

No country for racists

 By [Johan Botes](#)

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May an employee who uttered racist statements be placed back into the same workplace? This is the question the Constitutional Court answered in its judgment delivered on 8 November 2016. Issues a day before the national elections across the pond that has been marked with vitriol and bigotry, our own highest court left everyone in no doubt that racist behaviour will not be tolerated in our country.

The South African Revenue Service (SARS) dismissed Jacobus Johannes Kruger for making racist comments. He took issue with his dismissal as he agreed to a sanction of a final written warning, 10 days' suspension without pay and counselling. The Commission for Conciliation, Mediation and Arbitration (CCMA) agreed with Kruger that SARS could not unilaterally amend the sanction to dismissal. The CCMA awarded Kruger reinstatement. SARS, in turn, took the decision of the CCMA commissioner on review to the labour court. Both the labour court and labour appeal court held that, lamentable as Kruger's conduct was, SARS could not interfere with the chairperson's finding.

SARS then approached the Constitutional Court where it argued that the CCMA commissioner erred ordering Kruger's employment to be reinstated. Adapting its approach used in the earlier courts, SARS attacked the award by stating that the decision to reinstate Kruger was a finding at which no reasonable commissioner could arrive. It abandoned its attack on the substantive fairness of the commissioner's finding but focussed on her order to reinstate him into the workplace.

The Labour Relations Act provides that reinstatement is the appropriate remedy for unfair dismissal. This is so unless:

1. the employee does not seek reinstatement,
2. the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable,
3. it is not reasonably practicable for an employee to be reinstated, or
4. the dismissal was unfair only because the employer did not follow a fair procedure.

The Constitutional Court considered the CCMA commissioner's award and Kruger reinstatement she ordered. Kruger complained that, at the CCMA, SARS did not adequately show why he should not be reinstated. In an unanimous judgment the ConCourt held that "[i]t cannot be primarily the duty of the employer to explain the intolerability that flows effortlessly from the obvious repugnant conduct of the employee." It does thus not lie in an employee's mouth to bemoan the evidence produced by the employer (or absence thereof) to show that reinstatement should not be awarded as a continued working relationship would be intolerable. Such an employee would need to go to great lengths to explain away the obvious intolerability, the ConCourt stated.

The judgment explains and underlines the damaging effect of racism in our society. It warns employees exhibiting such

behaviour in a workplace that there should be no room for them to hide. It extends a hand to embattled employers who have to show why reinstatement is not appropriate by placing a burden on employees to show why continued employment is not intolerable where they dispute this assertion by the employer.

Employers and employees alike should welcome the judgment. It leaves no doubt as to the view of our highest court on a scourge that still plagues our nation. Eradicating racist behaviour is critical in our process of building an open and democratic society based on human dignity, equality and freedom. Whilst others are contemplating building walls, we should welcome any opportunity to build bridges instead.

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