IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 30 /17

In the matter between:

EDCON LIMITED **Applicant**

and

MS TERESA CANTAMESSA **First Respondent**

COMMISSIONER KHUMALO N.O. **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

Heard: **9 August 2019**
Delivered: **11 October 2019**

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Summary: Review application – right of employer to discipline employee over acts committed outside of working environment – in general has no jurisdiction or competency to discipline an employee for conduct that is not work related which occurs after working hours and away from the workplace – exception - where such conduct had the effect of destroying or of seriously damaging the relationship of employer and employee between the parties –

parity principle – not to the exclusion of justified differentiation - *in casu,* employer had right to discipline – dismissal not unfair.

JUDGMENT

CELE, J

Introduction

[1] This is an application in terms of section 145 (2) of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award of the second respondent (Commissioner) issued under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) finding that the dismissal of the first respondent (Ms Teresa Cantamessa) was substantively unfair. The applicant (Edcon) has applied for the award to be replaced with an order that Ms Cantamessa's dismissal be upheld as substantively fair. Ms Cantamessa opposed the application

Factual Background

[2] Throughout the hearing of this matter, starting with the internal disciplinary hearing, the arbitration hearing and the review application, facts testified to and argued by the parties were largely common cause. Ms Cantamessa was employed by Edcon as a Specialist Buyer, Ladies Wear (Kelso) and occupied a senior position though she was not part of management.

[3] During December 2015, the then President Zuma, as Head of State, replaced Finance Minister Nhlanhla Nene with Minister Des van Rooyen. Public media estimated that the aforesaid cabinet reshuffling caused a loss of between R250 to R500 billion to the South African economy. Many South Africans were upset about President Zuma's cabinet reshuffling and on 16 December 2015, South Africa saw the "#ZumaMustFall" marches in Cape Town and Johannesburg.

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[1] Act 66 of 1995 as amended.

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President Zuma subsequently replaced Minister van Rooyen with Minister Pravin Gordhan as the Minister of Finance. The African Nation Congress (ANC), as the ruling party and through its National Executive Committee, (NEC) publicly defended President Zuma's decision. The cabinet reshuffling caught the attention of public media, including television programs such as Carte Blanche, which on 20 December 2015 aired a program on the reshuffling. Still on 20 December 2015 at 19h16, while on annual leave since 16 December 2015, Ms Cantamessa published the following post onto her Facebook account:

> "Watching Carte Blanch and listening to these fucking stupid monkeys running our country and how everyone makes excuses for that stupid man we have to call a president... President my fucking ass!! #zumamustfall This makes me crazy ass mad." (sic)

[4] During the weekend of 3 January 2016, a Ms Penny Sparrow posted a comment on her Facebook page in which she, *inter alia*, stated that in future she would refer to Black people as monkeys, which comment, not surprisingly, caused an outrage in South Africa. The African National Congress (ANC) laid criminal charges against her. Various public demonstrations, such as marches were held in response to that comment. Some of those marches were directed at an estate agency which was her employer. When her whereabouts were hounded, she resorted to hiding. She has since died. All this was in the public media. At the time that Ms Cantamessa published her post, her Facebook profile stated that she was employed by Edcon as a Fashion Buyer. On 12 January 2016, Edcon received an email from Ms Amanda Sibeko, who might be its customer in which she complained about Ms Cantamessa's Facebook post. She wrote:-

> "I would like to bring to your attention the attached post by an Edcon employee on social media. In light of recent occurances [sic] in our country I felt it my duty to act on Ms Cantamessa's post. Her bIo indicates that she works for Edcon and therefore associated her social media with the organisation.
>
> Knowing how entrenched Edcon is in the black community I would like this to be

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dealt with in a serious manner that speaks to the sentiment of most South Africans; which is not to tolerate racism of any form.

I decided it's best to contact Edcon and not repost her comments on social media. I appreciate that you might not be the relevant person for this complaint but please pass it to the person who can deal with it.

Please advise[sic] on what transpires from this email."

[5] From 21 January 2016, Twitter users started to mention Ms Cantamessa's Facebook post and that some 351 Tweets mentioned the post between 14h00 on 21 January 2016 and 13h00 on 22 January 2016. Comments on that social media platform included

> "@EdgarsSA what are your thoughts on the degrading racist remarks made by one of your buyers??we demand answers #MsTeresaCantamessa" and "Another one!! #Ms TeresaCantamessa #RacismMustFall"

[6] On 22 January 2016, the Sowetan Newspaper published an article about Ms Cantamessa's post entitled *"Racist Monkey slur strikes again"* Several Twitter users who reacted to Ms Cantamessa's Facebook post demanded answers from Edcon and in some instances, threatening not to do business with Edcon. Edcon initiated investigations into the matter and upon conclusion determined that it was necessary to call Ms Cantamessa to a disciplinary enquiry. In summary the reasons for Edcon were that:

6.1 When she published her Facebook post, Ms Cantamessa's Facebook profile clearly indicated that she was employed by Edcon;

6.2 Ms Cantamessa's Facebook post was made public and was read by customers and the public at large;

6.3 Ms Cantamessa's Facebook post attracted negative media attention

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and negative social media activity (which placed Edcon's reputation at risk); and

6.4 Ms Cantamessa's Facebook post was considered to be racist and did not conform to the values of Edcon's business.

[7] As a consequence of the above, Ms Cantamessa was called to an internal disciplinary enquiry and was charged with misconduct described as:

> "On the 20th of December 2015, you made an inappropriate racial comment on Facebook. Such action placed the Company's reputation at risk and has breached the employment trust relationship."

[8] Ms Cantamessa's disciplinary enquiry was held on 23 February 2016 and on 3 March 2016, the chairperson of the disciplinary enquiry found her guilty of the abovementioned charge. In summary, the chairperson found Ms Cantamessa guilty of the charge for the following reasons:

8.1 The Facebook post was indeed racist (at her disciplinary enquiry, Ms Cantamessa argued that it was not racist and that she was merely highlighting incompetence);

8.2 Although Ms Cantamessa published the Facebook post outside of working hours, Edcon was associated to the post given that her Facebook profile clearly indicated that she was employed by Edcon;

8.3 The Facebook post resulted in the risk of reputational damage to Edcon and her credibility as an employee;

8.4 Ms Cantamessa breached the values of Edcon by making the Facebook post;

8.5 As a senior employee and from a point of common sense, Ms

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Cantamessa was expected to communicate in a professional, courteous and sensitive way (regardless of whether the communication took place during or after working hours).

[9] Upon making a finding of guilt, the chairperson considered mitigating and aggravating circumstances and summarily dismissed Ms Cantamessa. Aggrieved by her dismissal, Ms Cantamessa referred an unfair dismissal dispute to the CCMA. Conciliation failed to resolve the dispute and the matter proceeded to arbitration. At arbitration it was common cause that Ms Cantamessa was dismissed for misconduct and she only challenged the substantive fairness of her dismissal, procedural fairness was not in dispute.

[10] Edcon called three witnesses in support of its case. They are Messrs Gwendoline Lekola (Senior Specialist, Dispute Management); Sunil Jain (General Manager, Buying); and Vuyo Mtawa (Executive, External Communication). Ms Cantamessa was the only witness to testify in her case. On 28 December 2016, the commissioner issued the assailed arbitration award. He concluded that Ms Cantamessa's dismissal was substantively unfair and he awarded her maximum compensation of 12 month's salary. In describing what enquiry the commissioner was called to determine, he stated that he was required to decide whether Edcon was entitled to act against Ms Cantamessa, given that she published her Facebook post while she was on annual leave and not at work. His chief findings may be summarised as follows:

10.1 Ms Cantamessa's Facebook post did not pertain to her work or to Edcon; A reasonable internet user would not have associated Edcon with the content of Ms Cantamessa's post simply because Ms Cantamessa had stated on her Facebook page that she worked for Edcon.[2]

10.2 In terms of a High Court judgment from the United Kingdom - *Smith v*

[2] See para 52 of the award.

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Trafford Housing Trust[3], a reasonable reader of Ms Cantamessa's Facebook post would not have associated her comment with Edcon[4]

10.3 Edcon's 2011 Social Media Policy did not apply to Ms Cantamessa's Facebook post because the policy only applied if she had used Edcon's equipment and facilities when she published the post on Facebook. The commissioner further stated that "*As a result, Jain correctly conceded during cross-examination that as the Applicant had used her own equipment to post the message, she did not contravene the 2011 social media policy. This settles the matter.*"[5].

10.4 Edcon's 2014 Internet Policy did not apply because again, Ms Cantamessa did not use Edcon's equipment/facilities nor did she publish the post while she was at work;

10.5 Edcon's Code of Ethics did not apply to the case because the Code states how employees should behave "when at work". In other words, the commissioner concluded that the Code of Ethics only applied to Ms Cantamessa while she was at work and not outside of working hours. Ms Cantamessa did not breach Edcon's Disciplinary Code in that the conduct complained of did not take place during working hours[6];

10.6 There was no persuasive or convincing evidence that Ms Cantamessa's Facebook post impacted negatively, financially or otherwise on Edcon. Save for one Twitter user who threatened to close his Edgars account, no other customers made such threats and there was no evidence to show that the particular Twitter user did in fact close his account or that he was in arrears with his accounts;

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[3] (2012) EWHC 3221 (Ch).

[4] See para 57 of the award.

[5] See para 59 of the award.

[6] See paras 64, 65 and 67 of the award.

10.7 Edcon failed to comply with the parity principle in that it dismissed Ms Cantamessa for publishing the post but only issued final written warnings to those Edcon employees who "liked" her post on Facebook;

10.8 Ms Cantamessa's statement that President Zuma was "stupid" did not constitute racism.

Grounds for review

[11] Ms Cantamessa identified seven grounds for review in this matter. The submissions are essentially that: -

11.1 No other reasonable commissioner could have concluded that because Ms Cantamessa published the Facebook post outside of working hours, Edcon was not entitled to discipline her because the commissioner was required, in determining whether Edcon was entitled to discipline Ms Cantamessa for her Facebook post which was made outside of working hours to take the following factors into account:-

11.1.1 Ms Cantamessa's Facebook profile clearly indicated to the public at large, that she was employed by Edcon;

11.1.2 Although Edcon's disciplinary Code states that the Code tells employees "how to behave at work" this does not, as a matter of course mean that Edcon is prohibited from disciplining employees for conduct which takes place outside of working hours, particularly if such conduct puts Edcon's reputation at risk;

11.1.3 Given Ms Cantamessa's level of seniority, she should have known that her after-hours conduct on Facebook could negatively impact on her employment relationship with Edcon (particularly because her Facebook profile clearly indicated that she was employed by

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Edcon);

11.1.4 The derogatory terms used by Ms Cantamessa in her Facebook post manifest from a deep-rooted racism and it was immaterial as to whether the post was made outside or during working hours. It is the racist attitude of Ms Cantamessa which she displayed on Facebook which affected the employment relationship. By making the racist Facebook post, Ms Cantamessa's conduct indicated to Edcon that she is not an employee who promotes and respects Edcon's values which it has entrenched over many years;

11.1.5 There was a link between Ms Cantamessa's conduct and the employment relationship;

11.1.6 Had the commissioner taken the above factors into account, the outcome of the award would have been different in that he would not have concluded that Edcon was not entitled to discipline Ms Cantamessa at all;

11.1.7 The commissioner committed a reviewable irregularity by placing too much weight on Edcon's Social Media and Internet Policies in determining whether Ms Cantamessa's dismissal was fair. Ms Cantamessa was not dismissed for breaching either of these policies. She was dismissed for making a racist comment and by doing so, placing Edcon's reputation at risk. It was irrelevant, in determining whether Ms Cantamessa's dismissal was fair, as to whether or not the policies in question were applicable. What the commissioner was required to do, was to determine whether Ms Cantamessa's Facebook post was racist and placed Edcon's reputation at risk;

11.1.8 In the award, the commissioner relied heavily on the High Court

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judgment from the UK in *Smith v Trafford Housing Trust*.[7] Firstly, in relying on this judgment, the commissioner ignored and/or failed to appreciate South Africa's unique history and the devastating effects of apartheid and how the racist terms used by Ms Cantamessa in her Facebook post affect black South Africans inside and outside of the workplace. Secondly, the commissioner's finding (based on the UK judgment) that a reasonable reader of Ms Cantamessa's Facebook post would not have associated it with Edcon is an unreasonable finding which is not supported by the evidence presented at the arbitration proceedings. The unchallenged evidence at the arbitration was that a customer lodged a formal complaint with Edcon when she read Ms Cantamessa's Facebook post. The customer noticed, when she read the post that Ms Cantamessa was employed by Edcon. This evidence demonstrated that a Facebook user (being a customer of Edcon) made this association herself and hence she reported the Facebook post to Edcon;

11.1.9 In paragraph 74 of the award, the commissioner concluded that Ms Cantamessa's Facebook post, in so far as she called President Zuma stupid, was not a racist comment. Although the commissioner concluded that this part (concerning President Zuma) of the Facebook post was not racist, the commissioner did not consider or make a finding on whether *"listening to these fucking stupid monkeys running our country*" was racist. The commissioner committed a reviewable irregularity by ignoring and/or not considering this part *(fucking stupid monkeys)* of the Facebook post in determining whether the post was racist or not. Had the commissioner considered this part of the Facebook post, the outcome of the award would have been different in that the commissioner would have concluded that the Facebook post which Ms Cantamessa published was in fact racist;

11.1.10 The commissioner concluded that because Edcon failed to show that

[7] (2012) EWHC 3221 (Ch).

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it suffered a financial loss as a consequence of Ms Cantamessa's Facebook post, her dismissal was unfair. The commissioner conclusion in this regard ignores the fact that Ms Cantamessa was not dismissed for causing a loss to Edcon. She was dismissed, as per the charge, for making a racist comment which *"placed the Company's reputation at risk".* It was not necessary for Edcon, when it presented its case to demonstrate an actual loss. As per the charge, Ms Cantamessa placed Edcon's reputation at risk;

11.1.11 No other reasonable commissioner would have concluded that Edcon did not comply with the parity principle when it dismissed Ms Cantamessa. It was not unfair of Edcon, when it disciplined those employees who *"liked"* the post to have issued final written warnings as opposed to dismissing them as in the case of Ms Cantamessa. Those employees who *"liked"* Ms Cantamessa's Facebook post did not make the racist comment. As such their conduct is distinguishable;

11.1.12 No other reasonable commissioner would have, given the circumstances of the case, awarded Ms Cantamessa maximum compensation. In effect, the commissioner rewarded Ms Cantamessa's conduct in circumstances in which her attitude to the matter was that Edcon had no right to go to her Facebook post and that because she published the post outside of working hours, it was none of Edcon's business. This attitude coupled with Ms Cantamessa's racism (regardless of the fact that the post was made outside of working hours) ought to have weighed heavily on the commissioner when he considered the amount of compensation to award. At arbitration she noticeably did not ask for re-instatement but sought compensation.

<u>Legal entitlement of Edcon to discipline Ms Cantamessa</u>

[12] It remained common cause throughout the dismissal dispute that Ms

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Cantamessa made an entry on her Facebook page during her leave, using her computer and her data. The comment made had nothing to do with her duties as an employee. Her Facebook page indicated though that she was employed by Edcon. It had therefore firstly to be determined whether her conduct put her within the disciplinary reach of her employer. The general rule is that an employer has no jurisdiction or competency to discipline an employee for conduct that is not work related which occurs after working hours and away from the workplace.[8] The findings by the commissioner, that none of Edcon's disciplinary policies were applicable to Ms Cantamessa's alleged misconduct, constitute no defect as outlined in section 145 of the LRA and are therefore not reviewable. However, where misconduct does not fall within the express terms of a disciplinary code, such misconduct may still be of such a nature that the employer may nonetheless, be entitled to discipline its employee. Likewise, the fact that the misconduct complained of occurred away from the workplace would not necessarily preclude the employer from disciplining its employee in respect thereof.[9] The Court held in *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another*[10] that:

> "In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work force as a whole, as well as on the relationship between the employer and the employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined

[8] See *National Education, Health and Allied Workers Union obo Barnes v Department of Foreign Affairs* (2001) 22 ILJ 1292 (BCA) at 1294.

[9] See in this respect *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another* (1993) 14 ILJ 1449 (LAC*); City of Cape Town v South African Local Government Bargaining Council and Others* [2011] 5 BLLR 504 (LC).

[10] Ibid at pg 1459 F-H.

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> is if the employee's misconduct 'had the effect of destroying or of seriously damaging the relationship of employer and employee between the parties' (See *Anglo American Farms T/a Boschendal Restaurant v Konjwayo* (1992) 13 ILJ573 (LAC) 589 (G –H.)"

[13] In *Dolo v Commission for Conciliation, Mediation and Arbitration and Others*[11] an employee who was a casino table supervisor was dismissed for fraud when she and her boyfriend had committed fraudulent activities over time against the employer of her boyfriend. She then agreed to give evidence in a criminal matter against the boyfriend for indemnity against prosecution. Her employer became aware of that misconduct against a different employer and she was subsequently charged for it and was dismissed. She challenged the dismissal for her misconduct that was perpetrated outside her working place. The commissioner seized with the matter found that her employer could no longer trust her to handle money and to supervise other employees handling money. This Court upheld the right of her employer to discipline her and it found that it was reasonable for the commissioner to hold that her employer could no longer trust her, especially since she worked with money.

[14] *In Custance v SA Local Government Bargaining Council and Others*[12] this court, per Pillay J, found the following:

> "...the derogatory terms used manifest a deep-rooted racism which has no place in a democratic society. Whether the word was uttered on or off duty was immaterial as it is the attitude that persists which, when on duty, affects the employment relationship."

[15] In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others*[13] the employee alleged that he had not specifically been told that he could not use racist epithets. It made no difference that the misconduct was not set out in a policy. The Code of Good Practice on Dismissal provides that employees may

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[11] (2011) 32 ILJ 905 (LC).

[12] (2003) 24 ILJ 1387 (LC) at 1391.

[13] [2002] 6 BLLR 493 (LAC).

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be disciplined if they break rules regulating conduct in or of relevance to the workplace. Misconduct can vary from dishonesty, assault, sexual harassment, fraud etc. Thus, the main principle is to determine the connection between the misconduct and the employer's business. Thereafter, the employer has to prove to which extent it has affected the employment trust relationship.

[16] In principle therefore, Edcon could exercise discipline over Ms Cantamessa provided it established the necessary connection between the misconduct, if any, and its business. The comments made by Ms Cantamessa did not in and of themselves relate to the employer - employee relationship. The only source for the connection lies in that her Facebook page indicated that she worked for Edcon. However, Edcon is a merchandiser of its various products in a competitive industry. Ms Cantamessa as a Specialist Buyer played a pivotal role in the acquisition of such products, including ladies trending styles and fashion for Edcon. The success of its business depends also largely on how it markets itself to the general public. Therefore, having a good name is an essential asset or quality of Edcon to the general public. In as much as Buyers of Edcon can and often remain anonymous to the general public, once their identities are exposed to the general public, it must only be in a positive and not negative environment or circumstance, otherwise such disclosure imposes a risk that the name of Edcon may be brought into disrepute. Therein lay the connection between the conduct of Ms Cantamessa with the relationship she had with her employer. She had to avoid being a controversial employee in the public eyes where she could be associated with Edcon.

[17] South Africa is undoubtedly constituted largely by Black citizens. It is not surprising therefore that Edcon operated in areas where the Black citizens are likely to be the main or majority source of its past, present and future customers. Since 1994 the South African Government is run by the majority of Black citizens due to the advent of democratic elections. Before the advent of democracy, the South African government was notorious for its legislated racism. Some White minority citizens were known to refer to Black citizens by

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various derogatory expressions, including the monkey slur. The usage of the monkey slur by Ms Cantamessa should therefore never be seen in isolation as though such usage had no history. Put differently, to fully understand what Ms Cantamessa was saying, it is of importance that the history behind the monkey slur be considered. It is an emotive expression of our sad past where racial discrimination in South Africa, and in the workplace in particular, was the order of the day. No doubt, Ms Cantamessa having lived in South Africa for more than 20 years knew about it. She said that she was angry when she took to Facebook and did something she had never done before. In her opening remarks, at arbitration, she conceded that certain South Africans were offended by her Facebook post and that certain South Africans perceived the said post as racist.

[18] In 2016, when Ms Cantamessa took to Facebook to post her remark, the government of the day was largely constituted by Black citizens, in respect of whom racial slurs were used before and after the democratic elections of 1994. In this context, she could reasonably have not been referring to the government when using the slur. Put differently, it makes no sense to substitute "monkey" with "government" in her comment. The relevant potion would read:- *"….and listening to these fucking stupid government running our country and how everyone makes excuses for that stupid man……."* She was clearly referring to a number of persons whom she said were stupid and every one of them made excuses for the stupid man to be called a president. She could not reasonably be construed as referring to a single entity, namely the government. Her defence that she was referring to government is accordingly devoid of any merits. Therefore the usage by her of *"…..and listening to these fucking stupid monkeys running our country and how everyone makes excuses…."* was in the circumstances a racial slur directed at Black persons in government, running the country. It certainly was a highly offensive remark in respect of which Edcon was entitled to take disciplinary measures, lest its name be put into disrepute for tolerating racism.

[19] Democracy practised in South Africa allows citizens to express themselves in

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various public gatherings and marches when racism lifts its ugly head. While Ms Cantamessa was the first to make the racial slur before Ms Penny Sparrow, Ms Cantamessa's remark did not immediately catch the attention of the public as did that of Ms Sparrow. Ms Sparrow's haunting by South Africans at large, even to her place of employment, was a clear indication of what could have happened to Ms Cantamessa. Two reasons account for Ms Cantamessa's situation. One is that her comments were limited to a circulation by fewer people. While she made it in a private Facebook account, it did leak out, albeit to a limited extent and within that range Edcon was associated with her. It exposed Edcon to a risk of reputational damage. The fact that no damage was proved by Edcon was not a valid defence. The charge sheet did not allege that any such damage was actually suffered. The second reason it that Edcon took decisive disciplinary actions as soon as the matter came to light and it also publicly distanced itself from Ms Cantamessa's conduct. Edcon described these actions as nipping the problem from its bud. The decisive disciplinary actions entailed the immediate suspension of Ms Cantamessa and subjecting her to an internal disciplinary hearing.[14] It is that hearing which led to her dismissal.

[20] In terms of section 16 of the Constitution Act[15], everyone has the right to freedom of expression which includes:-

20.1 Freedom of the press and other media;

20.2 Freedom to receive or impart information or ideas;

20.3 Freedom of artistic creativity and

20.4 Academic freedom and freedom of scientific research.

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[14] See in this regard *Saaiman and Another v De Beers Consolidated Mines (Finsch Mine*) (1995) ILJ 1551 (IC) where a it was found that there was *prema facie* evidence that the employees action had, at the least, a potential to impact on the employer/employee relationship.

[15] Act 108 of 1996.

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[21] The rights as mentioned above do not however extend, *inter alia*, to advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm. Ms Cantamessa accordingly enjoyed the freedom of expression which included freedom of the press and other media as well as freedom to receive or impart information and ideas, provided her posting did not extend to advocating hatred based on race which constitutes incitement to cause harm. She enjoyed the freedom to criticise government of the day where she felt it erred in its administrative manoeuvring. She however did not have the right to resort to racial slurs to vent her anger. Her conduct amounted to advocating hatred based on race which constitutes incitement to racial disharmony at the workplace and in the general public. Her misconduct was serious in nature, was caused by a senior personnel of Edon who had even previously been a manager and it had the potential of seriously harming Edcon's business. The derogatory terms used manifested a deep-rooted racism which has no place in a democratic society as said in *Custance v SA Local Government Bargaining Council and Others.*[16] The more than 20 years of experience Ms Cantamessa had with a clean record were overweighed by the aggravating factors. Dismissal was an appropriate sanction, in the circumstances. There is nothing problematic in the treatment of co-perpetrators differently, depending, for instance, on the extent of their participation to such misconduct, as Edcon did in the present matter. The applicability of the parity principle is not to the exclusion of prevailing different circumstances of the offending employees.

[22] In conclusion therefore, I am satisfied by submissions of Edcon over those of Ms Cantamessa that the commissioner misconceived the nature of the enquiry he was called to determine and failed to evaluate the evidential material placed before him properly, with the result that he reached a conclusion which no reasonable decision maker could have made.[17]

[23] In the premises, the following order is made:

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16 (2003) 24 ILJ 1387 (LC) at 1391.

17 See in this regard *Goldfield Mining SA v CCMA* [2014] 1 BLLR 20 (LAC) at para 16.

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Order:

1. The arbitration award issued in this matter by the second respondent (commissioner) is reviewed and set aside;

2. The dismissal of the first respondent (Ms Cantamessa) by the applicant (Edcon) was substantively fair;

3. No costs order is made.

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H.Cele

Judge of the Labour Court of South Africa.

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Appearances:

For the Applicant: Mr V Oosthuizen

Instructed by: Shepstone and Wylie.

For Respondent: Dr G Ebersohn

Instructed by: Gerrie Ebersohn Attorneys.

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