



- (1) Reportable: NO
(2) Of interest to other Judges: Yes

Signature

14 July 2026

Date

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

Case No: C440/2023

In the matter between:

FULL CIRCLE CONTACT CENTRE SERVICES (PTY) LTD

Applicant

t/a CAPITA SOUTH AFRICA

and

SHAUN WILLIAMSON

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

Second Respondent

AND ARBITRATION

DAVID WILSON N.O.

Third Respondent

Date of Hearing: 27 June 2025

Date of Judgment: 14 July 2026

Summary: Section 145 of the LRA – Review application of an arbitration award where the Commissioner found that the employee's admittedly racially discriminatory conduct, amounted to nothing more than insensitive conduct which did not warrant dismissal. The Commissioner ignored this country's past and the fundamental principles expressed by the Constitutional Court in respect of racial discrimination in the workplace. The Commissioner misconstrued the

nature of the enquiry and arrived at an unreasonable outcome. The review application is successful and the arbitration award set aside.

JUDGMENT

DANIELS, AJ

INTRODUCTION

- 1] In the words of Mogoeng CJ, writing for a unanimous Constitutional Court, more than two decades into our constitutional democracy disputes such as the present one remain a reminder, of the “*many bridges yet to be crossed in our journey from crude and legalised racism*” towards a workplace in which the values of equality, non-racialism and human dignity are a lived reality.¹
- 2] Our courts have repeatedly affirmed that racism in the workplace strikes at that dignity, and that it must be confronted firmly and rooted out as “a plague and a cancer in our society”.²

THE APPLICATION

- 3] It is against this backdrop that this review falls to be decided — a review in which a senior commissioner, confronted with conduct that the employee himself conceded to be racist, characterised as no more than “insensitivity”.
- 4] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (“the LRA”) to review and set aside an arbitration award issued by the third respondent (“the Commissioner”) under the auspices of the second

¹South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (CCT19/16) [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC) (SARS) at para 1.

²Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others [2002] 6 BLLR 493 (LAC) (Crown Chickens) at para 63 (Nicholson JA) and para 38 (Zondo JP).

respondent (“the CCMA”) on 14 July 2023 under case number WECT5889-23 (“the award”).

- 5] In the award the Commissioner found that the dismissal of the first respondent (“the employee”) was procedurally fair but substantively unfair, and ordered the applicant to reinstate him retrospectively, together with back pay. The applicant seeks the review and setting aside of the award and its substitution with a finding that the dismissal was substantively fair; alternatively, the remittal of the dispute to the CCMA for arbitration afresh before a different commissioner.

BACKGROUND TO THE DISPUTE

- 6] The applicant is a business process outsourcing concern that operates a call centre in South Africa and provides call centre services to a number of international clients. The employee was employed by the applicant from November 2019 as a Team Leader responsible for a team of approximately fifteen call centre agents. The Commissioner is cited in his capacity as the Senior Commissioner who presided over the arbitration proceedings under review. No relief is sought against the second or third respondents.
- 7] During the period November to December 2022, several members of the employee’s team complained about his conduct, alleging that he had made a number of racially discriminatory remarks and unprofessional conduct. The aforementioned complaints were ventilated at a “skip level” meeting convened on 6 December 2022, in the employee’s absence, by an Operations Manager who had been tasked with managing the unit during the employee’s manager’s maternity leave. Written complaints followed. The employee was suspended in January 2023. The respondent was charged with conduct in which he sought to impugn the intellectual and leadership capabilities of African females, simply based on skin colour and gender and or sex.
- 8] By a notice of disciplinary hearing dated 21 February 2023, the employee was charged with discrimination on the listed grounds of race and gender (Charge

1), and conduct unbecoming of a manager (Charge 2). The particulars of Charge 1 were, in summary, that the employee had:

- (a) compared the ability of an African employee and a Coloured employee to multi-task, stating that he was “sure if I ask another black lady they will say no too but when I ask a coloured girl they will say yes”;
- (b) stated, while discussing possible team-building activities, that his team could not meet at his house because his dog, named “Hitler”, was trained to bite and bark at African people, and recounted — finding it funny — an incident in which the same dog had chased an African child in the road;
- (c) discussed his discomfort at previously having reported to an African female team leader, both because she was African and because she was female;
- (d) referred to African team members’ conduct as a “black thing”; and
- (e) treated African and Coloured employees differently, giving preferential treatment to the latter.

9] The disciplinary hearing was held on 3 April 2023. The employee was found guilty and summarily dismissed with effect from 4 April 2023. He referred an unfair dismissal dispute to the CCMA, challenging the substantive fairness of his dismissal (and certain aspects of its procedural fairness), contending that the sanction was too harsh, that it was a first offence, and that alternatives to dismissal had not been considered.

10] The arbitration was held on 5 July 2023. The employee appeared in person and the applicant was represented by an Industrial Relations Specialist and called four witnesses.

THE AWARD

- 11] The Commissioner found that the dismissal was procedurally fair but substantively unfair. The central findings were that the employee had been “insensitive to the feelings of black people in his team”, as was apparent from his telling of the story of the dog named “Hitler” chasing a black girl while everyone laughed, and his mentioning that the dog barked at black people. In relation to the multi-tasking incident, the Commissioner accepted the employee’s version but considered that he “may have acted insensitively”. The remaining allegations were found to be either not discriminatory, or vague and unsubstantiated.
- 12] On the whole, the Commissioner was satisfied that, although the employee had been insensitive in some respects, this insensitivity was insufficient to warrant dismissal. He found that the employee had shown remorse by apologising to the applicant and to the individual witnesses at the arbitration, and that both team members who testified had indicated that they would have accepted an apology. He noted that, although the applicant’s Disciplinary Code provided for dismissal as a sanction for a first offence of discrimination on a listed ground, it remained for the chairperson to determine whether dismissal was merited. Having regard to the factors in *Sidumo*³, he concluded that dismissal was too harsh and not objectively justifiable. He ordered the applicant to reinstate the employee retrospectively to the date of dismissal, and to pay back pay of R57 608.31.

PRELIMINARY ISSUE: CONDONATION

- 13] Before dealing with the merits of the review application I deal with the preliminary issue of condonation. The first respondent sought condonation for the late filing of his answering affidavit and essentially his late opposition to this application.
- 14] The review application was launched on 28 August 2023. In terms of the Rules of this Court, the first respondent’s answering affidavit fell due on 22 February

³*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC) (*Sidumo*).

2024. The answering affidavit was only delivered only on 18 June 2025, together with an application for condonation of its late filing, more than 15 months out of time. The applicant opposed the condonation application.

- 15] Having heard both parties' legal representatives and considered the papers filed of record in the condonation application, I dismissed the application in an *ex tempore* ruling, indicating that my reasons would be furnished as part of this judgment. Those reasons, which I summarised in court, are amplified below.
- 16] In his founding affidavit in support of the condonation application, upon which the oral argument was predicated, the first respondent advanced the following as the basis for the indulgence sought: that his failure to file his answering affidavit timeously was not the product of any indifference on his part, but of his reliance on Legal Aid South Africa, which had approved his application for assistance and then failed to act and ultimately declined to represent him; that his inability to pursue the matter in person, or to secure alternative representation, was explained by his financial hardship and personal circumstances, he being unemployed and unable to afford the cost of private representation; that, on the advice available to him, he had genuinely believed the review to have been finalised in his absence, and had revived his opposition only upon receipt of the notice of set-down; and that he had acted without delay once a loan enabled him to instruct his present attorneys, who promptly assembled and delivered a complete application. On those grounds he submitted that his default was neither wilful nor the product of supineness, and that it would be in the interests of justice to condone the late filing of his answering affidavit opposing the review application.
- 17] At the hearing, Mr Lawrence, who appeared for the first respondent, moved the application on the basis that the first respondent had at all times been an active, and not a supine, litigant, and that the applicant's characterisation of him as having done nothing was without merit. He took the Court through the founding and replying affidavits in the condonation application to demonstrate the steps the first respondent had taken, and submitted that the prohibitive cost of litigation, together with the administrative burden and risk of a lay litigant conducting the matter personally, explained why the first respondent had not

appeared in person or filed his own papers. Central to the explanation, he submitted, was the first respondent's personal position, that he was struggling both financially and emotionally amid a reversal of the traditional roles within his household, and that he had relied solely on the legal advice available to him.

- 18] Mr Lawrence submitted further that a renewed engagement by the first respondent's former employer, which enquired after his well-being and his family, had given him a fresh opportunity to pursue the matter, and that his attorney had thereafter promptly assembled a complete application. He emphasised that the applicant had remained silent on the correspondence and overtures made on the first respondent's behalf, which pointed away from any supineness on the part of the first respondent, who had been trying to advance his position. On lateness, he urged the Court not to consider the matter in a vacuum but to weigh the explanation as a whole, submitting that the first respondent had taken the Court into his confidence and that his failure to explore other avenues was not, of itself, decisive. On prospects, he submitted that, viewed as a whole, the award is simply not reviewable, and that it would be wrong to close the door on the first respondent.
- 19] The applicant opposed the application on five broad grounds: that the delay, exceeding fifteen months, is extremely excessive; that the explanation tendered for it is inadequate and unreasonable; that the first respondent had in any event waived his right to oppose the review application; that his prospects of success in the main dispute are weak and are not established on the papers; and that the applicant will suffer prejudice if condonation is granted, whereas the first respondent has an alternative remedy against Legal Aid in civil proceedings. Those grounds, and the authorities on which the applicant relied in support of them, are addressed in the analysis that follows.
- 20] Mr Stansfield, who appeared for the applicant, reiterated during oral argument, that the delay of approximately fifteen months, is egregious and calls for a proper explanation which, he submitted, is wholly absent. The applicant's complaint is that the explanation rests in essence on two inadequate pillars, namely the legal advice which the first respondent says he received but, on his own account, did not obtain, and the *Santam* point. The founding affidavit, he

submitted, is devoid of dates and thin on detail, providing not a single date and lacking the particularity required, such that the first respondent does not take the Court into his confidence. This, he submitted, is a fatal failure to furnish a full explanation, the significance of which is underscored by the Rule 7A(8) notice dated 9 February 2024. He submitted further that the account is neither full nor candid, and is possibly untruthful, since it is unclear whether the operative events occurred before or after 9 February 2024, a lacuna in the reply, which does not answer the answering affidavit.

- 21] On waiver, Mr Stansfield submitted that the first respondent, with knowledge of his right and the benefit of legal advice, expressly waived his right to oppose the review, having weighed a number of facts and elected not to oppose. On the prospects of success, he took the Court to the common-cause facts and the transcript, submitting that the first respondent's telling of the story of the dog named *Hitler*, and the accompanying remark that there was no cause for concern because others were laughing, constituted egregiously racist conduct carried into the workplace, such that it is common cause that the first respondent is guilty of racism (relying on the authority of *Bester*⁴ and *Crown Chickens*⁵). An arbitrator who treated such conduct as no more than insensitivity had, he submitted, arrived at a conclusion no reasonable arbitrator could reach, and one which the CCMA cannot countenance. He accordingly submitted that condonation should be refused and that the review ought to proceed.
- 22] The principles governing condonation are trite. Whether to grant condonation is a matter for the Court's discretion, exercised on a conspectus of the interrelated factors identified in *Melane v Santam*: the degree of lateness, the explanation for it, the prospects of success, the importance of the matter and the prejudice to the parties, together with the respondent's interest in the finality of the dispute and the effect of the delay on the administration of justice.⁶ None of these factors is decisive in isolation; they are weighed together, and the

⁴ Rustenberg Platinum Mine v SAEWA obo Bester and Others (CCT127/17) [2018] ZACC 13.

⁵ Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others [2002] 6 BLLR 493 (LAC).

⁶ Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532B–E.

ultimate question is whether it is in the interests of justice to grant the indulgence.⁷ Condonation is not, however, there for the mere asking, and a party seeking it bears a heavy onus to satisfy the Court that it should be granted.⁸

- 23] Two principles, on which the applicant relied and which are well established, bear directly on this matter. First, the explanation must cover the entire period of the delay: the party seeking condonation must fully explain the reason for the delay so as to place the Court in a position to assess whether the explanation is a good one, and the mere listing of events without an explanation for the time that lapsed between them amounts to no more than a recordal of dates.⁹ Secondly, where no acceptable explanation is given for the delay, the Court may refuse condonation without more, and the prospects of success and the remaining factors become immaterial, unless they themselves raise something that necessitates the Court's interference.¹⁰
- 24] Against those principles, the applicant's submissions are, in my view, well founded. The first respondent's answering affidavit fell due on 22 February 2024. The whole of his explanation: his dealings with Legal Aid, and with the labour lawyer arranged through his wife's insurer concerns the period between July 2023 and February 2024 and thus predates the date on which his answering papers became due. It does not address the delay that in fact requires explanation. The suggestion that Legal Aid declined to assist him in February 2024 because he had "*missed the deadline*" is, moreover, difficult to

⁷Brummer v Gorfil Brothers Investments (Pty) Ltd 2000 (2) SA 837 (CC) at para 3.

⁸Makuse v Commission for Conciliation, Mediation and Arbitration and Others (2016) 37 ILJ 163 (LC); Mashishi v Mdladla NO and Others (2018) 39 ILJ 1607 (LC) at para 6.

⁹Independent Municipal and Allied Trade Union obo Zungu v South African Local Government Bargaining Council and Others [2009] ZALC 137; (2010) 31 ILJ 1413 (LC) at para 13.

¹⁰SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2011) 32 ILJ 2442 (LAC).

accept, since his answering affidavit was only towards the latter part of February and surely Legal Aid ought to be aware that in any matter where a litigant is late in filing papers, condonation can be applied for at the earliest opportunity. A delay on its own has never been a bar to a litigant opposing an application which has merit. However, the delay was egregious by the time the first respondent decided to file opposing papers.

- 25] The period that had to be explained is that from 22 February 2024 to 18 June 2025, the delay proper, exceeding fifteen months' and for that period no acceptable explanation is offered. On the first respondent's own version he took no step to advance the matter during that time. More tellingly, on 2 July 2024 he informed the applicant's attorney that, having taken advice, he did not intend to oppose the review — an election that accords with the service affidavit and that amounts, in substance, to a waiver of his right to oppose. His later change of heart, prompted only by the notice of set-down, is not an explanation for the intervening delay. Nor did he explain why he could not have pursued the matter in person, as many unrepresented litigants do, or sought assistance elsewhere, or why the loan that eventually funded his attorneys could not have been obtained sooner. That he was allegedly cautioned by the labour lawyer arranged through his wife's insurer that an adverse costs order might follow if he pursued the matter is, with respect, no answer; the risk of such an order is not an acceptable reason for abandoning the opposition altogether.
- 26] The condonation application itself was also not brought expeditiously. A party who becomes aware of the need for condonation must apply as soon as reasonably possible, and any further delay in doing so must be explained.¹¹
- 27] The first respondent's prospects of success fare no better. It is trite that where the explanation for the delay is inadequate, the prospects of success are immaterial and need not be considered.¹² In any event, the first respondent's

¹¹Rota v Commission for Conciliation, Mediation and Arbitration and Others [2015] ZALCJHB 73.

¹²Chetty v Baker McKenzie (2022) 43 ILJ 1599 (LAC) at para 10; South African Municipal Workers Union obo Mahlangu and Others v City of Tshwane Metropolitan Municipality [2025] ZALCJHB 39 at paras 55–58.

prospects of success in this context are his prospects of successfully resisting the review — the likelihood that the award reinstating him would withstand scrutiny against the reasonableness standard. Although Mr Lawrence argued that the award is not reviewable, the condonation application itself materially lacked any substantive averments in respect of the first respondent's prospects of success in opposing the review. Prospects of success are addressed in a single sentence, at paragraph 45 of the affidavit in support of the condonation application, in which the first respondent does no more than state that he has a bona fide defence and reasonable prospects of success, without more. That bald and unsubstantiated assertion is, in my view, wholly insufficient.¹³

28] The remaining considerations point the same way. The applicant is entitled to the finality of the dispute, and a delay of this order prejudices both the applicant and the administration of justice in a system whose object is the expeditious resolution of labour disputes. A refusal of condonation does not, moreover, leave the first respondent without recourse for any prejudice occasioned by Legal Aid's conduct, which, as the applicant pointed out, is a matter he may pursue against Legal Aid. Even if Legal Aid were to blame for part of the delay, there are limits beyond which the doors of the court cannot remain open to a litigant who has not acted diligently in the pursuit of his rights,¹⁴ as in this matter where Mr Williamson elected not to do anything about his matter for extended periods and belatedly got a renewed interest in his matter from an enquiry as to his well-being. This is implausible.

29] Weighing all of these factors together, I was not persuaded that it would be in the interests of justice to grant the indulgence sought. It was for these reasons that I made the following order:

- (a) the application for condonation for the late filing of the first respondent's answering affidavit is refused;

¹³Collett v Commission for Conciliation, Mediation and Arbitration and Others [2014] 6 BLLR 523 (LAC), where the Labour Appeal Court held that an applicant for condonation must place sufficient material before the court to enable an assessment of the prospects of success, a bald assertion being insufficient.

¹⁴Seatlolo and Others v Entertainment Logistic Service [2011] 32 ILJ 2206 (LC).

- (b) notwithstanding the applicant's prayer for costs, and having regard to the requirements of fairness, there is no order as to costs; and
- (c) The review application accordingly proceeds on an unopposed basis.

THE REVIEW APPLICATION

30] I now turn to the review application which proceeded on an unopposed basis. That does not relieve the applicant of the onus of satisfying the Court that the award is reviewable, nor this Court of its duty to test the award against the applicable standard, and I have approached the merits on that footing. The applicant argued its case on the basis of its heads of argument, from which the analysis that follows is substantially drawn.

The grounds of review

31] The applicant contends that the Commissioner committed a gross irregularity in the conduct of the arbitration as contemplated in section 145(2)(a)(ii) of the LRA; committed a material error in relation to the evidence; misconstrued the nature of the enquiry before him; arrived at an outcome that no reasonable arbitrator could reach; and thereby infringed the applicant's right to lawful and procedurally fair administrative action under section 33(1) of the Constitution. Since *Sidumo*, however, it is settled that a CCMA arbitration award is reviewed under section 145 of the LRA, into which the constitutional standard of reasonableness is suffused; the reliance on section 33(1) as a discrete ground of review accordingly adds nothing to the section 145 reasonableness enquiry and need not be separately determined.¹⁵ In essence, the applicant's complaint is that the Commissioner made no finding on whether the employee was guilty of discrimination as charged, and reduced plainly race-based conduct to mere

¹⁵*Sidumo* above n 3 at para 110, where it was held that the constitutional standard of reasonableness suffuses section 145 of the LRA. It follows that the review of a CCMA award is conducted under section 145, and not under the Promotion of Administrative Justice Act 3 of 2000; a discrete complaint founded on section 33(1) of the Constitution therefore adds nothing to the section 145 enquiry.

“insensitivity”, thereby misconceiving the enquiry and reaching an unreasonable result.

The Applicable Principles

- 32] It is well established that a review under section 145 of the LRA is concerned with the reasonableness of the award, not its correctness. For a defect in the conduct of the proceedings to amount to a gross irregularity, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result; and a result is unreasonable only if it is one that a reasonable arbitrator could not reach on all the material before him.¹⁶ Material errors of fact, and the weight and relevance attached to particular facts, are of consequence only if their effect is to render the outcome unreasonable. Where a gross irregularity is alleged, the enquiry extends to whether the decision falls within a band of decisions to which a reasonable decision-maker could come on the available material.¹⁷
- 33] Where the complaint is that the arbitrator ignored material facts, the questions are whether the facts were indeed ignored; whether they were material, in the sense that their consideration would, on the probabilities, have produced a different result; and, if so, whether there is nevertheless a basis in the evidence as a whole to displace the resulting prima facie unreasonableness. Where an irregularity or error is material to the determination of the dispute, it may constitute a misconception of the nature of the enquiry such that the award may be set aside on that ground alone.¹⁸

Racism in the workplace and the objective test

- 34] Racism and racial discrimination in the workplace constitute serious misconduct, and this Court and the Labour Appeal Court will deal with acts of racism firmly, so as to reflect the courts' rejection of racism in general and

¹⁶*Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) (*Herholdt*).

¹⁷*Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

¹⁸*Head of Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) (*Mofokeng*).

racism in the workplace in particular.¹⁹ Differently put, racism requires a firm and unapologetic response from our Courts. This is a constitutional obligation to contribute meaningfully towards the eradication of racism and its tendencies.²⁰ It is worth reiterating, given the apparent lack of understanding and or appreciation by the Commissioner, that the seriousness and gravity of offences involving racism can never be over-emphasised, and an employer is under a duty to provide a safe working environment and to protect its employees from such conduct.²¹

- 35] Whether particular conduct is racist is determined objectively: the test is whether a reasonable, objective and informed person, on the correct facts, would perceive the conduct or language to be racist and derogatory.²² That test mirrors the objective test applied to determine whether a statement is defamatory, having regard not only to what the words expressly convey but also to what they imply.²³ The enquiry may not begin from a presumption that the conduct is neutral or innocuous; to do so sanitises the context in which the conduct occurred and ignores the legacy of apartheid and racial segregation that has left South Africa with a racially charged present. The conduct must instead be assessed against the totality of the circumstances. The enquiry does not turn on how the employer understood the words, nor on the subjective feelings of the person to whom they were directed.

Evaluation

- 36] In a dispute concerning a dismissal for misconduct, the arbitrator must first establish whether the employee was guilty of the misconduct that led to the dismissal, and only then determine whether dismissal was an appropriate sanction.²⁴ The Commissioner did neither of the first of these things properly. He made no express finding as to whether the employee was guilty of Charge

¹⁹*Crown Chickens* supra.

²⁰ SARS supra at [

²¹*Makhoba v Commission for Conciliation, Mediation and Arbitration and Others* (2022) 43 ILJ 166 (LC).

²²*Rustenburg Platinum Mine v SAEWA obo Bester and Others* (CCT127/17) [2018] ZACC 13 (*Bester*) at paras 45 and 48–51.

²³*Sindani v Van der Merwe* [2001] ZASCA 130; [2002] 1 All SA 311 (A) at para 11.

²⁴*Sibanye Gold Protection Service Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others* (JR1914/22) [2025] ZALCJHB 9 (14 January 2025) (*Sibanye Gold*) at para 13.

1 or Charge 2. The high-water mark of his reasoning was that the employee had been “insensitive”. As the aforesaid authorities illustrate, racism in the workplace cannot be equated to insensitivity.

- 37] Having characterized the conduct as merely insensitive, the Commissioner misconceived the enquiry. The employee was not charged with insensitivity. He was charged with discrimination on the listed grounds of race and gender. By reducing conduct that was, *prima facie*, race-based to mere insensitivity, the Commissioner failed to apply the objective test set out above and, as occurred in *Bester* itself, sanitised the conduct by treating it as innocuous.
- 38] Assessed objectively, and against the totality of the circumstances, the conduct was racist and derogatory. The evidence, much of it undisputed or conceded, established that the employee kept a dog named “Hitler” which, on the version put to him and which he did not deny, was trained to bark at and bite black people, with the result that his black colleagues could not visit his home; that he recounted, with evident amusement, an incident in which that dog chased a black child who had not provoked it, conceding that he and others had laughed; and that he compared the ability of African and Coloured women to multi-task in expressly racial terms. Having regard to this country’s history, including the use of dogs against black people, and the connotations of the name “Hitler”, any reasonable, objective and informed person, in particular a reasonable Commissioner, would perceive this conduct to be racist and derogatory, and to be an assault on the dignity of the black members of the employee’s team.
- 39] Two further matters, material to the enquiry and apparent from the transcript, are conspicuously absent from the award. First, the employee conceded during the arbitration that mentioning the dog incident had not merely been “insensitive”, as the Commissioner found, but “offensive”. Secondly, and more tellingly, he conceded under cross-examination that his comments concerning the dog had, as a fact, been racist or constituted racism. An employee’s own concession that his conduct was racist is plainly material to the question whether he committed discrimination on a listed ground. Had the Commissioner had regard to these concessions, he could not reasonably have confined his finding to “insensitivity”; the omission of these material concessions had a

distorting effect on the Commissioner's conception of the enquiry and on the result.²⁵ Conduct of this nature threatens to take us back to our past and cannot be glossed over or accommodated or excused²⁶, as the Commissioner did in this matter.

- 40] It follows that the Commissioner misconceived the nature of the enquiry and, in characterising conduct that was objectively and admittedly racist as merely "insensitive", reached a conclusion that a reasonable decision-maker in the circumstances and presented with this evidence, could not reach. On this ground alone the award is reviewable and falls to be set aside.

Sanction

- 41] The mischaracterisation as described above, consequently tainted the sanction enquiry. Having failed to find the employee guilty of discrimination, the Commissioner necessarily failed to weigh the seriousness of that misconduct. Racism in the workplace is serious, and an arbitrator is obliged to appreciate its gravity and the employer's duty to root it out.²⁷ The Commissioner failed to have regard to the history of racial discrimination in South Africa, to the impact of the conduct on the dignity of the affected employees, and to its effect on the viability of the employment relationship. The Commissioner also failed to have regard to and be guided by the principles established by the authorities cited herein above, particular that of the Constitutional Court in arriving at the decision in his arbitration award.
- 42] The Commissioner also erred in his treatment of remorse. He found remorse in the employee's apology at the arbitration. However, that apology was tendered for the first time at the arbitration, months after the dismissal. The employee had not apologised during his suspension or at the disciplinary enquiry. This was confirmed by the evidence of one of the applicant's witnesses, which the Commissioner did not consider. A belated apology of the kind tendered by Mr Williamson does not, without more, establish the genuine remorse capable of rendering dismissal an inappropriate sanction. Moreover, mitigating factors

²⁵*Mofokeng supra*.

²⁶ SARS *supra* at para [7].

²⁷*Crown Chickens supra*

such as remorse and length of service do not necessarily save an employee guilty of racism from dismissal.²⁸ An apology could not, in any event, have cured the damage caused, and the applicant's Disciplinary Code provided for dismissal for a first offence of discrimination on a listed ground.

- 43] A reasonable commissioner, having found the employee guilty of racial discrimination, and having regard to its gravity, the employer's duty to deal firmly with racism, the terms of the Disciplinary Code, and the undesirable precedent that an award of reinstatement would set in relation to proven and admitted acts of racial discrimination, could not have concluded that dismissal was too harsh. The Commissioner's contrary conclusion falls outside the band of decisions to which a reasonable decision-maker could come.
- 44] The award accordingly stands to be reviewed and set aside.

REMEDY

- 45] Where an award is set aside, the ordinary course is to remit the dispute to the CCMA. A court may, however, substitute its own decision where it is in as good a position as the arbitrator to make the determination, and where doing so will avoid further delay and expense. The full record of the arbitration is before me. The outcome does not turn on any dispute of fact or any credibility finding that only the Commissioner could make. The outcome turns on the correct legal characterisation of conduct that is, in material respects, common cause and was in terms conceded by the employee to be racist. In those circumstances I am in as good a position as the Commissioner to determine the matter, and no purpose would be served by remitting it. Substitution is accordingly the appropriate remedy.

COSTS

- 46] In terms of section 162 of the LRA, costs follow the requirements of the law and fairness. The application was unopposed; the first respondent, having sought

²⁸South African Transport Allied Workers Union obo Finca v Old Mutual Life Assurance Company (SA) Ltd and Another (C198/2004) [2006] ZALC 51.

advice from Legal Aid, elected not to oppose it. This is not a matter in which an order of costs would accord with fairness. I make no order as to costs.

47] In the result, I make the following order:

ORDER

1. The arbitration award issued by the third respondent under case number WECT5889-23, dated 14 July 2023, is reviewed and set aside.
2. The award is substituted with a finding that the dismissal of the first respondent was substantively fair for the reasons set out herein.
3. There is no order as to costs.



C Daniels, AJ

Acting Judge of the Labour Court of South Africa

Representatives

For the applicant: Mr G Stansfield of Mcaciso Stansfield Incorporated

For the first respondent: Adv A Lawrence, Cape Bar
Instructed by G Hartzenberg of Hartzenberg
Attorneys