that the court's approach potentially undermines the protective purpose of anti-discrimination legislation and may set concerning precedents for future cases involving unfounded allegations of racism in workplace disputes. It concludes that a more purposive interpretation of anti-discrimination provisions is necessary to balance addressing genuine racial discrimination effectively and preventing the weaponisation of racial allegations.

Keywords: unfair discrimination — workplace harassment — arbitrary grounds — vicarious liability — burden of proof — unfounded allegations of racism.

1 INTRODUCTION

South Africa's history of racial discrimination and inequality has left an indelible mark on workplace relations, making cases involving racial allegations particularly sensitive and complex. Despite significant legislative reforms post-apartheid, the workplace remains a contested space where racial tensions can manifest in various forms. One particularly challenging manifestation is the phenomenon of unfounded accusations of racism, which can poison workplace relationships and undermine legitimate efforts to address genuine racial discrimination.

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This case note examines a Labour Court judgment concerning such unfounded accusations of racism in *Solidarity obo K v Western Cape Education Department and Others*.¹ The case raises fundamental questions about how courts should interpret and apply anti-discrimination legislation in cases involving unfounded allegations of racism. Through critical analysis of the court's reasoning, this note argues that the judgment contains several problematic elements that warrant examination: the court's failure to recognise unfounded accusations of racism as inherently discriminatory conduct, its overly technical approach to employer liability under s 60 of the Employment Equity Act 55 of 1998 (EEA), and its questionable treatment of the severity threshold for harassment.

The analysis draws on established jurisprudence to demonstrate how the court's reasoning diverges from existing legal principles regarding workplace discrimination. The note contends that the judgment's approach potentially undermines the protective purpose of anti-discrimination legislation and may set concerning precedents for future cases involving unfounded allegations of racism in the workplace. By examining these issues, this study aims to contribute to the ongoing dialogue about how South African labour law can effectively balance the need to address genuine racial discrimination while preventing the weaponisation of racial allegations in workplace disputes.

2 FACTS OF THE CASE

The case involves a dispute between the Solidarity trade union, representing an employee,² and the Western Cape Education Department. The employee was employed as a farm manager by the department and experienced ongoing conflicts with his subordinate.³ The relationship between the employee, who was white, and the subordinate, who was coloured, was extremely strained, with both parties lodging multiple grievances against each other. While the subordinate filed several grievances against the employee, no disciplinary action was ever taken against the employee. However, every grievance the employee lodged against the subordinate resulted in disciplinary action being taken by the department.⁴

The first major incident occurred when the subordinate refused to carry out work instructions from the employee and behaved insolently. Following the employee's complaint, the subordinate underwent disciplinary proceedings and received a final written warning.⁵ In a second incident, the subordinate physically assaulted the employee by grabbing him by the throat. Although the subordinate was found guilty

¹ *Solidarity obo K v Western Cape Education Department and Others* [2024] ZALCCT 59.

² For pragmatic reasons, I refer to the parties as the 'employee' and the 'subordinate'.

³ *Solidarity* n 1 above para 22.

⁴ *ibid*.

⁵ *ibid* para 24.

of assault in disciplinary proceedings, the chairperson determined that the employee had partly provoked the conduct and recommended a final written warning rather than dismissal.⁶ Another significant incident involved the subordinate allegedly falsely accusing the employee of racism during a dispute about containing dogs on the premises. This led to the employee filing a grievance, while the subordinate counter-filed a grievance, claiming the employee had made racist comments.⁷

The department attempted mediation between the parties, but this failed. Subsequent disciplinary proceedings were initiated against the subordinate based on the employee's grievances.⁸ The situation culminated in a serious assault by the subordinate of the employee, after which the subordinate was immediately suspended and later dismissed following disciplinary proceedings.⁹ The Solidarity trade union, on behalf of the employee, engaged with the department on the employee's behalf, expressing concerns about the subordinate's conduct and the department's handling of the situation.¹⁰ However, Solidarity only entered the picture after the employee had lodged a formal grievance against the subordinate following an altercation in which the subordinate had allegedly falsely accused the employee of being racist.¹¹

The employee ultimately resigned from his position, claiming his continued employment had become intolerable. He successfully pursued an unfair dismissal claim at the Commission for Conciliation, Mediation and Arbitration (CCMA), where he was awarded compensation for constructive dismissal. Separately, through Solidarity, he also initiated an unfair discrimination dispute based on harassment.¹² It should be noted that the employee only labelled the conduct as unfair discrimination after he had already succeeded with the constructive dismissal claim, and that he never specifically raised a claim of racism in any of his multiple grievances against the subordinate.

3 FINDINGS OF THE LABOUR COURT

The court granted absolution from the instance in favour of the department. The central issue was whether the employee had established a *prima facie* case of discrimination in the form of harassment on an arbitrary ground. The test for absolution requires evidence upon which a court, applying its mind reasonably, could find for the plaintiff.¹³ The

⁶ *ibid* para 25.

⁷ *ibid* paras 26–27.

⁸ *ibid* paras 28–29.

⁹ *ibid* paras 35–36.

¹⁰ *ibid* paras 29, 31–32.

¹¹ *ibid* para 29.

¹² *ibid* paras 40–41.

¹³ *ibid* para 6. See also *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA).

court found that the employee bore the onus of proving discrimination on an arbitrary ground. Section 11(2) of the EEA requires a complainant to prove that the conduct was not rational, amounted to discrimination, and was unfair.¹⁴

Importantly, the court determined that s 6(3) of the EEA, which deals with harassment as discrimination, could not apply as the employee did not rely on a listed ground in s 6(1).¹⁵ For arbitrary conduct under s 6(1) to constitute discrimination, following *Harksen v Lane NO and Others*,¹⁶ it must be 'based on attributes and characteristics which have the potential to impair fundamental human dignity of persons as human beings or to affect them adversely in a comparable serious manner'.¹⁷ With reference to s 11 of the EEA, the court found that '[t]here can thus be no doubt that the applicant bears the onus *in casu*'. Section 11 of the EEA establishes two distinct burdens of proof depending on the type of discrimination alleged. For discrimination based on listed grounds under s 6(1), the burden of proof lies with the employer, who must prove on a balance of probabilities that either the alleged discrimination did not occur or the discrimination was rational and not unfair or otherwise justifiable. However, for discrimination based on arbitrary grounds under s 6(1), the burden of proof lies with the complainant, who must prove on a balance of probabilities three elements: that the conduct complained of is not rational, that the conduct amounts to discrimination, and that the discrimination is unfair. This represents a critical distinction where the burden is significantly higher for complainants alleging discrimination on arbitrary grounds, as they must prove all three elements, whereas, in cases of listed grounds, the onus shifts to the employer to disprove the discrimination or justify it.

The court found that while the subordinate's conduct was inexplicable and irrational, there was no evidence that it was connected to the employee's personal attributes, beliefs, characteristics or persuasions.¹⁸ The court emphasised that not everything bad, inexplicable or irrational that happens to an employee constitutes discrimination.¹⁹

Furthermore, the court held that the department could not be held vicariously liable under s 60 of the EEA. The employee had not immediately reported the alleged harassment as discrimination to the department, instead reporting it as misconduct.²⁰ When complaints were made, the department took appropriate disciplinary action against the subordinate.²¹ The court found that no grievance concerning

¹⁴ *ibid* para 13.

¹⁵ *ibid* para 14.

¹⁶ 1998 (1) SA 300 (CC).

¹⁷ *Solidarity* n 1 above para 16.

¹⁸ *ibid* para 43.

¹⁹ *ibid* para 45.

²⁰ *ibid* para 52.

²¹ *ibid* para 59.

discrimination was raised at the time. Instead, the employee dealt with these incidents purely as disciplinary matters, initiating disciplinary proceedings and accepting the sanctions meted out to the subordinate.²² The court noted that while grievances were raised promptly, they were framed as complaints of misconduct and unacceptable behaviour rather than as contraventions of the EEA. Even the grievance about the unfounded racism allegation was not presented as discrimination requiring action under the EEA.²³ The first time a specific complaint of discrimination was raised was in the CCMA, which occurred after the subordinate had already left employment.²⁴

The court distinguished this case from *Solidarity obo Oosthuizen v SA Police Service & others*,²⁵ where an employer had actively protected perpetrators of racial harassment. In contrast, in casu the court determined that the department took all reasonable steps to address the employee's complaints.²⁶ In *Oosthuizen*, where two subordinates had conspired to accuse their superior falsely of racism, the employer had actively protected the perpetrators by abandoning recommended disciplinary measures, suppressing critical evidence from investigative reports, and denying the superior an opportunity to testify. The court, in that case, found the employer had 'dismally failed to investigate the racial confrontation' and 'did everything in its power to protect the perpetrators of racial harassment'.²⁷ In stark contrast, the department in the present case took a series of appropriate actions: it treated the employee's grievance seriously, considered it at the management level, attempted mediation, and when that failed, proceeded with formal disciplinary charges. The employee was given the full opportunity to testify before an independent chairperson, and the department ultimately dismissed the subordinate.²⁸ Unlike the orchestrated campaign in *Oosthuizen*, the racism allegation here was a single incident that was properly investigated but found to be unproven after consideration of all evidence. The court emphasised that comparing these cases 'must leave one convinced that no case of vicarious liability can be said to exist' in the present matter, as the department's actions clearly met the reasonable steps requirement under s 60 of the EEA.²⁹

While acknowledging that the subordinate's conduct was inexcusable and unacceptable, the court concluded that it did not constitute discrimination. The court suggested that the employee might have other legal remedies available, such as a claim of substantively unfair constructive

²² *ibid* para 52.

²³ *ibid* para 53.

²⁴ *ibid* para 52.

²⁵ (2023) 44 *ILJ* 882 (LC).

²⁶ *Solidarity* n 1 above paras 61–62.

²⁷ *ibid* para 61.

²⁸ *ibid* para 62.

²⁹ *ibid*.

dismissal, a claim under the *actio legis Aquiliae* or for pain and suffering, but these fell outside the court's discrimination jurisdiction.³⁰

Given that the employee had already succeeded in his constructive dismissal claim at the CCMA, the court noted that the same arbitrary behaviour that rendered his dismissal unfair could not also constitute discrimination without establishing the *Harksen* considerations for the existence of 'arbitrary conduct that is also discrimination' or the existence of a listed ground under s 6(1) of the EEA.³¹ The court made no order as to costs, considering factors including the legitimate suffering of the employee, the non-malicious nature of the claim, and the proper conduct of both parties during proceedings.³²

4 PROBLEMS WITH THE LOGIC EMPLOYED BY THE COURT

4.1 *Listed or unlisted ground?*

The Labour Court accepted that the claim of racism was not on a listed ground. Although it appears from the logic of the judgment that the court itself was convinced that the claim was not related to the race of the employee, it should be noted that the employee and the employee's representative did not regard the matter as being related to a listed ground.³³ This, it is submitted, was a material misdirection. The very nature of an accusation of racism requires a racial context. It cannot exist independently of race as a concept. When the subordinate accused the employee of being racist, this accusation could only have meaning and impact because of the employee's racial identity as a white person. Such accusations involve attributing negative racial attitudes to someone specifically because of their race. It is impossible to think that the subordinate would have made the accusation if the employee had not been white. Such accusation weaponises racial identity by attempting to stigmatise someone as racially prejudiced.

As such, because the matter was regarded as being on an unlisted or arbitrary ground, the onus rested on the employee to prove, on a balance of probabilities, that the conduct complained of was not rational, amounted to discrimination and was unfair in terms of s 11(2) of the EEA. According to the court, the evidence showed that the subordinate's unacceptable conduct toward the employee stemmed from their workplace relationship and personal animosity, rather than being connected to the employee's personal attributes or characteristics. While the subordinate's conduct was undoubtedly reprehensible, including insubordination, assault and making an unfounded accusation of racism, there was, according to the court, no evidence that this conduct was

³⁰ *ibid* para 67.

³¹ *ibid* paras 46 and 66.

³² *ibid* para 69.

³³ *ibid* para 13.

motivated by or connected to the employee's race or any other personal characteristic. The single incident of falsely accusing the employee of racism, according to the court, did not transform the entire pattern of misconduct into discrimination based on personal attributes.

This reasoning of the Labour Court is problematic. For a matter to be regarded as being on an arbitrary ground, it must be 'analogous to a listed ground of discrimination and have the potential to impair human dignity in a comparable manner or have a similar serious consequence'.³⁴ The definitive test for identifying an 'arbitrary ground' that qualifies as analogous to listed grounds was established in *Harksen*. According to this test, an arbitrary ground must be '[b]ased on attributes and characteristics which have the potential to impair fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'.³⁵ In *Naidoo & others v Parliament of the Republic of SA*,³⁶ the Labour Appeal Court (LAC) emphasised that the 'glue that holds the listed grounds together is the grundnorm of human dignity'.³⁷ It further stated that unlisted grounds should 'meet the well-established test' of having 'the potential to impair the fundamental human dignity of a person (or have a comparably serious effect) and has to show a relationship with the listed grounds'.³⁸ Even if the evidence had been poorly led, the court's failure to consider the inherent impact on the employee's human dignity was especially problematic.

As will be shown, our judiciary has established previously that unfounded accusations of racism are inherently an attack on human dignity. Although the two following cases referred to in this note were decided in the context of misconduct, they nevertheless establish that this conduct was directly connected to the dignity of the victim faced with unfounded accusations of racism. Put differently, although these cases were heard in terms of the provisions of the LRA, they may have been equally successful under a claim brought for purposes of the EEA.

The LAC in *Legal Aid SA v Mayisela & others*³⁹ was explicit that unfounded accusations of racism are inherently an attack on human dignity, stating 'unsubstantiated accusations of racism are demeaning, insulting and an attack on dignity'. The LAC's stance on unfounded accusations of racism in the *Mayisela* case reflect a nuanced understanding of both workplace dynamics and the serious implications of unfounded

³⁴ Du Toit (ed) *Labour Law through the Cases* commentary on s 6 of the Employment Equity Act (October 2024 - SI 44). See also *Naidoo & others v Parliament of the Republic of SA* (2020) 41 ILJ 1931 (LAC); *Minister of Justice & Correctional Services & others v Ramaila & others* (2021) 42 ILJ 339 (LAC) and *Lebelo and Others v City of Johannesburg Metropolitan Municipality* [2024] ZALCJHB 23.

³⁵ *Harksen* n 16 above para 46.

³⁶ *Naidoo* n 34 above.

³⁷ *ibid* para 27.

³⁸ *ibid*.

³⁹ (2019) 40 ILJ 1526 (LAC).

racial allegations. The judgment carefully balances the need to address genuine experiences of racial discrimination with the responsibility to prevent the misuse of racial allegations. The court acknowledged that while employees may subjectively experience negative performance assessments as racial discrimination, any allegations of racism must be based on 'persuasive objective information leading to a compelling and legitimate inference'.⁴⁰ This establishes a clear threshold for raising such serious accusations.

The court in *Mayisela* was particularly concerned with what it termed 'playing the race card'— the practice of making unfounded allegations of racism against superiors when faced with disciplinary action or performance assessment. Such behaviour, the court noted, can 'illegitimately undermine the authority of the superior and damage harmonious relations in the workplace'.⁴¹ This recognition shows the court's awareness of how unfounded accusations can poison workplace relationships and undermine legitimate management processes. Importantly, the judgment emphasises that there are proper channels through which concerns about racial discrimination should be raised. The court held that these issues should be addressed through established grievance procedures rather than through direct accusations in workplace communications.⁴² This procedural requirement helps ensure that such serious allegations receive proper investigation while protecting both the accuser and the accused. The court's position also demonstrates an understanding of the broader societal impact of unfounded racism allegations. By treating such accusations as serious attacks on dignity, the judgment recognises how unfounded allegations can trivialise genuine experiences of racism and potentially undermine efforts to address real instances of racial discrimination in the workplace.⁴³

The Labour Court in *SA Chemical Workers Union & another v NCP Chlorchem (Pty) Ltd & others*⁴⁴ held that being falsely accused of racism will invariably be experienced as insulting and abusive. The court provided a significant analysis of the impact of unfounded racism accusations in the workplace. It court emphatically stated that it could 'hardly conceive of any place or circumstance or country where, if a person is told that he is racist, it will not be experienced by such person as him or her being insulted and abused'.⁴⁵ The judgment emphasised that employers have both a statutory obligation and moral duty to create working environments free from racism, noting that 'it need hardly be debated' that this is 'patently the right thing to do'.⁴⁶ This obligation extends not

⁴⁰ *ibid* para 48.

⁴¹ *ibid*.

⁴² *ibid* para 50.

⁴³ *ibid* paras 49–50.

⁴⁴ (2007) 28 *ILJ* 1308 (LC).

⁴⁵ *ibid* para 13.

⁴⁶ *ibid*.

only to preventing racist behaviour but also to addressing false accusations of racism. The court established that racial harmony in the workplace must be 'of paramount importance to each and every employer and employee alike'.⁴⁷ It emphasised that while racist behaviour needs to be eliminated, allowing employees to make baseless accusations of racism 'willy-nilly' must be addressed with 'equal fervour' by employers.⁴⁸ The court reasoned that permitting unfounded allegations would be 'equally destructive to racial harmony in the workplace'.⁴⁹

Notably, the *NCP Chlorchem* judgment recognised that accusations of racism are 'very serious allegations' that strike 'at the heart of racial harmony'.⁵⁰ The court equated such accusations with defamation, characterising them as 'a very serious attack on that party's person'.⁵¹ Consequently, it held that such allegations should only be made based on reasonable grounds and with proper justification. The court's position acknowledges that while employees must be able to raise legitimate concerns about racism without fear of reprisal, making unfounded accusations can have severe consequences for workplace relationships and should typically result in 'serious consequences for the perpetrator'.⁵² This balanced approach aims to protect both the right to raise genuine concerns about racism and the right to be free from unfounded accusations.

The Labour Court's failure to recognise the unfounded allegation of racism as harassment based on race or a ground akin to this represents a significant oversight when measured against the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.⁵³ The code explicitly recognises that racial harassment can manifest through 'racist verbal and non-verbal conduct, remarks, abusive language ... or innuendos',⁵⁴ which would encompass unfounded accusations of racism. The code's emphasis that conduct 'involving racial innuendo stereotyping or other types of racial conduct is assumed to be offensive and unwanted'⁵⁵ is particularly relevant. An unfounded accusation of racism inherently involves racial stereotyping and innuendo, as it attempts to paint the accused as racially prejudiced based on the person's racial identity. Such accusations clearly impact 'negatively on the dignity of employees' as contemplated by the code.⁵⁶ When applying the factors outlined in the code to the case under discussion,

⁴⁷ *ibid* para 27.

⁴⁸ *ibid*.

⁴⁹ *ibid*.

⁵⁰ *ibid* para 31.

⁵¹ *ibid*.

⁵² *ibid*.

⁵³ GN R1890 GG 46056 of 18 March 2022.

⁵⁴ item 6.3.

⁵⁵ item 6.5.

⁵⁶ *ibid*.

the unfounded allegation of racism meets multiple criteria: it constituted abusive language that impaired the dignity of the complainant, it was specifically directed at that employee, and it had a significant impact on the workplace environment.⁵⁷ Furthermore, under the test provided in the code, the conduct was explicitly related to race and would likely not have occurred if the employee had belonged to a different racial group.⁵⁸ The fact that the allegation was unfounded made it particularly egregious, as it represented a calculated attempt to arm racial discourse in a manner that creates ‘a hostile or intimidating environment’.⁵⁹

Following this reasoning, when the subordinate falsely accused the employee of being racist, this conduct was by its very nature connected to the employee’s personal attributes and characteristics — it attacked his dignity by falsely attributing racist attitudes and behaviour to him based on his race. The accusation inherently related to and attacked the employee’s identity and character by painting him as a racist person. Therefore, the Labour Court’s finding that there was ‘no evidence’ connecting the subordinate’s conduct to the employee’s personal attributes appears to have overlooked the courts’ clear guidance that unfounded accusations of racism inherently constitute an attack on dignity that is connected to personal characteristics. The court should have recognised that this specific conduct met the *Harksen* test of conduct based on attributes that impair fundamental human dignity. While not all of the subordinate’s misconduct may have been discriminatory, the unfounded accusation of racism should have been recognised as discrimination on an arbitrary ground due to its inherent attack on the employee’s dignity connected to racial characteristics.

Furthermore, the court’s approach of denying that the unfounded allegation of racism was related to a listed ground or an attribute of the employee that had the potential to impact his human dignity ignores the established understanding that discrimination can be manifested in subtle or disguised forms that may not explicitly reference protected characteristics. As noted by the Constitutional Court, discrimination is often more complex and nuanced than direct action against members of a particular group.⁶⁰ By requiring direct evidence connecting the conduct to the employee’s personal attributes, the court adopted a standard that would fail to capture many real-world instances of discrimination.

4.2 *Liability of employer*

Section 60 of the EEA establishes a framework for employer liability in cases of workplace discrimination. When an employee allegedly

⁵⁷ item 6.7.

⁵⁸ item 6.8.

⁵⁹ item 6.8.4.2.

⁶⁰ *MEC for Education, KwaZulu-Natal & others v Pillay* 2008 (1) SA 474 (CC) para 32.

contravenes the Act, the conduct must be immediately reported to the employer, who must then consult relevant parties and take necessary steps to eliminate the conduct. If the employer fails to take such steps and the employee is proven to have contravened the Act, the employer is deemed to have also contravened it. However, the employer can escape liability if it can prove it took all reasonably practicable steps to prevent the contravention. This creates a mechanism for vicarious liability while providing employers with a defence if they can show they took appropriate preventative action. In *Ntsabo v Real Security CC*,⁶¹ the Labour Court held that '[w]here the employer allows and condones, either directly or by inaction, conduct which is or leads to a violation of the EEA, then the employer is vicariously liable for any damages flowing from such conduct'.⁶²

The Labour Court's reasoning on this point is problematic and artificial. The court created an unreasonable technical distinction between complaints of 'misconduct' and complaints of 'discrimination' when discrimination is inherently a form of misconduct in the workplace and the misconduct amounted to discrimination, albeit that the employee did not phrase it as such. The purpose of s 60 of the Employment Equity Act is to ensure employers are notified of discriminatory conduct so they can take steps to address it.⁶³ When the employee complained about being falsely accused of racism by the subordinate, this should have put the department on notice that potentially discriminatory conduct had occurred. It should not matter whether the employee specifically labelled his complaint as 'misconduct' rather than 'discrimination' or whether the substance of the complaint clearly indicated conduct that could constitute discrimination through harassment. It was reported to the department that unfounded allegations of racism had been made against the employee.

The nature of the conduct itself — unfounded accusations of racism — should have been sufficient to alert the employer and the court to its potentially discriminatory character. The substance of a complaint, rather than its label, should determine how it is treated under anti-discrimination law. When the employee reported being falsely accused of racism, this inherently raised issues relating to racial dynamics and dignity that fall within the ambit of the EEA, regardless of whether the employee specifically characterised it as 'discrimination'. The EEA is designed to protect employees from discriminatory conduct, not just complaints explicitly labelled as discrimination. Furthermore, employees often lack the legal knowledge to categorise their experiences properly within specific legal frameworks. Requiring them to frame complaints explicitly using precise legal terminology creates an additional barrier

⁶¹ (2003) 4 ILJ 2341 (LC), [2004] 1 BLLR 58 (LC).

⁶² *ibid* paras 94–95.

⁶³ *Liberty Group Ltd v M* (2017) 38 ILJ 1318 (LAC) (*Liberty Group*) para 52.

to protection that runs counter to the remedial purpose of the EEA. An employer, particularly one with HR and legal resources like the department, should be able to recognise potentially discriminatory conduct from the substance of a complaint. The court's overly technical approach created an artificial distinction between 'misconduct' and 'discrimination' that ignores the reality that discriminatory behaviour may be viewed as a form of misconduct. When the employee reported being falsely accused of racism, this should have been sufficient to put the department on notice of potentially discriminatory conduct, regardless of whether the employee used the specific label of 'discrimination'.

Furthermore, the court's decision to grant absolution from the instance effectively prevented any examination of whether the subordinate's conduct constituted discrimination in the form of harassment. The court thus prevented a full exploration of the merits of whether falsely accusing someone of racism constitutes discrimination, which would have been a valuable jurisprudential development regardless of the ultimate outcome.

The court's approach risks creating a system where only legally sophisticated employees who know to frame their complaints explicitly as 'discrimination' receive the full protection of anti-discrimination law. This undermines the EEA's purpose of providing broad protection against discrimination in all its forms and places an unreasonable burden on employees to categorise misconduct correctly within specific legal frameworks. While the timeline and the employee's pursuit of other remedies certainly affect how we view the case as a whole, the court's decision to grant absolution from the instance when it did was still a missed opportunity to examine the discriminatory nature of unfounded accusations of racism in the workplace properly, regardless of how they were initially labelled by the complainant.

This overly technical approach defeats the purpose of s 60, which is to ensure employers address discriminatory conduct in the workplace. It creates an artificial barrier requiring employees to use specific legal terminology rather than focusing on the substance of their complaints. Employees should not need to frame their complaints explicitly as 'discrimination' when reporting conduct that is clearly discriminatory in nature.

Moreover, this reasoning is circular — it suggests that an employee must recognise and label conduct as discrimination before an employer's duty to address discrimination arises, when part of the employer's duty is precisely to identify and address discriminatory conduct when it is brought to its attention, regardless of how the employee characterises it.

Ostensibly, a more difficult hurdle to overcome for a finding of vicarious liability is proving that the employer failed to take all reasonable and practical measures to ensure that the employees did not act in contravention of the EEA. In this case, the court held that the department took appropriate steps to ensure compliance with the EEA through its consistent disciplinary responses to the misconduct. The

judgment shows that whenever the employee complained about the subordinate's conduct, including the unfounded allegation of racism, the department took action through formal disciplinary proceedings. The department held several disciplinary hearings with independent chairpersons and issued progressively serious sanctions against the subordinate, ultimately leading to his dismissal.⁶⁴ The court notes that the department 'did all that can reasonably be expected of it to eliminate the conduct complained of'.⁶⁵ This included taking immediate action when complaints were raised; conducting proper disciplinary hearings before independent chairpersons; issuing appropriate sanctions, including final written warnings — although it is interesting to note that the subordinate was given two final written warnings before the assault occurred; eventually dismissing the subordinate for his misconduct and keeping Solidarity informed of disciplinary proceedings. The court pointed out that when the employee accused the subordinate of racism, 'no disciplinary action of any kind was ever taken against [the employee] as a result of the grievances lodged by [the subordinate] against him, while in the case of every grievance lodged by [the employee] against [the subordinate], disciplinary action was taken against [the subordinate] by the Department'.⁶⁶ The court thus found that through its consistent disciplinary responses and ultimate dismissal of the subordinate, the department demonstrated it took all reasonably practicable steps to prevent contraventions of the EEA.

It is submitted that this line of reasoning is thin. Consistently disciplining an employee for various acts of misconduct is not sufficient. In *Amathole District Municipality v CCMA & others*,⁶⁷ the LAC found that keeping an alleged victim away from her alleged harasser and offering her counselling for stress 'are the steps envisaged in section 60 of the Act'.⁶⁸ In *A K v Right to Care NPC*,⁶⁹ it was found that s 60 of the EEA requires the employer to act 'swiftly and determinedly'.⁷⁰ In *Potgieter v National Commissioner of the SA Police Service & another*,⁷¹ it was held that the employer had complied with the requirements of the Act by taking reasonable steps to prevent a recurrence of the harassment. Although it has previously been held that disciplinary action is sufficient to prevent a recurrence of the harassment,⁷² there have also been cases in which the courts have not accepted that such action adequately prevented

⁶⁴ *Solidarity* n 1 above paras 22–36.

⁶⁵ *ibid* para 59.

⁶⁶ *ibid* para 22.

⁶⁷ (2023) 44 *ILJ* 109 (LAC), [2023] 2 *BLLR* 103 (LAC).

⁶⁸ *ibid* para 61.

⁶⁹ (2023) 44 *ILJ* 2200 (LC).

⁷⁰ *ibid* para 38.

⁷¹ (2009) 30 *ILJ* 1322 (LC), [2009] 2 *BLLR* 144 (LC).

⁷² *Mokoena & another v Garden Art (Pty) Ltd & another* (2008) 29 *ILJ* 1196 (LC).

repetition of the harassment.⁷³ In the case under consideration the court seems to have regarded the fact that disciplinary action was taken against the subordinate by the employer as sufficient. The fact that the matter culminated in a serious assault seems to suggest the opposite. When allegations of racism are made, unfounded or not, disciplinary steps may not be sufficient.

From the judgment, there is no evidence presented of any proactive steps taken by the department to prevent discrimination or ensure EEA compliance. While the department responded reactively to specific incidents of misconduct through disciplinary proceedings, there is no mention of anti-discrimination policies; training programmes on discrimination and harassment; clear procedures for reporting discrimination; guidelines on appropriate workplace conduct; awareness initiatives about discrimination and unfounded allegations of racism; or preventative measures or systems.

It is also not clear how multiple final written warnings serve the principle of progressive discipline. Furthermore, the department appears to have focused solely on responding to misconduct through progressive discipline rather than taking preventative steps to ensure employees would not contravene the EEA in the first place. This is relevant to s 60(4) of the EEA. The department's approach seems to have been purely reactive rather than demonstrating the kind of comprehensive preventative strategy that s 60(4) contemplates. This gap in the evidence should have been considered by the Labour Court in assessing the department's liability under s 60.

4.3 *A single incident*

The court's emphasis on the 'single incident' of falsely alleging racism and that these actions were not recurring appears problematic for several reasons. As a point of departure, it should be noted that it is an accepted principle of law that a single incidence of alleged unfair discrimination can be sufficient and that the alleged conduct does not have to be ongoing or recurring to warrant action by the employer. Item 4.5.1 of the code states that '[h]arassment [itself an instance of unfair discrimination] may occur as a result of a pattern of persistent conduct or a single instance or event. In the case of a single instance, harassment will be present if the conduct is of a serious nature. Whether a single instance of conduct will be sufficiently serious to constitute harassment must be determined in light of the event that is the subject of the complaint.' Item 6.2 provides that '[r]acial harassment is unwanted conduct which can be persistent or a single incident that is harmful, demeaning, humiliating or creates a hostile or intimidating environment. Conduct that is calculated to induce

⁷³ See *Future of SA Workers Union obo AB v Fedics (Pty) Ltd* (2015) 36 ILJ 1078 (LC). See also *Biggar v City of Johannesburg* (2011) 32 ILJ 1665 (LC) and *Liberty Group* n 63 above.

submission by actual or threatened adverse consequences constitutes harassment although this is not an essential element of its definition’.

This approach of the court in *Solidarity* contradicts the LAC’s guidance in *Mayisela*, which emphasised the inherently serious nature of unfounded accusations of racism. In *Mayisela*, the court made it clear that even isolated unfounded accusations of racism are serious attacks on dignity that can have ‘very serious and deleterious consequences’ in the workplace.⁷⁴ By characterising it as just a single incident’, the court appears to minimise the severity and impact of unfounded accusations of racism. This contradicts the LAC’s view that such accusations are ‘demeaning, insulting and an attack on dignity, more so when the person attacked, by reason of a previously disadvantaged background, probably has suffered personally the pernicious effects of institutional and systemic racism’.⁷⁵

In addition, this was not actually an isolated incident but part of the subordinate’s pattern of harassment against the employee. By treating it as a single incident, the court artificially separated it from the broader context of the subordinate’s conduct.⁷⁶ The focus on frequency rather than severity misses the point that some forms of discriminatory conduct are so serious that even a single incident can constitute harassment. The court’s approach sets an unfortunate precedent suggesting that isolated incidents of serious discriminatory conduct might not qualify as harassment, which seems contrary to both the purpose of the EEA and established jurisprudence.

4.4 *Dual claims*

Some may characterise the employee’s EEA claim as ‘opportunistic’ given his prior success in the constructive dismissal case. This line of thought overlooks several important legal principles regarding dual claims. While this perspective might seem reasonable on the surface, a deeper analysis reveals compelling justifications for allowing both claims to proceed. The LAC in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*⁷⁷ has explicitly endorsed the permissibility of dual claims under both the LRA and the EEA arising from the same factual matrix.⁷⁸

A fundamental justification for allowing dual claims lies in the distinctive purposes of the two statutes. While the LRA primarily addresses unfair labour practices including dismissals, the EEA specifically targets discrimination in the workplace. These statutes protect different rights and interests — the right to fair labour practices and the rights to equality and dignity respectively. By allowing dual claims, the legal

⁷⁴ *Mayisela* n 39 above para 48.

⁷⁵ *ibid* para 49.

⁷⁶ *Solidarity* n 1 above para 47.

⁷⁷ (2015) 36 ILJ 2989 (LAC).

⁷⁸ See also *Simmadari v Absa Bank Ltd* (2018) 39 ILJ 1819 (LC).

system acknowledges that a single set of facts may infringe multiple protected rights that deserve separate remedies.

The significance of permitting dual claims becomes particularly evident when considering the constructive dismissal context. A successful constructive dismissal claim establishes that working conditions became intolerable, but does not necessarily address the discriminatory nature of those conditions. The EEA claim allows for an examination of whether the intolerable conditions were discriminatory in nature and provides specific remedies for that discrimination. Without this avenue, the discriminatory aspects of workplace conduct might remain unaddressed even when a constructive dismissal claim succeeds.

Moreover, dual claims recognise the different remedial purposes of the statutes. The EEA expressly provides for damages in addition to compensation, which is not available under the LRA. This distinction acknowledges that discrimination can cause harm beyond mere economic loss, including damage to dignity and psychological wellbeing. The LAC in *Hibbert* recognised this distinction when it noted that while double dipping should be avoided, courts should determine ‘what is just and equitable for the indignity the employee has suffered’ when both claims are proven.⁷⁹

The timing of the employee’s discrimination claim, while perhaps appearing opportunistic at first glance, does not negate its legal validity. Employees often only become fully aware of the discriminatory nature of their treatment through reflection and legal counsel after their employment has ended. Recognising this reality, courts have consistently focused on whether the substantive requirements of the claims are met rather than imposing rigid procedural barriers that might prevent legitimate claims from being heard. The characterisation of dual claims as ‘opportunistic’ would therefore fail to appreciate the distinct rights protected by different employment statutes, the comprehensive remedial approach endorsed by our courts, and the practical realities of employment litigation. Far from being opportunistic, dual claims represent a legally sound approach to addressing the multifaceted harms that can arise from discriminatory employment practices.

5 CONCLUSION

The Labour Court’s judgment in this matter reveals several concerning flaws in its legal reasoning that warrant examination. The court’s classification of unfounded accusations of racism as not being on a listed ground or on an arbitrary ground stands in direct contradiction to established jurisprudence from cases like *Mayisela* and *NCP Chlorchem* and item 6 of the code, which recognise such accusations as inherent attacks on dignity connected to racial characteristics.

⁷⁹ *Hibbert* n 77 above paras 22–24.

The court's interpretation of employer liability under s 60 of the EEA was particularly problematic. By creating an artificial distinction between complaints of misconduct and discrimination, the court established an unnecessary technical barrier that undermines the protective purpose of the legislation. Furthermore, the court's acceptance of merely reactive disciplinary measures as sufficient evidence of reasonable steps, without requiring proof of proactive anti-discrimination measures, sets a concerning precedent for employer obligations.

Perhaps most troubling was the court's dismissal of the incident as a 'single event', which contradicts items 4.5.1 and 6.2 of the code and established case law recognising that even isolated incidents can constitute harassment if sufficiently serious. This approach appears to minimise the gravity of unfounded accusations of racism and their impact on workplace dignity and harmony.

The judgment reflects an overly technical approach that potentially undermines the protective purpose of anti-discrimination legislation. Moving forward, courts should maintain closer alignment with established jurisprudence on workplace discrimination and adopt a more purposive approach to interpreting anti-discrimination provisions, ensuring that the fundamental objectives of equality and dignity in the workplace are properly served.

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