

The Corporate Report

Facilitating Business in South Africa

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The Corporate Report

Facilitating Business in South Africa

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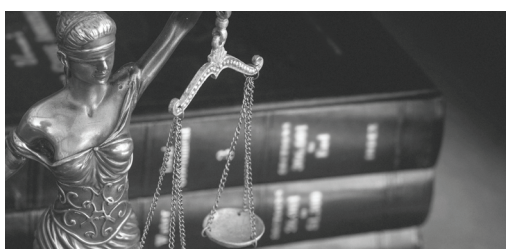
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Unconscious bias, latent discrimination and real consequences

Cynthia Schoeman

The primary guidance as regards offensive or discriminatory behaviour is clearly articulated in the South African Constitution.

Bias may be unconscious and discrimination latent, but the consequences in South Africa are very real as illustrated by recent court judgements. Dealing with this in the workplace warrants a significant focus by leadership to entrench proper, ethical conduct as regards peoples' treatment of and behaviour to others and to avoid the damage caused by such situations.

Extreme cases such as the case against former real estate agent, Vicki Momberg, are, ironically, easier to deal with in the sense that they so clearly represent gross unethical conduct. The case arose out of an incident in which a black police officer had assisted her after an alleged smash-and-grab incident in Johannesburg in 2016. In a video clip, which went viral, Momberg verbally assaulted the officers with racially offensive language. The court found her guilty on four counts of *crimen injuria* (which is a wilful injury to

There have been instances where the behaviour is not as clearly viewed as unethical and illegal. This is well illustrated by the 'ping-pong' reversal of judgements in the case between Meyer Bester and Rustenburg Platinum Mine as the matter was legally escalated. However, the Constitutional Court ruling provides perfect clarity and yet another precedent for the future about racist language.

The case arose from Bester's dissatisfaction about the allocation of a parking space at the mine in Rustenburg in April 2013, during which Bester called a colleague, Solly Tlhomelang, a 'swart man' (black man). The company held a disciplinary hearing and dismissed Bester in May 2013 after finding him guilty of misconduct and making racial remarks. But Bester appealed to the Commission for Conciliation, Mediation and Arbitration (CCMA), and in

The landmark sentence not only sends a strong message to unrepentant racists, but also sets a noteworthy precedent for similar cases.

someone's dignity, caused by the use of obscene or racially offensive language or gestures) in November 2017. In the Randburg Magistrate's Court in March 2018 Magistrate Pravina Rugoonandan sentenced Momberg to three years in prison, with one year suspended. In April 2018 Magistrate Rugoonandan denied Momberg leave to appeal her conviction. The landmark sentence not only sends a strong message to unrepentant racists, but also sets a noteworthy precedent for similar cases.

December 2013 the CCMA found for Bester, who was reinstated with back pay. The mine then approached the Labour Court which, in January 2016, found that the use of the phrase 'swart man' in the context of the case was derogatory and racist, and warranted Bester's dismissal. But Bester's union, the South African Equity Workers Association (SAEWA), appealed to the Labour Appeal Court, which found in Bester's favour in May 2017. The company took the matter further and appealed to the Constitutional Court.

In deciding whether the words were derogatory and racist, the Constitutional Court judgement stated that the context of South Africa's history of apartheid had to be taken into account, and noted Bester's lack of remorse and no acknowledgement of wrongdoing. In a unanimous judgement on 17 May 2018, Justice Leona Theron found the term racist and agreed Bester should be dismissed.

Another very high-profile matter that played itself out on social media was the racist video that went viral which Adam Catzavelos posted while on holiday in Greece. Although there are not yet any legal consequences, it has had significant consequences for his family businesses and his family. Many clients cancelled their contracts with St George's Fine Foods, and The Smokehouse and Grill restaurant

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Another high-profile case was brought by Adila Chowan, a chartered accountant who worked for Associated Motor Holdings (AMH, a subsidiary of Imperial Holdings), against AMH, Imperial, and Mark Lamberti, then CEO of Imperial Holdings. The case against Lamberti stemmed from a meeting in April 2015 in which he referred to Chowan as 'a female employment equity candidate', after which she complained and was, for this reason, fired.

In March 2018 Judge Pieter Meyer of the North Gauteng High Court found for Chowan: that in describing Chowan in those words Lamberti had impaired her dignity. Critically, the Judge found that this statement was the culmination of an ongoing, deep-rooted and systemic culture of race and gender-

in Braamfontein, Johannesburg, in which Adam Catzavelos held a minority stake, has been forced to close. To date, the Economic Freedom Fighters (EFF) laid racism charges against Catzavelos with the police, and the incident is being investigated by the South African Human Rights Commission.

A lesson from this incident that should not be lost is that discriminatory behaviour can negatively impact an organisation even when the discriminatory behaviour occurred outside the workplace, in the employee's own personal time and in his or her private capacity. While there is, in theory, a distinction between one's personal and organisational roles and responsibilities, in practice – as this case illustrates – this distinction is lost in the outrage that follows.

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based inequality at the organisation. Particularly noteworthy was the Judge's statement that '[a]s blatant and patent as discrimination was in the days of apartheid, so subtle and latent does it also manifest itself today'. Inherent in this finding is that the latter (a subtle or less blatant form of discrimination) is just as harmful, unethical and unlawful.

There were consequences beyond the judgement – Lamberti resigned as a board member of Eskom and Business Leadership South Africa Director, as well as from his position as CEO of Imperial.

The primary guidance as regards offensive or discriminatory behaviour is clearly articulated in the South African Constitution. Chapter 1 outlines the founding provisions namely that 'the Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism ...'. Adding to that, Chapter 2 of the Bill of Rights, 'enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. These

provisions are further supported by other legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 and the Employment Equity Act, No. 55 of 1998.

But, much as legislation is essential, it does not unfortunately completely eliminate bias or discriminatory behaviour, whether on the basis of race, class, culture, ethnicity, gender or religion. It must therefore be addressed at a personal and behavioural level.

A starting point is to recognise that unconscious bias – judgements and behaviours toward others that we are not aware of, often resulting from factors such as one's upbringing, background, cultural environment and personal experiences – affects all aspects of our lives. Similarly, social categorisation takes place among all people, often based on stereotypes that ascribe certain attributes, characteristics and behaviours to a particular group of people. Although these are not always bad or

had not made a purchase. A video of the incident that has been viewed almost 11 million times was damning, and sparked massive protests and a social media storm. This led to a decision by Starbucks to close more than 8 000 stores in the US on 29 May 2018 for employee racial-tolerance training. This is a significant step – to actually close down so many stores.

However, while training is definitely valuable, one day's training on its own is not sufficient. It needs to be ongoing to shape the organisation's culture so that it becomes ingrained that discriminatory language and behaviour is unacceptable. And in the South African context another factor needs to be recognised: that the examples included in this article are not the exception. It is likely that this conduct is happening to varying degrees in many organisations and is being perpetrated by executives and employees alike. Interventions therefore need to be conducted for all, from the board to the most junior staff.

A crucial response is to recognise the signs of bias and discrimination and attempt to eliminate them from one's decision making.

negative, unconscious bias and stereotypes can drive prejudice and discrimination.

A crucial response is to recognise the signs of bias and discrimination and attempt to eliminate them from one's decision making. In the Lamberti case, his view of Chowan as an 'employment equity candidate' implies that she held the position because of her race and gender: he did not view her, as he should have, as an experienced and skilled colleague. Training which identifies discrimination and bias offers one solution that can build greater levels of awareness, encourage leaders and employees to be on the lookout for biases, and strengthen corporate norms that reinforce acceptable behaviour.

This is the remedy Starbucks has chosen following a racist incident at a Starbucks cafe in Philadelphia, USA. Two African-American men, Donte Robinson and Rashon Nelson, who were waiting to meet a friend at a Starbucks, were arrested by Philadelphia police after the cafe manager called police as they

In his April 2015 *Harvard Business Review* article, '3 Ways to Make Less Biased Decisions,' Howard Ross recognises two other factors that will help to reduce biases. Organisations should reorganise structures and systems to create consistency throughout the business processes, from recruitment to performance reviews. This ensures that individual bias is minimised. Therefore recruitment criteria, amongst other practices and processes, need to be consistently applied for all candidates. Ross also recognises the importance of accountability: where potential biases are identified within a business they should be investigated and acted on as necessary. Added to this, is that persons who speak out against unfair discrimination should be protected from victimisation, dismissal and the like.

Judge Meyer's findings in the Lamberti case highlight the imperative to be alert to discriminatory conduct even when it is not patently obvious or blatant. A more holistic understanding of discrimination would certainly increase an organisation's ethical

Training which identifies discrimination and bias offers one solution that can build greater levels of awareness, encourage leaders and employees to be on the lookout for biases, and strengthen corporate norms that reinforce acceptable behaviour.



capital, notably as its people would more effectively address any unconscious biases they may have. The choices that organisations therefore face are: to act proactively to minimise this risk and improve the quality of stakeholder relationships; to simply hope this does not occur; or to wait until an incident arises to take action.

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