Nkuna / Outsurance Insurance Company Limited

(2021) 30 CCMA 8.37.4

Reported in (Butterworths)	[2021] 4 BALR 408 (CCMA)
Case No.	GATW6839/20 & GAEK5591/20
Award Date	10/12/2020
Jurisdiction	Commission for Conciliation, Mediation and Arbitration
Commissioner	L Dekker
Subject	Substantive fairness in dismissal Misconduct Racist conduct

Keywords

Dismissal - Substantive fairness - Misconduct - Racist conduct - Employee posting WhatsApp message to closed group accusing customer of racism - Dismissal unfair because employer had condoned similar incidents in past.

Mini Summary:

The applicant, a sales advisor, was dismissed for posting a statement on a WhatsApp group, referring to a customer who had declined a quotation. The post read: "The MF was a racist piece of sh*t! He said he'd go with an Afrikaans company that helps Afrikaans people (virseker)." The applicant claimed that her dismissal was unfair because a colleague who had posted a racist comment had received a warning and that she had posted the comment in the heat of the moment because she was frustrated at losing a sale and had perceived the reason why the customer had turned down her quotation as racist. The respondent contended that the comment could have had serious repercussions for its reputation and brand name.

Having found the dismissal procedurally fair, the Commissioner noted that the incident had occurred after a 20-minute telephonic interview with the customer. The applicant had been upset about what occurred, but did not vent her anger against the customer. Instead, she had posted a comment on a WhatsApp group restricted to members of her team, who often posted comments laced with foul language. She could not be said to have "introduced" racism into the group, as the respondent alleged because two employees had posted racist comments more serious than that of the applicant, and received only warnings. The Constitutional Court had held that the use of the word "k******" need not always lead to dismissal. The present case involved a single incident. While it was serious, the respondent had not treated similar cases as harshly. There was no evidence that the employee was inherently racist. A final warning would have been sufficient in the circumstances.

The employee was awarded compensation of two months' salary.

Award

Particulars of proceedings and representation

[1] The matter [GAEK5591/20] was initially set for 3 September and it was partly heard. It was agreed between the parties as follows:

> "More witnesses to be called by the parties.
>
> Proposed New Date of Hearing: Thursday 22/10/20."

[2] On 28 September 2020 a Notice was sent out [GATW6839/20] and it appears that it was the same matter that was duplicated. The two case numbers were combined and was then set for arbitration for 24 and 25 November 2020.

[3] On 24 November 2020 the matter continued to be heard. All the parties were present and the respondent was represented by Attorney George *Herbst* [Barnard Incorporated] who submitted a bundle of documents paginated "R1 to 124". The applicant was represented by Attorney Khutso *Sekgobela* [Molefe Dlepu Attorneys] who also submitted a bundle of documents paginated "A1 to 56". A transcript containing the telephone conversation between the applicant, C Nkuna, and Mr G Hattingh on 11 May 2020 paginated pages "1 to 18" is also on file. The matter was finalised on 25 November 2020 and the hearing was electronically recorded and handwritten notes were made.

[4] Closing heads of argument were submitted by the respondent's representative on 5 December 2020, pages "1 to 10" [paragraphs 1 to 21]. The applicant's representative also submitted closing heads of argument on 2 December 2020 pages "1 to 20" [paragraphs 1 to 51].

Issues in dispute

[5] Whether the applicant was procedurally and substantively unfairly dismissed by the respondent, and if so, appropriate relief for the applicant based on the alleged inconsistent application of discipline by the employer.

Background to the dispute

[6] Applicant: Mihloti Caution Nkuna

Employer: Outsurance Insurance Company Ltd

Workplace: Centurion Head Office

Period of Service: 2016 - 13/03/18 & 01/04/2019 - 05/06/20 [interrupted service, in total ±five [5] years]

Position of Employee: Inbound Sales Advisor

Remuneration: R18 000 [Eighteen Thousand Rand] per month

Charges:

"Charge 1

1.1 Introducing Racial narrative on a social platform used as a business tool within your working environment in that on the 11th of May 2020 you posted the following statement, 'The MF was a racist piece of shit! He said he'll go with an Afrikaans company that helps Afrikaans people (virseeker)'

Charge 2

1.2 'Poor Team relations as your conduct resulted in team members feeling racially offended and/or singled out'.

Charge 3

1.3 'Potentially bringing the name of the company in disrepute'.

Charge 4

1.4 'Creating an environment of racial segregation which goes against the values of the company."

Disciplinary Hearing held: Held on 26 and 27 May 2020 with Joe Shen as independent Chairperson, found guilty on all charges and dismissed on 5 June 2020.

Relief Sought: Reinstatement and Compensation.

Survey of evidence and argument

[7] This matter is well documented - see the detailed outcome of the Disciplinary Hearing [pages R21 to 25], the 18-page transcript of the conversation with the client and the message on the WhatsApp group ("R30"). The oral evidence has been recorded electronically and downloaded on the CCMA System and hand-written notes were made. The purpose of a concise summary of evidence in an arbitration award is not a verbatim restatement in a form approximating a complete word for word recording. The relevant evidence and some arguments are in a relatively simple form to show certain factors were taken into consideration. Only some of the evidence relevant to the determining of the dispute is summarised. The failure to record all oral evidence in this award raised at arbitration does not mean that its relevance was not considered. Reference is also made to the evidence in the analysis of the case. The heads of arguments submitted on behalf of both parties were used extensively.

Evidence by Candice Kirchner [Inbound Sales Manager] obo respondent

[8] The witness was at the relevant time the manager (direct manager) of the applicant. She was also the initiator in the disciplinary proceedings. She testified that the incident of the WhatsApp message was reported to her and an investigation was done, including a right of response ("ROR") meeting which was held with the applicant.

[9] The witness testified that there were individuals who were offended by the racist tone of the message and this was reported, though due to the sensitivity of the subject matter, one of the affected individuals elected to remain anonymous. The decision was made to suspend the applicant pending further investigation and consideration and *in lieu* of possible disciplinary action.

[10] The respondent proceeded with the disciplinary hearing, which was presided over by an external chairperson, Joe Shen, who is employed by Labournet. The applicant was dismissed subsequent to the disciplinary hearing, on 5 June 2020.

[11] Later and after the applicant was dismissed, the witness was informed of an anonymous tip-off to Outsurance that the applicant's team manager, one Thandeka Ndaba, had previously (in July of 2019) committed acts which were racist and which were similar in nature to that which the applicant had done. This was investigated and Thandeka Ndaba was confronted with the allegations and evidence.

[12] The witness explained that according to Thandeka Ndaba, the "Blacks only" WhatsApp group was named in that manner because it was a reference to a common interest of the group members, being a comedy show they all were interested in attending, as well as a social stokvel. Later but before all of the current events and/or tip-off, Thandeka had changed the name of the "Blacks only" group to "The legends" and had then included the white members of her team in this group as well.

[13] As to the racist comment, referring to an Outsurance client as "a b*tch n*ga" the applicant admitted that this had been wrong, could have been offensive and she had profusely apologised for this.

[14] The management of the company (Lynette Kellerman, general manager) considered all the circumstances and the fact that the alleged misconduct had happened a year prior, also that no previous complaints had been received from anyone (including the applicant, who was a member of the group at the relevant time). The decision was made that in Thandeka Ndaba's case a final written warning was an appropriate sanction.

[15] The witness referred in her evidence to the Social Media Policy of the respondent and explained in what manner the conduct of the applicant was in breach thereof. It was also her evidence that apart from the racist tone of the message in question, it was also unprofessional and demeaning to refer to clients in the manner that was done by the applicant.

[16] The evidence of the witness was that the applicant, as is the case for all employees, was or should have been aware of the policy (and this is not disputed) and it is available electronically to all. There was also specific mention and training on the social media policy during induction training for employees, which applied to the applicant as well. Her testimony was also to highlight the risks to the respondent's business and brand, should the applicant's remarks have been distributed, which could and still can easily occur, but has not occurred.

[17] The witness testified that although the applicant did in the disciplinary enquiry indicate that she was remorseful, she was not convinced. The racist comment which the applicant posted on WhatsApp was in relation to a telephonic sales discussion with an Afrikaans person, who did not accept the quote and indicated that he prefers to deal with another company who services clients in Afrikaans (Virseker). The recording of this engagement was played for the commissioner and the transcript forms part of the record.

[18] The witness testified that nothing in the recording which was played indicated any kind of racial attack on the applicant, as was alleged by the applicant. The witness also testified (and this is common cause) that to her knowledge, one other employee was also dismissed for making a racist comment on the work WhatsApp platform/group. This was subsequent to the dismissal of the applicant.

[19] The witness was then cross-examined on the statement posted by Thandeka Ndaba on page 48. She admitted that the statement was racial by use of the word "n*ga". She was referred to the circled comments on pages 49, 50, 51. Although the witness stated that the comments by Ndaba were racial and had the potential of bringing the company into disrepute, she was unable to explain why Ndaba received a warning as she was involved in disciplining Ndaba. She then advised that Thandeka Ndaba reports to Lynette Kellerman who is the general manager and Lynette is the relevant person for answering the issue of consistency.

Evidence by Joe Shen [External Chairperson] obo respondent

[20] The witness was the chairperson who presided over the disciplinary hearing of the applicant. He is employed by Labournet and is not an employee of the respondent. He testified that the disciplinary process was followed in accordance with the law and the applicant had an opportunity to put her case.

[21] The witness confirmed that the applicant had pleaded guilty to charge 3, being that she potentially brought the name of the respondent into disrepute by her actions - that she posted the racist remarks on a social media platform (WhatsApp).

[22] The witness also testified that the applicant raised the issue of her not having been the first person who had made racist remarks on the relevant WhatsApp group (referring to Thandeka Ndaba). He determined that the applicant was, however, well aware of the remark having been made by Thandeka Ndaba at the time (July 2019), but that she did not report it at the time because "she did not want to be a snitch".

[23] The witness's view of the allegations made by the applicant towards Thandeka Ndaba was only to deflect attention and gravity from her own misconduct. Even having considered that Thandeka Ndaba had also made similar remarks to that of the applicant, his decision on her guilt and his recommendation that she be summarily dismissed would have remained the same, due to the seriousness thereof and the particular circumstances in the hearing over which he presided. He delivered a written recommendation to the employer for the dismissal of the applicant.

[24] It was important to the witness, when he presided over the disciplinary hearing, that the applicant indicated she had not done anything wrong. Although she had indicated on the record in the proceedings before him that she was remorseful, he did not believe it to be genuine remorse - as chairperson he recorded that the applicant was remorseful for her conduct (page "A28").

[25] Under cross-examination, the witness testified that had he not recommended a dismissal; it might set a bad precedent in the company for such a serious form of misconduct. He also opined that the applicant's performance in her role was not relevant to his ultimate decision, due to the nature of the misconduct. He did not believe that the applicant's behaviour could be changed.

[26] The witness was cross examined on why he did not include reference to Andile Ngcobo's testimony for the applicant - he answered that he did not see the testimony of Andile at the time, as relevant to the matter before him. The evidence was not referred to and was disqualified as irrelevant.

[27] Finally, much cross examination was done of the witness about what he regards as being racist - whether "B*tch N*ga" as uttered by Thandeka Ndaba previously was racist or not and to compare the statement about the white Afrikaans person with Thandeka Ndaba's utterance. The witness did give his personal opinion on this and did not think the two utterances were equally offensive. As Commissioner I do not agree with this opinion of the witness - it tends to be biased against the current applicant.

Evidence by Roland Smith [Sales advisor] obo respondent

[28] The witness is a sales advisor in the same team as the applicant at the time when the racist comment was posted by her. He confirmed that he saw the comment about the white Afrikaans client. He did regard it as a racially charged comment, but did not take offence.

[29] The witness testified that he is "thick skinned" when it comes to matters of race and is not so easily offended personally. However, he does think that the comment in question could be offensive to others. He was asked to give his opinion when the matter was being investigated and he did so on an email. He testified that another team member, Erica (a white Afrikaans lady) was definitely offended by the remark and she told him as much.

[30] The witness testified that on the day that the applicant posted the statement in the group, he was not personally offended by the statement. According to the witness in the afternoon of that day he was approached by Thandeka Ndaba and requested to give his opinion on the statement. He was of the opinion that everyone in the group was asked to do the same and due to being busy at work he only typed the email on page 108 of bundle R on the same night and sent it to Ndaba as requested. He would not have said anything had he not been approached by Ndaba and he still does not know why he was specifically chosen to give his views in writing out of a group of about 10/11 people.

[31] The witness also testified that had the roles been swapped around - had a white person made such a comment about a black person - the consequences would be severe and it would become a big issue. So, he intoned that just because this is a "black on white" situation does not make it less offensive. He testified further that Outsurance has a values system and culture that embraces diversity and behaviour such as what the applicant did is not acceptable.

[32] Under cross examination the witness was asked about his opinion on the terms in question and whether they are racist or not. The witness indicated that he did not view the words "B*tch N*ga" (the term previously used by Thandeka Ndaba) as racist *per se*, but indicated that it is not proper language to use.

[33] The witness confirmed under cross examination that the language used by the applicant and that of Thandeka Ndaba would be very harmful to the brand and reputation of the respondent, should it be communicated externally to the public. He testified that although people do vent their frustrations in the WhatsApp group in question, they should still be mindful of how they do it, especially because of the sensitivity of racial issues in South Africa.

Evidence by Lynette Kellerman [General manager: sales] obo respondent

[34] The witness testified that she is the general (senior) manager in the department in which the applicant worked. The witness and Inbound Sales Manager, Candice Kirchner reports to Mrs Kellerman.

[35] The witness received the "tip-off" regarding the racist remarks made by Thandeka in 2019. The tip-off was received anonymously on 16 July 2020 (exactly one year after the comments were made by Thandeka). They confronted Thandeka Ndaba about it and Thandeka Ndaba informed her of the reasons for the "Blacks Only" group - which at the time seemed plausible to her. Thandeka Ndaba explained that she felt immensely sorry for the group name and the racist remark and did apologise profusely to the relevant persons. The name was changed to "The Legends" and it became inclusive of all team members.

[36] The witness believed that Thandeka Ndaba was sincere. She also considered the specific circumstances of the matter - that the misconduct had occurred a year prior and there had been no complaints, nor any other misconduct in the interim. On having considered the matter she decided that the appropriate sanction for Thandeka would be a final written warning. Thandeka Ndaba accepted the sanction and there was no need for a formal hearing. She agrees that Thandeka Ndaba's comment about a client as a "b*tch n*ga" was objectively speaking, racist.

[37] When asked to explain why the witness views Thandeka Ndaba and the applicant's matters differently, she indicated that whilst Thandeka Ndaba had displayed genuine remorse, the applicant did not at all. Although the applicant did indicate that she was willing to apologise, it was not done and she was only willing to apologise about how others felt about it, not because she was wrong. It should however be noted that the applicant was not provided an opportunity to apologise.

[38] The witness also referred to the Social Media Policy of the respondent and on page 85 thereof indicated to the commissioner that the conduct of the applicant is in direct breach thereof and the values of the company.

[39] During the testimony of the witness, I as commissioner was informed of and handed the outcomes of two other disciplinary matters within Outsurance, that of Mr Christiaan Smit and Mr Quentin Lindeque. These were two separate other matters for which the employees were dismissed for making racist comments or remarks, in which the facts are broadly similar to that of the applicant's matter. The two matters were not disputed and form part of the evidence record - it is dealt with in paragraph 69(9)(i) and (ii).

Evidence by Mihloti Caution Nkuna - applicant

[40] The applicant testified about the day on which she made the racist comment. She had been working from home due to the COVID-19 lockdown. She was trying to reach high performance standards and was frustrated by not making the number of sales that she intended to - she was "stressed for performance". She also experienced some internet connectivity issues which further contributed to her frustration.

[41] When speaking to the relevant potential customer, Mr Gielie Hattingh, the witness was confident that she was going "to close this deal". The call was going just fine until, at the end thereof, the customer informed her that he was not going to accept her quote because "an Afrikaans company" (Virseker) was willing to help him and they offered him a lower premium and a lower excess payment.

[42] The applicant testified that she experienced the customer's rejection of the offer she made on behalf of Outsurance, constituted a racial attack on her person. She felt that the customer was being racist towards her because he wanted to deal with a company that assists him in Afrikaans. Her thought was "how dare he?". She then posted the comment to vent her frustration on the WhatsApp group in her team. She thought this was a safe space within which she could say anything to her co-team members.

[43] However, the applicant did also testify that if a member of the group "overstepped" in making comments, there would be a reprimand or a discussion or meeting about it. She may not have looked to be remorseful because she does not cry easily and she has a strong personality and is very confident of herself.

[44] In the disciplinary hearing the applicant pleaded guilty to charge 3 - that her conduct (posting the message) potentially could damage the reputation of the employer. She conceded in cross examination that messages can move quickly between groups and can easily be communicated externally of the employer and that the consequences for the employer could be seriously detrimental. Fortunately, in this case the racist message did not "leak" to outside the firm.

[45] As to charge 1 in the disciplinary proceedings - she maintains she could not be guilty of such a charge due thereto that she did not "introduce" the racial narrative - because Thandeka Ndaba had, a year prior, posted a racist message, she "introduced" racism to the team.

[46] When cross examined on the conduct of Thandeka Ndaba, the applicant agreed that what Thandeka Ndaba posted was objectively racist. She conceded that her own message of 11 May 2020 was similar to that of Thandeka Ndaba. Although the applicant had at the time been a member of the WhatsApp group and had seen Thandeka Ndaba's comment, she did not report it despite realizing it was patently racist - her explanation was that "I did not want to be a tattle tale".

[47] The applicant further conceded that her conduct was wrongful by stating "I do understand that what I did was hurtful, but I was angry". The applicant maintained that although what she did by sending the message, can be seen as racist and wrong, she should not be dismissed, because Thandeka Ndaba, a more senior employee, was not dismissed for the same type of misconduct. She said she would have accepted if both of them had been dismissed or both given a final written warning.

[48] The bulk of the testimony of the applicant focused on putting Thandeka Ndaba on trial for her racist behaviour and the argument put forth by the applicant is based on inconsistent discipline by the respondent.

Evidence by Andile Ngcobo on behalf of the applicant

[49] The witness on behalf of the applicant, Mr Andile Ngcobo, testified that he never actually listened to the recording of the engagement between the applicant and the customer which led to the applicant posting the racist remark on WhatsApp. However, when he saw the remark on 11 May 2020, he immediately felt sorry for the applicant because she was racially attacked.

[50] The witness testified that had the message posted by the applicant been published on other social media platforms such as Facebook or Twitter, he would have another opinion, because it would definitely damage the reputation of Outsurance.

[51] The witness says he is racially sensitive and if a customer merely indicates that he prefers to be served in Afrikaans, he would take offence as a black person. However, Mr Ngcobo refused to concede that the message by the applicant about the Afrikaans client is racist in nature.

[52] The witness testified under cross examination that it is okay to make a racist and/or inappropriate comment about a person as long as it is done privately and it does not get out to others.

Evidence by Neo Mositho on behalf of the applicant

[53] The witness on behalf of the applicant, Neo Mositho was dismissed from Outsurance's employment for performance related issues and used to be a colleague of the applicant in the same team. They are also friends. She testified that she reported the "tip-off" about Thandeka Ndaba and she is giving evidence for the applicant because of the principle of the matter, also because what Thandeka Ndaba did went against the values of the employer.

[54] The witness was aware of the previous racist remark of Thandeka Ndaba in July of 2019, but she never reported it. She only reported it as misconduct when she realized that the applicant was dismissed for the same thing.

[55] The witness agrees that Thandeka Ndaba's remark of "b*tch n*ga" is racist and offensive. Also, she testified that she never saw the message of the applicant about the Afrikaans person before coming to the CCMA on 25 November 2020.

[56] The witness initially did not want to concede that the applicant's message is racist, "because it's only her opinion". Later she did concede that the message could and did create racial segregation. She also agreed under cross examination that if the both the applicant and Thandeka Ndaba had been dismissed, that would

have been fair. However, she says that Outsurance could have given the applicant a warning because Thandeka received a warning.

Submissions on behalf of respondent

[57] The representative on behalf of the respondent submitted a ten [10] - page [paragraphs 1 to 21] submission analysing the evidence in great detail to indicate that the applicant was guilty as charged. It is referred to and used in the analysis and other parts of the award. The submission of the respondent is that the applicant should be dismissed. The discussion and argument on behalf of the respondent as set out in paragraphs 14 to 21 of the Heads of Argument is as follows [numbering retained]:

"DISCUSSION AND ARGUMENT:

14. The mentioned case law and a plethora of other decisions confirm that racism (in the workplace) is not to be tolerated. The use of racist remarks towards others is serious and can be argued to be as serious as physically assaulting a person.

15. The argument of the Applicant that because another person committed the same misconduct and only received a written warning, she should therefore also not have been dismissed, cannot be correct or in line with the values embodied in our Constitution.

16. The Applicant's argument about inconsistent discipline is further flawed because the evidence shows that the employer had dismissed 3 out of 4 employees who had committed acts of racism. In all the matters where a disciplinary hearing was held, it led to a dismissal and correctly so, having regard to the facts of the cases.

17. Even if one was to accept for the sake of argument, that Thandeka should have been dismissed for her racist remark, then the wrong decision was made not to dismiss her. That being so, given the nature of the misconduct and the importance of the issue in our society and law, such a wrong decision should never be allowed to set a precedent - because the precedent would be patently wrong. To allow such precedent will only embolden those with racist tendencies, knowing that they will now only be given the proverbial slap on the hand.

18. As to the witnesses of the Applicant - Both Andile Ngcobo and Neo Mositho displayed gross bias in their testimony, because they refused to make concessions on various issues when they had to. They both agreed however agreed [*sic*] with the Respondent that the remark made by the Applicant was harsh and racially offensive. They clearly were assisting the Applicant to put Thandeka on trial and to deflect from the grievous nature of the Applicant's conduct.

19. The social media policy (page 85 thereof) of the Respondent is clear - the Applicant contravened the terms of the policy and severely so.

20. The test of whether the remark made was racist and defamatory and offensive is objective and I submit that the evidence in this matter on the issue is clear and undisputed.

21. I submit respectfully that the Respondent's decision to dismiss the Applicant was correct and justified. It must, as a socially responsible corporate citizen, be intolerant of this behaviour".

Submissions on behalf of applicant

[58] The Closing Arguments on behalf of the applicant is twenty [20] pages [paragraphs 1 to 51] in which the conclusion is that the dismissal of the applicant was procedurally and substantively unfair and should be compensated equivalent to twelve [12] months' remuneration. The conclusion on behalf of the applicant is set out in paragraphs 48 to 51 of the Heads of Argument as follows [numbering retained]:

"CONCLUSION

48. The applicant in this case was unfairly treated and dismissed. She was ordered to stop working right after her right of response and was not advised of the reason why. During the period that she was not working, she was not earning a salary and once again no explanation was offered by the employer but she had to 'check in' with the employer everyday again without an explanation. She was suspended and during the suspension did not receive a salary whereas it is a known fact that suspension during investigation should be paid.

49. The applicant was at a disadvantage from the beginning. She went into her right of response blind and as such could not respond to her satisfaction whereas her team manager had enough information on an act of misconduct committed over a year ago.

50. The employer has failed to adhere to Schedule 8 of the Code of Good Practice in applying the penalty of dismissal consistently in more than one situation against with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration and on that basis [*sic*] the applicant was substantively unfair. The employer failed to justify its decision.

51. The employer failed to put facts on the table to rebut the inconsistency.

WHEREFORE, the applicant prays for an award on the following terms:

(a) Compensation of 12 months by the employer for the unfair dismissal;

(b) Retraction of the dismissal on the applicant's record;

(c) A written apology from the employer;

(d) Costs of suit against employer and

(e) Further/alternative relief".

Analysis of evidence and argument

Background

[59] On 11 May 2020, the applicant took a phone call from a client, Mr Gielie Hattingh. The call was listened to during the arbitration process and was transcribed. After the call, the applicant expressed her frustration resulting from the call in a WhatsApp group consisting of friends and colleagues

[60] On 18 May 2020 the applicant was invited to a right of response by email (ROR) scheduled for later on the same day. The applicant attended the meeting without knowing what it was about and was therefore unprepared. The applicant was ordered to stop working from that day until her suspension hearing which was to take place on 19 May 2020 and was suspended on the same day. The following four [4] charges were brought against the applicant:

60.1 Introducing a racial narrative on a social media platform used as a business tool within the working environment;

60.2 Poor team relations as her conduct resulted in team members feeling racially offended and/singled out;

60.3 Potentially bringing the name of the company into disrepute; and

60.4 Creating an environment of racial segregation which goes against the values of the company.

[61] On 22 May 2020 the applicant received a notification to attend a disciplinary hearing. The disciplinary hearing chaired by Joe Shen took place via Microsoft teams on 26 and 27 May 2020. The respondent presented its case and led evidence. The applicant called a witness who was also cross examined by the respondent and parties closed their respective cases.

[62] On 4 June 2020 Joe Shen sent his recommendations wherein he recommended that the applicant be summarily dismissed [pages A24 to 28]. On 5 June 2020 the respondent dismissed the applicant [pages A29/30].

[63] On 16 July 2020, Neo Mositho a colleague of the applicant who was also in the same WhatsApp group sent an anonymous email to the tip off email address of the respondent. In that email [pages A47 to 51] she attached screenshots from the same group which were posted a year ago by Thandeka Ndaba wherein she referred to a client as a "b*tch n*gga", created a group and titled it "blacks only" which excluded non-black colleagues and a statement which read as follows "motherfu*kers must know". This was brought to the attention of the respondent and Thandeka Ndaba received a final written warning as sanction for the racial slur and foul language and resumed with her duties. She is currently still employed by the respondent.

[64] The applicant approached the CCMA for relief [pages R1 to 3]. Con/Arb was set to take place on 17 July 2020 which the respondent objected to participate in. Arbitration process began on 3 September 2020 and 22 October 2020. It continued on 24 November 2020 with the last day being 25 November 2020.

Procedural fairness

[65] In the *Avril Elizabeth Home* case [JR782/05], Judge A van Niekerk made the following ruling relating to procedural fairness in labour related cases not requiring to replicate the criminal justice model:

> "The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognise that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.
>
> The balance struck by the LRA thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that <u>to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits</u>" [own underlining].

[66] The outcome of the Disciplinary Hearing held on 26/27 May 2020 is part of bundle A pages 17 to 28 and indicates that the basic requirements for a fair disciplinary hearing was complied with. This is supported by the oral evidence given at the Arbitration hearing by the chairperson of the Disciplinary Hearing Mr Joe Shen.

[67] The chairperson can be criticised for not even referring to the evidence given by a witness of the applicant, a team member, Andile Ngcobo. The chairperson described it as irrelevant and gave that as a reason for not referring thereto. He should at least have referred thereto and should have explained why he found it irrelevant. This did not materially affect the outcome and it is found that the procedure was fair.

Substantive fairness

[68] To evaluate the substantive fairness of the dismissal, the context and circumstances in which the misconduct took place must be taken into account.

[69] To properly assess whether the sanction of dismissal of the applicant by the respondent was appropriate, all the circumstances and context in which it took place must be considered. The most important relevant factors to be considered is set out below:

(1) The incident on 11 May 2020 took place after an almost twenty [20]- minute telephone discussion between the applicant and a potential client, Mr Gielie Hattingh with the full transcript available.

(2) During the discussion with the client, the applicant did not commit any offence; to the contrary she behaved well towards the client, as is evident from the relevant portion of the transcript of the conversation:

> *"MS NKUNA: Please allow me to help you.*
>
> *MR HATTINGH: Ja, I have got an Afrikaans company that help Afrikaans people ... [indistinct] Afrikaans people for a premium for R816, ja, with lots ... [intervenes].*
>
> *MS* NKUNA*: And how much is the excess then.*
>
> *MR* HATTINGH*: Hey?*
>
> *MS* NKUNA*: How much is the excess there?*
>
> MR HATTINGH: The excess for them is R4 686.
>
> *MS* NKUNA*: And this insurance company is specifically designed for Afrikaans people you said?*
>
> *MR* HATTINGH*: No, not specifically, but they do - but they do Afrikaans, they insure Afrikaans people, ja.*
>
> *MS* NKUNA*: They do what, sorry?*
>
> *MR* HATTINGH*: They do - they do insure them.*
>
> *MS* NKUNA*: Okay, so would you feel better if I got an Afrikaans speaking advisor to contact you and maybe give you some discount in order to bring you over to Outsurance?*
>
> *MR* HATTINGH*: No, I am not interest. No, no, I have already - I need to get going. I need to get somebody. I am sorry I took so long and so on. I am sorry, hey.*
>
> *MS* NKUNA*: No problem. Thank you so much for your time and have yourself have a great day.*
>
> *MR* HATTINGH*: Same to you - same to you, have a good time, okay.*
>
> *[end* of *recording]"*

(3) In the Heads of Argument on behalf of the applicant the following statement is made which is quoted with approval:

> "44. In applying the facts of *Sidumo* when it was at the CCMA stage; the sanction of the employer was harsh and the applicant is of the view that progressive discipline was going to be effective. In the years that the applicant was employed by the respondent the applicant was an overachiever and at the time of this hearing she had maintained a clean record. Because of the conduct of the applicant there had been no loss suffered by the respondent and even the witnesses for the respondent confirmed this. The violation of the rule by the applicant had been unintentional, it was out of frustration and anger at that time and she has over and over explained that now that she is no longer frustrated, she sees that it was wrong. The employee in this case was honest and backed up her statements with facts".

Similarly the applicant did wrong, but it was out of frustration and anger.

(4) The applicant was outraged about the way the client treated her, but did not react towards the client, she vented her feelings on a WhatsApp Group linked to members of her team where foul language was often used.

(5) Members of the group often used foul language such as "mother fu*ker" (MF). It was common use amongst the members and used so often that not much weight is attached thereto in the team. These swear words were the jargon generally used by the group and was not supposed to leak out.

(6) It was an error in the charges against the applicant to allege that she "introduced" racism on the web - it was introduced a year earlier by the team leader, Thandeka Ndaba, who called the group "Blacks Only" and referred to "b*tch-n*ga".

(7) The applicant is the team member who was concerned about the exclusive name of the group" Blacks Only", she spoke to the team leader who amended the name to "The Legends", so as to be more inclusive.

(8) The team member who allegedly took offence to the SMS posted by the applicant was Erica. Ironically, she is the member of the team over which the applicant was concerned that she could not be a member of the "Blacks Only" group and took initiative to have the name changed so that Erica could also be admitted.

(9) The two cases referred to by the employer where employees were dismissed for making racial remarks on social media are the cases of Smit and Lindeque. Both cases were more seriously racially offensive than that committed by the applicant and can rationally be motivated for dismissal as an appropriate sanction. The relevant facts are the following:

(i) Christiaan Smit [28/02/19]

The employee made a racist remark directly to a co-employee "whats up n*gger".

(ii) Quentin Lindeque [29/06/2020]

Posted an inappropriate picture of a African baby with an offensive swearword on a WhatsApp used by all management team within the group.

(10) This case of the applicant is an example of a "one incident" dismissal after a clean record for several years where a progressive approach should have been followed. In the *SARS*-case of Kruger [reported as *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* [2017] 1 BLLR 8 (CC) - Ed], the *Crown Chickens* case was quoted with approval by the Constitutional Court when it ruled in paragraph [43]:

"... the Court underlined the particularly crucial role that courts have to play of ensuring that racism or racial abuse is eliminated. And that they must fulfil that duty fairly, fully and firmly. The notion *that the use of the word k*ffir in the workplace will be visited with a dismissal regardless of the circumstances of a particular case, is irreconcilable with fairness. It is conceivable that exceptional circumstances might well demonstrate that the relationship is tolerable*" [own underlining].

(11) The Constitutional Court thus ruled that even in an extreme case where the K... word, is used, the notion that dismissal will automatically be the result, regardless of the circumstances, is not compatible with the requirement of fairness. All relevant circumstances must be taken into account.

[70] Taking into account all the circumstances of this case, it is found that the employee has done something wrong in her rage and anger against a client, but it was not done against the client. It gave rise to her dismissal, but it is found that the misconduct is not sufficient to warrant dismissal, also taking into account the almost similar circumstances of Thandeka Ndaba that was met with a final written warning. Thandeka Ndaba did not even act in anger and rage, she just acted in the normal course of events.

[71] Dismissal can be imposed for a first offence if the circumstances so warrant it and if the employee's behaviour destroys the trust in the employment relationship. Neither of these qualifications objectively applies in this case.

[72] The Constitutional Court in *Rustenburg Platinum Mine v SAEWA obo Bester and others* [2018] ZACC 13 in paragraph 55 [reported at [2018] 8 BLLR 735 (CC) - Ed] quoted the *Sidumo* case as follows:

"[55] In *Sidumo*, this Court listed a number of factors that a commissioner must consider when deciding on the fairness of a dismissal. The Court emphasised that the factors do not represent a closed list and that the weight to be attached to each factor would differ from case to case. The factors are: (i) the importance of the rule that was breached; (ii) the reason the employer imposed the sanction of dismissal; (iii) the basis of the employee's challenge to the dismissal; (iv) the harm caused by the employee's conduct; (v) whether additional training and instruction may result in the employee not repeating the misconduct; (vi) the effect of dismissal on the employee; and (vii) the long-service record of the employee".

[73] These seven [7] factors can be applied in this case as follows:

(i) Importance of Rule

This was an extremely important rule against racism in the workplace that was breached. However, it does not automatically lead to dismissal without taking into account all the circumstances of the case.

(ii) Reason for Dismissal

The reason given was that the applicant was found guilty of the four charges. It is dealt with elsewhere in this award where it is inter alia indicated that the applicant did not "introduce" a racial narrative on a social platform, it was introduced a year earlier by Thandeka Ndaba who was given a final written warning.

(iii) Basis of the Challenge

The basis of the challenge was inconsistent application of discipline and the sanction of dismissal as set out in detail in the applicant's Heads of Argument from paragraphs 25 to 47.

(iv) Harm Caused to Employer

The applicant pleaded guilty to charge 3 and conceded **potential** harm to the employer. There was no actual harm.

(v) Non-Repeating of Misconduct

There was no evidence led that inherently the applicant is a racist person incapable of not repeating the same mistake. To the contrary, she is the team member that spoke to the team leader Thandeka Ndaba to change the name of the WhatsApp Group away from "Blacks Only" to make it inclusive and to also admit Erica to the group. My impression of the applicant over a few days hearing is that of a pleasant, sharp young female with great potential who would have heeded a final written warning, had she been given the opportunity.

(vi) Effect of Dismissal

The applicant was dismissed in the lockdown period with devastating consequences for her career and her financial income.

(vii) Record of Employee

The applicant had a clean record after five [5] years when dismissed.

[74] Taking all these factors into account, the conclusion is that the dismissal was substantively unfair and the sanction of dismissal was inappropriate and too harsh.

Relief: Compensation

[75] The applicant does not seek either reinstatement or re-employment, but compensation equivalent to twelve [12] months' remuneration [Heads of Argument paragraph 51(a)].

[76] It is found that similar to Thandeka Ndaba, the employer should not have dismissed the applicant, but a final written warning would have been a more appropriate sanction, similar to the penalty of Thandeka Ndaba.

[77] It is taken into account that the applicant did commit an offence and transgressed the Social Media Policy of the employer, but the sanction of dismissal was too harsh.

[78] In terms of our labour law, payment of compensation is not automatic; it is a discretionary matter. A number of factors must be taken into account to determine whether compensation has to be paid and if so, for how many months. The impact of the misconduct that the applicant is guilty of on the employer and its workplace environment is an important fact to help decide on an amount of compensation - see *SARS v CCMA* [2016] ZACC 38 at paragraph 50 [reported at [2017] 1 BLLR 8 (CC) - Ed]. The team did not take serious offence - the witness called by the employer being Roland Smith took no offence.

[79] Under the circumstances an award equivalent to two [2] months' remuneration will be fair and equitable to all parties.

Award

1. The dismissal of the applicant, Mihloti Caution Nkuna, by the respondent, Outsurance Insurance Company Ltd, on 5 June 2020 is found to be procedurally fair, but substantively unfair and inconsistent with disciplinary action taken by the employer against other employees for similar transgressions and dismissal an inappropriate harsh sanction, having regard to the context in which the misconduct took place.

2. The respondent is ordered in terms of section 194 of the Labour Relations Act to pay compensation to the applicant equivalent to two [2] months' remuneration = two [2] x R18 000, 00 = R 36 000, 00 [Thirty-Six Thousand Rand] to be paid into the applicant's bank account known to the respondent, i.e. Discovery 1706422 XXXX by not later than 31 December 2020, failing which interest is payable in terms of section 143(2) of the Labour Relations Act.

3. The applicant is advised that should the respondent fail to comply with paragraph 2 of this Arbitration Award, application can be made in terms of section 143(3) of the Labour Relations Act read with rule 40 of the CCMA Rules to have the Award certified and endorsed by submitting Form LRA7.18 to the CCMA for approval and then referring a Writ of Execution to the appropriate Sheriff of the Court in the Magisterial District where the employer party resides or conducts business.