``IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C 198/2004

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION for and on behalf of XOLILE FINCA Applicant

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED First Respondent

JENNY BURGER Second Respondent

JUDGMENT

REVELAS J

[1] This matter is about racism in the workplace. The applicant ("the Union") brought these proceedings on behalf of its member, Mr. Xolile Finca ('Finca"), a black employee, who had been employed by the first respondent in its Executive Management Client Support ("EMCS") department for approximately 20 years. The union has also brought these proceedings on behalf of all its other members, employed by the first respondent.

[2] The union claimed that the second respondent (Jenny Burger), a white employee, also employed by the respondent in the same EMCS department, had wrongfully discriminated against black employees on the grounds of their race. The union further claimed that the first respondent (or "Old Mutual") had failed to take proper steps to ensure the elimination of the discrimination perpetrated by the second respondent, and to address the issue properly.

[3] In support of its case, the union relied on sections 6, 50 and 60 of the Employment Equity Act no 55 of 1998, and Sections 9(3), 10 and 23(1) of the Constitution of the Republic of South Africa, No 108 of 1996 ("the Constitution").

[4] The incident which gave rise to these proceedings occurred when the second respondent, uttered a complaint to her immediate superior, Ms Barbara van Zyl about being placed close to the black employees in the office (being only Mr. Finca and Ms Amanda Dikeni). Her complaint followed an office restructuring where the configuration of the working stations, desks and furniture in the first respondent's EMCS department, were rearranged.

[5] The remark was overheard by a fellow employee, Ms Zorina Jeffries, who insisted on an apology by the second respondent to Ms Dikeni and Mr. Finca. Her friend and superior, Ms Barbara van Zyl, gave the second respondent a verbal warning. The applicant, dissatisfied with the mere warning issued, took the matter further, and after some discussions with the first respondent's transformation manager and some resistance from the first respondent's management team, a formal disciplinary enquiry was held. The hearing resulted in the second respondent's dismissal, which was subsequently set-aside on appeal and she was reinstated. The reason given by the chairperson of the appeal hearing for the respondent's reinstatement was that she suffered double jeopardy, by in effect being tried twice for the same offence. (Once by Ms Van Zyl and once by Mr. Mookapele, who was the chairperson of

the disciplinary hearing). The second respondent's defense of *estoppel* was therefore upheld on appeal.

[6] The applicant seeks the following relief:

1. Two declarators in the terms as set out in paragraph 2 above, in respect of the two respondents respectively;

2. A further declarator deeming the first respondent's conduct to constitute unlawful discrimination on the grounds of race, and a breach of Sections 23(1), 10 and 9(4) of the Bill of Rights, as contained in the Constitution, and in terms of Section 60 of the Employment Equity Act;

3. An order setting aside of the findings of the chairperson who presided over the appeal hearing of the second respondent;

4. Compensation for Mr. Finca, though the amount was not to be determined not in this hearing, as the determination of the merits and compensation have by agreement been separated. An order to this effect was made at the onset of the hearing.

5. A Labour Court Directive on steps to be taken to avoid similar conduct in future.

[7] The trial commenced on 9 May 2005 and became part heard on 13 May 2005. The proceedings resumed on 31 October 2005, the second respondent having withdrawn her opposition earlier, on 25

October 2005. The second respondent's withdrawal is of significance. According to Ms Jeffries, who was called as a witness by the applicant, who assumed the duty to begin to lead evidence, the second the respondent had asked Ms Van Zyl: **"Hoekom sit jy my langsaan (sic) die kaffirs?" ("why did you put me next to the kaffirs?")**. It was put to Ms Jeffries, by counsel for the second respondent, that the second respondent's version, if she came to testify, would be that she never uttered the derogatory words in question, but had merely asked Ms Van Zyl: **"Hoekom moet die hele Khayelitsha rondom my sit?" ("Why must I be surrounded by the whole of Khayelitsha?").**

[8] The second respondent withdrew her opposition to his matter when the trial resumed again in October, and the first respondent (who argued that the nature of the remark remained in dispute) never called her as a witness. Therefore I am bound to accept Ms Jeffries' version regarding the alleged racist remark. Both versions of the remark are racist in nature in any event. On both versions, the second respondent conveyed her malcontentedness to share her immediate office space with Africans. That constitutes direct unfair discrimination against persons based on their race, ethnic and social origin as foreseen by Section 9(3) of the Constitution.

[9] An employee who experiences this type of discrimination in the workplace, having the right to fair labour practices in terms of section 23(1) of the Constitution, has the right to approach a competent court in terms of section 38 of the Constitution, for appropriate relief. That would include the Labour Court. The applicant is therefore entitled to the declarator it seeks from this Court in respect of the second respondent. Establishing discriminatory conduct on the part of the second respondent

had been a relatively simple task, since the second respondent did not testify, and the common cause facts established discriminatory conduct on her part.

[10] Ms Dikeni had accepted the second respondent's apology and Mr. Finca had assured the second respondent that he would not take steps against her, when she apologized to him. These actions and would explain why the applicant union "**acting in the interests of a group or class of persons"** (section 38(c) of the Constitution) approached this court, rather than on behalf of Mr. Finca or Ms Dikeni. The Union brings the application on behalf of "all its members employed by the first respondent".

[11] The next three questions to be decided are: Firstly, whether the first respondent's conduct in dealing with the matter, constituted discriminatory conduct, secondly, whether Mr. Finca is entitled to any compensation, and thirdly, whether the findings of the appeal chairperson should be set aside. To determine the first question, the events which followed the incident where Ms Jeffries heard the racial remark, must be examined in their chronological order.

[12] According to the testimony of Ms Jeffries, she was shocked by the racist remark she had overheard, and when she confronted Ms van Zyl, the second respondent's supervisor, to whom the remark had been made, the latter's response was that Ms Jeffries should not be overly concerned as the word **"kaffer"** was commonly used by Afrikaans speaking people and was not necessarily used in a derogatory sense. Ms Jeffries insisted on an apology. The second respondent apologized to her. Ms Jeffries felt that the apology was not owed to her, but to the only two Africans in the department,

namely Mr Finca and Ms Dikeni.

[13] The incident in question took place on 15 April 2003. At the disciplinary hearing of the second respondent (which took place much later), a document was produced which reflected that on 16 April 2003, the second respondent had been given a verbal warning by Ms van Zyl. The written record of the warning stated the following:

> **"Incident happened where Jenny made what could be seen as a racist remark. I verbally warned Jenny that this is not to happen again, as it can lead to dismissal.**

Jenny apologized and explained mitigating circumstances.

> **Zorina approached me, is unhappy about remark she overheard. Spoke to Jenny, she apologized to Zorina, matter closed."**

[14] Ms Jeffries was still not satisfied with how the matter was dealt with. The written warning was also not produced by Ms van Zyl as proof that she took up the matter with Ms Burger. (The written warning only emerged at the disciplinary hearing). Ms Jeffries then decided to tell Mr Finca and Ms Dikeni what the second respondent had said. Ms van Zyl and the second respondent had requested Ms Jeffries not to inform Ms Dikeni and Mr Finca about what had happened. When Ms Jeffries nonetheless did so, she was reprimanded by Ms van Zyl and Kelly Personnel (who provided her services to the first respondent as was the case with Ms Dikeni). Ms van Zyl accused Ms Jeffries of being **"a troublemaker"**.

[15] When an upset Mr Finca demanded to know from Ms van Zyl why she had not informed him of the incident, she replied that she did

not want his feelings to be hurt. What in fact hurt Mr Finca's feelings the most, he told Ms van Zyl (and later this Court), was that colleagues with whom he had worked with for so long (such as the second respondent), could refer to people (to him) as **"kaffirs"** in private, but smile at them (him) on the other hand. In other words, apart from the obvious insult, he found the hypocrisy that accompanied it, also hurtful.

[16] The second respondent apologized to Mr Finca and Ms Dikeni for the racist remark she had made. Ms Dikeni accepted the apology. Mr Finca testified that he did not accept the second respondent's apology, but only conveyed to her that he would not **"take steps against"** her. Apparently she wanted to know what he was going to do, as it must have been clear to her by then, that this incident might just not disappear and be forgotten. Mr Finca did not seem very convincing in explaining his non-acceptance of the apology, but in the absence of a contrary version, I am bound by his explanation that he did not really accept the apology.

[17] Through the efforts of Ms Jeffries no doubt, the union became aware of the incident. Her brother was a union official of the South African Commercial Catering and Allied Workers Union ("SACCAWU"). On 26 May 2003, the SACCAWU / SATAWU Representative Committee discussed the matter and made a recommendation to the first respondent's management to investigate the matter further, and to take steps against Ms van Zyl for her failure to take appropriate steps against the second respondent. The reasoning was that the offence in question was viewed by the first respondent (in its code) as a serious offence, which may lead to dismissal. Such an offence should have been the subject matter of a formal disciplinary enquiry in terms of the code, and could not be dealt with by merely issuing a warning. It was

also recommended that in the course of the proposed investigation, the first respondent should also consider what steps should be taken against the second respondent.

[18] When the Old Mutual management indicated (through Mr Karl Parks) that it did not intend to take the matter further, as it felt that the matter had been finally dealt with, Mr Finca filed a grievance on 17 March 2003 about the incident. He also placed on record that the issuing of a mere warning was not appropriate, considering the severity of the misconduct.

[19] Mr Finca was subsequently advised (in writing), by the first respondent's client services' manager (Mr Paul Rist), that the grievance procedure was inappropriate as the matter concerned a grievance between himself and another employee (not his employer), and that he should make an alternative suggestion.

[20] The union responded to the client services' manager's letter on 23 June 2005, pointing out that an employee was entitled to file a grievance such as the one he, the manager, would not accept, where the employer failed to follow the correct procedures under its own code. In the same letter, the union warned the first respondent that its approach to this incident, or lack of action, might suggest that Old Mutual was unable to act against racism in the workplace.

[21] The suggestion that there should be a disciplinary hearing was met with a counter-proposal that an external facilitator, whose recommendations shall be binding and final, should investigate the matter. The union did not accept this proposal.

[22] The matter was then taken up with the Employment Equity Manager of Old Mutual, Ms Annaline Rhoda. She also gave evidence at the hearing of this matter. She wrote a sympathetic letter to Mr Finca on 9 July 2003, expressing her agreement that Old Mutual needs **"to address the matter and not push it aside as something that needs to be sorted out between two employees". She assured Mr Finca that if a formal investigation is what he and the union wanted, that was "exactly what needs to happen next". Ms**

Rhoda's letter was followed by a response from the first respondent who promised to investigate the matter further, and to take statements from all parties concerned.

[23] In the interim, the applicant approached the first respondent's transformation manager, Mr Manne. He then compiled a fact-finding report in August 2003. He found that the word "**kaffir"** was in fact used and observed that although Ms van Zyl deemed it necessary to give the second respondent a warning, she could not recall what she had said. Mr Manne expressed his view on the inappropriateness of the warning. He noted that Ms van Zyl had told him that she did not keep a written record of the warning she allegedly gave to the second respondent. This of course raised the question why a written warning emerged only when the disciplinary hearing was eventually held. The inference to be drawn therefrom did not, however, escape the chairperson of the disciplinary enquiry.

[24] On 31 October and 11 November 2003, Mr Mookapele chaired the disciplinary hearing held into the incident in question. An employee of the staff association OMREB assisted the second respondent. The second respondent was charged with the use of racist language in that she was alleged to have used the word **"kaffir". In the alternative, she was charged with insensitive and inappropriate language. She pleaded guilty to the alternative charge only, but was found guilty of the main charge. The sanction imposed was dismissal. A record of the disciplinary**

hearing was before me as part of the applicant's bundle, which formed part of the evidence. It is necessary to consider some aspects of the various testimonies at that hearing, and to make some observations with regard thereto.

[25] Ms Amanda Dikeni, who did not give evidence at the trial, but did so at the disciplinary hearing, confirmed that she had been apologized to by the second respondent, and stated that at the first meeting held with the second respondent, she admitted that she had used the word **"Kaffir**".

[26] The second respondent denied use of the aforementioned language and testified that she only asked why she had to be surrounded by "**Khayalitsha**" in the new office-sitting plan. Interestingly, and this is also of importance, the second respondent was not cross-examined on her version by Mr Paul Rist, who acted as prosecutor on behalf of the first respondent. He was the manager who advised Mr Finca that he could not file a grievance about this incident and should make another suggestion. Mr Rist did not regard a disciplinary hearing as the obvious solution, when he received the latter.

[27] Ms van Zyl testified at the disciplinary hearing, that she could not remember what the second respondent had said to her. She said if the second respondent had used the word "**kaffir**", she would have remembered it. This version is unlikely and was rejected. Ms Jeffries had attempted to catapult everyone who appeared to be

lethargic about the issue at hand, into some form of action. Ms Jeffries, whom I observed, was not a person to mince her words, confronted Ms van Zyl in a very determined way on more than one occasion about this one issue. If the second respondent had indeed only referred to "**Khayalitsha**", Ms van Zyl would have remembered that. It is very unlikely that she could have forgotten what exactly the second respondent had said to her, given the trouble this particular utterance had caused.

[28] Both Mr Finca and Ms Jeffries testified that Ms van Zyl had given them an explanation, on different occasions, that afrikaans speaking persons did not attach the same meaning to the word "**kaffir**" as other persons might do. This explanation or excuse made on behalf of the second respondent should have been a further indication, that the second respondent had indeed used the word **"kaffir".** That is precisely what Mr Mookapele had found and that was also found by Mr Manne in his fact-finding exercise.

[29] Mr Mookapele found that the warning given by Ms van Zyl to the second respondent was vague and did not comply with the first respondent's own disciplinary procedures. He did not think that a warning was the appropriate sanction and therefore imposed summary dismissal. In his decision (handed down on 11 November 2003), he in particular relied upon a judgment of the Labour Appeal Court in *Crown Chickens (Pty) Ltd t/a Rocklands Pou;try v Kapp and others (2002) BLLR 493 (LAC)*. In that judgment, the Labour Appeal Court made it very clear, that in the context of

employment disputes, it (and the Labour Court) will deal with acts of racism "**very firmly"** and that such an approach will contribute to the **"fight for the elimination of racism in the workplace".**

[30] The second respondent appealed against her dismissal. Mr Deon Williamson, one of the most senior persons in Old Mutual to have dealt with the matter, did not interfere with the factual findings of Mr Mookapele, when he considered the matter as chairperson of the appeal hearing. He also found that the word in question was used. That is apparent from his reasoning. He did however set aside the sanction of dismissal imposed by Mr Mookapele. In doing so, he took into account the warning Ms van Zyl had issued verbally to the second respondent, which was **"confirmed in writing"**, for **"making a racist remark"** and that she had warned the second respondent that, should it happen again, it could lead to her dismissal. He further considered the fact that the second respondent had apologized to Ms Jeffries, Mr Finca and Ms Dikeni, and that the latter two had accepted the apology and indicated that the matter would not be taken further. Mr Williamson also gave consideration to the letter written by Mr Karl Parks to the Union, where he, on behalf of the first respondent, stated, **"the company does not intend taking the matter any further".**

[31] Mr Williamson criticized Mr Mookapele's finding that all the facts only became known to the first respondent recently, (**"within a reasonable period"),** prior to the disciplinary hearing being initiated. He held that no new evidence had come to the attention of the first

respondent after 15 April 2003 (being the date of the incident). That being the case, he concluded that the six months period between the date of the incident and the date of the disciplinary hearing was unacceptable.

[32] Mr Williamson found himself unable to agree with Mr Mookapele's reasoning that the warning given was vague, or failed to comply with the first respondent's procedures. He found that there was **"apparent compliance with the informal disciplinary process",** but it reached "**the point where a very serious error of judgment on the part of management did occur".** He also found that Ms van Zyl, as a department head, had the necessary authority to take steps against the second respondent, which would bind Old Mutual, but he labeled it a step which **"in retrospect turned out to be a material judgment error"** and a **"very poor judgment call"**. Mr Williamson expressed his concern that the second respondent, through the applicant's conduct, was led to believe on quite a few occasions, that this matter against her had been finalized. She had received a verbal warning, which was valid for six months. He also found that Mr Mookapele had erred in finding that the first respondent, came into possession of all the relevant facts shortly before the disciplinary hearing, should therefore not have rejected the second respondent's estoppel defence, that the delay created the impression that the employment relationship was not disturbed.

[33] In his view, management had made an informed decision to follow the informal procedures, once the incident had come to its

knowledge. He observed that this was the point where the very serious error of judgment occurred. For such a serious offence he held that, a formal disciplinary hearing should have been held. He then made the point that the second respondent had on a number of occasions been led to understand that the matter had been finalized. This notwithstanding, on 14 October 2003, a formal disciplinary action was initiated without **"any compelling reasons by management to what motivated this step, including new evidence that became available".** In short he found that the disciplinary hearing should not have been held. Even though he pointed out that **"The Old Mutual process does not provide for a managerial review process",** he nonetheless reversed the sanction of dismissal and reinstated the second respondent.

[34] In his reasoning Mr Williamson emphasized that any person who used the word **"kaffir"** in the workplace **"must be subject, immediately, to formal disciplinary action"** and added, as had done all the first respondent's witnesses who testified before me, that the appropriate sanction for such conduct is dismissal. In conclusion, he suggests training for Old Mutual managers in this regard, and branded Ms van Zyl's conduct (following an informal process) as negligent and suggested that she be counseled.

[35] Mr Williamson's criticism of the way in which the Old Mutual management dealt with this matter, is very apt.

[36] Up to the point where Ms Rhoda intervened and the Old Mutual management promised to have the matter investigated, it seemed quite clear that the first respondent was not going to take up the cudgels on

behalf of a black employee who was the victim of a racist insult. Further, the attitude adopted by management then, sent a message that employees who insulted their fellow employees in this way, may expect a rap over the knuckles, and then only when dissatisfaction was expressed or a trade union becomes involved.

[37] The approach adopted by the first respondent was bound to lead to a justified determination on the part of the union to prevent the matter from being swept under the carpet. The first respondent is an employer who stressed that it had a diverse workforce and that it had made great strides in encouraging mutual respect between the races. To have found itself in such a situation is indeed very regrettable.

[38] Mr Williamson's condemnation of the manner in which the matter was dealt with, does not absolve the first respondent for purposes of the Employment Equity Act. His reinstatement of the second respondent reinforced the perception that Old Mutual management was protective of those of its employees who were guilty of making racist remarks. This perception might not be entirely fair, given the fact that part of Mr Williamson's reasoning was motivated by the clearly inadequate process adopted and how that may have been unfair to the second respondent. The fact that the second respondent's misconduct was very serious does not mean that she was not entitled to a fair process.

[39] The delay and its cause were very unfair to Mr Finca. He was justifiably angry and hurt, he deserved far better treatment than he had received, by way of addressing his problem. He should never have learnt of the remark in the manner he did. He should have learnt about it in a context where his employer had stood up for him swiftly and in no uncertain terms. Instead, he observed how the perpetrator was protected over many months, only to be reinstated in the end. In my view, the first respondent's failure to protect Mr Finca amounted to direct discrimination.

[40] The applicant wishes me to set aside the findings of Mr Williamson. In support of its argument, I was referred to a decision of the Labour Appeal Court in the matter of *Branford v Metrorail Services (Durban) and others [2004] 3 BLLR 199 (LAC)*. In that matter an employee charged with fraud was subjected to two

disciplinary hearings. He was found guilty in both. The first disciplinary enquiry chairperson gave him a warning and the second enquiry resulted in his dismissal. The Labour Court set aside the arbitrator's award in which he held that the dismissal was unfair because the employee had been punished twice for the same offence. On appeal, a majority of the Labour Appeal Court upheld the court *a quo's* decision to set aside the award, relying on the decision in *BMW (SA) (Pty) Ltd v van der Walt (2000) 21 ILJ 113 (LAC)*. In the latter decision the Labour Appeal Court held that a second disciplinary enquiry may be opened against an employee if it is "in all the circumstances fair to do so".

[41] I am in respectful agreement with the aforesaid decisions. I, however, do not agree that those decisions entitle me to set aside the decision of the appeal chairperson in this matter. The purpose of the trial was to address the wrong done to Mr Finca. To set aside the appeal chairperson's decision, would be tantamount to dismissing the second respondent. The Labour Court is primarily charged with the task of assessing whether dismissals were fair or unfair. This ordinarily happens in review applications or trials initiated by the dismissed employees. In principle, the Labour Court should not be forced to dismiss an employee at the behest of a third party.

[42] At the heart of this matter lies a view, shared by far too many people, that the word **"kaffir"** is not as hurtful as some others (africans in particular) would have it. I gained the strong impression in this matter that this incident was regarded by some as a storm in a tea cup which would soon blow over, as long as people did not make too much of a fuss about it. It was precisely this type of approach that exacerbated the conflict that emanated from the whole incident.

[43] The unfairness to Mr Finca will not be addressed by setting aside the appeal chairperson's findings and, effectively, dismissing the second respondent after months of sweeping matters under the carpet. The second respondent is not the only guilty party in this saga. Ms van Zyl, Mr Parks, Mr Rist and every one who protected her have a share in the discrimination in question. The first respondent must deal with the second respondent's situation internally and in a firm manner that would reflect its clear intention to get rid of racism in the workplace, particularly amongst its senior personnel and management.

[44] The applicant has also sought relief in the form of a directive in terms of section 50(2) of the Employment Equity Act, to compel the first respondent to take steps to prevent similar discrimination occurring in the future, and to report thereon to the Labour Court within a specified time period. The first respondent led undisputed evidence that it has done much by way of training and other means, to eradicate racism. Ms Rhoda and Mr Manne are examples of managers who are sensitive and who dealt with the matter in question admirably. They would be best suited to advise the first respondent on policy. This matter was not so much concerned with policy on racism, as it was concerned with one specific breach of that policy. In my view, that breach will adequately be addressed by ordering the first respondent to pay compensation to the aggrieved person who suffered under the breach. The undisputed evidence was that there was no lack of training in this particular area of human relationships within the first respondent. It is the response to such training, which was the problem in this matter. Some mindsets will not respond to training. Swift disciplinary action and damages or compensation as punitive measures, should be imposed when training has failed, as it did fail in this case.

[45] Having found that the first respondent had in fact discriminated against Mr Finca by failing to take the necessary steps to protect him against racism in the workplace, he is entitled to compensation. By agreement between the parties, the amount of compensation payable to Mr Finca by the first respondent will be determined in different proceedings.

[46] This is a matter where costs should follow the result. At the onset

of the matter, the second respondent brought an application to amend her pleadings, which application she withdraw after the applicants demonstrated very clearly, that the second respondent's founding affidavit contained untruths. I declined to make a costs order against the second respondent for the wasted costs of that application on May 2005 on a punitive scale. The ordinary scale would be sufficient. The nature of the amendment sought was to incorporate a technical point in *limine.* The averments in the founding affidavit appeared to me to have emanated from a lawyer's pen, rather than that of the second respondent. No costs order was sought against any of the second respondent's legal representatives for the wasted costs, therefore, I made no order against any party on a punitive scale. Since the second respondent abandoned her position after the matter became part heard in May 2005, I do not intend to make a costs order against her for the period 31 October 2005 to November 2005 (the second part of the hearing).

[47] For the reasons set out above, I make the following order:

1. The second respondent's conduct in this matter, constituted unlawful discrimination against black employees on the grounds of their race.

2. The first respondent's failure to take proper steps to prevent racism being perpetrated at the workplace by certain of its employees (including the second respondent) constitutes direct and unfair discrimination against Mr Finca.

3. The first respondent is to pay Mr Finca compensation in an amount to be determined by this court at a later stage, in terms of the agreement

between the parties.

4. The first respondent is ordered to pay the applicant's costs of this application.

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E REVELAS

Judge of the Labour Court

Date of hearing: 04 November 2005
Date of judgment: 06 April 2006

On behalf of the applicant

Adv. C.S Kahanovitz

Instructed by Mr W Field of Bernadt Vukic Potash and Getz

On behalf of the first respondent

Mr M Wagener of Bowman Gillfillan Inc