REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 844/15

In the matter between:

SHOPRITE CHECKERS (PTY) LTD	Applicant
and	
BULELWA SAMKA	First respondent
CCMA	Second respondent
ELDRIDGE EDWARDS N.O.	Third respondent

Heard: 19 October 2017

Delivered: 29 November 2017

SUMMARY: Appeal in terms of s 10(8) of Employment Equity Act. Alleged unfair discrimination. Employer not liable in terms of s 60 of EEA for conduct by customer.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an appeal and a cross-appeal in terms of s 10(8) of the Employment Equity Act[1] against an arbitration award made in terms of s 60 of the EEA. The arbitrator[2] found that the appellant, Shoprite Checkers (Pty) Ltd, had unfairly discriminated against an employee, Ms Bulelwa Samka[3], on the ground of race.

Background facts

[2] The employee, Ms Samka, worked at the Fish Hoek branch of Shoprite Checkers as a cashier. She alleged that that the controllers and managers at the store victimised, bullied and harassed her because of her race. She said that the reason was that she raised grievances about the way the management treated black cashiers. She also complained about an incident in which an elderly white customer, a Mrs Price, called her a "stupid kaffer".[4]

[3] The employee referred a dispute to the CCMA in terms of s 60 of the EEA. There were three aspects to her referral:

3.1 She submitted that the company's practices in the workplace are racist towards black cashiers in general.

3.2 She was being bullied and victimised because she raised her grievances.

3.3 The company failed to protect her from the racist utterance by the customer and in fact condoned the customer's action.

The legal framework

[4] The arbitrator correctly located the dispute in the EEA. Section 6 of that Act reads:

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[1] Act 55 of 1998 (EEA).

[2] Commissioner Eldridge Edwards (the third respondent), a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) (the second respondent).

[3] The first respondent.

[4] For the sake of this judgment, and given that it forms the substance of the employee's complaint, it is unfortunately necessary to quote the offensive statement.

"**6. Prohibition of unfair discrimination**

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

[5] Section 10 provides for dispute resolution – through conciliation and, if that fails, through arbitration – for employees who earn less than the threshold referred to in s 6(3) of the Basic Conditions of Employment Act[5], such as Ms Samka. And s 10(8) provides for an appeal such as this one:

> "A person affected by an award made by a commissioner of the CCMA pursuant to a dispute contemplated in subsection (6)(a) may appeal to the Labour Court against that award within 14 days of the date of the award, but the Labour Court, on good cause shown, may extend the period within which that person may appeal."

[6] Section 11 deals with the onus in disputes where the employee alleges discrimination, as in this case:

> "Burden of proof
>
> (1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-
>
> (a) did not take place as alleged; or
>
> (b) is rational and not unfair, or is otherwise justifiable.
>
> (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
>
> (a) the conduct complained of is not rational;
>
> (b) the conduct complained of amounts to discrimination; and
>
> (c) the discrimination is unfair."

[7] And lastly, s 60 deals with the liability of employers:

[5] Act 75 of 1997 (BCEA).

"60. **Liability of employers**

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."

The arbitration award

[8] The arbitrator considered each of the employee's three complaints. In summary, he reached the following conclusions:

The alleged racist practices aimed at black cashiers

[9] A number of cashiers raised a grievance well after Ms Samka had referred her dispute alleging unfair discrimination. A management representative, Petersen, conducted an investigation. At the time of the hearing it had not been concluded. None of the witnesses subpoenaed by Samka attended the arbitration. On the evidence before the arbitrator, he concluded that the company had taken steps to address the grievances. There was no evidence that any of the issues raised related to racial discrimination.

Bullying and victimisation

[10] The arbitrator accepted that Ms Samka had been bullied and victimised by Elton Arendse, Herman Byleveld (the branch manager) and someone identified only as Chantelle. However, there was no racial element to it.

[11] Instead, the identified persons were fed up with Ms Samka's numerous complaints and grievances, many of which they considered to be petty and frivolous. About 80%V of the cashiers are black, yet no-one else experienced bullying or victimisation; and the insults aimed at Samka were not based on race.

The altercation with Price

[12] The altercation with the customer, Mrs Price, is perhaps the most important and disturbing aspect of Ms Samka's complaint.

[13] It is not disputed that Price uttered the offensive words. Yet, the arbitrator found, the company did not investigate it properly. He found that it did not take appropriate steps "to prevent the misconduct from happening again"; and that it should have considered steps like preventing Price access to the shop in future.

[14] The arbitrator considered the provisions of s 60 of the EEA and found that subsections (1), (2) and (3) were applicable. He found that the steps taken by Roberts and Byleveld (two of the managers) were insufficient to address the racial abuse that the employee had suffered. He found that it amounted to indirect discrimination on the ground of race.

The award

[15] Having found that the appellant had indirectly subjected Ms Samka to unfair discrimination on the ground of race, the arbitrator considered an award of compensation of R75 000, 00 to be an appropriate sanction.

<u>The appeal</u>

[16] The appeal is based on strictly legal grounds. Mr *Bosch* submitted that, quite simply, section 60 of the EEA only holds the employer liable for an action by its employee, and not by a customer.

The cross-appeal

[17] Mr *Sidaki* argued that the Commissioner erred in not concluding that there was sufficient evidence supporting the employee's complaint of unfair discrimination because of bullying and harassment.

Evaluation: The appeal

[18] The words that the customer, Mrs Price, directed to the employee, Ms Samka, constitute one of the worst racial insults imaginable in our country. As Kathree-Setiloane AJA remarked in *SAB v Hansen*:[6]

> "[O]ur courts have taken a very firm stand on the use of racist language in the workplace, in particular, the use of the word "kaffir", visiting upon such misconduct the sanction of dismissal.[7] More recently, the Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[8] said this in relation to the history, meaning and implications of the use of the word "kaffir":
>
> '[T]he word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.'
>
> The Constitutional Court went on to quote the words of Brook J in *Thembani v Swanepoel*,[9] which it said captured the best rendition of the

6 *South African Breweries (Pty) Ltd v Hansen and Others* (2017) 38 *ILJ* 1766 (LAC); [2017] 9 BLLR 892 (LAC) para 14.

7 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* [2002] 6 BLLR 493 (LAC) at para 35; *City of Cape Town v Freddie and Others* [2016] 6 BLLR 568 (LAC).

8 (2017) 38 *ILJ* 97 (CC) at para 4.

9 2017 (3) SA 70 (ECM).

use of the word kaffir as being "undoubtedly disparaging, hurtful and intentionally hateful":[10]

'The term "kaffir" historically bandied about with impunity, is a term which today cannot be heard without flinching at the obvious derogatory and abusive connotations associated with the term. It is rightly to be classified as an inescapable racial slur which is disparaging, derogatory and contemptuous of the person of whom it is used or to whom it is directed. Considered objectively, the use can only be an expression of racism with a clear intention to be harmful and to promote hatred towards the person of whom it is used or to whom it is directed. This brings its use clearly within the ambit of section 10 of [the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000].'

In relation to the seriousness of the misconduct of using the word "kaffir" in the workplace, the Constitutional Court quoted the words of Zondo JP in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others*, where he said this:

'The attitude of those who refer to, or call, Africans 'kaffirs' is an attitude that should have no place in any workplace in the country and should be rejected with absolute contempt by all those in the country – black and white – who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard, the courts must play their proper role and play it with the conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will 'give expression to the legitimate feelings of outrage' and revulsion that reasonable members of our society – black and white – should have when acts of racism are perpetuated.' "

[19] Those sentiments can only be endorsed by this Court. But could the employer, Shoprite Checkers, be held liable for the racist utterance of its customer, Mrs Price, as opposed to an employee?

[20] Analysing the clear language of section 60 of the EEA, it cannot. Section 60 envisages that, if an employee, while at work, discriminates against another employee, the employer is liable if it does not take the necessary steps to eliminate the racist conduct.

[10] *South African Revenue Service v CCMA* at para 5.

[21] In *Mokoena v Garden Art (Pty) Ltd*[11] the Court noted that an employer will be held liable if the following requirements are met:

21.1 the conduct must be by an employee of the employer;

21.2 the conduct must constitute unfair discrimination;

21.3 the conduct must take place while at work;

21.4 the alleged conduct must immediately be brought to the attention of the employer;

21.5 the employer must be aware of the conduct;

21.6 there must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA; and

21.7 the employer must show that it took all that was reasonable practicable to ensure that the employee would not act in contravention of the EEA.

[22] It is clear that section 60 only applies in cases of conduct by an employee of the employer. And the courts have repeatedly stipulated that.[12]

[23] Prof Rochelle le Roux has also pointed this out:[13]

> "In order to establish vicarious liability on the part of the employer, the plaintiff must prove that:
>
> (a) the perpetrator was an employee of the employer;
>
> (b) the perpetrator committed a delict against the plaintiff while
>
> (c) acting within the course and scope of his or her employment."

[24] In this case, deplorable as the conduct of the customer was, the employer cannot be held liable for her conduct against its employee in terms of s 60 of the EEA.

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[11] [2008] 5 BLLR 428 (LC); (2008) 29 *ILJ* 1196 (LC) par 40. See also *Potgieter v National Commissioner of SAPS* [2009] 2 BLLR 144 (LC); (2009) 30 *ILJ* 1322 (LC) par 46.

[12] Cf *Piliso v Old Mutual* (2007) 28 *ILJ* 897 (LC) par 15; *Makau v Department of Education, Limpopo Province* [2013] ZALCJHB 222 (20 September 2013) par 37.

[13] Le Roux et al, *Harassment in the Workplace: Law, Policies and Processes* (LexisNexis 2010) at 139.

[25] As an aside, it should be noted that an employee in this position is not without remedies. She could, for example, bring a delict shall claim against Mrs Price in the civil courts or pursue an unfair discrimination claim in the Equality Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act.[14] The employer could conceivably even be held liable on the basis of vicarious liability outside of the scope of the EEA.[15]

[26] In this case, though, the arbitrator was wrong to conclude that the employer was liable in terms of section 60 of the EEA. The appeal succeeds.

Evaluation: cross-appeal

[27] The employee has lodged a cross-appeal on the basis that the employee was subject to harassment by the employer, even though it could not be linked to race. Mr *Sidaki* argued that the arbitrator ought to have found that the employer was also liable for unfair discrimination on the ground of bullying, harassment and victimisation on the basis that it had been sufficiently proved by the evidence. He did not challenge the finding that these actions were not based on race.

[28] The arbitrator accepted that the employee was bullied and victimised by three fellow employees. However, it did not occur because of her race. He therefore could not uphold her claim of unfair discrimination based on race with regard to these incidents.

[29] In order to decide whether this conclusion was correct, one must, once again, consider the provisions of the EEA. Section 6(1) prohibits discrimination "on one or more grounds", including race, "or any other arbitrary ground". And s 6(3) provides that:

> "Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)."

[14] Act 4 of 2000.

[15] See the discussion by Darcy du Toit, *Labour Relations Law: A Comprehensive Guide* (LexisNexis 6 ed 2015) at 714-6 and *Media 24 Ltd v Grobler* [2005] 7 BLLR 649 (SCA).

[30] In terms of s 11 of the EEA, if unfair discrimination is alleged on a listed ground, the employer must prove on a balance of probabilities that it did not take place; or that it is rational and not unfair, or otherwise justifiable. If unfair discrimination is alleged on arbitrary ground, the complainant must prove that the conduct complained of is not rational; that it amounts to discrimination; and that it is unfair.

[31] It would appear that these provisions dealing with the burden of proof and with harassment as a form of unfair discrimination on any of the grounds listed in subsection (1) have not changed the test set out in *Harksen v Lane N.O.*[16]*:*

> "Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) [of the Constitution]."

[32] In *Aarons v University of Stellenbosch*[17] Waglay J held:

> "The applicant does allege that her constructive dismissal was based on harassment. "Harassment" is not specifically referred to in the Act. It is not one of the listed grounds in section 187(1)(f) of the Act. However, the grounds listed in section 187(1)(f) are not exhaustive. Harassment is

[16] 1998 (1) SA 300 (CC) par 52.

[17] [2003] 7 BLLR 704 (LC) par 18.

> specifically referred to and defined in the Employment Equity Act 55 of 1998 ("the EEA"). Section 6(3) of the EEA provides that "harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)". The grounds listed in section 6(1) of the EEA is no different to those listed in section 187(1)(f) of the Act. Harassment may indeed be a form of unfair discrimination that is recognised under section 187(1)(f) of the Act. However, an employee claiming harassment must do more than just make the bald allegation; it must clearly set out why the harassment amounts to unfair discrimination. The applicant has not done so."

[33] Rochelle le Roux has commented critically on the wording of the Act relating to workplace bullying and has called for judicial reform in this regard; but as the law stands, it seems that the interpretation in *Aarons* remains the correct one. That is also the interpretation preferred by the arbitrator. Le Roux comments:[18]

> "While workplace bullying is undefined in statute, the consequences of harassment are made clear. However part of the reason for the ambiguity surrounding workplace bullying lies in the uneasy formulation of section 6(3) of the EEA, which states that:
>
> 'Harassment of an employee is a form of unfair discrimination and is prohibited on anyone, or a combination of grounds of unfair discrimination listed in subsection (1).'
>
> While declaring harassment (which is undefined) to be a form of unfair discrimination, the subsection links the prohibition of harassment to any one of, or a combination of the listed grounds of unfair discrimination in section 6 one of the EEA. This, arguably, can be read to mean that while all forms of harassment should be regarded as unfair discrimination, only those forms of harassment which can be linked to a listed ground (for example, race, sex, sexual orientation, age et cetera) are prohibited by the EEA. However, the alternative reading is one which sees harassment to be prohibited unfair discrimination only if it relates to the specific grounds. This

[18] Le Roux et al, *Harassment in the Workplace: Law, policies and processes* 4.4.1 at pp 62-63 s.v. "Anti-harassment protection" (footnotes omitted); and 4.5 at p 65 s.v. "The need for new legislation".

See also the critical discussion in Du Toit et al, *South African Labour Law: A Comprehensive Guide* (6 ed) at 699-700 s.v. "Harassment".

reading is consistent with the full definition of harassment in the PEPUDA (which explicitly limits the definition of harassment to sex, gender, sexual orientation and race) and with the judgement in *Aarons v University of Stellenbosch*, where the Labour Court held that an employee claiming harassment 'must do more than just make the bald allegation; it must clearly set out why the harassment amounts to unfair discrimination'.

The exclusion of harassment on unlisted grounds has been argued to be inconsistent and it has been suggested that section 6(3) should be interpreted in the light of the general prohibition of unfair discrimination intended by section 9(3) of the Constitution. Certainly this more purposive interpretation is required to bring workplace bullying within the ambit of prohibited unfair discrimination. However, it may be that discrimination is not the best legal category into which workplace bullying should be fitted. As Yamada has noted, what bothers people about abuse of workplace conduct is not the fact that it may be discriminatory, but it that it is abusive in the first place; if a work environment is sufficiently abusive, it should not save an employer from liability because the abuse is dispensed without regard to race, sex or gender or sexual orientation."

…

"The preceding sections indicate the uncertainty of existing legal remedies to deal with workplace bullying. The existing unfair discrimination law seems not to prohibit workplace bullying, because it is not harassment on a listed ground."

[34] In this case, the employee has not shown that the harassment was on a listed or other arbitrary ground. She has not shown any unfair discrimination. The cross-appeal must fail.

Conclusion

[35] The award is not sustainable on the finding of unfair discrimination based on race. The appeal succeeds. The appellant, Shoprite Checkers, did not discriminate against the first respondent, Ms Bulelwa Samka.

[36] The cross-appeal is unsuccessful. The award cannot be faulted with regard to the arbitrator's findings on the other two complaints and his application of the legal principles to the evidence.

[37] Although the appellant has been successful, this is not a case where costs should follow the result. The employee was represented by Legal Aid South Africa to defend the award in her favour. Although her initial complaint was against a private employer and not the State, she tried to vindicate her constitutional rights against unfair discrimination. Applying the principles in *Biowatch*,[19] I make no order as to costs.

Order

[38] I therefore make the following order:

38.1 The appeal is upheld and the cross-appeal is dismissed.

38.2 The award of Commissioner Eldridge Edwards under case number WECT 12300-16 dated 8 November 2016 is substituted with an award that the appellant, Shoprite Checkers (Pty) Ltd, did not discriminate against the employee, Ms Bulelwa Samka.

38.3 There is no order as to costs.

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A J Steenkamp

Judge of the Labour Court of South Africa

[19] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC)

APPEARANCES

APPELLANT:	C S Bosch
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FIRST RESPONDENT:	T S Sidaki
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