

RACIAL HARASSMENT AND DISCRIMINATION IN THE WORKPLACE

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DEDICATION

This paper is dedicated to my mother Xolisile and father Bambaliphi Sibiya. I am grateful for everything you have done for me. Ngiyabonga.

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SUMMARY

This research will investigate the problem of racial harassment and discrimination in the workplace. This problem of racial harassment and discrimination in the workplace is based on section 6 of the Employment Equity Act¹ (EEA) which lays the foundation of this research.

In chapter one of this dissertation the background of our constitutional dimension is discussed as it is the cornerstone of our law.² Chapter one also raises racial harassment and discrimination as a problem in the workplace. Chapter 2 discusses the pre-democratic, the transition to democracy and the post-democratic racial position in the workplace. Chapter 2 enables the reader to have a full understanding of South Africa's racial history particularly in employment. Chapter 3 analyses how South African courts address the problem of racial harassment and discrimination in the workplace. This analysis is done by way of discussing cases that have dealt with racial harassment. Further issues that are discussed in chapter 3 are whether the sanction of dismissal imposed by courts in racial harassment and discrimination cases are appropriate. How courts address the sensitivity of employees towards racial harassment and discrimination in the workplace and finally the employers duty to protect employees from racial harassment and discrimination. This is done by way of a broader discussion of case law and section 60 of the EEA.

Chapter 4 is the comparative chapter where racial harassment and discrimination from the United States of America (USA) perspective is analysed and compared to South Africa. In this chapter the Civil Rights Act of 1964 is used to discuss the test that USA courts use to establish racial harassment and discrimination in the workplace. The employer's duty to protect employees from racial harassment is also discussed in chapter 4, as well as the tests used by courts to establish liability on the part of the employer in the USA. Chapter 5 includes recommendations on how courts and employers can ensure that the remedies that they impose on employees who are guilty

¹ Act 55 of 1998.

² See preamble of the Constitution, 1996.

of racial harassment are effective in the elimination of racial harassment and discrimination in the workplace. This chapter will also contain concluding remarks.

INDEX

CHAPTER 1	INTRODUCTION	
1.	Contextual Background	1
2.	Research Problem	4
3.	Research Question	6
4.	Research Methodology	6
5.	Overview of Chapters	7
CHAPTER 2	PRE-DEMOCRATIC AND POST-DEMOCRATIC POSITION IN SOUTH AFRICA	
1.	Introduction	8
2.	Pre-democratic Era	9
3.	Transition to Democracy	10
4.	Post-democratic Era	11
5.	Defining Racial Harassment and Discrimination	12
6.	Conclusion	14
CHAPTER 3	THE COURTS AND THE EMPLOYER'S APPROACH TO THE PROBLEM OF RACIAL HARASSMENT AND DISCRIMINATION IN THE WORKPLACE	
1.	Introduction	16
2.	The Courts Approach to Racial Harassment and Discrimination In the Workplace	18
	2.1 Is Dismissal an Appropriate Sanction?	19
	2.2 How do Courts Address the Sensitivity of Employees Towards	

Racial Harassment and Discrimination in the Workplace	24
3. The Employer's Duty to Protect Employees from Racial Harassment and Discrimination in the Workplace.	26
4. Remedies for Aggrieved Employees	28
4.1 Courts Role	28
4.2 Employer's Role	30
5. Conclusion	31
CHAPTER 4	THE POSITION OF RACIAL HARASSMENT AND DISCRIMINATION IN THE UNITED STATES OF AMERICA
1. Introduction	32
2. Racial Harassment and Discrimination in the USA and the Courts	33
3. Employer's Duty to Protect Employees from Racial Harassment and Discrimination in the USA	37
4. Conclusion	39
CHAPTER 5	CONCLUSIONS AND RECOMMENDATIONS
	41
BIBLIOGRAPHY	43

CHAPTER 1

INTRODUCTION

1. CONTEXTUAL BACKGROUND	1
2. RESEARCH PROBLEM	4
3. RESEARCH QUESTION	6
4. RESEARCH METHODOLOGY	6
5. OVERVIEW OF CHAPTERS	7

1. CONTEXTUAL BACKGROUND

The South African apartheid political and legal systems were squarely based on inequality and discrimination.³ Apartheid dealt with the problem of scarce resources by systematically promoting the socio-economic development of the white population at the expense of the rest of society.⁴ As the Constitutional Court pointed out, apartheid systematically discriminated against black people in all aspects of societal life.⁵ The result of apartheid was that inferior facilities were provided to black people in housing, job access and education.⁶

When the apartheid regime finally collapsed in the late 1980's the emergence of a new democratic order in 1994 culminated in the adoption of the Interim Constitution. Surprisingly section 15 of the Interim Constitution, unlike section 16 of the final Constitution,⁷ did not have a qualification for free speech in the form of an express exclusion of 'hate speech from constitutional protection.⁸ Section 15 of the Interim Constitution gives everyone the freedom of speech and expression which includes the press, other media, freedom of creativity and scientific research.⁹ While section 16(1) the final Constitution provides generally for freedom of expression, section 16(2) removes

³ Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town 2013) 211.

⁴ Ibid.

⁵ *Brink v Kitshoff* 1996 4 SA 197 (CC) 41.

⁶ Note 1 above.

⁷ The Constitution of the Republic of South Africa Act, 1996 (The Constitution).

⁸ Thabane T & Rycroft A "Racism in the Workplace" 2008 *ILJ* (29) 43.

⁹ Section 15 of the Interim Constitution.

from the ambit of general constitutional protection of expression that which propagates war, incites imminent violence and advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.¹⁰

In 1996 the equality clause¹¹ of the final Constitution enjoined the enactment of national legislation to ‘prevent or prohibit’ unfair discrimination (section 9(4)).¹² However before the enactment of the EEA the notion of ‘unfair discrimination’ first made its appearance in the 1988 amendment of the previous Labour Relations Act.¹³ Unfair discrimination was defined as the unfair discrimination by an employer against any employee solely on the grounds of race, sex or creed.¹⁴ The result of this was that any racial harassment or discrimination claim would be regarded as an unfair labour practice in terms of the LRA. Examples of where racial harassment and discrimination were regarded as unfair labour practices are in the cases of *SACWU v Sentrachim*¹⁵ and *Chamber of Mines v CMU*.¹⁶ In the *SACWU*¹⁷ case, wage discrimination based on race was held to be an unfair labour practice.¹⁸ In the *Chamber of Mines*¹⁹ case the practices resting on the doctrine of ‘separate but equal’ were considered to be unfair labour practices and thus amounted to racial discrimination.²⁰ Racial harassment and discrimination were considered to be unfair labour practices until the enactment of the Employment Equity Act²¹ in which unfair discrimination in the workplace is dealt with in its own right rather as a species of unfair labour practice. Chapter 1 of the EEA provides that the purpose of the Act is to achieve equity in the workplace by:

- (a) “Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and

¹⁰ Section 16(2) of the Constitution.

¹¹ Section 9 of the Constitution.

¹² Du Toit D *Labour Relations Law: A Comprehensive Guide* 6th ed (Lexis Nexis 2015) 654.

¹³ Act 28 of 1956 (LRA).

¹⁴ Section 1 of the LRA.

¹⁵ (1988) 9 ILJ 410 (IC) (*SACWU* case).

¹⁶ (1990) 11 ILJ 52 (IC) (*Chamber of Mines* case).

¹⁷ Note 13 above.

¹⁸ *Ibid.*

¹⁹ Note 14 above.

²⁰ *Ibid.*

²¹ Act 55 of 1998 (EEA).

- (b) Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational levels in the workforce.”²²

This research will be based on the first purpose of the EEA and analyse how courts and employers address the issue of racial harassment and racial discrimination in our democratic society based on dignity, equality and freedom. The above will be compared to the USA perspective concerning racial harassment and discrimination in the workplace. Therefore, it is necessary to look into section 6(1) of the EEA which provides that:

“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 ,belief, political opinion ,culture, language ,birth, belief or any other arbitrary ground.”²³

The EEA was followed by the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act²⁴ which is applicable outside the employment context. However, this research will not deal with an analysis of PEPUDA because it focuses on racial harassment and discrimination in the employment context.

²² Chapter 1 of the EEA.

²³ Section 6(1) of the EEA.

²⁴ Act 4 of 2000 (PEPUDA).

2. RESEARCH PROBLEM

Harassment comes in a wide range of forms including verbal, non-verbal and physical conduct.²⁵ Verbal conduct includes insulting, disrespectful, demeaning, intimidating or offensive remarks, comments, jokes, e-mails, probing and hinting.²⁶ Sometimes it's easy to misunderstand human interaction such as words, looks and gestures.²⁷ Clearly the notion of racial harassment has to exclude an individual perception that is capable of resolution in a straightforward conversation between adults.²⁸ However it raises the question that if the conduct persists at what stage does it become harassment?²⁹ There is no definition of harassment in the EEA, but the Domestic Violence Act³⁰ provides a definition of harassment which can be used as a guideline. According to section 1 of the DVA harassment can be defined as engaging in a pattern of conduct that causes the fear of harm to another person.³¹

Many employees have found themselves being victims of racial harassment and discrimination in the workplace therefore this is indeed a problem in our society. This problem has made headlines in newspapers and labour courts have also been challenged with this problem of racial harassment and discrimination in the workplace on a number of occasions. In 2011 the problem of racial harassment and discrimination in the workplace made headlines in the Mail and Guardian (M&G) newspaper where a professor at the University of Pretoria claimed that over the past decade white executives had been ganging up with the departments head to harass him.³²

²⁵McGregor M "*Racial Harassment in the Workplace: Context as Indicata SA Transport & Allied Workers Union obo Dlamini & Transnet Freight Rail*" 2009 ILJ 1692 (ARB) TSAR 650.

²⁶ *Ibid.*

²⁷ Le Roux R et al *Harassment in the Workplace: law, policies and processes:* (LexisNexis Durban 2010) 46.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Act 116 of 1998 (DVA).

³¹ Section 1 of the DVA.

³² Mg.co.za/article/2011-12-19-tuks-academic-makes-racism-claim.

In this article, the Higher Education Transformation Network (The Network) told the M&G that the professor's long standing tiff with management was evidence of an organisational culture that was hostile to black employees.³³ The Network also said what happened to Kachienga (professor) is happening to many black employees of the university because of its adverse institutional culture.³⁴ The problem of racial harassment in the workplace also makes its way to the courts. The case of *Crown Chicken Farms (Pty) v Kapp & Others*³⁵ is an example. In this case the first respondent a white male was employed by the appellant employer as a feedmill supervisor.³⁶ On one occasion while the first respondent and other employees including Maxim were working nightshift, Maxim was injured on duty and needed to be taken to hospital.³⁷

It was alleged that the first respondent refused to call an ambulance and said “los die kaffir-laai” (leave that kaffir to die).³⁸ A disciplinary enquiry was held and the matter ended up in the Labour Appeal Court (LAC). In the LAC Nicholson JA acknowledged the fact that racism and racial harassment exists in the workplace and described racism as a plague and a cancer in our society which must be rooted out.³⁹ Judge Nicholson went on to say that the use of racial insults severely degrade the dignity of the employee in question.⁴⁰

In the same case Zondo JP held that:

“what this case raises is the question of how courts should deal with cases of racism or racially motivated crimes or acts of unacceptable behaviour or conduct motivated by racism in the workplace especially in light of the Constitution.”⁴¹

Therefore all of the above indicate that racial harassment as a form of discrimination is prevalent in the workplace and is indeed a problem.

³³ Note 30 above.

³⁴ *Ibid.*

³⁵ 2002 23 ILJ 863 (LAC) (*Crown Chicken Farms case*).

³⁶ *Ibid* at 863.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid* at 868.

⁴⁰ *Ibid.*

⁴¹ Note 33 above at 877.

3. RESEARCH QUESTION

This research will examine how courts address the problem of racial harassment as a form of discrimination in the workplace. Together with the above question this research will investigate the following:

1. South Africa's racial history before and after the constitutional era.
2. The extent to which the EEA and other legislation address the problem of racial harassment and discrimination in the workplace.
3. Whether South African courts effectively address the problem of racial harassment and discrimination in the workplace.
4. The position in the USA regarding racial harassment and discrimination in the workplace compared to South Africa.

4. RESEARCH METHODOLOGY

This research takes an analytical approach on racial harassment in the workplace which incorporates a comparative element (USA) where case law, journal articles, newspaper articles and legislation will be used.

5. OVERVIEW OF CHAPTERS

The first chapter will serve as introduction.

Chapter two will look at the pre-apartheid and post-apartheid era in South Africa. This will enable the reader to have a full understanding of South Africa's racial history.

Chapter three will look at South African case law in dealing with racial harassment and discrimination in the workplace. This chapter will focus on each case's approach to racial harassment and discrimination in the workplace and whether the sanctions imposed assist in the elimination of racial harassment and discrimination in the workplace.

Chapter four will look at racial harassment and discrimination from the USA perspective compared to South Africa. This chapter will discuss how USA courts deal with racial harassment and discrimination in the workplace as compared to South African courts and what are the tests applied in the USA when dealing with racial harassment and discrimination in the workplace.

Chapter five will conclude the dissertation with recommendations on what employers and courts can do to assist in the elimination of racial harassment and discrimination in the workplace.

CHAPTER 2

PRE-DEMOCRATIC AND POST-DEMOCRATIC POSITION OF RACIAL HARASSMENT AND DISCRIMINATION IN SOUTH AFRICA

1. INTRODUCTION	8
2. PRE-DEMOCRATIC ERA	9
3. TRANSITION TO DEMOCRACY	10
4. POST-DEMOCRATIC ERA	11
5. DEFINING RACIAL HARASSMENT AND DISCRIMINATION	12
6. CONCLUSION	14

1. INTRODUCTION

Since 1652 South Africans have identified themselves primarily in racial terms.⁴² In 1995 the British took over the Cape of Good Hope and continued with racial segregation.⁴³ The concept of race became a particularly explosive idea during colonization as well as during the apartheid period which began in 1948.⁴⁴ Racial segregation continued until South Africa became a democratic country and the fight against racism continued. However, for a long time the goal of ending discrimination and achieving equality was understood to apply mainly to race with hardly any mention made of the other forms of discrimination that were experienced by other sections of society for example gender and towards disabled people.⁴⁵ In addition until the 1970's there was little clarity as to how notions of non-discrimination would apply in the labour market, let alone what redress mechanisms would be needed to address the legacy of centuries of discrimination.⁴⁶

⁴² Le Roux R et al (2010) 43.

⁴³ Author Unknown 2015 Race and Ethnicity in South Africa www.sahistory.org.za/article/race-and-ethnicity-south-africa [date of use 17 Feb 2016].

⁴⁴ *Ibid.*

⁴⁵ Bezuidenhout A et al "Tracking Progress on the Implementation and Impact of the Employment Equity Act Since its Inception" Research Consortium March 2008 University of the Witwatersrand Press 4.

⁴⁶ *Ibid.*

In order for one to appreciate the scope of this research, it is necessary to embark on the historical background and the transition to our democratic country that protects employees from racial harassment and discrimination.

2. PRE-DEMOCRATIC ERA

Under the apartheid regime, the practices of colonization were formalised by legislation.⁴⁷ Examples of legislation that were enacted and implemented during the apartheid regime are the Registration Act⁴⁸ which provided for the compilation of a register of the entire South African population,⁴⁹ the Reservation of Separate Amenities Act⁵⁰ which legalised the racial segregation of public services premises and other amenities⁵¹ and the Bantu Education Act⁵² which legalised racial separation of education in South Africa.⁵³ The above legislation ensured differentiation based on race amongst South Africans. The consequence of this is that apartheid gravely assaulted the dignity of black people in particular.⁵⁴ It was however not human dignity alone that suffered.⁵⁵ Black people were provided with services greatly inferior to those of whites and to a lesser degree to those of Indian people.⁵⁶

Discrimination is deeply rooted in South African history.⁵⁷ In a society where racial inequality was the norm, discriminatory practices became a pervasive feature of employment relations because under apartheid, discrimination against workers on grounds such as race and sex was not only permitted but it was legally enforced.⁵⁸ Racial discrimination was particularly evident in the development of trade unions. Although this research is not based on a discussion of trade unions but it is necessary to look into their history as it gives one an idea of the racial discrimination that

⁴⁷ Note 41 above.

⁴⁸ Act 30 of 1950.

⁴⁹ O'Malley *The Heart of Hope* www.nelsonmandela.org [date of use 11 April 2016].

⁵⁰ Act 49 of 1953.

⁵¹ Note 41 above.

⁵² Act 47 of 1953.

⁵³ Note 41 above.

⁵⁴ *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) 46.

⁵⁵ *Ibid.*

⁵⁶ Note 41 above.

⁵⁷ Du Toit (2015) 653.

⁵⁸ *Ibid.*

employees were subjected to during the pre-democratic era. In 1922 white workers in the mining industry came out on strike and protested against attempts by the mining industry to reduce wage levels and to break the monopoly on skilled work which was enjoyed by white trade unions.⁵⁹ One of the consequences of the above strike was the enactment of the 1924 Industrial Conciliation Act.⁶⁰ The ICA required trade unions, employer's organisations and councils to register and created the possibility of voluntary collective agreements which were recognised by statute and enforceable by criminal sanction.⁶¹ One of the disadvantages of the ICA was that it only applied to white workers and this exclusion lasted until 1979.⁶² The ICA was thereafter revised a few times but still excluded black workers from the statutory system. In 1977 the Wiehahn inquiry was appointed to report on and make recommendations concerning the existing labour legislation and the result of this was that trade unions representing mainly black employees started to reject the racist legislative dispensation.⁶³ Eventually the resistance of trade unions representing black workers resulted in the extension of trade union rights to black employees.⁶⁴ This was the start of the eradication of racial discrimination in the workplace and the transition to democracy.

3. TRANSITION TO DEMOCRACY

The 1980's saw the first steps towards reversing such practices in a limited ad hoc manner and particularly in the workplace.⁶⁵ Discrimination on the basis of sex, race and colour in industrial council agreements was outlawed in 1981 and at the same time such practices were becoming vulnerable to challenge in terms of unfair labour practice jurisdiction of the Industrial Court.⁶⁶

⁵⁹ Van Niekerk A et al *Law@Work* 3rd ed (LexisNexis Durban 2015) 11.

⁶⁰ *Act 11 of 1924 (ICA)*.

⁶¹ *Note 57 above*.

⁶² *Ibid.*

⁶³ *Note 57 above* 12.

⁶⁴ *Ibid.*

⁶⁵ *Note 55 above*.

⁶⁶ *Ibid.*

In the following years, the Interim Constitution was adopted in 1993 which emerged from the Multi-party Negotiating Process at the World Trade Centre and represented a negotiated a transition to democracy.⁶⁷ The people participated in the process of drafting and adopting our Constitution in a way that was never done before internationally.⁶⁸ On the labour front the National Economic Development and Labour Council (NEDLAC) was established to provide a structure for the engagement of the social partners in the process of passing labour laws so as to deepen our democracy.⁶⁹

The Interim Constitution was approved by representatives of all political parties who participated in the Multi-party Negotiating Process, where after it was enacted by Parliament with a few minor changes.⁷⁰ The Interim Constitution contained an equality clause which stated that:

“every person shall have the right to equality before the law and to equal protection of the law.”⁷¹

The above clause prohibited unfair direct and indirect discrimination in a non-exhaustive way listing race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.⁷²

4. POST-DEMOCRATIC ERA

In 1997, the Final Constitution was adopted by the Constitutional Assembly.⁷³ This Constitution clearly a product of many years of struggle came against the backdrop of a history of apartheid, a central feature of which was inequality based on race.⁷⁴ The adoption of the Final Constitution, lead to the enactment of the EEA which prohibits

⁶⁷ Mureinik E “A Bridge to Where? Introducing the Interim Bill of Rights” 1994 SAJHR 31.

⁶⁸ Chaskalson M et al “Constitutional Law of South Africa” 1996 2-15.

⁶⁹ Pillay D “Giving Meaning to Workplace Equity: The Role of the Courts” 2003 ILJ 56.

⁷⁰ McGregor M “A Legal Historical Perspective on Affirmative Action in South Africa” Part 2 2007 Fundamina 99.

⁷¹ Section 8(1) of the Interim Constitution.

⁷² *Ibid.*

⁷³ Ngcukaitobi T “Adjudicating Transformation in the Labour Courts- An Edifice on the Rise”? 2007 ILJ (28) 1436.

⁷⁴ *Ibid.*

unfair discrimination as part of its broader purpose of promoting employment equity.⁷⁵ The prohibition is one of the public policy norms governing an employment relationship which cannot be excluded by contract.⁷⁶

Together with the prohibition of unfair discrimination clause in chapter 2 of the EEA, section 6(3) of the EEA recognises harassment as a form of unfair discrimination which is prohibited on any or a combination of the grounds listed in section 6(1).⁷⁷ The above statutes were enacted to accommodate those who were previously disadvantaged.⁷⁸ Therefore Anton Kok describes the Final Constitution and EEA as ‘transformative law’ and states that they are intended to reduce both social and economic differences between groups to transform the hearts and minds of South Africans.⁷⁹

Despite efforts to transform South Africa and to heal those who were affected by inequalities of the past. The heritage of racial discrimination is still strongly felt in our workplaces⁸⁰ Authors also seem to feel this way and have said that apart from sexual harassment, racial harassment is the form of harassment that comes up most frequently in our case law and probably in practice.⁸¹ Therefore it is important for one to have an understanding of the terms “racial harassment” and “racial discrimination”

5. DEFINING RACIAL HARASSMENT AND DISCRIMINATION

5.1 RACIAL HARASSMENT

While the law is clear in categorizing racial harassment as a form of racial discrimination, there are no pointers in the EEA regarding the definition of harassment.⁸² However there is legislation available to guide employers and employees on the definition of racial harassment. As stated above, the DVA and PEPUDA provide a

⁷⁵ Du Toit D (2015) 654.

⁷⁶ *Ibid.*

⁷⁷ Section 6(3) of the EEA.

⁷⁸ Fergus E and Collier D “*Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation*” 2014 SAJHR 484-485.

⁷⁹ Kok A “*The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or Legislature-driven Societal Transformation*” 2008 19 Stell LR 122,124-5.

⁸⁰ Le Roux R et al (2010) 43.

⁸¹ Du Toit D & Potgieter M *Unfair Discrimination in the Workplace* 1st ed (Juta Cape Town 2014) 39.

⁸² Le Roux R et al (2010) 45.

definition. Although such legislation is not applicable in the employment context, it can guide employers and employees in defining racial harassment when confronted with this problem. The definition of harassment in the DVA is already discussed above and therefore PEPUDA defines harassment as:

“unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to (a) sex, gender or sexual orientation or (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group”⁸³

Racial harassment has also been defined by certain authors as a form of social behaviour by either the employer or employee that is intended to belittle, marginalise, coerce, manipulate or intimidate persons belonging to a particular race.⁸⁴

5.2 RACIAL DISCRIMINATION

The Constitution provides for the basis of defining racial discrimination. Section 9(3) of the Constitution provides that:

“ the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender , sex pregnancy , marital status , ethnic or social origin , colour , sexual orientation , age ,disability , religion , conscience , belief culture , language and birth.”⁸⁵

The EEA gives effect to the Constitution through the prohibition of unfair discrimination.⁸⁶ In one of the first reported labour cases⁸⁷ the term discrimination was used.⁸⁸ Already at that stage it was accepted that labour rights in South Africa must be interpreted in the light of international law.⁸⁹The International Labour

⁸³ Section 1 of PEPUDA.

⁸⁴ Rycroft A and Mudely E 2010 *Dealing with Racism and Racial Harassment* 23rd Annual Labour Law Conference <http://www.LexisNexis.co.za> [date of use 7 Oct 2015].

⁸⁵ Section 9(3) of the Constitution.

⁸⁶ Section 6 of the EEA.

⁸⁷ *Raad van Mynvakkbonde v Minister van Mannekrag en 'n Ander* 1993 4 ILJ 2002 (T), *UAMAWU & Others v Fodens SA (Pty) Ltd* 1983 4 ILJ 212 (IC).

⁸⁸ Du Toit D “*Protection Against Unfair Discrimination in the Workplace: Are Courts Getting it Right?* (2007) 2.

⁸⁹ Note 86 above.

Organisation (ILO) Convention III of 1958 (the Convention) is recognised as a point of reference in defining discrimination.⁹⁰ In the *SACWU*⁹¹ case it was held that discrimination in the Convention is defined as:

“any distinction ,exclusion or preference made on the basis of race, colour, sex, religion, social origin, political opinion , national extraction or social origin , political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”⁹²

There are however limits with article 1 section (2) in stating that

“any distinction exclusion or preference in respect of a particular job based on inherent requirements thereof is not deemed to be discrimination.”⁹³

Unlike racial harassment, the definition of racial discrimination can be found in the EEA and most importantly our Constitution identifies various forms of discrimination that everyone may not be subjected to. However taking into consideration the number of times racial harassment and other forms of harassment come up in the workplace, it can be suggested that the legislator should consider incorporating a definition of harassment in the EEA which will be applicable in the workplace.

6. CONCLUSION

South Africa has a very rich racial history in which racial harassment and discrimination became the norm. However, as seen above, this normality was changed by the enactment of the Constitution which is still the prevailing law in South Africa. The EEA is implemented with reference to the Constitution. The Constitution and the EEA have been applied for over a decade therefore this makes one eager to observe the future

⁹⁰ *Ibid.*

⁹¹ Note 13 above.

⁹² ILO Convention III of 1958 (The ILO Convention).

⁹³ Article 1 section 2 of the Convention.

implementation of the Constitution and the EEA on the problem of racial harassment and discrimination in the workplace.

The above paragraphs are an indication of the transformation that South Africa has been through in the racial context and how this has affected legislation that is applicable in the workplace. However, there could be more active implementation from employers with the aim of eradicating this problem of racial harassment and discrimination in the workplace.

Despite the changes that the Constitution and the EEA have brought in employment, racial harassment and discrimination continues to crop up⁹⁴ and this awakens echoes of a past that are disliked by most South Africans and re-opens wounds that have not yet healed.⁹⁵ Though much has been done to combat racial harassment and discrimination in the workplace ugly and disturbing incidents of racial harassment continue to appear.⁹⁶ The next chapter will therefore discuss incidents of racial harassment and discrimination and how courts and employers approach the problem of racial harassment and discrimination in the workplace.

⁹⁴ Du Toit D and Potgieter M (2014) 39.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

CHAPTER 3

THE COURTS' AND THE EMPLOYER'S APPROACH TO THE PROBLEM OF RACIAL HARASSMENT AND DISCRIMINATION IN THE WORKPLACE

1. INTRODUCTION	16
2. THE COURTS APPROACH TO RACIAL HARASSMENT AND DISCRIMINATION IN THE WORKPLACE	18
2.1 Is Dismissal an Appropriate Sanction?	19
2.2 How do Courts Address the Sensitivity of Employees Towards Racial Harassment and Discrimination in the Workplace	24
3. THE EMPLOYER'S DUTY TO PROTECT EMPLOYEES FROM RACIAL HARASSMENT AND DISCRIMINATION IN THE WORKPLACE	26
4. REMEDIES FOR AGGRIEVED EMPLOYEES	28
4.1 Courts Role	28
4.2 Employer's Role	30
5. CONCLUSION	31

1. INTRODUCTION

Inequality on the basis of race and gender is deeply entrenched in our society and has affected all spheres of our economy, the workplace and wider society.⁹⁷ Evidence of this can be found in the number of racial harassment and discrimination cases that have come before the courts. Although courts and tribunals charged with the mandate of dealing with workplace disputes have expressed complete disapproval on racial harassment and discrimination in the workplace in the strongest possible terms. This is largely because of the destructive role that racism has played in restricting society to one direction and assaulting people's dignity in the past.⁹⁸ In this regard section 39 of the Constitution provides courts with a guideline on how to interpret the Bill of Rights and states:

⁹⁷ *Director-General: Department of Labour & another v Comair Ltd* 2000 30 ILJ 2711 (LC) 2715.

⁹⁸ Thabane T and Rycroft A (2008) 44.

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) Must promote the values that underlie an open and democratic society based on human dignity equality and freedom
 - (b) Must consider international law
 - (c) May consider foreign law
- (2) When interpreting any legislation and when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.⁹⁹

From the above, it is clear that when the courts interpret the law the interpretation must be based on values, these values must be based on those that underlie an open and democratic society based on dignity, equality and freedom.¹⁰⁰ The question which therefore arises is how should courts interpret racial harassment and discrimination cases? Pillay provides that judicial interpretation must begin with an interpretation of the express language of the written text.¹⁰¹ If this is not done, the law may come to have whatever meaning one wants it to have.¹⁰² Adjudicators have a duty to develop our law based on principle,¹⁰³ our law must be developed 'cautiously,'¹⁰⁴ judicially and pragmatically if it is to withstand the test of time¹⁰⁵ and within the ambit of the principle of the separation of powers.¹⁰⁶ Judicial discipline is also necessary to ensure consistency, certainty, clarity and rationally in decision making.¹⁰⁷

⁹⁹ Section 39 of the Constitution.

¹⁰⁰ Pillay D (2003) 57.

¹⁰¹ *Ibid.*

¹⁰² *S v Zuma* 1995 4 BCLR 401 SA, *Park-Ross v Director, Office for Serious Economic Offences* 1995 2 BCLR 198 (C).

¹⁰³ *Christian Education South Africa v Minister of Education* 1998 12 BCLR 1449 (CC).

¹⁰⁴ *Carmichele v Minister of Safety & Security* 2001 10 BCLR 995 (CC), *Du Plessis v De Klerk* 1996 3 SA 850 (A).

¹⁰⁵ *Kanesa v Minister of Home Affairs and Minister of Education v Harris* 2001 11 BCLR 1157 (CC) 19.

¹⁰⁶ Pillay D (2003) 58.

¹⁰⁷ *Ibid.*

2. THE COURTS APPROACH TO RACIAL HARASSEMENT AND DISCRIMINATION IN THE WORKPLACE

Before the democratic era our courts have applied the above principles and condemned racism in the workplace even during the apartheid era. Looking back to 1976 when apartheid was solidly entrenched, the first case on racial harassment was reported.¹⁰⁸ In that case a white policeman had called a black person (Mr Ciliza) a 'kaffir', Mr Ciliza sued the policeman for damages but according to the magistrate he had failed to prove whether the word was derogatory or mere meaningless abuse.¹⁰⁹ However on appeal the Judge found that the use of the word constituted 'an unlawful aggression upon Mr Ciliza's dignity.'¹¹⁰ The above case was heard at a time when there was major racial tension in South Africa as a result the court was reluctant to address the issue but ultimately the court leaned towards protecting the dignity of citizens and employees despite the inequality afforded to most citizens.

Later courts started relaxing the burden of proof on citizens and employees who alleged to be called derogatory names. The second case where the court was faced with a racial harassment dispute, the Judge described the word "kaffir" as derogatory, contemptuous and deeply offensive to black people.¹¹¹ The Judge added that almost everybody knew that and significantly stated that an intention to give offence could be taken for granted on most occasions.¹¹² This is because previously our country was strongly contained of statutes which infringed on the dignity of others and discriminated against women and persons of colour.¹¹³ Even though the events of the case of *Ciliza*¹¹⁴ and *Mbatha*¹¹⁵ did not take place in the workplace, they give an idea of how courts dealt with the first cases of racial harassment and discrimination. Section 10 and 8 of the Constitution now protect the dignity of persons and justifies the reversal of the

¹⁰⁸ *Ciliza v Minister of Police and Another* 1976 4 SA 243 (N) (*Ciliza case*).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Mbatha v Van Staden* 1982 2 SA 260 (N) (*Mbatha case*).

¹¹² *Ibid.*

¹¹³ *Modikwa Personnel Services v CCMA and Others* 2013 34 ILJ 373.

¹¹⁴ Note 106 above.

¹¹⁵ Note 109 above.

accumulated legacy of such discrimination.¹¹⁶ If racial abuse was regarded as serious by the courts in the 1970's it is now regarded as extremely so.

Evidence of how courts currently address racial harassment and discrimination in the workplace is in the wording of the judgement in the case of *Crown Chicken Farms*¹¹⁷ where Judge Nicholson compared racism to a cancer which must be rooted out in our society.¹¹⁸ This means that courts are of the opinion that racism is a destructive act which must be totally eliminated in the workplace and in the broader society. Looking at the *Crown Chicken Farms*¹¹⁹ case the questions that arise are, can the courts and employers assist in the elimination of this “cancer” in our workplaces? What duties do courts and employers have in this regard? And should courts impose dismissal as a sanction for racial harassment and discrimination in the workplace?

2.1 IS DISMISSAL AN APPROPRIATE SANCTION?

More than a decade after South Africa's political transformation, racism still remains a very sensitive issue.¹²⁰ It is a form of inequality which the Constitution of 1996 and the EEA seek to combat.¹²¹ Therefore abusive language and racist comments are generally considered misconduct, which may justify dismissal, especially if such comments impair the dignity of the person against whom they are directed.¹²² When the language used is racist, courts and arbitrators have generally shown little sympathy to the offending employee, since this type of conduct is equivalent to harassment.¹²³ The reason for this could be that racial insults go beyond those to whom they are individually directed,¹²⁴ they impact upon the workplace as a whole.¹²⁵

¹¹⁶ Note 109 above.

¹¹⁷ Note 33 above.

¹¹⁸ Note 33 above at 24.

¹¹⁹ Note 33 above.

¹²⁰ Manamela ME “*Dismissal based on an unfounded allegation of racism against a colleague: SACWU v NCP Chlorchem*” 2008 SA Merc LJ 302.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Siemens Ltd v NUMSA 1990 11 ILJ 610 (ARB) 614 (Siemens case).*

¹²⁵ *Ibid.*

The remedies given by courts indicate that they view racism in the workplace as one of the most serious forms of misconduct calling for dismissal.¹²⁶ Courts are mostly of the view that employees who are guilty of racially harassing their colleagues should be dismissed.¹²⁷ For example in the case of *Oerlikon Electrodes SA v CCMA and Others*¹²⁸ the Labour Court came out very strongly and unambiguously that any use of racist epithets in the new South Africa should lead to the dismissal of employees who are found to be guilty of such conduct.¹²⁹

As much as courts are in support of the sanction of dismissal it has been held that they should also be hesitant to interfere with sanctions imposed by employers unless the sanction is unfair or where the employer acted unfairly in imposing the sanction.¹³⁰ An example of this would be where the sanction is so excessive as to shock one's sense of fairness.¹³¹ As previously stated that racial harassment and discrimination is a form of misconduct, employers have a right and a duty to maintain discipline in the workplace.¹³² This right is in line with the LRA which contains a Code of Good Practice and sets out guidelines on dismissal for misconduct, incapacity and poor work performance¹³³ It must be noted that even though the LRA gives employers the power to discipline employees for misconduct, section 185 of the LRA affords employees with a right not to be unfairly dismissed.¹³⁴ One can argue that the reason why courts should also consider fairness is because our law is based on fundamental values such as equality and dignity. In order to assist the courts in determining whether or not the sanction of dismissal is fair, it is important to also look at the circumstances surrounding the event of the racial harassment.

¹²⁶ Thabane T and Rycroft A (2008) 45.

¹²⁷ This discussion focuses on racial harassment and discrimination between employees and the dismissal of employees who are guilty of racial harassment and discrimination. It does not address the situation where an employer harasses or discriminates an employee.

¹²⁸ 2003 24 ILJ 2188 (LC) (*Oerlikon case*.)

¹²⁹ *Ibid* at 2194.

¹³⁰ *JAMAFO on behalf of Nero and Pick 'n Pay* 2002 28 ILJ 688 (CCMA) 39.

¹³¹ *Ibid*.

¹³² Grogan J *Workplace Law* 11th ed (Juta Cape Town 2014) 149.

¹³³ Chapter 13,14 and 15 of the Code of Good Practice of the LRA.

¹³⁴ Section 185 of the LRA.

In the case of *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Evans & Poly Oak*¹³⁵ the victim had just had an argument with his colleague (applicant). The applicant was angry and the words “kafferjie” were uttered by the applicant in the context of the argument, although the applicant argued that the words were said as a joke and that the victim did not take offence.¹³⁶ The court took account of the context in which the words were and said that the racial slur could not have been said as a joke and therefore upheld the sanction of dismissal imposed by the employer.

A case where the court was faced with deciding an appropriate sanction is the case of *SARS v Commission for Conciliation Mediation and Arbitration and Others*.¹³⁷ In this case an employee of SARS, Mr Jacobus Kruger (respondent) who was employed as an anti-smuggling officer had an argument with Mr Abel Mboweni who was his superior.¹³⁸ During the argument Mr Kruger referred to Mr Mboweni as a “kaffir” and as such Mr Kruger faced disciplinary proceedings.¹³⁹ The result of the disciplinary proceedings were that Mr Kruger received a final written warning which would be valid for six months as well as suspension for ten days and he would also undergo counselling.¹⁴⁰ However upon receipt of the report on the outcome of the disciplinary enquiry, the SARS Commissioner changed the outcome from a final written warning to a dismissal.¹⁴¹ Mr Kruger was unhappy about this and referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the crucial question that the CCMA had to decide on was whether the Commissioner of SARS had powers to convert a sanction of final written warning and suspension without pay to dismissal.¹⁴² The Arbitrator decided that it was legally impermissible for the Commissioner to substitute the sanction imposed by the Chairperson of the disciplinary enquiry.¹⁴³ SARS was unhappy with the Arbitrator’s findings and as such referred the matter to the Labour Court which dismissed the application on the basis that the collective agreement did not

¹³⁵ 2003 24 ILJ 2204 (BCA).

¹³⁶ *Ibid.*

¹³⁷ [2016] ZACC 38 (SARS case).

¹³⁸ *Ibid* at 15.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 16.

¹⁴¹ Note 135 above at 17.

¹⁴² *Ibid.*

¹⁴³ Note 135 above at 20.

permit SARS to substitute the sanction imposed by the Chairperson.¹⁴⁴ SARS again challenged the reversal of the dismissal in the Labour Appeal Court on essentially the same grounds and that challenge was also unsuccessful.¹⁴⁵ This matter was therefore brought before the Constitutional Court.

In deciding the appropriate sanction, the Constitutional Court discussed the racial misconduct by Mr Kruger in calling Mr Mboweni a kaffir. The court's discussion on the issue of racial misconduct can be divided into two:

1. The effect of the use of the word kaffir in the workplace.
2. The court's role in the elimination of the use of the word kaffir.

On the effect of the use of the word kaffir in the workplace, the court reiterated what was said in the case of *Crown Chicken Farms*¹⁴⁶ and in the *Siemans*¹⁴⁷ case and held that the word kaffir was not only directed at Mr Mboweni but all of Mr Kruger's fellow African workers.¹⁴⁸ The court held that by using the word kaffir, the Respondent disputed all African worker's thinking, intellectual capacity and undermined their leadership and managerial capabilities.¹⁴⁹ The Constitutional Court emphasised on the protection of the dignity of African workers and held that the use of the word kaffir indicated that Mr Kruger viewed African workers as people of low level intelligence and despite their educational qualifications, experience or superior placement none of the African workers are fit to tell him what to do.¹⁵⁰ It is clear that the Constitutional Court felt that the use of the word kaffir has a very negative impact on the employment relationship such that the use of such a word could break down the trust relationship and renders the employment relationship intolerable.¹⁵¹

It is clear that the Constitutional Court views the use of the word kaffir very seriously to such an extent that when one African is called such a derogatory name it indirectly

¹⁴⁴ Note 135 above at 23.

¹⁴⁵ *Ibid.*

¹⁴⁶ Note 33 above.

¹⁴⁷ Note 122 above.

¹⁴⁸ Note 135 above at 42.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* at 55.

¹⁵¹ Note 135 above at 46.

impacts on all African workers in a very negative way by infringing their dignity and leads to a hostile work environment for African employees. The protection of dignity is a very important consideration and as seen above it was also applied in one of the first few cases of racial harassment and discrimination. The right to dignity is also included in the Constitution as one of the fundamental rights and as such it is largely applied in our current case law relating to racial harassment and discrimination in the workplace.

The Constitutional Court in the *SARS* case also underlined the crucial role courts have to play of ensuring that racism or racial abuse is eliminated.¹⁵² The court held that conduct of this kind needs to be visited with a fair and just but very firm response.¹⁵³ Judge Bekker CJ¹⁵⁴, Mahomed CJ¹⁵⁵ and Zondo JP¹⁵⁶ were quoted in saying that racist conduct requires a very firm and unapologetic response from the courts, particularly in the highest courts. In the circumstances of this particular case the court stated that it would be irreconcilable with fairness to dismiss Mr Kruger.¹⁵⁷

Therefore the use of abusive language against co-employees may constitute the basis for dismissal particularly when it amounts to racial harassment.¹⁵⁸ However the *SARS* case alerts courts and employers to the provisions of the LRA¹⁵⁹ and the Constitution¹⁶⁰ which require a fair, just and equitable dismissal looking at the circumstances of each case.

¹⁵² Note 135 above at 43.

¹⁵³ Note 135 above at 56.

¹⁵⁴ *S v Van Wyk 1992 (1) SACR 147 (NmS) at 172D.*

¹⁵⁵ *S v Salzwedel [1999] ZASCA 93; 2000 (1) SA 786 (SCA) at 18.*

¹⁵⁶ Note 33 above.

¹⁵⁷ Note 135 above at 43.

¹⁵⁸ Note 118 above 303.

¹⁵⁹ Section 185 of the LRA.

¹⁶⁰ Section 172 of the Constitution.

2.2 HOW DO COURTS ADDRESS THE SENSITIVITY OF EMPLOYEES TOWARDS RACIAL HARASSMENT AND DISCRIMINATION IN THE WORKPLACE?

Even though harassment and in particular racial harassment in South Africa is an extremely serious matter due to the country's history of racial discrimination¹⁶¹ complainants should be careful and assess their reaction in order not to be overly sensitive when deciding to institute a claim. In the case of *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala*¹⁶² the court dealt with racial harassment and discrimination between an employer and an employee. However as stated above, the harassment of an employee by an employer is not the focus of this research but it is important to take this case into consideration because it was held that the question of whether or not an employee has been discriminated on the ground of race is a question of fact and it must be established that the employee was treated differently on grounds either than race.¹⁶³ How about the employee's reaction?

The case of *SA & Allied Workers Union obo Dlamini and Transport Freight Rail and another*¹⁶⁴ used the objective test as applied by the Canadian courts to assess whether or not the reaction of an employee who alleges to be racially harassed or discriminated can be considered excessive or unreasonable. This test entails that the court must ask itself from the perspective of a reasonable black person, whether such conduct can be perceived as injurious or humiliating?¹⁶⁵ The test must be assessed according to the "reasonable" victim and the perspective of the person who is harassed.¹⁶⁶ However the above Canadian case¹⁶⁷ also lists others factors when assessing "reasonableness" namely the nature of the conduct at issue, the workplace environment, the pattern or type of prior personal interaction between the parties and

¹⁶¹ McGregor M (2014) 656.

¹⁶² 2008 (1) SA 551 (SCA).

¹⁶³ *Ibid* at 27.

¹⁶⁴ 2009 30 ILJ 1692 (Dlamini case).

¹⁶⁵ *Dhanjal v Air Canada* 1996 28 CHR D1367 (CHRT).

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid*.

whether the objection or complaint has been made when establishing the limits of social interaction which would be tolerable.¹⁶⁸

As already stated the above objective test was applied in the *Dlamini*¹⁶⁹ case where a manager of a company circulated an email which was part of a speech presented by the governor of the Reserve Bank,¹⁷⁰ the email read:

“I have sought to recruit many competent black people and no sooner have we recruited and trained them, they leave. I get so upset...I am stopping this recruitment of black people. I am okay with my Afrikaners. They stay and do the work and become experts.”¹⁷¹

The court in *Dlamini*¹⁷² assessed the circumstances of the case and in applying the Canadian test agreed that although employers and employees have the right to engage in vigorous debate it is not a licence to lash out racist remarks.¹⁷³ However the court in this case was not persuaded that the language in the email received by the complainant offends the dignity of black people in the workplace and the court concluded by saying that although the complainant disagreed with the content in the email, she suffered no detriment.¹⁷⁴ The court concluded by saying that the complainant’s disagreement with the opinion does not make the managers conduct an act of discrimination and therefore her reaction to the email was excessive and unreasonable.¹⁷⁵

It can be said that the case of *Dlamini*¹⁷⁶ implies that the real demon lives in our heads: those of the former dominators who cannot come to terms with the idea that black people might be good at anything and of the former privileged, having been told countless times that they are inferior, have come to believe it.¹⁷⁷ Just as lack of self- esteem is deeply damaging for individuals so it is for groups whether it

¹⁶⁸ Note 163 above.

¹⁶⁹ Note 162 above.

¹⁷⁰ *Ibid.*

¹⁷¹ Note 162 above at 1695.

¹⁷² Note 162 above.

¹⁷³ Note 162 above at 1714.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Friedman S “*Racism under scrutiny*” Mail & Guardian 25 February 2000 267-268.

leads to eagerness to obey or hostility to others.¹⁷⁸ That is why the sooner we begin to openly discuss our racial issues, the sooner we will be able to tackle our challenges.¹⁷⁹

3. THE EMPLOYER'S DUTY TO PROTECT EMPLOYEES FROM RACIAL HARASSMENT AND DISCRIMINATION IN THE WORKPLACE

An employee has a right not to be subjected to racial discrimination in the workplace.¹⁸⁰ The EEA also places a duty on employers to address and eliminate all forms of discrimination in the workplace failing which the employer will become liable. In this regard section 60 of the EEA provides:

- (1) If it is alleged that an employee while at work contravened a provision 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 its 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 in this Act.¹⁸¹ This provision is referred to as the section 60 enquiry.

Section 60 of the EEA is the only provision in the Act that addresses the employer's liability for discriminatory acts of one employee against another and yet the courts are providing minimal direction on this provision,¹⁸² despite there being

¹⁷⁸ Note 175 above.

¹⁷⁹ *Ibid.*

¹⁸⁰ Modise L and Mochitele M 2011 *Unmask the Ugly Face of Racism in the Workplace* <http://www.sowetanlive.co.za> [date of use 18 Feb 2016].

¹⁸¹ Section 60 of the EEA.

¹⁸² Le Roux R "Section 60 of the Employment Equity Act 1998: Will a Comparative Approach Shake This Joker Out of the Pack?" 2006 OBITER 412.

some cases where employers are held liable for the misconduct of their employees because of the failure to take steps to eliminate harassment and discrimination in the workplace.

The case of *Biggar v City of Johannesburg*¹⁸³ is an example of the employer's contravention of section 60 of the EEA. In the *Biggar*¹⁸⁴ case, the applicant and he's family lived in a residential complex provided by the applicant's employer that was shared with other employees.¹⁸⁵ Mr Biggar was an Indian man and he's fellow colleagues were predominantly white.¹⁸⁶ As such he and his family were subjected to racial abuse from his white colleagues on various occasions. Mr Biggar was verbally and physically abused and his wife and children were subjected to the same racial abuse.¹⁸⁷ The employer never took any active steps to put an end to the racism, despite numerous and continuous complaints by the applicant.¹⁸⁸

The court in *Biggar*¹⁸⁹ found that the employer did not take all the necessary steps to eliminate the racial abuse that was being perpetuated by some of its employees at its residential premises and it cannot be said that it did everything that was reasonably practicable to prevent the continued harassment.¹⁹⁰

In the case of *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger*¹⁹¹ the court also applied section 60 of the EEA where an employee was subjected to a racist remark.¹⁹² Revelas J embarked on the section 60 enquiry and concluded that the remark was clearly racist and that the employer's delay in taking action against the perpetrator and its failure to protect the victim amounted to direct discrimination.¹⁹³ Despite section 60 of the EEA employers and the courts need to provide appropriate remedies to employers who have been subjected to

¹⁸³ 2011 32 ILJ 1665 (LC) (*Biggar case*).

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* at 1669-1670.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Note 181 above.

¹⁹⁰ Note 181 above at 1673.

¹⁹¹ 2006 8 BLLR 737 (LC) (*SATAWU case*).

¹⁹² *Ibid.*

¹⁹³ *Ibid* at 39.

racial harassment and discrimination in the workplace. The next few paragraphs will discuss the role of the courts and employers in providing appropriate and efficient remedies to racial harassment cases.

4. REMEDIES FOR AN AGGRIEVED EMPLOYEE

4.1 COURTS ROLE

During the 1980's there was a shift in employment law in that the Industrial Court accepted that workplace discipline should not only be punitive.¹⁹⁴ Workplace discipline began to be seen as corrective and rehabilitating an employee from unacceptable conduct so that he or she could understand the rules and practices that constituted acceptable performance.¹⁹⁵ However as seen above, racial harassment is a type of misconduct that warrants immediate dismissal, the reason for this is that where misconduct seriously destroys the trust relationship in the workplace, corrective discipline need not be pursued.¹⁹⁶

As seen above, courts view racial harassment and discrimination very seriously. Therefore courts are most likely to impose the sanction of dismissal on an employee who has racially harassed or discriminated another employee. However an observation that must be noted is that Labour Courts are more intolerant of racial harassment and discrimination in the workplace. This is compared to cases of racial harassment and discrimination that happen outside of the workplace. For example the Equality Court has jurisdiction to hear complaints of hate speech which include racial abuse and harassment.¹⁹⁷ Section 21 of PEPUDA provides that the court has powers to make an appropriate order after holding an enquiry and this includes ordering payment of damages for impairment of dignity as a result of hate speech or harassment.¹⁹⁸ The court may also order payment of

¹⁹⁴ Thabane T & Rycroft A (2008) 46.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ Section 21(2) (d) of PEPUDA.

damages to an appropriate body or organization or direct that positive measures be adopted to stop racial harassment.¹⁹⁹ It may also order that an unconditional apology be made or that a special audit of specific policies and practices be made as determined by the court.²⁰⁰ The sanctions given by Labour Courts can be regarded as more serious as opposed to the sanctions given by the Equality Court for racial harassment and discrimination.

One might ask, what determines whether an employee who is guilty of racial harassment and discrimination is dismissed, ordered to pay or is simply asked to make an apology. The answer to this could be that all adjudicators are compelled to adopt a value based method of interpretation however the adjudicators life experience and world view may come into play.²⁰¹ Sometimes there may be no single right answer to this problem of racial harassment and discrimination in the workplace.²⁰² For adjudicators, racial harassment and discrimination may turn out to be a subjective issue because those adjudicators who have experienced discrimination and racial harassment personally may be more sympathetic to granting relief in favour of an employee who complains of discrimination than the one who has had no such experience.²⁰³

We must firstly keep in mind that the hallmark of democracy is the rule of law and not the rule of man and our Constitution and labour laws are the most progressive and equitable in the world.²⁰⁴ We must therefore apply the rule of law with pride.²⁰⁵ Secondly the exercise of judicial discretion is unavoidable as our law cannot provide for every possibility.²⁰⁶ Lastly judicial discretion must be exercised consistently with the law and the values of a society based on human dignity, equality and freedom.²⁰⁷

¹⁹⁹ Section 21(2) (e) of PEPUDA.

²⁰⁰ Section 21(2) (j) & (k) of PEPUDA.

²⁰¹ Pillay D (2003) 63.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ Pillay D (2003) 67.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

4.2 EMPLOYER'S ROLE

It is seen from the above chapters that employers also have a role to play in the elimination of racial harassment and discrimination in the workplace. However in the case *SATAWU*²⁰⁸ it was held that the employer failed to take proper steps to ensure the elimination of the discrimination perpetuated by an employee.²⁰⁹ This is because the employee who discriminated against another employee merely received a warning. The remedies that employers award for racial harassment and discrimination have been subject to criticism and it has been said that employer's do not provide support to victims of harassment and discrimination, instead employer's remedies will take the form of monetary compensation and this raised the question whether monetary compensation assists in restoring an employee's dignity and self-esteem after they have been victims of racial harassment and discrimination.²¹⁰

Fergus and Collier believe that monetary remedies actually affect the employer's future actions, policies and practices.²¹¹ The reason for this could be that employees who are victims of racial harassment and discrimination will not receive adequate protection and assistance after incidents of racial harassment but will rather receive money which will not solve the root cause of the problem or ensure that future cases of racial harassment do not occur.

The remedies that employers give must therefore be expanded and redesigned to facilitate substantive transformation and assist victims of racial harassment and discrimination to truly repair their damaged selves.²¹²

Therefore where employers fail to take steps to eliminate racial harassment and discrimination in the workplace or where the steps that the employer has taken have failed, the courts suggest that employers should rather deal with the root

²⁰⁸ Note 189 above.

²⁰⁹ *Ibid.*

²¹⁰ Fergus E and Collier D (2014) 502.

²¹¹ *Ibid.*

²¹² *Ibid.*

cause of the problem²¹³ and that swift disciplinary action, damages or compensation as punitive measures should be imposed when training of employees has failed.²¹⁴

5. CONCLUSION

An observation that can be made from the above chapter is that courts and employers view racial harassment and discrimination very seriously. Courts and employers are also mindful of overly sensitive employees and this is to avoid frivolous cases of racial harassment and discrimination being brought before them.

This chapter also provides evidence of the transformation that our courts have made regarding racial harassment and discrimination in the workplace, although this process can be slow and halting at times.²¹⁵ This is because working towards racial harmony and justice is a strategic imperative and competitive advantage for the workplace.²¹⁶ Racism is a powerful force and dynamic that poses a threat to the employee's confidence as well as the financial viability of the workplace.²¹⁷ Addressing racial harassment in the workplace is not an overnight process nor is it a comfortable one, genuine sustainable transformation requires paradigm shifts for employers and employees.²¹⁸

However this doesn't take away the fact that from the above it is clear that racial harassment and discrimination in the workplace is a very serious matter, if you are proved to be racist by use of racist language you may be dismissed and if you are called racist unjustifiably, you will have a claim for damages because any racist conduct is regarded as reprehensible.²¹⁹

²¹³ Note 208 above.

²¹⁴ *Ibid.*

²¹⁵ Thabane T and Rycroft A (2008) 50.

²¹⁶ Author Unknown 2016 *Racial Tensions: Powerful Forces and Dynamics in Organization* <http://www.hrfuture.net> [date of use 26 May 2016].

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ Oosthuizen M "Racist language in the workplace" De Rebus March 2004 46.

CHAPTER 4

THE POSITON OF RACIAL HARASSMENT AND DISCRIMINATION IN THE UNITED STATES OF AMERICA

1. INTRODUCTION	32
2. RACIAL HARASSEMENT AND DISCRIMINATION IN THE USA AND THE COURTS	33
3. EMPLOYERS DUTY TO PROTECT EMPLOYEES FROM RACIAL HARASSMENT AND DISCRIMINATION IN THE USA	37
4. CONCLUSION	39

1. INTRODUCTION

As stated in Martin Luther King Junior's "I Have a Dream" speech

"I have a dream that one day this nation will rise up and live out the true meaning of its creed: We hold these truths to be self-evident, that all men are created equal "....."I have a dream that my four little children will one day live in a nation where they will not be judged by the colour of their skin but by the content of their character"²²⁰

Access to equal enjoyment opportunity has long been the key to realizing the American dream.²²¹ Yet far too long, African Americans and other minorities were locked out of much of the American workplace, denied jobs because of their race, segregated into lower paying-jobs, victims of pay discrimination and racial harassment.²²²

²²⁰ American Rhetoric top 100 speeches <https://www.americanrhetoric.com> [date of use 29 June 2016].

²²¹ Civil Rights 101: Leadership Conference on Civil Rights Education Fund/ 2001 www.civilrights.org.za [date of use 18 July 2016].

²²² *Ibid.*

However, not so long after this speech the Civil Rights Act²²³ became the law of the land in the United States of America (USA). For purposes of this chapter attention will be paid to Title VII of the CRA which prohibits employment discrimination based on race, colour, religion, sex and national origin.²²⁴ One can assume that Martin Luther King Junior's "dream" not only referred to the social equality but also equality in the workplace. This is because some of the results of the civil rights movement were that racial harassment and discrimination in the workplace became illegal as well as the tolerance of racist signs and symbols began to fade.²²⁵ The CRA also provides for the Equal Employment Opportunity Commission (EEOC) which is a commission created to interpret and enforce federal law prohibiting discrimination.²²⁶ Under Title VII of the CRA victims must first file administrative charges with the EEOC which investigates the charge and determines whether there is reason to believe that discrimination has occurred.²²⁷ At that point the EEOC may choose to continue to resolve the dispute and if necessary, litigate the case or the plaintiff may choose to file a lawsuit in federal court.²²⁸ This chapter will therefore establish how the USA courts apply Title VII of the CRA in the aim of eradicating racial harassment in the workplace as compared to South Africa.

2. RACIAL HARASSMENT AND DISCRIMINATION IN THE USA AND THE COURTS

Workplace harassment law under Title VII and related state antidiscrimination statutes generally requires the presence of a hostile work environment where discriminatory intimidation, ridicule and insult must be sufficiently severe or

²²³ Civil Rights Act of 1964 (CRA).

²²⁴ Section 703 of the CRA.

²²⁵ Baeder B 2013 Martin Luther King Jr's 'I have a dream speech: Job inequality still present 50 years after' www.dailynews.com [date of use 15 Sept 2016].

²²⁶ U.S Equal Employment Opportunity Commission <https://www.eeoc.gov> [date of use 29 June 2016].

²²⁷ Note 218 above.

²²⁸ *Ibid.*

pervasive enough to change the conditions of the victims of employment and create an abusive work environment.²²⁹ Through the hostile work environment theory, harassment law has been applied to suppress or attempt to suppress a whole variety of expressive activity.²³⁰ Harassment law has also been used to impose prior restraints to enjoin what is governmentally deemed to be objective speech or reading materials.²³¹ The CRA and other laws²³² have been justified as a means to control private thought and public opinion.²³³

Racial harassment cases are unlike other discrimination cases.²³⁴ This is because in a racial harassment cases there is almost always undisputed evidence of harassment which the defence must contend.²³⁵ Racial harassment can be carried out through various forms including the hanging of nooses, slurs, graffiti, photographs and race-neutral evidence.²³⁶ Each of the above forms of racial harassment has the potential to support a prima facie hostile work environment claim.

The hostile work environment claim is both subjective and objective in that a plaintiff must show that their work environment was objectively and subjectively offensive,²³⁷ that it is one that a reasonable person would find hostile or abusive and one that the victim in fact did perceive it to be so.²³⁸ In determining whether an environment is sufficiently hostile to support a claim, the Supreme Court has considered a totality of the circumstances.²³⁹ The circumstances include the frequency of the discriminatory conduct, its severity, whether it is physically

²²⁹ *Harris v Forklift Systems, Inc*, 510 U.S 17, 21 (1993) (*Harris case*).

²³⁰ Mallery MN and Rachal R "Report on the Growing Tension Between First Amendment and Harassment Law" 12 Lab. Law 475 (1996-1997).

²³¹ Note 228 above.

²³² Age Discrimination Act of 1967 and Americans with Disabilities Act of 1990.

²³³ Note 219 above.

²³⁴ Watson JR and Warren WW "I Heard it Through the Grapevine: Evidentiary Challenges in Racially Hostile Work Environment Litigation" 19 Lab. Law 381 (2003-2004).

²³⁵ *Ibid.*

²³⁶ Watson JR and Warren WW (2003-2004).

²³⁷ *Ellis v CCA of Tennessee LLC*, 650 F.3d 640 (7th Circuit 2011) (*Ellis case*).

²³⁸ *Faragher v City of Boca Raton*, 524 U.S 775 (1998) (*Faragher case*).

²³⁹ Note 235 above.

threatening or humiliating or a mere offensive utterance and whether it unreasonably interferes with an employees work performance.²⁴⁰

Together with these factors, USA courts have consistently applied the test in the *Harris case*,²⁴¹ which provides that in order to determine a hostile work environment, the harassment must be permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to change the condition of the victim's employment and create an abusive working environment (Harris test).²⁴² An observation that can be made is that, like in South Africa, the USA has no set test for racial harassment in the workplace. Each case is decided on its facts based on previous cases but the common thread is the test in the *Harris case*.²⁴³

In the case of *Berryman v Supervalu Holdings Inc*,²⁴⁴ the plaintiff was successful in bringing a racial harassment claim where the court applied the *Harris* test together with the subjective and objective test and found that the plaintiff was subjected to a hostile work environment and therefore this was a violation of Title VII.²⁴⁵ Likewise, in the case of *Allen v Michigan Department of Corrections*,²⁴⁶ where the plaintiff was subjected to numerous acts of harassment, retaliation and discrimination on account of his race²⁴⁷ the court in this case held that in order to establish a hostile work environment claim, a plaintiff must show that the harassment consisted of severe pervasive conduct.²⁴⁸ The court held further that all that a victim of racial harassment needs to show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job.²⁴⁹

²⁴⁰ Note 235 above.

²⁴¹ Note 227 above.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ 669 F.3d 714 (6th Circuit 2012) (*Berryman case*).

²⁴⁵ *Ibid.*

²⁴⁶ 165 F.3d 405 (6th Circuit 1999) (*Allen case*).

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

Taking into account USA history, courts are aware that certain symbols displayed in the workplace may constitute racial harassment. In the case of *Williams v New York City House*²⁵⁰ the plaintiffs supervisor hung a noose on the wall behind his desk, the noose hung there for three days.²⁵¹ After the plaintiff filed a complaint objecting to the display of the noose his supervisors started treating him differently from other employees, the plaintiff therefore filed a claim alleging that he had been subjected to racially harassing and hostile work environment.²⁵² The court in this case took into account USA history and the present circumstances that African Americans are subjected to and held that:

“There can be little doubt that such a symbol is significantly more harmful than a racist joke. The noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence. It is impossible to appreciate the impact of the display of the noose without understanding the harsh legacy of violence against African Americans. The effect of such violence on the psyche of African Americans cannot be exaggerated. The hangman’s noose remains a potent and threatening symbol for African Americans, in part because the serious and disturbing racially motivated violence continues to manifest itself in present day hate crimes. Moreover, persistent inequality in this country resuscitates for modern African Americans many of the same insecurities felt years ago. It is for this reason that the Civil Rights Act of 1964 was enacted”²⁵³

The above also illustrates the court’s view in the South African case of *Crown Chicken Farms*²⁵⁴ where the court described racism and racial harassment as a cancer that must be rooted which also affects the dignity of employees in the workplace.²⁵⁵ From the historical racial similarities between South Africa and the USA it seems that the USA is also trying to extract this “cancer” called racial harassment and discrimination in the workplace as it is still a problem.

²⁵⁰ 154 F.Supp .2d 280, (S.D.N.Y 2001) (*Williams case*).

²⁵¹ Gregory RF *The Civil Rights Act and the Battle to End Workplace Discrimination: A 50 Year History* (2014) 90.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ Note 33 above.

²⁵⁵ Note 33 above at 24.

3. EMPLOYER'S DUTY TO PROTECT EMPLOYEES FROM RACIAL HARASSMENT AND DISCRIMINATION IN THE USA

In earlier decisions the EEOC held that reasonable cause exists to believe that the employer violates Title VII by maintaining working environments where supervisors have a habit of referring to black employees as “nigger” amounts to the employer’s language.²⁵⁶ The Commission stated further that an employer is responsible for the behaviour of its agents within the course of their employment.²⁵⁷ It is also obliged under the CRA to maintain a working atmosphere free of racial intimidation or insult and the failure to take steps reasonably calculated to maintain such an atmosphere violates the Act.²⁵⁸

After the 1970’s courts followed the above principles until 1998 when the United States Supreme Court in the cases of *Faragher*²⁵⁹ and in the case of *Burlington Industries Inc v Ellerth*²⁶⁰, set out the standard for determining when an employer will be held liable for the harassment committed by its employees.²⁶¹ The test dictates that an employer will be held liable for the harassment committed against the employee even if the employer had no actual notice of the harassment.²⁶² In order for the employer to avoid liability it must show that:

- (1) It exercised reasonable care to prevent and correct promptly any harassing behaviour and
- (2) The employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the company or to otherwise avoid harm.²⁶³

²⁵⁶ Ford RO *The Evasion of African American Workers: Critical Thought on U.S Labor and Employment Law and Policy* (2008) 140.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ Note 236 above.

²⁶⁰ 524 US 742 (1998) (*Burlington case*).

²⁶¹ Notestine KE, Ford KE and Hill RN *Fundamentals of Employment Law* (2000) 58.

²⁶² *Ibid.*

²⁶³ Note 236 and 258 above.

South African law applies a similar test, contained in section 60 of the EEA as quoted in the previous chapter. Section 60 of the EEA also provides for a test to determine whether an employer may be held liable for the harassment committed by an employee. Although the test for the employer's liability and hostile work environment emanated from sexual harassment cases²⁶⁴ courts in the USA have subsequently applied this test in racial harassment cases.²⁶⁵ An example is in the case of *Booker v Budget Rent-A-Car Systems*²⁶⁶ where the court applied the test formulated in the *Faragher*²⁶⁷ and *Burlington*²⁶⁸ cases. As stated above this test in *Faragher*²⁶⁹ and *Burlington*²⁷⁰ entails that the employer must take reasonable care to prevent and correct racial harassment and discrimination in the workplace as well as that the employee must make use of the preventative measures provided for by the employer.²⁷¹ In the case of *Booker*²⁷² an African American employee claimed that he was racially harassed and the court held that because the company also received complaints about the harassment but had taken no action, the employer is therefore liable.²⁷³ Actions of the employer such as suspending the harasser after learning about the harassment, changing work schedules and transferring the victim after he/she requested a transfer, have been regarded by the courts as prompt remedial action and as constituting effective defences against liability.²⁷⁴

USA law holds employers liable for the racial harassment of their employees in the event that they fail to exercise reasonable care²⁷⁵ to prevent racial harassment in the workplace. USA courts are also mindful of frivolous racial harassment allegations and employees who are too sensitive. In the case of *Hardin v S.C*

²⁶⁴ Notestine KE (2000) 59.

²⁶⁵ *Ibid.*

²⁶⁶ 17, *F. Supp, 2d* 735 (M.D 1998) (*Booker case*).

²⁶⁷ Note 236 above.

²⁶⁸ Note 258 above.

²⁶⁹ Note 236 above.

²⁷⁰ Note 258 above.

²⁷¹ Note 236 and 258 above.

²⁷² Note 264 above.

²⁷³ *Ibid.*

²⁷⁴ *Kent v Henderson* 77 *F.Supp 2d* 628, 81 *Fair Empl. Prac. Cas. (BNA)* 1373 (E.D Pa. 1999).

²⁷⁵ Note 218 above.

*Johnson Inc.*²⁷⁶ an African American female claimed her supervisor subjected her to racial and sexual harassment, she claimed that her supervisor cursed at her, cut her off in the parking lot, allowed a door to close in her face and startled her.²⁷⁷ The court rejected the employee's claims finding nothing inherently sexual or racial²⁷⁸ about the supervisor's abusive language and behaviour and in addition the court found that the supervisor mistreated everyone and did not single out women or black people for poor treatment any more than men and or white people.²⁷⁹ As discussed above South African courts are also mindful of overly sensitive employees and use an objective test according to the perspective of a reasonable victim of racial harassment.²⁸⁰

4. CONCLUSION

It is clear from the above that the USA strongly resembles South Africa on the problem of racial harassment and discrimination in the workplace. The similarities are that in South Africa and in the USA, courts and employers are less tolerant of such behaviour and this may be because of the racial transitions that both countries have made. In addition employers in South and in the USA have a duty to protect employees from racial harassment and discrimination in the workplace. Most importantly the USA and South Africa have been working towards having workplaces that are free from racial harassment and discrimination.

Since the CRA, the USA's promise of equal opportunity and treatment for all citizens has inched closer to fulfilment.²⁸¹ This has been done through the tireless effort of courageous lawyers, judges and legislators.²⁸² However a lot of transformation still needs to take place in the USA because researchers have

²⁷⁶ 1999 WL 36035 (7TH Circuit 1999) (*Hardin case*).

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ Note 162 above.

²⁸¹ Wexler M et al "The law of Employment Discrimination from 1985 to 2010" 25 A.B.A.J Lab & Emp. L. 349 (2009-2010).

²⁸² *Ibid.*

found that black people and dark-skinned minorities lag well behind white people in virtually every area of societal life, they are about three times more likely to be poor than white people, earn about 40% less than white people and have about an eighth of the net worth that white people have.²⁸³ Black people in the USA also receive inferior education compared to white people even when they attend integrated institutions.²⁸⁴ Therefore at first glance it may seem as though racial harassment and discrimination have been eradicated but there is evidence that this is not so because of the amount of cases involving racial harassment and discrimination in the workplace and as such it is safe to conclude that black people and most minorities in the USA are at the “bottom of the well.”²⁸⁵ The question that remains is, have Martin Luther King Junior’s words remained “just a dream.”?

²⁸³ Bonilla -Silva E *Racism Without Racists: Color Blind Racism and the Persistence of Racial Inequality in America* 4th ed (2013) 2.

²⁸⁴ Note 281 above.

²⁸⁵ *Ibid.*

CONCLUSIONS AND RECOMMENDATIONS

The purpose of this research was to address the problem of racial harassment and discrimination in the workplace. The first research question was aimed at establishing the extent to which the EEA and other legislation addresses the problem of racial harassment and discrimination in the workplace. The finding to this research question is that it is with no doubt that the Constitution and the EEA make provision for the elimination and prevention of racial harassment and discrimination in the workplace. Together with the above legislation, it can be concluded from this research that employers have also complied with legislation by imposing serious sanctions towards employees who have subjected other employees to racial harassment and discrimination in the workplace. However it is still possible to eliminate this problem of racial harassment and discrimination where employers can facilitate difficult dialogues about racial harassment and transformation in the workplace.²⁸⁶ Employers also need to have integrity and be trusted that they will not take employees back to the position they were in before the implementation of our democratic era.²⁸⁷

The second research question was aimed at establishing whether South African courts effectively address the problem of racial harassment and discrimination. It is found in this research that racial harassment and discrimination continues to be a problem in the workplace, judging from the vast amount of racial harassment cases that courts are confronted with and reports of racial harassment that never make it to court. However, despite this, courts have shown to have a very low tolerance of racial harassment and discrimination in the workplace by going to the extent of dismissing anybody who has subjected another employee to racial harassment and discrimination. USA courts have also followed suit because of

²⁸⁶ Thabane T & Rycroft A (2008) 43.

²⁸⁷ Author Unknown 2016 HR Future: Take your eLearning to New Height www.hrfuture.net [date of use 26 May 2016].

their sensitive history, the CRA and USA courts ensures the elimination of racial harassment and discrimination in the workplace.

Going forward, one can recommend that courts should develop a test for racial harassment and discrimination in the workplace in order to maintain consistency. This test developed by courts should be applied by other courts and employers who are faced with this problem of racial harassment and discrimination. Employers on the other hand should put in place workplace rules and policies to ensure that racial harassment and discrimination are eliminated and anyone who is guilty of such conduct must be disciplined accordingly.

Keeping in mind that South Africa's Constitution is based on the fundamental values of equality, dignity and freedom it is evident from this research that although racial harassment and discrimination is still a problem, courts, legislators and employers are united in the elimination of racial harassment and discrimination in the workplace.

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