REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 790 / 2011

In the matter between:

JANENE DE BEER **Applicant**

and

TRUDON (PTY) LTD **Respondent**

Heard: **6 and 7 August 2013**

Delivered: **27 September 2013**

Summary: **Automatic unfair dismissal – application of the provisions of section 187(1)(d) – principles stated – employee dismissed as a result of challenging demotion – constitutes automatic unfair dismissal**

Automatic unfair dismissal – dismissal purporting to be for misconduct – proper nexus between purported misconduct dismissal and the exercise of rights in terms of the LRA – dismissal not for misconduct but automatically unfair

Automatic unfair dismissal – no substance of any kind in allegations of misconduct – only proper inference that dismissal automatically unfair

Evidence – failure to call pertinent witness – principles stated

Compensation – compensation for automatic unfair dismissal – principles stated

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this matter, the applicant referred a dispute to the Labour Court on 29 September 2011 in which she contended that her dismissal by the respondent was automatically unfair as contemplated by section 187(1)(d) of the LRA. The applicant did not seek reinstatement and only sought compensation as relief. The matter came before me on trial on 6 and 7 August 2013. After the conclusion of the evidence in this matter, both parties were given the opportunity to file written submissions in support of their respective cases by 23 August 2013. Both parties availed themselves of this opportunity and filed written submissions, which I have considered as well.

Determination of the evidence

[2] From the outset, it is critical to consider that the respondent never called the actual agent provocateur in this matter, being its general manager Lionel Smith ("Smith"), to testify in Court. Smith is squarely at the centre of all the contentions raised by the applicant, and as such, it was in fact essential for him to testify. The only two witnesses called by the respondent, being Nokunkhanya Madondo and Adrian Van Vuuren, were simply not involved in the preceding events complained of by the applicant and could offer no contrary version or answer to the case raised by the applicant. I was provided with no explanation as to why Smith could not be called to testify other than that he was no longer working for the respondent. This explanation is wholly insufficient. The respondent never stated

that Smith could not be found or was not willing to or able to testify. The respondent could always have subpoenaed Smith, and there was no explanation why this course of action could not be followed in this instance. I was left with the distinct impression that there was a very good reason why Smith was not called, which I will elaborate on hereunder.

[3] The principles relating to the failure to call a witness was enunciated in *ABSA Investment Management Services (Pty) Ltd v Crowhurst*[1] as follows:

> '.... it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support - and may even damage - that party's case. Compare Zeffertt et al SA Law of Evidence (5 ed) at 128-30.'

[4] In *General Food Industries Ltd v Food and Allied Workers Union,*[2] the following was said, which in my view can equally be applied in the current matter:

> 'In my view, if the respondent wanted to challenge the appellant's version of what transpired at certain meetings and union officials or shop stewards were present at such meetings, it should have adduced their evidence. However, it was up to the respondent to make the decision to call or not to call a witness in this regard. In the absence of such evidence, if there were two versions the court would accept the evidence of the appellant's witnesses insofar as such evidence emerged unscathed from the rigours of cross-examination.'

[5] The Court in *Simelane and Others v Letamo Estate*[3] adopted a similar approach and said:

> 'Failure to produce a witness who is available and who is clearly able to give relevant evidence leads to an adverse inference being drawn by the court

[1] (2006) 27 ILJ 107 (LAC) at para 14.
[2] (2004) 25 ILJ 1260 (LAC) at para 46.
[3] (2007) 28 ILJ 2053 (LC) at paras 22 and 23.

(*Gleneagles Farm Dairy v Schoombee* 1949 (1) SA 830 (A), *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm) at 489I-J and *S v Ngxumza and Another* 2001 (1) SACR 408 (Tk).

In *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 749, the following was said:

> "[I]t is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts before the trial court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. But the inference is only a proper one if the evidence is available and would elucidate facts.'"

[6] I make a final reference in this respect to *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd*[4] where it was held as follows, which in my view is directly applicable to the current matter:

> 'Thus in my view the respondent having put forward a prima facie case that Mr Ntsoane for the union and the applicant had conceded in correspondence to what transpired between the parties, it was for the union to have called him to clarify these issues, failing which to provide an explanation for such failure. There was no explanation why Mr Ntsoane was not produced as a witness and therefore the inference to be drawn is that the applicant feared that he would give adverse evidence against the applicant or for that matter confirm the version of the respondent. It is a well established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn. See *Simelane* and the authorities referred therein.'

[7] Based on the above principles, I am compelled to conclude that Smith was not called by the respondent because he would in fact damage the respondent's case. Considering what the applicant had to say about him, coupled with no real or proper explanation as to why he was not called, such an inference is

[4] (2009) 30 ILJ 1379 (LC) at para 29.

irresistible. The result of this is that the evidence of the applicant is left uncontradicted, and should be accepted on that basis. In *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland,*[5] the Court dealt with very similar circumstances in the context of an automatic unfair dismissal dispute and said the following:

> 'That conclusion is the following: the evidence of respondent constitutes the uncontradicted factual matrix. Mr Freed or any other member of appellant could have testified and placed in issue the employment conditions described by respondent as he had set them out in his evidence. This was never done and therefore the evidence of respondent pertaining to his illness and the actions of appellant's employees and directors remains uncontradicted….'

[8] In *SFW Group Ltd and Another v Martell et Cie and Others,*[6] the Court said that 'the technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.' As I have said, the evidence of the applicant must actually be considered to be uncontradicted. The applicant, when giving evidence, was consistent in her evidence and sincere, and I have no reason to doubt her credibility. Certain aspects of her evidence were also fully supported by her witness, Gillian Jordaan ("Jordaan"). I have also considered the issue of probabilities, which I will further addressed hereunder. Based on all these principles, I will now set out what I consider to the proper factual matrix to be used in the determination of this matter.

Factual Matrix

[9] The business of the respondent is in essence that of the publisher of the Yellow

[5] (2009) 30 ILJ 2875 (LAC) at para 23.
[6] 2003 (1) SA 11 (SCA) at para 5.

Pages.

[10] The applicant commenced employment with the respondent on 1 August 1996, initially as a PR officer. The applicant then progressed through the ranks, so to speak and in September 2001 was appointed as corporate communications manager, which position she held until 2005, when the functions of such position was split and a post of stakeholder relationship manager was created which the applicant was then appointed in. The applicant continued to fulfil her duties in this post. The applicant, in this position, reported to the new corporate communications manager Mokone Molete ("Molete").

[11] The applicant had a signed and approved job description in her position as stakeholder relationship manager. Her duties entailed, *inter alia*, events management, the monitoring of and reporting on such events and the maintenance of relationships with stakeholders. The applicant also had financial duties relating to forecasting and budgeting. The applicant also had to plan and organise projects as and when needed.

[12] There was never any issue concerning the applicant's performance. From the evidence, the respondent was not only satisfied with her work but considered her to be an asset to the business. In fact, and after Molete left in January 2010, Smith came to the applicant in April 2010 and asked her if she would be interested in taking up the corporate communication manager's position. The applicant stated that she would be interested in this. A meeting was then held between the applicant, Smith and the general manager HR, being Mashudu Malivha ("Malivha") on 14 April 2010 and in this meeting the applicant was offered the position of corporate communication manager which she accepted. In fact, the applicant agreed to take up this position and still keep the functions of her existing position.

[13] Also in this meeting of 14 April 2010, the applicant, Smith and Malivha had a

discussion about the grading of this position the applicant had accepted because the applicant was at that time graded as a D1 and the corporate communications manager position was a D4. It was agreed that a job specification be drawn up for this new position and then the position be graded, accordingly, once this is finalised. Smith then indeed drew up the new job specification on 15 April 2010 and sent it to the applicant for comment. The applicant then commented on the specification and Smith accepted these proposed changes on 19 April 2010. Smith informed the applicant that the positron was now going to be regarded by external consultants and she would be informed of the outcome.

[14] Whilst still awaiting the results of the grading of this position she would now fill, the applicant discovered on 20 May 2010 that the respondent was conducting interviews for the same corporate communication manager position she was to be appointed in. This came as a shock to the applicant, as she had in fact been offered, and had accepted, that position. The applicant also noticed the position being advertised on the intranet of the respondent. Clearly not satisfied with this state of affairs, the applicant lodged a written complaint with Smith on 21 May 2010, in which she recorded the preceding events in April 2010, recorded that she had been offered and accepted the position and she asked where she now stood. Smith answered on the same date, recording that the position was advertised in January 2010 and the applicant did not apply, so the respondent was now “reopening” the job for internal candidates. Smith also informed the applicant that there were no verbal job offers, and that the applicant was required to submit her application for the position to HR.

[15] The applicant, on 21 May 2010, lodged a formal grievance against Smith for the above conduct and for reneging on a position that he had actually offered to her and which she had accepted. Smith did not take kindly to this grievance. On 24 May 2010, he demanded that the applicant change her job title on e-mails from stakeholder relations manager to events coordinator. The applicant protested

and provided written proof that her position was in fact that of stakeholder relations manager and had always been that since 2005.

[16] The applicant's grievance was heard on 15 June 2010 by Malivha. Malivha gave a written outcome to the grievance in which he accepted that the position was in fact discussed between the applicant and Smith and that Smith "wanted to offer" her that position. Malivha recorded that the position specification still had to be finalized. Malivha concluded that since the position specification was not finalised, no actual decision on the job offer could be made. Malivha recommended that this position specification be finalised and in the interim, the applicant had to be interviewed for the corporate communication manager's position because she was one of the applicants. The applicant was not satisfied with this outcome and wanted to appeal but was told that she had to refer the matter to the CCMA if she wanted to pursue it further.

[17] On 21 June 2010, Smith then gave the applicant a letter in terms of which she was actually demoted from stakeholder relationship manager to events coordinator and from a D1 level to a C5 level. There was no cause or reason for this demotion nor was it preceded by any process. This demotion was clearly in retribution for the applicant persisting with the grievance. The applicant lodged a protest against this behaviour with Smith on 22 June 2010 with HR. No response was received.

[18] On 28 June 2010, the applicant then referred an unfair labour practice dispute to the CCMA. The dispute was based on two grounds, being that of an unfair conduct relating to promotion and unfair conduct relating to demotion. The promotion issue concerned the corporate communications manager's position offered to her which she had accepted and the demotion issue concerned the fact that Smith had unlawfully demoted her to events coordinator. With the referral, the applicant's attorneys also sent a letter of demand to the respondent (dated 25 June 2010), setting out the concerns of the applicant and inviting the

respondent to discussions to try and resolve the matter so as to avoid litigation. No detailed response was received from the respondent, save for a single answer that the matter had to be resolved by the CCMA.

[19] The applicant's dispute referred to the CCMA was then set down for con/arb on 28 July 2010. The applicant attended at the CCMA on that date as did the representatives for the respondent, including Smith. All that was conducted on 28 July 2010 was conciliation, which was unsuccessful, and the matter was adjourned to be arbitrated. Astoundingly, Smith then decided to take issue with the applicant for not being at work on 28 July 2010 but attending at the CCMA and demanded that she apply for leave for that day. Smith adopted this approach despite advice by the HR department to the contrary. The applicant submitted that attending at the CCMA should be considered to be part of a work issue and she should not be compelled to take leave. Smith did not budge and did not leave the matter there. In e-mails sent on 29 July and 2 August 2010, he then went further and in essence accused the applicant of being dishonest in the CCMA conciliation proceedings held on 28 July 2010. He clearly failed to consider that conciliation discussions in the CCMA are actually privileged discussions. Smith also accused the applicant of bringing the company name into disrepute. Smith demanded that the applicant attend a meeting about this, despite the still pending CCMA proceedings on these very issues discussed. It also appears that the accusations of Smith against the applicant in fact related to statements she had made as part and parcel of her case she would call the CCMA on to determine. The applicant expressed her reluctance to attend such a meeting whilst the CCMA case on this was still ongoing and justifiably so. On 2 August 2010, Smith went even further and stated that if the applicant did not attend this meeting he demanded, he would take action against her for insubordination.

[20] On 3 August 2010, the applicant then pleaded for assistance from Malivha. She

recorded that she was simply pursuing her rights that she was entitled to in terms of the company grievance procedure and was entitled to escalate the unresolved matter to the CCMA. The applicant advised that the arbitration date which would determine all these issues was set down for 25 August 2010. The applicant stated that she was being intimidated daily by Smith who accused her of being dishonest and bringing the company name into disrepute and for being AWOL and despite attempted assistance from her union representative this conduct was persisting. The applicant recorded that the accusations made against her by Smith directly related to discussions in the CCMA proceedings which was part of her case. The applicant asked Malivha to intervene.

[21] Despite this plea for assistance from Malivha, what followed is that on 4 August 2010, the applicant was charged for making false allegations against management and bringing the company name into disrepute. A disciplinary hearing was scheduled for 10 August 2010. It is significant that it was Smith who brought the changes and actually signed the charge sheet. Added to this conduct of Smith, the applicant was scheduled to have an interview for the corporate communications manager's position on 4 August 2010, which interview was scheduled pursuant to the grievance recommendations by Malivha referred to above. Some five minutes before the interview was to take place, it was cancelled and, subsequently, never reconvened.

[22] All the above events also drove the applicant to the point of having a break down (understandably so), and she was booked off work from 7 August 2010 to 29 August 2010 as a result of this break down. The applicant provided the respondent with the medical certificate in this regard. What then followed was rather disturbing. Firstly, the respondent took this sick note and submitted it to the CCMA as a basis for seeking a postponement of the arbitration on 25 August 2010 as the applicant was booked off to 29 August 2010. On the other hand and virtually in the same breath, the respondent on 11 August 2010 demanded that

the applicant report for work as her sick note was not accepted because it did not disclose the nature of her incapacity. This approach is clearly untenable. However, and pursuant to these issues raised by the respondent, the applicant provided the respondent on 12 August 2010 with an amended sick note recording the nature of the incapacity together with a medical report further elaborating on the same. In particular and in terms of a psychiatrist report provided to the respondent on 23 August 2010, it was specifically recorded that her mental state was directly caused by her situation at work and the victimisation and abuse she was suffering there. The applicant remained off work.

[23] The CCMA arbitration proceedings then took place on 25 August 2010 and 31 August 2010. The applicant, however, returned to work after 29 August 2010, when her sick note period expired. When the applicant submitted a sick leave application upon returning to work, this application was denied because she attended at the CCMA on 25 August 2010. In particular and in declining the applicant's sick leave, Smith recorded the following: 'I do not think you were sick as you were able to attend a CCMA entire day cession'. On 6 September 2010, Smith went further and accused the applicant of abusing sick leave and stated that he would not accept any of her sick notes. He specifically said that since she was fit to attend a CCMA hearing, she must have been fit to be at work. The applicant then sought the intervention of her medical practitioner to resolve the situation and despite such practitioner's efforts, Smith remained steadfast in rejecting the applicant's sick notes and sick leave.

[24] On 16 September 2010, the CCMA then issued an arbitration award in respect of the dispute referred by the applicant as set out above and which was arbitrated at the end of August 2010 as set out above. The arbitrator upheld the applicant's unfair labour practice claim and ordered that the respondent was required to reverse its decision to demote the applicant from stakeholder relationship

manager to events coordinator and restore the *status quo ante*. In addition, the respondent was ordered to promote the applicant to the corporate communications manager position that she was offered and had accepted with effective date of the promotion being 16 September 2010 in terms of the award. The applicant was thus successful in her case against the respondent at the CCMA. A reading of the award shows that the finding in favour of the applicant was to a large extend based on what was held by the commissioner to be unlawful conduct by Smith.

[25] The respondent then applied to the Labour Court to review and set aside this arbitration award. Significantly, the respondent did not challenge the issue of the reversal of the demotion of the applicant in the review application. The respondent only challenged the award with regard to the finding relating to the promotion of the applicant to corporate communications manager. The applicant testified that when the review application was filed, Smith openly celebrated for all to see and in full view of the applicant and gloated that she had not won and the fight against the applicant was continuing.

[26] With the respondent not challenging the reversal of the demotion of the applicant, then surely the respondent was compelled to restore the applicant to her position of stakeholder relationship manager. This never happened. The respondent and Smith, in particular, simply ignored the award. In fact, even after this award was given, the respondent took the applicant's company cellular telephone away because Smith considered that she was no longer a manager. Her electronic e-mail signature was changed to events coordinator. The applicant also received a lesser bonus based on a position at the level of events coordinator and not based on the position of a manager. The applicant was also no longer allowed to travel to the other areas of the respondent which was an essential part of her position as stakeholder relationship manager. She was not allowed to entertain customers as she used to be expected to do. Even worse, the events actually

organised, managed and controlled by the applicant in the past was taken away from her and allocated to the sales persons to attend to. The applicant had also been responsible to arrange the sales incentive trip in the past and to do all the bookings for this and then also attended this event. This was also taken away from her. She was also not invited the managers' meetings, which as a manager she always attended. She was told not to attend the annual sales conference despite always having attended it and her ticket and accommodation in fact being booked. Finally, the applicant was also excluded from all budget planning, which was an essential part of her duties. It is clear that the retribution meted out by Smith to the applicant as a result of her legal challenge was swift and extensive.

[27] When it came time for increases in 2011, the applicant was given a 2% increase. The applicant queried this, and had to wait several weeks for an answer. She was finally informed in writing that she received this small increase because her salary was 37.55% over the market related salary for an events coordinator. This made it clear, beyond doubt, the respondent deliberately disregarded the CCMA award referred to above. It must also be pointed out that in her testimony, Modondo confirmed that that Smith was instrumental in and had the most say where it came to determining increases for employees. It is also pointed out that it was only the applicant and one other employee (whose circumstances will be fully discussed hereunder) that received such a low increase.

[28] In the CCMA proceedings at the end of August 2010, one of the applicant's fellow employees, being Gillian Jordaan ("Jordaan"), testified on her behalf and in support of her case. Her testimony, *inter alia*, concerned specifically those issues that Smith had accused the applicant of being dishonest about. It may be pointed out that despite being present at the arbitration, Smith never testified. The fact that Jordaan testified for the applicant in the CCMA is important context for what followed in 2011 as will be discussed hereunder.

[29] As already touched on above, in the 2011 increases, Jordaan received a similar

small increase to that of the applicant, and was the only other employee to receive such a low increase. Jordaan said that all the other employees were happy with their increases, so it concerned her that she received such a low increase. The fact is that Jordaan was not happy with this poor increase and proceeded to firstly herself query it. When Jordaan queried this increase, it was explained to her that she had already reached the ceiling of her remuneration grade associated with her position. For reasons not relevant to the determination of this matter, Jordaan stated that this explanation did not make sense to her and did not ring true. The upshot of this is that Jordaan then approached the applicant for assistance. The applicant first referred Jordaan to the union to help her and advised that she meet with management. On the evidence, Jordaan did as the applicant advised but was still not satisfied with the outcome.

[30] At some point in time in June 2011, Jordaan then came back to the applicant. Jordaan told the applicant that she (Jordaan) believed that her poor increase was motivated by the fact that she had testified for the applicant in the CCMA. Jordaan asked the applicant to assist her in resolving her query and the applicant then attended some meetings with HR together with Jordaan where the issue was discussed. At no stage was any confidential information concerning the actual salaries of employees exchanged. It also appears that in the meetings with HR, it was asked whether Jordaan testifying for the applicant in the CCMA had anything to do with the poor increase she received and this was disputed by the respondent.

[31] What happened next was equally astounding. On 23 June 2011, Smith came to the applicant and presented her with a change sheet. Smith had completed and signed the charge sheet and gloated as he handed it to the applicant. In terms of the charge sheet, the applicant is charged with inciting a fellow employee and the basis of this charge was that the applicant had allegedly entered into discussions with regard to Jordaan's salary and it was alleged by the applicant that Jordaan's

increase was due to her being a witness for the applicant in the CCMA. How this, even on the face of the charge as it stands, could constitute incitement is unclear.

[32] The applicant's disciplinary hearing then commenced on 12 July 2011. To call this hearing a sham is an understatement. The transcript of the disciplinary hearing formed part of the documentary evidence before me and was undisputed evidence. Both parties made extensive references to this transcript and referred to numerous extracts from it. I do not intend to repeat everything contained in this transcript and all the submissions made by the parties with regard thereto in this judgment. Suffice it to say that the respondent's own witnesses in the disciplinary hearing in effect disavowed its case, pertinent evidence was completely ignored by the chairperson, the disciplinary process was not properly applied as prescribed by the respondent's own code and Smith never testified as he was supposed to.

[33] It is clear from what happened in the disciplinary hearing that there was absolutely no substance in the charge against the applicant. There was no evidence of any incitement of a fellow employee on the part of the applicant. In fact, if the hearing shows anything, it is that all the applicant did was to assist a fellow employee in resolving a query about her increase. Much was made in the proceedings before me about whether this query about Jordaan's increase was a grievance, or whether the respondent's grievance procedure had been complied with or even if the grievance procedure was applicable. I will not concern myself with this because nothing turns on this and it simply does not matter whether there was a grievance in terms of the grievance process or an information dispute raised about Jordaan's increase. Suffice it to say, Jordaan had a legitimate query about her increase which she was entitled to pursue and she was entitled to procure the assistance of the applicant as her fellow employee to help her with this. The applicant in turn had the right to assist Jordaan.

[34] There is yet another concern that emerges from the disciplinary proceedings. It is clear from the transcript that Smith was not at the disciplinary hearing, he did not participate therein and he certainly did not testify. Assuming that the applicant has committed some of other wrongdoing in participating in the complaint of Jordaan (which I have said I do not believe to be the case), then surely the issue of an appropriate sanction had to be determined next, which process the chairperson then purported to embark upon. However, in this regard, the only testimony before the disciplinary hearing chairperson was presented by the applicant's direct line manager, Gisella Viglioti, who testified that the applicant did excellent work, she was trust worthy and there is no difficulty with the employment relationship. In response to this testimony, the chairperson records, astoundingly and inexplicably, that this testimony sounds very bad and that the trust relationship is destroyed. How such a quantum leap could be made by the chairperson considering this actual testimony referred to is inexplicable. The icing on the cake, so to speak, arises when the chairperson gives his written finding on 21 July 2011 and records that the trust relationship between the applicant and Smith has broken down, with no such evidence being before him. It is clear that Smith must have had a hand in this.

[35] The applicant was dismissed with effect from 18 July 2011 pursuant to the above proceedings. The applicant was also dismissed whilst still occupying the demoted capacity as events coordinator and with the CCMA award never having been implemented. Jordaan testified that when the applicant was dismissed, Smith celebrated openly and went out to lunch with his colleagues to celebrate.

[36] The applicant referred an unfair dismissal dispute to the CCMA on 25 July 2011. She contended that she was dismissed because she had successfully pursued a dispute against the respondent to the CCMA. The applicant contended that her dismissal was automatically unfair as contemplated by Section 187(1)(d) of the LRA. In addition, the applicant's attorneys sent a letter of demand to the

respondent at the same time, motivating the contentions made by the applicant and in particular referring to the role and conduct of Smith. This letter was not even responded to by the respondent.

[37] As a final chapter to this whole saga, the review application brought by the respondent against the arbitration award in favour of the applicant referred to above was heard on 4 March 2013 and in a written judgment handed down on 22 March 2013, the review application was dismissed with costs. This means that with effect from 16 September 2010, the applicant was in fact promoted to corporate communications manager.

The issue of Section 187(1)(d)

[38] Section 187(1)(d) of the LRA provides as follows:

> 'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is - ... *(d)* that the employee took action, or indicated an intention to take action, against the employer by - (i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act.'

[39] In cases where this section is at stake, there is hardly ever a smoking gun that pin points its application. Most often, the reason given by the employer for the dismissal would be something that on face value seems entirely legitimate, such as insubordination or incitement or causing a disruptive influence in the employer. Imperative to the enquiry into whether section 187(1)(d) would find application is the determination of the true reason for the dismissal and the elimination of all the camouflage surrounding this true reason seeking to disguise it. In *SACWU and Others v Afrox Ltd,*[7] the Court, in dealing with an automatic unfair dismissal in terms of section 187(1)(a) said the following:

[7] (1999) 20 ILJ 1718 (LAC) at para 32.

> 'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here …. The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases….'

[40] In *Kroukam v SA Airlink (Pty) Ltd,*[8] the Court applied this two tier test of factual and legal causation as enunciated in *Afrox* in order to determine whether section 187(1)(d) found application. The Court held that if the 'dominant or principal reason or reasons*'* for dismissal was a reason listed in section 187(1), the dismissal was automatically unfair.[9] The Court went further and concluded that even if the prohibited reason(s) established for the dismissal were not the dominant or principal reasons for dismissal, a dismissal was nonetheless automatically unfair if, in the words of the Court:[10]

[8] (2005) 26 ILJ 2153 (LAC).
[9] Id at para 96.
[10] Id at para 103.

> 'even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees.'

[41] The Court in *Kroukam* also dealt with the issue of onus of proof in these kind of cases and said:[11]

> 'In my view s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in s 187 for constituting an automatically unfair dismissal.'

[42] As I have said above, there is very seldom in cases such as this direct evidence that exists of a dismissal that is in contravention of Section 187. This means that all the evidence must be considered as a whole in order to determine the true reason for the dismissal on a balance of probabilities. This in turn means, as the Court said in *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[12] that the inference drawn from the evidence has to be "the most natural or acceptable inference" and, not the only inference, that the dismissal was for a prohibited reason as contemplated by Section 187. Similarly in *Govan v*

[11] Id in the judgment of Davis AJA at para 28; see also *Van der Velde v Business and Design Software (Pty) Ltd and Another* (2006) 27 ILJ 1738 (LC) at 1745.
[12] (2000) 21 ILJ 2585 (SCA) at para 9.

Skidmore,[13] the Court held that it was trite law that the Court:

> '…. by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.

In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[14] it was held as follows:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).' (emphasis added)

[43] In the judgment of *Kroukam,*[15] the Court also said the following, which in my view correctly establishes the very basis of what must be done in the current matter:

> 'The respondent's stance has always been that the appellant was dismissed for the misconduct of gross insubordination and for being a disruptive influence to the orderly operation of the respondent. When one has regard to the respondent's stance, it all sounds very legitimate and innocuous. However, it is necessary to delve deep into it in order to understand the precise nature of the conduct on the part of the appellant which the respondent covers when it says that the appellant was guilty of gross insubordination and of being a disruptive influence to its orderly operation. In other words it is necessary to enquire into the precise nature of the conduct on the appellant's part that the respondent regarded as misconduct taking the form of gross insubordination and being a disruptive influence to its orderly operation.'

[44] Of particular importance in the current matter, especially considering the failure of

[13] 1952 (1) SA 732 (N).
[14] 1985 (3) SA 916 (A).
[15] (*supra*) footnote 8 at para 22.

Smith and Malivha to testify, is that the respondent actually did not advance or show any alternative inferences. The evidence of the applicant is uncontradicted, based on what I have already set out above. In this regard, the judgment in *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*[16] is quite apposite, where it was held as follows:

> '…. In the present case however no alternative inferences have been advanced which have a foundation in the evidence. It was suggested in argument that one or more of the appellants may have been absent, or may have been unwittingly caught up in the events. This, however, is no more than speculation, as there is no evidence to suggest that this is what occurred. In my view this is pre-eminently a case in which, had one or more of the appellants had an innocent explanation, they would have tendered it, and in my view their failure to do so must be weighed in the balance against them.'

[45] The above reasoning thus constitutes the methodology on how to determine if section 187(1)(d) would find application in a particular case and how the evidence must be considered and determined in order to arrive at such a conclusion. I will next consider what the provisions of '(i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act' as stipulated in Section 187(1)(d) actually mean.

[46] In the first instance, the Court has specifically held that the pursuance of grievances by employees do constitute the exercising of rights in terms of the LRA for the purposes of the application of Section 187(1)(d). In this matter, the applicant did raise a grievance and the fact that she raised this grievance and its outcome remained relevant throughout this matter. In addition, the proceedings in 2011 where the applicant assisted Jordaan with regard to her increase query can also be regarded as a grievance of sorts, irrespective of the debate whether there was actual compliance with the respondent's grievance procedure and these

[16] (1994) 15 ILJ 1057 (LAC) at 1064B – E; see also *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 38.

proceedings are then directly linked to her subsequent dismissal. Reference is made to *Mackay v ABSA Group and Another*[17] where it was held as follows:

> 'Therefore in keeping with the main object of the Act, ie of resolving all labour disputes effectively, and with the constitutionally guaranteed right to fair labour practices it must follow that a purposive interpretation of s 187 (1) would mean that the exercise of a right conferred by a private agreement binding on the employer and employee as well as participation in any proceeding provided for by such agreement was also contemplated in that section. As in casu, the participation by an employee in a privately agreed grievance procedure, must have been contemplated as a proceeding in terms of this Act, ie when s 187(1)(d) was enacted.'

[47] The Court in *De Klerk v Cape Union Mart International (Pty) Ltd*[18] followed the exact same approach as the Labour Court judgment in *Mackay* referred to above and concluded:

> 'In the absence of any finding to the contrary by the LAC, I consider the interpretation adopted by Mlambo J to be sufficiently persuasive not to prevent the applicant from pursuing her claim in those terms. The interpretation in *Mackay* appears to me to give effect to the constitutional values discussed in the quoted passage. I am not in a position to disagree with the learned judge's finding on the legal position.'

[48] The Court in *Jabari v Telkom SA (Pty) Ltd*[19] held that the dominant reason for the applicant's dismissal in that matter was predicated on the fact that the applicant initiated grievance proceedings against the respondent's management, challenging its unfair labour practices, and the Court then concluded as follows:

[17] (2000) 21 ILJ 2054 (LC) at para 18. I am aware that this judgment was subsequently overturned on appeal in the judgment of *Absa Bank Ltd and Another v Mackay* [2000] ZALAC 18 (CA 89/1999 22 August 2000), but the LAC overturned the appeal on the basis of a different conclusion on the facts and not on the principles of law referred to in the judgment of the Court a quo.
[18] (2012) 33 ILJ 2887 (LC) at para 37.
[19] (2006) 27 ILJ 1854 (LC) at 1869.

> 'The applicant had the constitutional and statutory right to initiate and pursue grievances against the respondent, as long as his actions were motivated by a bona fide belief that the respondent was subjecting him to unfair labour practices.
>
> In my view the reasons proffered by the respondent as the justification for the applicant's dismissal are not sustainable; the applicant was dismissed by the respondent in breach of s 187(1)(c) and (d) of the Act.'

[49] The Court in *Kroukam*[20] determined that where the reason for dismissal of the employee was based on the fact that the employee had instituted legal proceedings against the employer in terms of the LRA, this would be an automatic unfair dismissal was contemplated by Section 187(1)(d). The following extract from the judgment in *Kroukam* is applicable to the current matter as well:[21]

> 'What emerges quite clearly from Capt Foster's answer to the question is that one of the things he sought to do by making the presentation that he made to the appellant was to convey to the appellant his disapproval of the litigation and, in his words to 'discourage it'. In my view what Captain Foster was doing through making that presentation to the appellant was in effect to say to the appellant: You have hurt us very badly through this litigation. Now it is our turn!'

[50] In wish to make a final reference in this regard to the following dictum in the judgment of *Mutale v Lorcom Twenty Two CC*[22] where the Court said:

> '…. I find also that the applicant was indeed subjected to an automatically unfair dismissal after she had indicated to the respondent that she wanted to take action against it by exercising a right conferred by the Act. She had a right not to be unfairly discriminated against and had a right to refer an unfair labour practice dispute to a bargaining council for conciliation. The respondent realised what she

[20] (*supra*) footnote 8 at para 85.
[21] Id at para 67.
[22] (2009) 30 ILJ 634 (LC) at para 40.

wanted to do and attempted to frustrate her through trumped up charges of misconduct….'

[51] Therefore, if it is shown that the principal or dominant or even just an important reason for the dismissal of the applicant was that she pursued a grievance against the respondent or that she pursued proceedings in the CCMA to challenge the conduct of the respondent or that the respondent in effect victimised or harassed her for asserting the rights that she had in terms of the LRA and her employment contract, that would be an automatic unfair dismissal as contemplated by the section 187(1)(d) of the LRA. I will now turn to the facts of this matter in order to ascertain of this is indeed the case.

Application of the law to the facts of this matter

[52] I must state from the outset that the evidence of the two witnesses for the respondent, being Madondo and Van Vuuren, added nothing of real value to the determination of this matter. None of them could offer any evidence relating to or any insight into the events preceding the circumstances relating to the incitement charge being brought against the applicant. Van Vuuren had no prior knowledge of anything or any of the facts of this matter, and his sole function was to chair the disciplinary hearing. Madondo, on the other, could only testify as to her involvement in the meetings with the applicant and Jordaan about Jordaan's increase, and give general testimony about employment policies and practices (including those relating to increases) in the respondent. I need not per se assess and determine the credibility of Madondo or Jordaan for the purposes of the determination of this matter but I would like to say that I found the evidence of Van Vuuren particularly unsatisfactory, especially where it came to him trying to explain some of the findings that he came to in the disciplinary hearing considering the testimony placed before him. Madondo's evidence did not in effect contradict that of the applicant and was mostly her own views and opinions. I record, for the sake of completeness, that in the case of any conflict

between the evidence of the applicant and the witnesses for the respondent, I accept the applicant's evidence.

[53] Turning then to the facts of this matter, which I have summarised above, these facts simply do not paint a pretty picture. The picture is in fact one that causes disbelief as to how a faithful and loyal employee, who excelled in her work, and who had some 16 years' service with the respondent could be treated in the manner that she was. This kind of conduct by employers, which unfortunately do occur, is precisely the reason why it necessary to build into the LRA the protection afforded by Section 187. Borrowing from the judgment in *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland,*[23] which dealt with an automatic unfair dismissal as contemplated by Section 187(1)(f), I consider the following words to be apposite as to how the applicant was treated by the respondent in the current matter: '…. The conduct of appellant clearly constituted an egregious attack on the dignity of respondent' with the reference to appellant in this judgment being apposite to the current respondent in the case before me.

[54] The starting point for me making the statements as set out above must be that prior to the incident of the corporate communication manager's position which arose in April/May 2010, there is simply no evidence or indication of any difficulty in the relationship between the applicant and the management of the respondent. Far from it, the evidence is that she was a valued employee who had progressed through the ranks and who had always properly discharged her duties. In fact, and on the evidence, which included the grievance outcome given by Malivha, the applicant was actually offered the corporate communications manager's position when it became vacant. She never asked for it and this must surely confirm her value and position in the respondent. The aforesaid being the case, the next logical question then simply is – what then changed?

[23] (2009) 30 ILJ 2875 (LAC) at para 26.

[55] What the evidence shows is that only one thing changed. It was the attitude of Smith and with him being the general manager, this is significant. This attitude change was brought about because he was for the first time challenged by the applicant, who stood up for what she believed was right. To make it even worse and considering the documentary evidence, this challenge by the applicant was not even hostile or aggressive or disrespectful. All she did was to record what had happened with regard to her having been promised and her having accepted the corporate communications manager's position and asking why this position was being advertised? What could possibly be wrong in doing this? It is, however, clear that this act by the applicant was considered by Smith to be a challenge which spurred him into action, which included him actually in effect denying that he offered the position to the applicant.

[56] The applicant was clearly not going to resolve the issue directly with Smith. She then did the next logical thing that she was in any event entitled to do in terms of the LRA and that is to lodge a grievance. It is significant that this grievance outcome actually to a large extent confirmed the applicant's version of events as true and accepted that she was actually offered the position. The only reason why Malivha did not conclude that the position belonged to the applicant is because of what he found to be the uncompleted job specification. Malivha did direct that the applicant be interviewed for the position. The applicant was, however, still not satisfied with the grievance outcome and, which was her right to do, wanted to pursue the matter further. She was then actually told by the respondent to take the matter to the CCMA, which she did, and which, once again, was her right to do.

[57] The above situation then clearly infuriated Smith further. His retribution dished out to the applicant was swift and extensive. He demoted her, demanded that she change her title on the company communications sent out by her and stripped her of her status as manager and most of her responsibilities and duties.

He victimised and harassed her to such an extent that she had a break down and had to receive treatment and was booked off work.

[58] Once the unfair labour practice proceedings referred to the CCMA by the applicant then commenced, the situation became worse. The respondent, with Smith firmly at the helm, refused to accept her sick notes and in effect accused her of fabricating her illness. The applicant tried to resolve this issue by getting her medical practitioners involved and submitting reports. Smith remained steadfast in what entirely unacceptable and unjustified conduct in rejecting the applicant's sick notes. When the applicant attended at the CCMA for conciliation at which Smith was present, he wanted to discipline her for AWOL because she was not at work and did not apply for leave, despite HR's advice to the contrary. This kind of behaviour by a general manager, in itself, leaves one with a particularly bad taste in the mouth.

[59] The above conduct, as manifestly unacceptable as it is, was not the end of it. Following the conciliation proceedings at the CCMA and despite the discussion there by law being privileged and being conducted in the context of formal proceedings in terms of the LRA, Smith then wanted to discipline the applicant for what she said in conciliation. He accused her of being dishonest and bringing the company name into disrepute. It may also be pointed out that this accusation was based on what the applicant discussed as being part of her case referred to the CCMA and which she contended to be unfair conduct. In effect, Smith wanted to discipline the applicant for raising part of the case that she intended to raise at the CCMA. If this conduct does not fly directly in the face of the clear objectives of the LRA, it will be difficult to comprehend what would. The applicant, however, tried to defuse the situation. She got her union representative to become involved and communicate with Smith to bring him to other insights. This clearly infuriated him even more and he proceeded to serve a charge sheet on the applicant for alleged misconduct (gloating while he did so) on these very issues and despite

the immanent arbitration at the CCMA which would involve these very issues. All of this, understandably so, became too much for the applicant and she had the break down referred to above.

[60] In the arbitration proceedings at the CCMA which took place at the end of August 2010, at which Smith was present, he did not even take the effort to testify. This must surely confirm his entirely unacceptable attitude with regard to what was a legitimate dispute. The fact of the matter is then that the applicant won her case. It was found that she had been unlawfully demoted by Smith and it was directed that the status quo ante be restored. It was also found that she was actually offered the promotion to corporate communications manager and she had accepted it, and should thus have been promoted. Smith's reaction to this was to apply to the Labour Court for review of the award and he gloated when doing so to the effect that the applicant had not won yet.

[61] Significantly, the respondent's review application of the CCMA arbitration award did not include a challenge of that part of the award that found that the applicant had been demoted and directed that she be restored to her position as stakeholder relationship manager. This means that the respondent was compelled to comply with this award at least in this respect. The evidence shows that Smith simply ignored this part of the award in any event. He never restored the applicant into her manager's position as required. He actually removed her management responsibilities and status, the details of which have been set out above. To add insult to injury, where it came to bonuses, the applicant was not paid the management bonus she was entitled to but received a bonus based on her demoted position. In addition, her 2011 increase was also firmly based on her demoted position. This must surely illustrate the absolute disrespect and contempt Smith had for the rights of the applicant in terms of an arbitration award that he was, in fact, obliged to comply with and the provisions of the LRA.

[62] The final chapter in this whole sorry saga then came when the applicant came to

the assistance of her fellow employee Jordaan, which assistance Jordaan initiated and requested from the applicant of her own accord. The fact is that Jordaan also received a poor increase and, in my view, there is very little doubt that the reason for this was because she had testified for the applicant in the CCMA proceedings. If one strips away all the posturing and elaboration presented in this case by the respondent, all that Jordaan in effect wanted the applicant to do was to help her making enquiries about her increase. That is then actually all that happened. There were meetings held with HR in which it was, *inter alia*, asked if the poor increase of Jordaan was because she testified for the applicant in the CCMA. Much was made of the issue whether it was the applicant or Jordaan that initiated this CCMA testifying query but, in my view, it is simply not important and of no consequence if it was Jordaan or the applicant that initiated this query. It was always a legitimate query, which was entitled to be made, and deserved an answer. The reaction to it is entirely unfounded and unjustified.

[63] In fact, the reaction of Smith to this defies comprehension. He charges the applicant for inciting Jordaan. I am left with the distinct impression that Smith does not even know what 'incite' means. I do not propose to delve into the meaning of 'incite'. What is clear is that no matter how one chooses to define 'incite', what the applicant did in this matter cannot by the most generous stretch of the imagination be considered to be incitement. The respondent's own case, as it stands, and as it appears from the transcript of the disciplinary proceedings, cannot possibly support such a conclusion. The applicant, in the end, simply did not incite anyone. She was asked to assist with a query, and assisted. The charge of incitement was fabricated and formulated by Smith, the charge sheet was completed by Smith himself, and handed to the applicant by him, with some gloating.

[64] The disciplinary hearing was then held. To call it a farce is generous. The

respondent calls Jordaan to the hearing to testify on its behalf. Jordaan completely contradicts the case the complainant was trying to present. The other witnesses fare no better. The applicant's version in the disciplinary hearing was in essence unchallenged. Again, Smith does not even testify in the hearing but yet documentary evidence is produced that could only have come from him. The most shocking part of all of this, however, comes after the chairperson had found the applicant guilty of the charge (how this could have done in the first place is beyond comprehension) and the issue of an appropriate sanction needed to be addressed. The only witness for the respondent that testifies is the applicant's immediate manager who promptly describes the applicant as an excellent employee who can be trusted and with whom the manager has no difficulty. The chairperson responds to this by saying that this evidence is so bad that the applicant must be dismissed. The least said about this the better and this reasoning is clearly nonsensical and ludicrous. The cherry on the top, however, comes when the chairperson comes and gives a subsequent written finding in which he concludes that the trust relationship with Smith is broken down. Where the chairperson gets this from is unknown as Smith did not in any way participate in the disciplinary proceedings.

[65] The upshot of the above is that there never was any substance in any allegation of misconduct on the part of the applicant. There is no case made out that any such misconduct existed. I have no doubt that the charge against the applicant was fabricated by Smith as a final chapter in his campaign of harassment and victimisation of the applicant for challenging him and pursuing her rights, in order to finally get rid of her. I also have no doubt that the outcome of the hearing was pre-determined on the basis that the applicant would be dismissed, come what may. To 'seal the deal', in this respect, the uncontested evidence of Jordaan was that when the applicant was dismissed, Smith celebrated with a lunch with his colleagues. I find this entire state of affairs, especially in the modern age of industrial relations and the principles enshrined by the LRA and our Constitution,

to be despicable.

[66] I intend to conclude with some references to the case law when dealing with similar kind of matters. A comparative case is the judgment of *Sekgobela v State Information Technology Agency (Pty) Ltd*[24] where the Court dealt with an automatic unfair dismissal pursuant to a protected disclosure, and the following extract from this judgment is in my view apposite:

> 'At the outset it should again be pointed out that the respondent elected not to give any evidence. Only the version of the applicant was before the court. . . . . There is, therefore, no evidence before this court that the chairperson of the hearing even heard evidence in respect of the charges or that he even considered the merits of the charges brought against the applicant. Apart from the charge-sheet and the letter informing the applicant of his dismissal, no evidence whatsoever was presented to this court in respect of the merits of any of the charges against the applicant. Even if the chairperson did hear evidence (of which there is no evidence), there is no evidence before this court as to what role the disclosure charge had played in coming to the conclusion that the applicant was guilty as charged. It should also be pointed out that the applicant was not seriously cross-examined on the allegation that his dismissal was motivated by the fact that he had made a protected disclosure and not for misconduct. In fact, his evidence was clear: The respondent is lying if it says that other reasons played a role in dismissing him. In the light of the aforegoing and especially in the light of the complete absence of any evidence that might cast doubt on the applicant's clear evidence that the true reason for his dismissal was the fact that he had made a protected disclosure, I am therefore satisfied that the applicant was dismissed for an impermissible reason and that that likely formed the principal or primary reason for his dismissal.'

[67] I next refer again to the judgment in *New Way Motor and Diesel*.[25] The Court held

[24] (2008) 29 ILJ 1995 (LC) at para 32.
[25] *New Way Motor and Diesel* (*supra*).

as follows, which in my view can equally be applied to the current matter:[26]

> '…. The evidence which must thus be accepted is that, prior to December 2001, no problem had been encountered by respondent in his work relationships with any member of appellant, including its managing director Mr Freed. By contrast, shortly after his return to work in February 2002 the entire working relationship had radically altered and he was subjected to the disgraceful treatment described earlier in this judgment.'
>
> 'Expressed differently, the question can be posed thus: did the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent? See for the source of this approach, *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC); *Hoffmann v SA Airways* 2001 (1) SA 1 (CC); (2000) 21 ILJ 2357 (CC). In my view, the question must be answered affirmatively.'

[68] The judgment in *Harding v Petzetakis Africa (Pty) Ltd*[27] also dealt with unacceptable and arbitrary conduct by an employer and the Court said the following:

> 'Taking into account the express nature of the instructions in the e-mails from Petzetakis to comply with his orders summarily to dismiss the two employees in question, and the relentless calls made by Razis pressurizing the applicant to comply and warning her that it was 'a test' that would cost her job if she failed it, it is very hard to avoid the conclusion that it was the applicant's failure to implement these two instructions which in fact actuated the respondent's decision to dismiss her. Everything points to the respondent having drawn a line in the sand at that juncture that would decide the continuation of the applicant's employment relationship. It may have been so that if it had not done this it might have

[26] Id at paras 23 and 25–26.
[27] (2012) 33 ILJ 876 (LC) at paras 80–81.

eventually proceeded to dismiss the employee on the grounds it subsequently relied on, but the fact remains that even if it was losing confidence in her, her response to the two instructions at that stage was a decisive factor in determining her fate. The employer's actions after she would not back down confirm this.'

'However, in this case, because I believe it is clear on the evidence that the employer has failed to displace the strong prima facie case that the principal reason for the employee's dismissal at the time was her refusal summarily to dismiss the two employees without a hearing, it does not assist it to try to persuade the court that it did have grounds to fairly dismiss the applicant on the basis of poor performance or misconduct, on the standards adopted in the Bateman case. There was no evidence tendered by the respondent which could explain away the natural inferences to be drawn from the conduct of its senior office-bearers after the instruction to dismiss Herbst was issued, which could demonstrate that its actions were in fact founded on an assessment of the applicant's performance over the course of a number of years. It was best placed to substantiate what lay behind its actions in the fortnight leading to the applicant's dismissal, but it chose not to do so. In the light of the evidence of the respondent's actions over the fortnight leading to the applicant's dismissal, the respondent's unwillingness to expose its own reasoning at the time to scrutiny substantially weakens its attempt to persuade the court that it probably did dismiss the applicant for a permissible reason which it only articulated some months later.

The applicant made out a strong prima facie case that what was at stake at the critical time when the decision to dismiss her was taken, was her unquestioning obedience to the dictates of the CEO to the point of implementing an instruction which required her to do something unlawful. The respondent has failed to address this issue directly and the evidence for a performance based, or similar legitimate reason for the dismissal, does not answer the applicant's case.'

In my view, the above ratio could just as well have described the conduct of Smith. He acted unlawfully in not giving the applicant her promotion they had

agreed on. When she just did not want to back down and accept this, he victimised her, harassed her, and demoted her. He threatened to discipline her, refused to accept legitimate sick notes and actually instituted disciplinary proceedings for what is part of the CCMA case she brought. He refused to comply with the CCMA award that went against him. He stripped the applicant of her duties and responsibilities and prejudiced her with regard to her bonus and increase. The line in the sand, so to speak, came when the applicant came out to assist Jordaan with regard to her poor increase which she received after testifying for the applicant in the CCMA. It is clear that Smith then had enough of the applicant. All of this must be seen in the context that Smith did not even testify in the CCMA or the disciplinary hearing to explain himself and, worst still, did not testify in this Court as well.

[69] The judgment in *Kroukam,*[28] as I have said above, specifically dealt with section 187(1)(d). In my view, the following extracts from this judgment is pertinent, pursuant to which findings the Court accepted that an automatic unfair dismissal as contemplated by Section 187(1)(d) existed:[29]

> 'It seems to me that, by 12 April 2001 the respondent's management had had enough of the appellant and wanted him out of the company. They were fed up with him because, as far as management was concerned, he had expressed a vote of no confidence in some members of the management, had called for the resignation of some of the members of the management, had, on behalf of the union, instituted litigation that had compromised certain plans of the respondent and litigation which could have resulted in the arrest and detention of some members of the senior management of the respondent, had been 'aggressive' towards management and was challenging all the decisions that management were seeking to make in the interests of the respondent.
>
> A consideration of all of the evidence I have referred to above leads me to the

[28] (*supra*) footnote 8
[29] Id at paras 84 – 85

conclusion that at least some of the reasons why the appellant was dismissed were that as far as the respondent's management was concerned he had –

(a) challenged and questioned too many of the decisions made by the respondent's management;

(b) called for the resignation of certain personnel of the respondent;

(c) expressed a vote of no confidence in certain members of the respondent's management; and

(d) played a key role in the bringing of a contempt of court application against the respondent and, among others, the respondent's chief executive officer.'

[70] The conduct of Smith is in fact analogous to the following extract from the judgment in *Cosme v Polisak (Pty) Ltd*[30] where the Court said:

'….The dismissal in this matter happened in the context where the applicant had challenged the conduct of the managing director who it would appear had the habit of treating employees as sub-human beings by screaming, shouting and using inappropriate language when speaking to them. The applicant had enough of his abuse and took the firm and brave stand of asserting his dignity and the right to be treated with respect by his employer. He demanded an apology from his employer which was clearly not unconditionally given because, in retaliation thereto, the applicant's status as a supervisor changed. Another person was made responsible for those employees who used to report to the applicant. The employee made matters worse for himself by questioning his authority and it was for this reason that he had to find a way of getting rid of him.'

[71] Based on all of the above, I have no hesitation in concluding that the dismissal of the applicant by the respondent was an automatic unfair dismissal as contemplated by Section 187(1)(d). It is clear that the dominant reason for the

[30] (2010) 31 ILJ 1861 (LC) at para 38.

applicant's dismissal was because she had asserted the rights she had in terms of the LRA and her contract of employment. It is, in my view, clear that if she did not take issue with Smith's unlawful conduct with regard to her promotion, none of what happened to her would have happened. The fact that the applicant did not want to let the matter be and actually used the rights bestowed on her by the LRA to pursue the matter further only infuriated Smith and intensified his unlawful conduct against the applicant. The final straw came when the applicant assisted a fellow employee in questioning what was once again an unlawful conduct on the part of Smith in respect of the increase given to such fellow employee. Smith then fabricated a change against her, a sham hearing was conducted, and she was dismissed. The fact that the applicant was entirely justified in pursuing her rights is then finally confirmed by the fact that she was successful both in the CCMA and the Labour Court in respect of her unfair labour practice dispute.

The issue of relief

[72] The applicant, in this matter, does not seek reinstatement but seeks compensation. I am mindful of the fact that where it comes to the award of compensation, this Court must exercise a judicial discretion. I accept that the normal situation when deciding on compensation is properly enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others,*[31] as thus*:*

> 'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part

[31] (2007) 28 *ILJ* 2238 (LAC) at para 30. See also *Mohlakoane v CCMA and Others* (2010) 31 *ILJ* 2688 (LC); *SA Post Office Ltd v Jansen Van Vuuren NO and Others* (2008) 29 ILJ 2793 (LC); *Metalogik Engineering and Manufacturing CC v Fernandes and Others* (2002) 23 ILJ 1592 (LC): *Rope Constructions Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2002) 23 ILJ 157 (LC); *H M Liebowitz (Pty) Ltd t/a the Auto Industrial Centre Group of Companies v Fernandes* (2002) 23 ILJ 278 (LAC); *Ensign Brickford SA (Pty) Ltd v Shongwe NO and Others* (2001) 22 ILJ 146 (LC).

of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[72] The above being said, the fact of the matter is that the dismissal of the applicant in this instance was automatically unfair. As the Court said in the judgment of *Mutale,*[32] under similar circumstances, that 'the conduct of the respondent calls for a high sanction.'

[73] In the case of compensation awards for automatic unfair dismissals, the compensation cap is double that of other unfair dismissals, being a maximum of 24 months' remuneration instead of 12 months' remuneration.[33] This confirms that from a statutory perspective, automatic unfair dismissals are seen in a much more serious light and have a punitive component.

[74] Considering the fact that an automatic unfair dismissal is in actual fact arbitrary and prohibited conduct by an employer, *per se*, it has to carry with it a punitive element where compensation is considered. As was said in *Naude v Member of the Executive Council, Department of Health, Mpumalanga*[34] that 'generally, compensation is not a punitive measure, however… in cases of automatically unfair dismissals, a punitive element comes to the fore.' The Court in *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium 2000 CC*[35] authoritatively dealt with this issue. The Court specifically dealt with the issue of the award of compensation in the case of an automatic unfair dismissal in terms of section 187 and said the following:[36]

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[32] *Mutale* (*supra*) at para 40
[33] See Section 194(1) and (3)
[34] (2009) 30 ILJ 910 (LC) at para 113. See also *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2011) 32 ILJ 1637 (LC) at para 77; *University of South Africa v Reynhardt* (2010) 31 ILJ 2368 (LAC) at para 14 and the Court a quo judgment in *Reynhardt v University of South Africa* (2008) 29 ILJ 725 (LC) at para 145; *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 ILJ 1564 (LC) at paras 81–82.
[35] (2002) 23 ILJ 695 (LAC).
[36] Id at paras 48–49. The Court at para 50 also set out some of the factors that have to be considered in

> 'The reasons listed in s 187(1)*(a)-(f)* include dismissals motivated by unfair discrimination against an employee directly or indirectly, on any arbitrary ground, including, race, gender, sex, colour, conscience, belief, political opinion, and others. A dismissal of an employee for any one of those reasons strikes at the essence of the values which form the foundations of our new democratic society as enunciated in the Constitution. It is a dismissal that undermines the fundamental values that the labour relations community in our country depends on to regulate its very existence. Accordingly such a dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected.
>
> In considering whether or not to award compensation in such a case, the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must also take into account the fact that such a dismissal is viewed as the most egregious under the Act. Accordingly, there must be a punitive element in the consideration of compensation.'

[75] It must be considered that when this matter came before me, the respondent's review application in which it challenged the CCMA award pursuant to which the applicant was promoted to the position of corporate communication manager with effect from 16 September 2010 had been dismissed, which means that such CCMA award stands and is valid and binding. This means, as a matter of legal entitlement, the applicant's remuneration as at the date of her dismissal on 18 July 2011 has to be that payable to a corporate communications manager. What the applicant did in presenting her evidence was to discover the last pay slip of Molete, the corporate communications manager that resigned in January 2010 and whose position the applicant was to fill. According to this pay slip, Molete was earning a monthly remuneration of R41 298.65, being the total of a basic

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exercising the discretion in determining the quantum of compensation.

salary of R29 151.40 plus a non pension allowance of R768.74 plus a travel allowance of R11 378.51. The respondent had the opportunity to contradict this evidence. Madondo, who testified and who was in the HR department, could have produced evidence as to what the respondent in fact would pay a corporate communication manager if it differed from the aforesaid and she could have testified about it. This issue was specifically raised by the applicant in her evidence, as stated, which she presented before Madondo testified and she was challenged on it under cross examination. Yet, despite this and when it came to presenting its case, the respondent said nothing about this. The respondent thus had ample opportunity to contradict this evidence and did not. I will, therefore, accept that the applicant's compensation award must be determined on the basis of a corporate communications manager's remuneration of R41 298.65 per month.

[76] The applicant also led evidence as to what she did after she was dismissed by the respondent. She testified that she was unemployed for four months and in her current occupation she was receiving a net sum of about R17 000,00 per month. This needs to be considered as well in determining appropriate compensation.

[77] It must always be considered that even in terms of section 194(3), compensation must be 'just and equitable in all the circumstances'. In order to come to a fair and equitable determination on the issue of the appropriate amount in compensation, I consider the following: (1) The applicant had 16 years' service with the respondent; (2) the respondent had no cause or justification of any kind to dismiss the applicant; (3) the conduct of Smith towards the applicant was particularly unacceptable and exhibited mala fides; (4) the respondent did not even call Smith to give evidence to try and explain himself; (5) the respondent, in essence, showed contempt for the CCMA award in not restoring the *status quo* when the applicant's demotion was reversed; (6) The applicant's performance

with the respondent had always been satisfactory and there was issue with her at work until the issue in this matter arose; (6) a clear message must be sent to employers that this kind of conduct cannot be tolerated; (7) the applicant was only unemployed for four months and is currently gainfully employed, albeit at a lesser salary; and (8) at least the respondent did not seek to try and justify Smith's behaviour. Applying these considerations, and applying a general sense of fairness, it is my view that an award of 12 months' salary in compensation in favour of the applicant is appropriate.

[78] The compensation thus payable to the applicant as a result of her automatic unfair dismissal by the respondent is a sum of R495 583.80, being remuneration calculated at the rate of R41 298.65 per month for a period of 12 months.

[79] As to costs, it must be considered that the applicant was successful in showing an automatic unfair dismissal to exist. The applicant has asked for punitive costs but I can see no reason for this to be awarded. The litigation was properly conducted by both parties in this matter and I cannot find any *mala fides* on the part of the respondent in seeking to defend itself in the manner that it did. I do consider it appropriate that a costs order be made against the respondent but this would be on the normal party and party scale in opposed trial proceedings.

Order

[80] For all of the reasons as set out above, I make the following order:

1. It is declared that the applicant's dismissal by the respondent constitutes an automatic unfair dismissal as contemplated by Section 187(1)(d) of the LRA.

2. The respondent is ordered to pay compensation to the applicant in an amount of R495 583.80, which amount shall be paid to the applicant by the respondent within 10(ten) days of date of handing down of this

judgment.

3. The respondent is ordered to pay the costs of the matter.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Mr J D Crawford of Crawford and Associates Attorneys

For the Respondent: Ms S Zilwa of Makaula Zilwa Inc Attorneys