IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS557/12

In the matter between:

S Z NDZUTA **Applicant**

and

SOUTH AFRICAN POLICE SERVICES **First Respondent**

MINISTER OF POLICE **Second Respondent**

Heard: **23 February 2016 to 4 March 2016**

Delivered: **23 February 2017**

Summary: Employee alleging unfair discrimination and occupational detriments as reasons for his dismissal – evidence showing that employee's allegation unfounded and based on hearsay – employee failing to prove that he suffered either occupational detriment or unfair discrimination. Evidence proving that employee unhappy to be managed by people less qualified than him. Employee failing to establish a causal link between the alleged disclosure and his dismissal. Employee's claim dismissed.

JUDGMENT

MAHOSI AJ

[1] The applicant seeks an order to the effect that his dismissal be declared automatically unfair on account of discrimination and occupational detriments for having made some protected disclosures in terms of the Protected Disclosures Act (PDA).[1]

[2] This matter was heard from the 23rd of February 2016 until the 4th of March 2016. At the end of the trial, both parties requested to have the record transcribed and also to submit written heads of argument which request was granted. The transcribed record was filed on the 28th of June 2016 and the parties had until the 22nd of July 2016 to file the heads of argument. An application for the extension of time to file the heads of arguments was made by both parties and they were given until the 28th of August 2016. The parties failed to meet the deadline for the submission of the heads of argument. On the 4th of September 2016, Mr Nzuta filed his heads of arguments and informed the Court that he has since relieved his legal representatives from their responsibilities to represent him. This judgment was made without the written arguments from the respondent.

Background facts

[3] The salient feature of this matter may be summed thus. The respondent employed the applicant as a Colonel in its Forensic Science Laboratory in Pretoria.

[4] It is common cause that the respondent, without pay, suspended the applicant for misconduct. When the respondent lifted the suspension, it charged the applicant for contravening the South African Police Discipline Regulations by (i) failing to report for duty on 16 and 17 August 2010; (ii) conducting himself in an improper, disgraceful and unacceptable manner toward his commander and (iii) displaying disrespect toward his superior in that he told him to "voetsek" from his yard and that he was a sell-out who was going to destroy him. A disciplinary hearing was held at which, the applicant was found guilty as charged. The chairperson recommended his dismissal. The applicant then

[1] Act 26 of 2000.

lodged an internal appeal, which was dismissed. This prompted the applicant to lodge the current dispute.

[5] At the beginning of the proceedings, the respondent raised some preliminary questions, which the court had to consider.

Preliminary issues

[6] The first issue raised was a special plea of *lis pendens* in that there was a pending application filed by the applicant in June 2012. To this effect, the respondent contended that the relief sought by the applicant was similar to the one under consideration. The respondent then submitted that the current matter be dismissed with costs. In considering the plea, I found that this Court *per* Molahlehi J struck the applicant's application off the roll and directed that the applicant serves the statement of case. Having made the above findings, I then considered the requirements for the granting of a plea of *lis pendens* namely pending litigation between the same parties or their privies based on the same course of action and in respect of the same subject matter. The special plea of *lis pendens* was consequently dismissed because the first requirement of pending litigation was not met.

[7] The second point raised by the respondent was in relation to the lack of jurisdiction of this Court. The respondent contended so goes the argument that because the applicant argued that the respondent had committed an unfair labour practice by failing to pay his outstanding salary, his matter should be referred to the bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA). Further, that prior to these proceedings, the applicant referred an unfair dismissal dispute to the Safety Services Sectoral Bargaining Council (SSSBC), which was conciliated, and he failed to review the conciliation ruling. The respondent then argued that the applicant had failed to exhaust all remedies provided for in the Labour Relations Act 66 of 1995 (LRA).

[8] The court ruled that because the pre-trial conference minutes did not disclose a set of facts that would have enabled it to determine whether an automatically unfair dismissal took place, it decided to hear the merit. It relied

on the judgment of *Booysen v NUMSA* unreported Labour Appeal Court Case no: JA13/13 delivered on 13 May 2014 to the effect that:

> 'Because the existence of an alleged automatically unfair dismissal is a jurisdictional prerequisite to the Labour Court hearing a trial, it must logically follow that it is incumbent on a court to enquire into whether such a case has indeed been articulated for its adjudication, whether that question is raised by the litigants or not. This enquiry is not to be confused with an enquiry into the contested merits of the allegations and counter-allegations, which is the purpose of the trial itself.
>
> If a proper interpretation of the pleadings and any common cause facts put before the court demonstrates the absence of a set of circumstances that can support a conclusion that a dismissal took place that was automatically unfair then the court lacks jurisdiction and ought to refuse to hear the matter.'

[9] Having made a ruling that the merits of the matter be heard in order to determine whether an automatically unfair dismissal occurred, parties led evidence through their respective witnesses to which I now turn.

Evidence of parties

[10] Two witnesses led evidence for the applicant and the other two witnesses led evidence for the respondent. I should mention that the testimonies of the respective parties would be limited to facts relevant to the automatically unfair dismissal claim (discrimination and occupational detriment).

Applicant's witnesses

Col Ndzuta's testimony

[11] The applicant testified that he holds a BSc degree and MSc degree from Fort Hare University (in chemistry). He started working for the South African Police Services from the 1st of January 2005 at a rank of Colonel as a Control Forensic Analyst. He said that his duty in that position was to analyse exhibits, which were used as evidence in criminal cases. He further testified that he was later transferred to the Questioned Documents Unit with a mandate to set

up a new subsection, Scientific Chemical Analysis, that deals with chemical analysis of questioned documents.

[12] The applicant testified that the reason for his transfer to the Questioned Documents Unit was that he made some protected disclosures. He said that when he was appointed in January 2005, he was reporting to Brigadier de Klerk who had a diploma in Chemistry. The applicant further said that he was the only Black amongst Whites and was subjected to racial abuse, victimisation and harassment by his superior. He then lodged some grievances outcomes of which favoured him. Concerning the occupational detriment, he said that he wrote to the then Minister of Safety and Security, Mr. Charles Nqakula, and the respondent's top management around July 2005 about corruption in the appointment process.

[13] He testified that on a Friday, prior to the interview that was scheduled for the following Monday, he saw one of his colleagues with three White females in the laboratory. On the day of the interview, he saw the same women again. They were there to attend an interview. He testified that they were the top performers in the said interview and were all recommended for appointment. He further testified that he formed the view that they might have been tipped about the test, hence they performed well. Furthermore, he testified that although he did recommend them for appointment, he made additional notes to the Minister about what transpired prior to the interview. He also said that they were not appointed as a result and the Minister requested an investigation. He did not, however, know the outcome of the investigation save to say that they were not appointed.

[14] The applicant further recalled that he was victimised and harassed because of his letter to the Minister. He testified that the position of Head of Forensic Sciences Laboratory was advertised and her immediate superior, Brigadier de Klerk applied and was recommended by Division Commander du Toit. However, the then National Commissioner Selebi declined to appoint her but in her stead, appointed Major General Ngokha. The applicant testified that Brigadier de Klerk vented her anger at him accusing him of being the reason why she was not appointed. He further testified that he was poorly appraised,

scored at 1 or 2 out of 5. He said he was however not charged for incompetence. This led to the deterioration of their relationship which gave rise to more with verbal abuse (calling him incompetent) and disruption of his work, the applicant alleged. He testified that most of the hostility was because he joined the police service from the top and did not start from the bottom to the top. This, in his view, was because in the police service the employees that did not start from the bottom are seen as outsider or intruders. Hence, the derogatory remarks by Brigadier de Klerk that he was "not suited for this environment, this is not [your environment]".

[15] Concerning the transfer to the Questioned Documents Unit, the applicant testified that he was transferred simultaneously with Brigadier Tommy Mothoa as the Head of the unit. He said that Brigadier Mothoa was from the Criminal Record Centre with no chemistry background. He further testified that Brigadier Mothoa said at the first meeting that he was transferred to get rid of certain members. Furthermore, he testified that Brigadier Mothoa was in a mission to sabotage his work to set up the unit he was in charge of. To this effect, he said that he had six new recruits in his unit that he had to train. He then secured an expert from Germany to conduct some training. Approval was given months in advance. He testified that notwithstanding the approval, one of his trainees was required to attend physical training on the same period as his operational training; he pleaded to no avail with Brigadier Mothoa and unsuccessfully sought help from Major General Ngokha.

[16] The applicant also cited an incident where Brigadier Mothoa instructed an untrained and uncertified staff to handle exhibit, which led to the destruction of evidence. He testified that in terms of the quality manual, only certified analysts carry out manual forensic analysis. He also testified that Brigadier Mothoa confiscated a set of keys and case files thereby disrupting the smooth running of his unit. He also accused Brigadier Mothoa of destroying evidence and sending Colonel Mathebula to confiscate some files.

[17] Because of these interferences, the applicant testified that he laid some grievances against Brigadier Mothoa and suggested that disciplinary step be taken against him because his action amounted to defeating the ends of

justice. He further testified that there was no outcome to his grievances despite numerous follow-ups via e-mails and telephone calls. Further that the situation even worsened with Brigadier Mothoa continuing with the disruption of his services with secret meetings with his staff without his knowledge. The applicant then testified that he was frustrated, helpless and devastated in that he had no recourse because neither of the hierarchy would take his grievances into consideration.

[18] Concerning his suspension, the applicant testified that he received the notice of intention to suspend him on 12 August 2010. Lieutenant Colonel Mampane who replaced Lieutenant Colonel Du Toit a few days before, had penned the said notice. He duly made representation as to why he should not be suspended but was eventually suspended. He testified that he was subjected to unpaid suspension before the last one and had to have his suspension lifted through the Labour Court. He testified that he was suspended on 16 August 2010 with effect from 24 August 2010 and that the Labour Court lifted this last suspension on 14 December 2011. Further, that while of suspension for more than a year he was never charged but was only charged upon returning to work. In any event, he said that his suspension without pay did not meet the requirements provided in the Regulation. He then submitted that he was being harassed and victimised. He testified that upon his return to work in January 2012; he was transferred under duress to the Criminal Record Centre with no work to do. He was later charged with issues that took placed some 17 months before which led to his dismissal.

[19] On the first charge of being absent from work, the applicant testified that he was at work but did not attend the meeting that morning because he was making representation about the notice to suspend him. He said that an e-mail sent to the secretary bears testimony that he was at work. Further that the attendance register of the meeting cannot evince his absence from work as some colleagues were also absent from the meeting. On the charge 2 for being disrespectful to his superior, he testified that he did ask “who closed the door” because Lieutenant Colonel Du Toit closed the door when she came in with Brigadier Mothoa knowing that the door needs an access card to be

opened. He was in fact annoyed by the presence of Lieutenant Colonel Du Toit to discuss a matter of performance, which is a subsection matter. Concerning charge 3, the applicant denied uttering the words “voetsek” when Brigadier Mothoa and Lieutenant Colonel Du Toit visited his home. He said that he asked them to leave and that they were not welcome. In any event, he submits that the words “voetsek” means get away quickly and no derogative meaning should be ascribed to it.

[20] Under cross-examination, the applicant conceded that there was no court order to uplift his first suspension but submitted that General Phahlane uplifted it after seeing the court papers. About the charges, the applicant conceded that he was not charged for the first time after been suspended in August 2010. In fact, the disciplinary hearing was held on 28 March 2011.

[21] The applicant was at pains to concede that his complaint about corruption relating to recruitment, a matter that he reported to the Minister, was based on assumption. He denied that he made an inference that Dixon gave the White women questions paper before the interview, which led to them doing “exceptionally well”. In fact, the respondent’s representative put to him that Ms. Shisuba who scored 59 did well than the ladies. On the issue on whether the complaint to the Minister amounted to a protected disclosure, particularly that the non-appointment of Brigadier de Klerk was due to his complaint to the Minister, the applicant conceded with the respondent’s representative that that information was based on hearsay as the applicant did not see the recommendation of the interview panel.

[22] With regard to the issue of victimisation by Brigadier de Klerk and his subsequent transfer to the Questioned Documents unit, the applicant conceded that there was an agreement for his transfer and that at no stage did he raise victimisation. The respondent’s representative put it to the applicant that his transfer was one of the solutions by the commissioner who found that the applicant and Brigadier de Klerk had a clash of personalities, which affected the operation of the respondent. Concerning his complaint against Brigadier Mothoa, the applicant also conceded that he was not transferred simultaneously with him but was transferred some few weeks prior

to Brigadier Mothoa's transfer. He also agreed that his belief, that Brigadier Mothoa's statement that he was there to get rid of some people was referring to him, was based on assumption. In respect of the complaint about Brigadier Mothoa's interference in his job, the applicant conceded that he had issues reporting to someone who was clueless about the applicant's scope and work.

[23] Moreover, the applicant did not want him to attend the training because he lacked the competencies and the skills and further because "it will detract my members from their focus since now they have to accommodate a manager who is only there to bask in the sun". He also conceded that Brigadier Mothoa gave him good marks for his performance appraisal. The applicant conceded that he did not agree with Brigadier Mothoa's managerial style and viewed it as victimisation against him. The respondent's representative put to the applicant that most of alleged victimisation or conspiracy is based on assumptions: non-allocation of posts to his unit; his being accused of sexual harassment; Brigadier Mothoa forgetting the memory stick when he was to do a presentation in Bloemfontein; and holding secret meetings with the applicant's subordinates. Moreover, the complaint that Brigadier Mothoa did not allow his official to attend a training was untrue because there was a withdrawal letter emailed to the applicant that the official was no longer participating in the physical training. In any event, the applicant conceded that the relief sought for his grievances was to persuade management to remove him from Brigadier Mothoa's command so as to operate independently. The applicant stated that he wanted to report directly to the Head of the Laboratory. He further stated that most of the grievances were because the alleged acts by Brigadier Mothoa were without his knowledge.

[24] Concerning the charges against the applicant, it was put to him that he failed to inform Brigadier Mothoa where he was on 17th August in light of Brigadier Mothoa's evidence that he called the applicant's office, enquired from the HR and was told that the applicant was not at work. The applicant finally conceded that he was dismissed only on charge 3 being disrespectful to his superior as his appeal against charges 1 and 2 were upheld. In respect of the applicant being victimised by Phahlane, the respondent's representative put to

him that he could not be victimised because he did not apply for that position. In reply, he stated that he suffered occupational detriment because of his dismissal and suspension that prevented him from applying.

Mr P Ndala testimony

[25] Mr Ndala testified on behalf of the applicant. He stated that the respondent from 4 March 2002 until January 2014 employed him. He was employed as forensics analysis attached to the Questioned Documents unit. He was a shop steward and seconded to POPCRU in 2009. He represented the applicant at the CCMA in his dispute with Ms Sonja de Klerk. He further testified that the issue before the CCMA was related to harassment and victimisation because Brigadier de Klerk would hold meetings with the applicant's subordinates without him being involved hence ignoring the respondent's protocol. He said that the applicant joined the respondent at the time when it was undergoing transformation and was the only appointee at the highest level. He testified that the environment was hostile to Black employees because it was predominantly White. Further, that he was afraid that the applicant would suffer the same fate (bearing in mind that he did not come through the rank) like Dr Lusunsi who was the head of the Chemistry unit who resigned after being frustrated by the management.

[26] He said that on his personal experience, Black people were unfairly treated because they were trained for a longer period than their White counterparts whose training was shortened to three or six weeks compared to four years for Blacks. Consequently, the vast majority of Blacks could not be promoted nor have pay progression. Concerning the outcome of the CCMA award, he testified that an in-principle agreement was reached to transfer the applicant to the Questioned Documents unit.

[27] Under cross-examination, Mr Ndala confirmed what he said in his examination in chief that after the advisory award of the CCMA, he engaged with management and, as a result, an in-principle agreement was reached to transfer the applicant to the Questioned Document unit to have peace at the workplace. He said the intention to bring the matter to the CCMA was to seek

an amicable solution to the dispute between the applicant and Brigadier de Klerk. He denied that the applicant had personality issue although they did not challenge the award.

Lieutenant Colonel D Ramalobe

[28] Lieutenant Colonel D Ramalobe is the second witness to testified for the applicant. Unlike the applicant, he had gone through the rank of the respondent from Constable to Lieutenant Colonel. The respondent however no longer employs him because he resigned because he was harassed and victimised because of making some protected disclosures about corruption and theft of drugs at the forensic unit. He started working for the respondent in 1993, and his final post was at the Questioned Document unit. He was a shop steward and member of POPCRU. Like Mr Ndala, he testified that the forensic unit was predominantly White and that the applicant was the beneficiary of the transformation process engaged by the union. He also testified that there was resistance from White employees towards transformation of the police service, hence the hostile welcome that he received upon taking employment. In his words, the applicant "was thrown into a lion's den". Further, that it was agreed that no White would be employed at the forensic unit. This was in reply to a question that Brigadier de Klerk made provision in the memorandum for motivation to appoint Whites. Concerning the transfer of the applicant, he said that the applicant was transferred to the Questioned Document unit after the CCMA's ruling.

[29] Concerning the various complaints of interference by Brigadier Mothoa, Lieutenant Colonel Ramalobe testified that Brigadier Mothoa as the overall head of the Questioned Documents section oversees all management functions. Brigadier Mothoa was just an administrator whereas the applicant was spearheading a specialised unit. Further, that Brigadier Mothoa was not in charge of the operational matters of the two subsections of which the applicant was heading the traditional questioned documents unit and Colonel Mathebula heading the other subsection. He stated that under no circumstances will Brigadier Mothoa interfere with the operational work of the subsection without the consent of the operational heads. He could not for

instance hold meetings with the applicant's officials without him being present. Further, that Colonel Mathebula did not have the competency or prerogatives to remove cases filed from the applicant's section because he did not have a natural sciences background and that protocol of his section and that of the applicant was different.

[30] Under cross-examination, he testified what he said in his examination in chief that Brigadier Mothoa was the Head of both sections whereas the applicant and Colonel Mathebula were heading their respective subsection. He said to this effect that the reporting line was divided between the operational heads and the administrative head, Brigadier Mothoa. Further, that the issues between the applicant and Brigadier de Klerk were because Ms de Klerk was not giving the support the applicant needed from her. He distanced himself from the applicant's allegation that General Phahlane dismissed him because he wanted to pave his way for his girlfriend. He, however, confirmed what he said in the examination in chief that his complaint led to the nullification of the appointment of Ms. Morapedi because of some misrepresentation in her application. He denied that the meeting he had with the applicant and Ms. de Klerk was to issue a warning letter to the applicant hence maintaining his evidence that the meeting was to resolve conflicts between the two.

The respondent's witnesses

Brigadier S de Klerk

[31] Brigadier de Klerk is the first witness to testify on behalf of the respondent. She testified that she joined the respondent Forensic Sciences Laboratory since 1993. She is the Head of the Scientific Analysis at the Forensic Sciences Laboratory. She testified that as the Head, she overlooks all the activities of the section under her command including operational activities. She testified that when the applicant joined the respondent, she assisted him with the training and that he was reporting to him. She said that their relationship was strained because the applicant has problems reporting to her and submitting reports to her office. She also said that the applicant had the tendency to leave work without permission and going to Medunsa. She was

obliged under the circumstances to warn the applicant verbally but when nothing changed, she had a meeting with him with the applicant's two witnesses. On this score, she differed from the applicant's last witness in that the meeting was to issue the applicant with a warning letter formally. What ensued in the meeting is a subject of contradiction. She testified that the applicant burst, threw the table and one of his witnesses ask him to calm down. The meeting was eventually abandoned.

[32] Concerning the grievances led by the applicant, she testified that the applicant views as victimisation any instruction giving to him. Further, that she first made use of consultation with the applicant about his insubordination and non-performance. When consultation failed, she took disciplinary actions. In respect of the applicant's complaint about the recruitment, she testified that the applicant was the chairperson of the panel who signed the memorandum. That she only intervened when the applicant and Ms L Berg informed her that the passed rate was low. They agreed to lower the pass rate from 70 to 50 percent. As regards the motivation to appoint a White candidate despite an undertaking at management meeting to follow equity, she said that the reason was operational so as to decrease the backlog. Contrary to the applicant's two witnesses, she testified that unions were never present at management meeting when operational matters were discussed. She declined to comment on the applicant's allegation that she was not appointed because of complaint to the National Commissioner. The essence of her testimony is that she neither victimised the applicant nor conspiring with anyone as alleged by the applicant.

[33] Under cross-examination, she confirmed in essence what she said in the examination in chief that she did not victimise the applicant but that the applicant was reluctant to report to her and failed to submit reports at times. The bulk of the cross-examination was about her failure to adequately discipline the applicant. She responded that she did discipline him and escalated the matter to the hierarchy because she could no longer handle an issue on which she was the accused. As regards the complaint on the recruitment process, she reiterated that the panel made a recommendation

and that she did see the motivation therein only when the matter was escalated to the Minister. She clearly stated that the applicant chaired the interview and must have reached an agreement with other panel members. Concerning the removal of the exhibits from the laboratory, she indicated that exhibits could only be removed with permission.

General E K Ngokha

[34] General Ngokha is the second and last witness to testify on behalf of the respondent. He is the National Head of the Sciences Laboratory since 2006. He disputed that Ms de Klerk cried when he was appointed but instead said that she congratulated him and hugged him. He testified that the applicant had an impersonal relationship with Ms de Klerk, which led to the advisory award by the CCMA. He said that in order to comply with the award, the respondent engaged with the union and an agreement was reached to transfer the applicant to the Chemical Analysis a subsection of the Questioned Documents unit. As regards the applicant going to Medunsa without permission, he said that exhibits could not be removed to another environment, and more so when there was no memorandum of understanding with the institution. He testified to that effect that the applicant did not heed to his advice not to do the analysis at Medunsa.

[35] General Ngokha further testified that Ms de Klerk issued warning to the applicant and virtually handed the matter to him because she was accused of being racist and victimising the applicant each time she reprimanded him. He confirmed that there was an investigation, but there was no outcome as the applicant was transferred to the Questioned Documents unit. He denied the applicant's allegation that Brigadier Mothoa was moved to the Questions Documents unit to further his victimisation. The gist of General Ngokha's evidence about the complaints by the applicant is that some of the complaints lacked evidence and that in any event the applicant was never victimised. He testified that he did attend to the complaints escalated to his office and that agreement was reached, and parties moved on.

[36] Under cross-examination, he simply confirmed what was said in his examination in chief that he dealt with all the grievances of the applicant though there was no evidence to that effect.

Legal principles and Evaluation

[36] As indicated above, the applicant seeks an order to the effect that his dismissal be declared automatically unfair on account of discrimination and occupational detriment for having made some protected disclosures in terms of the PDA. In terms of section 187(1)(h) of the LRA, 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 a contravention of the PDA, by the employer, on account of an employee having made a protected disclosure defined in that Act. The objects of the PDA are set out in section 2 (1) of the Act:

> '2(1) The objects of this Act are—
>
> (a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
>
> (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
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> (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.'

[37] The PDA makes provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers. It further provides for the protection of employees who make disclosure, which is protected in terms of this Act. Section 3 of the PDA provides that no employee may be subjected to occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

[38] The first question would be whether the applicant made a protected disclosure. A disclosure is defined in section 1 of the PDA as follows:

> '"disclosure" means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) that the health or safety of an individual has been, is being or is likely to be endangered;
>
> (e) that the environment has been, is being or is likely to be damaged;
>
> (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or
>
> (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.'

[39] For the applicant to qualify for the protection and remedies in connection with any occupational detriment suffered on account of having made a protected disclosure under PDA, he must satisfy this Court that the communication he made was a disclosure as defined in the Act. The applicant is further required to prove that the said disclosure falls within the definition of protected disclosure as provided for in section 1. The protected disclosure is defined in section 1 as follows:

> 'Protected disclosure means a disclosure made to -
>
> (a) a legal adviser in accordance with section 5;

(b) an employer in accordance with section 6;

(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;

(d) a person or body in accordance with section 8; or

(e) any other person or body in accordance with section 9, but does not include a disclosure-

(i) in respect of which the employee concerned commits an offence by making that disclosure; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

[40] In this instance, the applicant alleged that he made a disclosure of information in a form of a letter to the Minister, regarding his colleague who allegedly perpetuated corruption relating to recruitment process in his unit. Section 7 of the PDA provides that any disclosure made in good faith to the member of Cabinet or of the Executive Council of a province is protected disclosure if the employee's employer is –

(a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;

(b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of province; or

(c) an organ of state falling within the area of responsibility of the member concerned.

[41] Apart from the requirements for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employers, he is required to prove that the disclosure was made in good faith. The applicant testified that prior to the interview scheduled for the following Monday, he saw one of his colleague with three White females in the laboratory on Friday. On the day of the interview, the same women were

interviewed. He testified that they were the top performers and were all recommended for appointment. Further that he formed the view that they might have been tipped about the test hence they performed well. However, the applicant conceded that his complaint was based on assumption and further denied that he made an inference that Dixon gave the White women questions paper before the interview, which led to them doing "exceptionally well". In fact, the respondent's representative put to him that a Black woman (Ms Shisuba) who scored 59 did well than the ladies. This proposition was not disputed by the applicant. On the balance of probabilities, it does not appear to have been anything to support allegations conveyed to the Minister in this issue, which might have prompted the applicant to have a reason to believe that such impropriety had taken place. In *Radebe and Another v Premier, Free State Province and Others,*[2] the LAC dealt with the requirement of good faith and held as follows:

> '[35] There is further, in my view, an overlap when determining whether the employee making the disclosure was acting in good faith and further whether he had the requisite reason to believe when making a disclosure that improprieties had been committed or were continuing. Honesty plays a pivotal role in both situations. Whilst good faith and honesty may conceivably amount to the same thing, I am of the view that a case by case approach is the proper one for a court considering these issues. Factors such as reckless abandon, malice or the presence of an ulterior motive aimed at self advancement or revenge, for instance, would lead to a conclusion of lack of good faith. A clear indicator of lack of good faith is also where disingenuity is demonstrated by reliance on fabricated information or information known by the employee to be false. The absence of these elements on the other hand is a strong indicator that the employee honestly made the disclosure wishing for action to be taken to investigate it.
>
> [36] Simply stated if an employee discloses information in good faith and reasonably believes that the information disclosed shows or tends to show that improprieties were committed or continue to be committed then the

[2] (2012) 33 2353 (LAC) at paras 35 and 36.

> disclosure is one that is protected. The requirement of 'reason to believe' cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. Disclosure of hearsay and opinion would, depending on its reliability, be reasonable. A mistaken belief or one that is factually inaccurate can nevertheless be reasonable, unless the information is so inaccurate that no one can have any interest in its disclosure. (See also the statement in *Babula* (*supra*) at para 41 where it was held that: '*Darnton* seems to me clear authority for the proposition that whilst an employee claiming the protection of ERA 1996, section 43(1) must have a reasonable belief that the information he is disclosing tends to show one of more of the matters listed in section 43B(1)(a) to (f), there is no requirement upon him to demonstrate that his belief is factually correct; or, to put the matter slightly differently, his belief may still be reasonable even though it turns out to be wrong.) If the primary or exclusive purpose of reporting is to embarrass or harass the employer the reasonableness of the employee's belief is also questionable.' (Footnotes omitted)

[42] Although the applicant conceded that his complaint was based on assumption, and therefore not factual he had a reason to believe when making a disclosure that improprieties had been committed or were continuing. There is no requirement for him to demonstrate that his belief is factually correct. It is my view that his belief is reasonable. I accept that the disclosure was made by the applicant to the Minister in accordance with the provisions of section 1(a) and section 7. As such, it follows that the disclosure made by the applicant was protected as provided for in the PDA.

[43] The question that arises is whether the applicant was subjected to any occupational detriment. In this instance, the alleged occupational detriment suffered on account of making a protected disclosure is dismissal which is automatically unfair in terms of section 187(1)(h) of the LRA. Occupational detriment is defined in the PDA and it includes dismissal.[3] There ought to be some causal link between the disclosure and the alleged occupational detriment. The applicant's case is his dismissal was that he was denied promotions, pay progression, and incentive payments; he was removed from

[3] Section 1 of the Protected Disclosure Act 26 of 2000.

work station under duress and confined in a dingy office for no reason; he was dismissed and he lost future earnings.

[44] Concerning his subsequent transfer to the Questioned Documents unit, the applicant conceded that there was an agreement for him to be transferred and that at no stage did he raise victimisation. His transfer was one of the solutions by the commissioner who found that the applicant and Ms de Klerk had a clash of personalities, which affected the operation of the respondent. The applicant further conceded that he was dismissed only on charge 3 being disrespectful to his superior as his appeal against charges 1 and 2 was upheld. In respect of the applicant being victimised by Phahlane, the respondent's representative put to him that he could not be victimised because he did not apply for that position. In reply, he stated that he suffered detriment because of his dismissal, suspension that prevented him from applying.

[45] From the evidence, the applicant failed to establish the causal link between his disclosure and the alleged detriments. In the absence of the causal link between his disclosure and the alleged detriments the applicant did not suffer occupational detriment as per the provisions of PDA. It follows that the applicant's dismissal was not automatically unfair as contemplated in section 187(1)(h) of the LRA.

[46] The applicant's case is further that the respondent was in violation of section 187(d) of the LRA in that he lodged grievances which were not considered. The said grievances related to the alleged allocation of a case to an untrained analyst, confiscation of files and exhibits, confiscation of laboratory keys and blocked below of cases by Brigadier Mothoa. General Ngokha's evidence about the complaints by the applicant is that some of the complaints lacked evidence and that in any event the applicant was never victimised. He testified that he did attend to the complaints escalated to his office and that agreement was reached, and parties moved on. Under cross-examination, the applicant testified that most of the grievances were because the alleged acts by Brigadier Mothoa were done without his knowledge. He conceded that the relief sought for his grievances was to persuade management to remove him

from Brigadier Mothoa's command so as to operate independently. The applicant stated that he wanted to report directly to the Head of the Laboratory as he viewed Brigadier Mothoa to be incompetent. In this regard, the applicant has not established a causal link between the grievances he made and his dismissal. As such the applicant's dismissal was not automatically unfair as contemplated in section 187(1)(d) of the LRA.

[47] In relation to the alleged respondent's violation of section 187(f), the applicant's case is that he suffered harassment and victimisation. The applicant alleged that the said acts of harassment and victimisation were brought to the respondent's attention, but the respondent condoned them. They comprised of two successive suspensions without valid reason and pay, performance appraisals that were biased against him, verbal abuse and trumped up charges with no substance. It was the applicant's argument that the discrimination he suffered was on the ground of race, educational background as well as career background.

[48] The applicant testified that the non-appointment of Brigadier Sonja De Klerk to the position of Head of Forensic Sciences Laboratory resulted in her venting her anger at him accusing him of being the reason why she was not appointed. However, he further testified that most of the hostility is because unlike others he joined the police service from the management position. Brigadier De Klerk testified that the applicant views any instruction giving to him as victimisation. She further testified that she first consulted with the applicant about his insubordination and non-performance. When consultation failed, she took disciplinary actions. In relation to his appraisal, the applicant conceded that Brigadier Mothoa gave him good marks for his performance appraisal. It is apparent from the evidence that the issue of unfair suspension was referred to this Court and an order was issued. The applicant conceded that he was dismissed on charge 3. It follows that he was not dismissed because of his race or academic qualifications. I find that the applicant failed to establish that his reason for dismissal was as a result of discrimination based on race, educational background as well as career background.

[49] Based on my finding that the applicant failed to establish that his dismissal was automatically unfair as contemplated by section 187(d), (f) and (h), I am also satisfied that on the third charge which he was found guilty of the applicant's dismissal was appropriate. Apart from the applicant's attempts to persuade management to remove him from Brigadier Mothoa's command so as to operate independently, he did not want to see him and he viewed him as a sell-out that was going to destroy him. There was no prospect of repairing the working relationship between him and his superiors. He viewed his transfer to Questioned Documents unit, notwithstanding that it was as per agreement to avoid personal clashes between him and Brigadier De Klerk, as victimisation and Brigadier Mothoa's agenda to ensure the dysfunction and ultimate destruction of his subsection. This is a clear indication that the applicant displayed disrespect at the workplace and that the working relationship was broken down to an extent that it could not be repaired.

[50] The applicant's claim of a procedurally unfair dismissal related to the respondent's failure to consider his appeal within 30 days and further to his suspension without pay. In this regard, the applicant submitted that he approached this Court for relief for which orders were issued. As such, it is my view that the applicant's claim of procedural unfairness has no merit.

Costs

[51] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

Order

[52] Accordingly I make the following order:

a) The applicant's claim for automatically unfair dismissal is dismissed and I find that his dismissal was substantively and procedurally fair.

b) No order as to costs.

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Mahosi AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:	Adv. MM Ndziba,
	Instructed by Mashaba Attorneys.
FOR RESPONDENT:	Adv. D. Mtshweni
	Instructed by State Attorney.