

SOUTH AFRICA / JUDGMENT

Baxter v Minister of Justice and Correctional Services and Others (DA1/2019) [2020] ZALAC 27; [2020] 10 BLLR 968 (LAC) ; (2020) 41 ILJ 2553 (LAC) (18 May 2020) [2020] ZALAC 27

COURT

Labour Appeal Court

BEFORE

Waglay, Davis, Murphy

CASE / FILE NUMBER

DA1/2019

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case

no: DA1/2019

In

the matter between

JAMES

PATRICK BAXTER

Appellant

and

THE

MINISTER OF JUSTICE AND

CORRECTIONAL

SERVICES

First Respondent

THE

ACTING NATIONAL COMMISSIONER

DEPARTMENT

OF CORRECTIONAL SERVICES

Second

Respondent

THE

**REGIONAL COMMISSIONER
KWAZULU**

NATAL: CORRECTIONAL
SERVICES
Third Respondent

Heard: 10 March 2020

Delivered: 18 May 2020

Summary: Protected Disclosures---employee disclosed some irregularities in the recruitment process to his superiors---such constituting disclosures in terms of the Protected Disclosure Act ---employee had reasonable belief information disclosed showed or tended to show manipulations in appointments process---‘Reason to believe’ not to be equated to the correctness of the information---employee disclosed truthful information thus protected.
Protected disclosure---requirements---section 8---disclosure in good faith---employee acting partly out of ulterior motive--- ulterior motive not necessarily the same as acting in bad faith --- bad faith referring to dishonest intention or corrupt motive---information disclosed truthful---disclosures made in good faith and protected by the PDA.
Causal link between disclosures and occupational detriment---determination whether disclosures main, dominant, proximate or most likely cause of the dismissal---court finding that in all probabilities dismissal on account of such disclosures---most of the charges covering the true reason for dismissal--- charges served as a secondary reason subordinate to the most proximate or dominant reason---Dismissal automatically unfair in terms of s 187(1)(h).

Coram: Waglay JP, Davis JA and Murphy AJA

JUDGMENT**MURPHY AJA**

[1] This appeal requires determination of the reason for the dismissal of the appellant. The appellant contends that his dismissal was

automatically unfair being one proscribed by section 187(1)(h) of the Labour Relations Act[1] (“the LRA”) because he was dismissed for making a series of protected disclosures as defined in the Protected Disclosures Act[2] (“the PDA”). Section 187(1)(h) of the LRA in relevant part provides that a dismissal is automatically unfair 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 the PDA. The respondents contend that the disclosures made by the appellant were not protected by the PDA and that he was dismissed because he was found guilty of misconduct.

[2] The Labour Court (Cele J) rejected the appellant’s argument that his dismissal was automatically unfair in terms of section 187(1)(h) of the LRA and held that his dismissal was substantively and procedurally fair. The appellant appeals against this order. The question for determination is whether the appellant’s dismissal would have occurred if the appellant had not made the protected disclosures and, if not, whether such disclosures, rather than the alleged charges of misconduct, were the main, dominant, proximate or most likely cause of the dismissal.

Background

[3] The appellant, who at the time of his dismissal was employed as the Area Commissioner – Kokstad, of the Department of Correctional Services (“the department”), contends that he was dismissed because he made protected disclosures to the second and third respondents (the National Commissioner and the Regional Commissioner KwaZulu-Natal of the department respectively), concerning irregularities in appointments to vacant posts in the department. He alleged in the alternative that his dismissal was substantively unfair as no fair reason for the dismissal existed and was procedurally unfair on grounds that the disciplinary enquiry was held beyond the prescribed time limits and was not authorised or procedural in terms of the relevant legislation.

[4] The appellant commenced employment with the department as a warder at St Albans Prison, Port Elizabeth in 1986. Over the years he was promoted through the ranks and in January 2007 was appointed to the position of Area Commissioner in the Kokstad Management Area, KwaZulu-Natal.

[5] The third respondent (“Nxele”) was the Regional Commissioner for KwaZulu-Natal and the appellant’s immediate superior. The relationship between the appellant and Nxele was friendly and collegial until the events leading to the appellant’s dismissal.

- [6] As part of his responsibilities as Area Commissioner, the appellant from time to time served on interview panels for appointments in respect of vacant posts in which he had an interest. During 2013-2014 discord arose between the appellant and Nxele with regard to the appointment of five employees to various posts in the department. These employees were Messrs Mnguni, Mdلالose, Mathenjwa, Mbanjwa and Mchunu. The contested protected disclosures relate to alleged irregularities in these appointments.

The appointment of the Regional Co-ordinator: Security, KZN Region – Mnguni

- [7] In May 2013, the appellant was a member of the panel that interviewed applicants for the post of Regional Co-ordinator: Security, KZN Region. After the interviews, the panel recommended the appointment of the highest-scoring candidate, S Pillay, to the post. As alternatives, the panel recommended P.Z. Marau in second place and M.A.F. Mnguni in third place. The scores and ranking are reflected in the interview sheets completed and signed off by all the members of the panel.
- [8] On 27 June 2013, unbeknown to the appellant at the time, Nxele signed a memorandum purporting to represent the deliberations of the panel but which recommended the appointment of Mnguni, rather than Pillay, and that Pillay or Marau be appointed only in the event of Mnguni declining the appointment.
- [9] The signed memorandum differs from a different unsigned version of it recommending (in keeping with the interview sheets) the appointment of Pillay, which the appellant testified was sent to him on his phone by Pillay's wife in January 2014. The appellant contends that the unsigned memorandum reflects the true decision of the panel. The existence of the unsigned memorandum correctly reflecting the deliberations and recommendation of the interview panel, the

appellant submits, indicates the probability that someone in the chain of authority wanted Mnguni appointed and gave instructions for an alternative memorandum to be drafted.

- [10] The appellant testified that in July- August 2013, at a meeting at the Karridene Hotel, he questioned Nxele about the failure to appoint Pillay and the appointment of Mnguni. According to the appellant, Nxele did not explain the deviation from the recommendation of the panel but informed the appellant that he should tell Pillay that he would be appointed to another position. Nxele denied that the conversation at the Karridene Hotel took place and maintained that the interview panel had indeed recommended Mnguni. However, Nxele was not a member of the interview panel and the respondents did not call any other member of the panel to confirm his version, despite it being put to Nxele that he could not comment decisively on whom the panel had recommended. Neither party called the chairperson of the interview panel, Mr. Davids, to testify about which memorandum was

the correct one. The appellant submits that an inference can be drawn that Nxele was party to altering the recommendation.

The appointment of DD: Head Correctional Centre (Ebongweni, the C-Max prison) - Mathenjwa

- [11] In November 2013 the appellant sat on a shortlisting panel and shortlisted various candidates to be interviewed in respect of the post DD: Head Correctional Centre (Ebongweni, the C-Max prison), a post falling directly under the appellant's management.
- [12] The post required, inter alia, a NQF level 6 qualification in behavioural science and seven years relevant experience in a supervisory post. The six shortlisted candidates were all existing employees of the department, and the filling of the post was, therefore, a promotion process. Mathenjwa applied for the post but was not shortlisted as he did not meet the requirements for the post as he held only a B. Admin degree and no qualification in behavioural science. The appellant explained during his testimony that the extreme conditions and the nature of the criminals incarcerated in a maximum-security prison justify the requirement of a degree in behavioural science.
- [13] On 23 November 2013, Nxele removed from the original shortlist for this post three of the qualifying candidates who met the selection criteria: M. Diko, K.J Godden and A.M.Z Mbono. Nxele mentioned to the appellant that he wanted Mathenjwa to be added to the shortlist. Mathenjwa subsequently appeared on a new shortlist.
- [14] The new shortlist was signed by only two of the seven shortlisting panel members. The appellant testified that he could not recall if he was part of the second shortlisting process but intimated that because his signature was not appended to the shortlist, he may not have been.
- [15] The appellant sat on the interview panel which interviewed Mathenjwa and other candidates in early December 2013. The appellant scored Mathenjwa 13 out of 20. He was however given higher scores by the other panellists and, despite the fact that he did not have a degree in behavioural science, was strongly recommended for appointment. The appellant conceded in cross-examination that when he raised the alleged irregularities of this appointment with the Acting National Commissioner (the second respondent) he failed to disclose to her that he was part of the panel that had recommended Mathenjwa and had not recorded an objection about any aspect of the process of appointment at the time.
- [16] On 27 December 2013, Nxele approved the recommendation and effected the appointment of Mathenjwa to the position with effect from 1 January 2014.
- [17] Under cross-examination, Nxele attempted evasively to justify Mathenjwa's lack of a behavioural science degree on the basis of his other experience heading a correctional centre. Pressed to address specifically the issue of the lack of the required degree, Nxele unconvincingly stated that Mathenjwa's degree in public administration was equivalent and met the requirements.

The appointment of the Assistant Director: Head Correctional Centre: Port Shepstone Correctional Centre – Mdlalose

[18] On 25 November 2013, various candidates including M.H. Mdlalose were interviewed for the post of Assistant Director: Head Correctional Centre: Port Shepstone Correctional Centre. The position fell within the scope of the appellant's managerial authority, but he was not asked to participate in the panel. The panel was chaired by Ms Nombuso Mkhize, an official with whom Nxele had been intimate in the distant past. Mkhize signed the relevant interview memorandum recommending that Mdlalose be appointed to the post.

[19] On 6 December 2013, the appellant heard that Mdlalose was to be appointed. He was concerned because contrary to the established practice he had not participated in the appointment process, and because in his opinion there were better candidates. He described the process as a "sham" with the outcome having been pre-determined prior to the interviews. He subsequently learnt that Mdlalose held neither the necessary qualifications nor had the requisite experience for the post. He was aware that one of the other candidates, Mr. Budin, who held a degree in correctional services management, was better qualified than Mdlalose. The appellant engaged Mkhize but she gave him no "real response" and brushed him off. Later that day, the appellant sent Nxele a text message which read as follows:

'Hi RC (Regional Commissioner) I am safe at home, I wanted to discuss the issue of the HCC Port Shepstone and the issues around it. I was totally not involved and I got stories around it and indeed confirmed it today. There is a Mr Mdlalose who are rumoured to be getting the post. I must say even when I enquired everybody was evasive. I wish we can discuss it further.'

[20] Nxele responded immediately confirming the practice that Area Commissioners such as the appellant should be on the interview panels for posts under their management, but did not say anything in relation to the appellant's concerns about the appointment. The next day (Saturday 7 December 2013) the appellant attempted to contact Nxele telephonically to discuss the matter but was not successful.

[21] On Monday, 9 December 2013, the appellant again sent a text message to Nxele asking to see him that day. Nxele responded with a threatening text message which read:

'Patrick, I really want to caution you this time about your travelling which has not been sanction (sic). It will seem lately you are very loose and judging by comments you make to even my support staff you either asking for trouble if not challenging me and my authority. I really don't need this but if it is the last thing we must have between us I will comply.'

[22] The appellant replied as follows:

'Hi RC I am requesting us to meet so we can discuss all this issues (sic) coz I don't want my Boss to have anything that strains the working relationship and I can assure you that I am committed to the direction you provide and would always take the invitation to raise issues with you directly if I have.'

The appointment of Head of Centre: Sevontein CC: Pietermaritzburg – Mbanjwa

- [23] The appellant was a member of the interview panel for this post together with others, including Dr Mdletshe, the Area Commissioner for Pietermaritzburg. Both the appellant and Mdletshe testified that Mbanjwa was not initially shortlisted because he did not feature on the original gross list. The appellant testified that after receiving the shortlist, Nxele insisted that Mbanjwa be included on the shortlist even though he had not applied for the post. In Nxele's approval of the shortlist he recorded in manuscript that the shortlist was approved "subject to amendments" in particular that Mbanjwa, who was acting as the HCC Sevontein at the time, was entitled in terms of policy to be considered for appointment.
- [24] In cross-examination the appellant conceded that Mbanjwa appeared on a second gross list and that his application for the post had been received before the closing date.
- [25] The appellant still maintained that Mbanjwa should not have been shortlisted because he did not have the necessary qualification for the position, a relevant NQF6 degree or diploma in behavioural science; nor did he have the requisite seven years' experience in a supervisory post. However, both the appellant and Mdletshe conceded that they scored Mbanjwa very high, that he was the best performing candidate at the interviews and that none of the panel members expressed any reservations about his appointment. They unanimously and strongly recommended him for the post. The appellant when complaining about this appointment to the Acting Commissioner, did not disclose to her that he had actually strongly recommended Mbanjwa for the appointment. Moreover, in cross-examination the appellant effectively conceded that he was complicit in the "corruption" pertaining to this appointment.

The appointment of the DD: Area Co-ordinator: Corporate Services Pietermaritzburg – Mchunu

- [26] Interviews took place for the post of DD: Area Co-ordinator: Corporate Services Pietermaritzburg on 13 December 2013. Mr. S.M. Mchunu was one of the candidates. The appellant's wife, Millicent Baxter, had applied for the position but was not shortlisted. However, the day before the interviews, she was told to present herself for an interview in Pietermaritzburg on 13 December
2013. She waited at the interview venue the entire day but was not interviewed for the position. Given that his wife was an applicant, the appellant was not a member of the panel. The appellant was aggrieved about the treatment of his wife.
- [27] Mdletshe, the Area Commissioner of Pietermaritzburg, was a member of the interview panel for this post as the position fell within his managerial authority. He testified that during the process it appeared that Mchunu and another candidate had also applied for a similar post in Empangeni. It was agreed therefore to split the interviews and to hold a further discussion at a later date before the selection of a recommended candidate.
- [28] On 19 December 2013, at an event at the Karridene Hotel, Mdletshe was informed that the process had been finalised and that Mchunu (who had not been interviewed by Mdletshe) had been recommended for appointment in Pietermaritzburg. Mdletshe confronted Davids

who had chaired the panel. Davids assured him that no final decision had been taken, that the panel members would still meet to discuss the appointments and they would do so on Monday 23 December 2013. In his testimony, the appellant confirmed that he had overheard the heated exchange between Mdletshe and Davids at the Karridene Hotel and understood it to relate to the alleged irregular appointment of Mchunu.

- [29] The proposed meeting in fact took place on 24 December 2013. It was disclosed at the meeting that Nxele had already appointed Mchunu to the position without the selection panel having finalised the appointment. The approval of the appointment of Mchunu was signed by Nxele on 23 December 2013.

The events leading to the suspension and dismissal of the appellant

- [30] The appellant was evidently troubled about these five appointments made between June and December 2013. He was particularly aggrieved by what he believed was the unfair treatment of his wife and her application for the Area Co-ordinator post in Pietermaritzburg. On 19 December 2013, he again sent Nxele a text message which read:

‘Morning RC I am on my way to the meeting but I must honestly raise with you whether I cannot be excused coz I am hurt and won’t be able to keep quiet and smile with my colleagues who made me a utter fool and disrespected my wife and our colleague. RC it has nothing to do with promotion it is matter of mutual respect and principle let alone the issues that I raised with you in respect of the manipulation I witnessed.’

- [31] The appellant testified that the manipulation to which he referred were the appointments of Mathenjwa and Mdlalose which he had raised with Nxele by text and telephonically. No explanation was given to him as to why his wife was not shortlisted but nonetheless invited to an interview and then after waiting all day not interviewed.

- [32] The appellant testified that after receiving birthday greetings from Nxele he replied by “whatsapp” on 30 December 2013. His message reveals that he remained aggrieved by the treatment of his wife, not only the failure to interview her but also her non-promotion. The message reads:

‘Morning RC I was pleasantly surprised to wake up to the message this morning thanks. I have however some bitter sweet since we took principled decisions in respect of appointments. RC don’t get me wrong I don’t blame the RC rather people abusing their status as panel members at the expense of hard working and dedicated officials to foster their friendships. Secondly, RC as a RMC we have a duty [to] jealously guard our integrity and protect one another not to undermine eg I know you are to discuss with me Ebongweni and what happened to Milly but boss urself, myself are and come from courts not to oppose our superiors rather that we hate injustice. What does the RMC expect of me to do when Milly challenged the perceived unfair labour practice especially me sitting with inside info like people unable to answer full questions yet scoring 5 like in the case of Mathenjwa. We short list a candidate appointed 1 December 2013 to the post of ASD and yet we say Milly lacks experience that is grossly unfair. I was told out of da panel that when

others showed DC the inconsistencies and unfairness he simply said NO she will not be shortlisted which therefore makes it personal. In spite of this be assured of my commitment to our Region but simultaneously my resolve not to accept personal injustice to my family and those I am privileged to lead.'

[33] The reference to Ebongweni in the "whatsapp" message was a reference to the appointment of Mathenjwa and the alleged manipulation of the scoring in relation to him. The appellant testified that Nxele had promised to discuss the Mathenjwa situation with him but had not done so by that stage.

[34] On 8 January 2014, the appellant's daughter Raneesha Baxter was interviewed for inclusion in the departmental learnership programme Kokstad Management Area. The advertisement in respect of the programme was externally advertised and was in respect of various fields as per the needs of the department. A total of 59 candidates were interviewed from which 20 were selected for appointment to 12-month learnership contracts from 26 January 2014. The appellant's daughter was the highest scoring candidate. Nxele approved the recommended appointments on 14 January 2014. Nxele testified that sometime after he made the appointments, he received a report that the appellant had sought to influence the appointment of his daughter. There was then some discussion about the appointment of the appellant's daughter.

[35] On 13 February 2014, the appellant sent text messages to Nxele pushing for a meeting to discuss various issues. The first message again reveals his grievance about his wife, which in relevant part read as follows:

'Hi RC I wanted to talk to you the other day about your promise to discuss what happened to Milly coz she is still aggrieved and to talk to you about the call my daughter received but every time someone walked to you as a result I failed to talk to you. I need us to talk RC coz even my case is coming up soon, and I wanted us to talk since the documents is going (sic) to infuriate people and implicate others...'

[36] Later the same day, the appellant wrote raising various issues including the failure to appoint his wife and the appointment of his daughter:

'Hi RC I have tried my level best to talk to you like men not as supervisor and subordinate. I have tried to defence (sic) the indefensible. I have tried to justify in your defence some decisions which hurt me. I swallowed some allegations unfounded. I took it like a man still defending you. 13 December we treated Milly like dirt. I still defended our decision. I raised things which hurt me again...fundamentally wrong the Mathenjwa and Mdlalose cases you promised we will discuss it. Still I supported coz your decisions is mine. Me and my family has you and your family in our daily prayers in spite of the many things that affects us negatively. When it touches the very innocent child I have to do what is expected of me as her father. From this point even dismissal or whatever does not bother me, I rather die with them knowing and die having their respect (sic).'

[37] On 14 February 2014, Nxele caused a fax to be sent to the appellant advising that he had instructed that the learnership appointments for the Kokstad management area would be suspended with immediate effect and that no further steps in the process should be taken. It was subsequently alleged that the appellant had compromised the integrity and credibility of the selection process by asking the chairperson of the panel shortly before the interviews whether he had seen the application of his daughter.

[38] The appellant testified that, at that point, he believed that Nxele was making good on his threat of 9 December 2013 and that his efforts to discuss the irregularities with Nxele and prevent them from occurring would come to nothing.

[39] On 14 February 2014, the appellant drafted and sent letters to Nxele and the Acting National Commissioner. The letter he wrote to Nxele in relevant part read as follows:

“2. Pursuant to my message (WHATSAPP) on 30 December 2013 the following:

3. This office received a communication for the office of the Regional Commissioner suspending the learnership of Kokstad Management Area, and it is hereby confirmed that it was done as instructed.

4. In as much as I formally welcome the intervention of the Regional Commissioner, I am requesting the following:

4.1 An in-depth investigation be launched into the learnership programme process which the Regional Commissioner personally instructed me to stop the process as he confided in me about certain people who were not shortlisted.

4.2 The appointment process of the Regional Co-ordinator Security: Mr MAF Mnguni.

4.3 The appointment process which I discussed personally with the Regional Commissioner of the following people:

4.3.1 Mr Mathenjwa: HCC Ebongweni

4.3.2 Mr Mdlalose: HCC Port Shepstone

4.3.3 Mr Mchunu: AC Corporate Services, PMB

4.3.4 Mr Mbanjwa DK: HCC Sevontein

5....

6. I trust that this communication be treated as urgent and wish to indicate that I have taken the liberty of forwarding same to my attorneys as well as other agencies.’

[40] The learnership programme referred to in paragraph 4.1 of the letter was an earlier programme which had been cancelled and not the one cancelled in 2014.

[41] The letter to the Acting National Commissioner read:

‘2. This communication is an official request to have an audience with the acting National Commissioner, Ms Jolingana and the Honourable

Minister of Correctional Services at a time and place convenient to them.

3. Purpose of the meeting will be outlined fully with the above-mentioned functionaries but generally are (sic) about corruption and abuse of power by the Regional Commissioner of KwaZulu Natal.”

[42] On the same day, Nxele sent a text message to the appellant. The message acknowledged receipt of the appellant’s letter and suggested that the appellant had only raised issues with the irregular appointments in response to Nxele’s suspension of the learnership programme. Later that day the appellant responded by text message, pointing out that Nxele’s claim was incorrect and that the appointment irregularities had been previously raised with him and not only in response to the suspension of the learnership programme. The relevant part of the text reads:

‘Thanks for the response however I want to correct you that all these matters has been raised with you on time and is not in response to this issue. From Pillay, Milly, Mdlalose, DK even the allegations and da rest and I have the proof by the way this is only to mention but a few (sic).’

Nxele responded immediately as follows:

‘Unless you have become the RC and believe you can dictate what must happen in this region, there is nothing you have raised with me except that you complain about how your wife was treated. Surely if there is anything that warrants an audience with the minister or and act NatCom you should have put it in writing past your supervisor especially where you want the RMC. And don’t be selective about what must or should be investigated. There is more than your wish list. There is no correcting me here.’

[43] Over the weekend of 15-16 February 2014 the appellant had a telephone conversation with the Acting National Commissioner and raised with her his concerns about irregularities in respect of the five appointments and interference in the previous learnership programme by Nxele. The appellant alleged that Nxele had stopped the earlier learnership programme because one of his relatives was not on the list of recommended appointments.

[44] Mdletshe testified that he too had issues with irregularities and nepotism in appointments to learnership programmes throughout KwaZulu Natal. He raised this and mentioned specific appointments at a meeting with Nxele on 17 February 2014. During the meeting, Nxele discussed the appellant’s letter and stated that he was “going to deal with him”. As some of the appointments were in Mdletshe’s area of Pietermaritzburg, Nxele warned Mdletshe not to become involved or he would be identified with the appellant and “dealt with”. Nxele further told Mdletshe that he had no difficulty with officials’ relatives being placed on the learnership programme but that this must be done on his authority, as had occurred on previous occasions.

[45] Mdletshe's account of the meeting of 17 February 2014 is captured in a memorandum he sent to Nxele some two months later on 7 April 2014 and which during his testimony he confirmed as a correct record of the events. Nxele did not reply to the memorandum in writing. The opening paragraph of the memorandum records that its purpose was twofold and was stated to be:

'1.1 To place on record certain matters that have characterised the interaction, either face-to-face or telephonically, between Mr M Nxele and oneself in our capacities as the Regional Commissioner: KwaZulu Natal and the Area Commissioner: Pietermaritzburg.

1.2 To formally inform the Regional Commissioner of what one construes as a deliberate move to influence the Area Commissioner:

Pietermaritzburg, in his capacity as an appointed member of the selection panel for various managerial posts advertised on 6 February

2014, in respect of the post of Assistant Director: Head of Correctional Centre, Vryheid.'

[46] During the meeting Mdletshe and Nxele discussed the problem of the appointment of relatives to posts in the department in general, but also in regard to a relative of Mdletshe (Sibusiso Somzana) also having been recommended for appointment to the learnership programme. The conversation then turned to the situation involving the appellant. The memorandum, in relevant part, records the discussion as follows:

'The Regional Commissioner indicated that if one wanted his relative to be considered for selection for the learnership programme, one should have approached him, as the Minister of Correctional Services also did, through the Acting National Commissioner, regarding the Minister's wife's relatives who were pushed through at his instruction as the Regional Commissioner.....

The Regional Commissioner indicated that the issue involving the applicant for the learnership programme, Sibusiso Somzana who was to be based at Kokstad, was not a serious matter compared to the one involving Mr JP Baxter's (the appellant) child who was also selected for the learnership programme, to be based at Kokstad. The issue of less seriousness stems from the fact that Sibusiso did not share the same surname with me, that Sibusiso got selected for placement at Kokstad and not at Pietermaritzburg.

When one tried to calm the Regional Commissioner down regarding his outcry concerning what he regarded as an unwarranted attack on him by Mr Baxter when Mr Baxter called for investigation into certain alleged irregular appointments, the Regional Commissioner indicated that he was prepared to "fall on his sword" rather than to allow Mr Baxter to get away with all what he had done. The Regional Commissioner, infuriated by Mr Baxter's actions, exploded and said that "Does it mean that if the Acting National Commissioner takes disciplinary action against me as the Regional Commissioner, I would go to the extent of asking for an investigation into how her brother, Mr Delekile Klaas was appointed as Regional Commissioner? No! One would not do that. What Mr Baxter has done is quite absurd.

Based on the fact that some of the alleged irregular appointments that Mr Baxter referred to belonged to Pietermaritzburg management Area, the Regional Commissioner asked the Area Commissioner: Pietermaritzburg to stay out of the Baxter saga as the mere mention of Pietermaritzburg appointment that are questioned by Mr Baxter implies that one was also part of what Mr Baxter was doing.

As a response to the Regional Commissioner's suggestion that the mention of Pietermaritzburg positions implies that one was part of what had written (sic) to the Regional Commissioner, one indicated that one was not at all involved.'

[47] On 18 February 2014, Nxele sent a letter to the appellant indicating that he had been made aware of the appellant's discussion with the Acting National Commissioner over the weekend and requesting reasons by the following morning at 08:00 why the appellant should not be suspended. The relevant part of the letter reads:

'I refer to the following incidents which you allegedly committed that amounts to misconduct in terms of the SMS Handbook.

1. You interfered with the recruitment processes for the learnership of Kokstad management Area by talking to panel members for the shortlisting and appointment of your daughter.
2. You undermined my authority by questioning my directive to temporarily suspend the Kokstad learnership due to irregularities

that were brought to my attention; in turn you accused me of being corrupt and suggested that I be investigated.

3. Requested an audience with the Acting National Commissioner and the Honourable Minister of Correctional Services to discuss how corrupt I am and how I abuse my powers as the Regional Commissioner.
4. During and after the weekend of 15/16 February 2014, you made numerous unfounded allegations to the National Commissioner and

threatened to expose and embarrass me, the Department and the ANC.

I hereby invite you to furnish me with written reasons by 08:00 on Wednesday 19 February 2014, why I should not suspend you pending an investigation and disciplinary processes to follow if any.'

[48] The appellant immediately addressed a letter to the Acting National Commissioner pointing out that he had confided in her in trust and confidence regarding "gross irregularities in respect of selection and recruitment" in KwaZulu-Natal and expressed disappointment at how she had dealt with the matter. He did not make any representations to Nxele. On 20 February 2014, the appellant was issued a letter placing him under precautionary suspension on certain conditions. Subsequent to his suspension, the appellant met with the Acting National Commissioner in Durban, on 11 March 2014, and handed to her

documentary proof of the disclosures he had made. She promised to revert to him but did not do so.

[49] During February 2014, an investigation was conducted by the department into allegations of maladministration in relation to the Kokstad learnership programme. The terms of reference of the investigation were stated to be: i) the suspected interference in the selection process during the intake of Kokstad Management Area's learners for 2013/2014 financial year; and ii) to determine whether the selection committee was influenced in any way to select relatives of two senior managers during the intake.

[50] In its report issued on 24 February 2014, the investigators noted that after the intervention of Nxele, the appellant's daughter and Mdletshe's relative, Sibusiso Somzana, were removed from the original list of 20 candidates and the remaining 18 learners on the list were allowed to report to Zonderwater College for their training. They found that the chairperson of the selection committee, Khumalo, and another panellist, Ms Mavimbela, had interacted with the appellant and Mdletshe prior to the shortlisting process and had discussed the applications of the appellant's daughter with the appellant and that of Somzana with Mdletshe. Khumalo and Mavimbela informed the panel about their respective discussions with the two Area Commissioners and made them aware of their relationships to the two candidates. The investigators recommended inter alia that Khumalo and Mavimbela should be disciplined for informing the panel about the relationship of the two candidates to the two Area Commissioners. However, it also recommended that the two candidates be permitted to report to the college for training as their exclusion could be construed as unfair discrimination.

[51] On 24 March 2014, different investigators issued a second report (without referring to the first) into the learnership programme. The second report relied on much the same information and made much the same recommendations as the first, save that it recommended that the appellant's daughter and Mdletshe's nephew not be appointed to the learnership programme as the process of their appointment was flawed. It found also that the appellant and Mdletshe had "abused their position of authority by influencing the committee members" to recruit their relatives. The report was critical of the appellant's refusal to co-operate in the investigation. It concluded as follows:

'It is further recommended that Director Baxter should remain on suspension due to the seriousness of these allegations, as well as myriad of other allegations levelled against him that are being considered to be investigated, including his lack of cooperation

which has made soured his relationship with the Management of the Region and staff members. His conduct has made it practically

impossible to work with him.'

[52] On 25 April 2014, the appellant was charged with five counts of misconduct. Only the first charge (in relation to the appellant's alleged attempt to influence the selection process in the learnership programme) bears any relation to the complaints raised by Nxele in the letter of contemplated suspension of 18 February 2014. The remaining four charges relate to other incidents which occurred after the appellant's suspension. The charge sheet provided as follows:

"COUNT 1

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7, annexure A, paragraph (6) in that during the learnership intake 2013/ 2014 you compromised the integrity and credibility of the selection process by asking the Chairperson of Kokstad Management Area Selection Panel Mr Khumalo BC if he saw the forms of your daughter, which question conveyed the innuendo that she should be appointed whereby you prejudiced the administration, discipline or efficiency of the Department.

COUNT 2

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (27) in that around the 09 March 2014 it is alleged that you refused to obey security regulations by refusing to open your car boot and be searched as required by the correctional services B-Order, 3.14.

COUNT 3

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (10) in that around the 22 February 2014 you violated your suspension condition by communicating with a Whatsapp with official Zikalala SN and even threatening her to summon her to court."

COUNT 4

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (1) in that around the 19 February 2014 you failed to submit sick leave within the 5 days period as stipulated by the determination and directive on leave of absence in the public service.

COUNT 5

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (28) in that around the 20 February 2014 you showed a document to Mr Patric Zibuyele Marau which you claim that the said official challenged the Department of Correctional Services for not appointing him which was misrepresentation because that was not in line with what was recommended by the Committee."

[53] On 18 November 2014, after a lengthy disciplinary hearing, the appellant was found guilty on all five charges.[3]

The Labour Court proceedings

- [54] In February 2015, the appellant referred a dispute to the Labour Court in terms of section 191(5)(b)(i) of the LRA alleging that the reason for his dismissal was automatically unfair on account of his having made protected disclosures. As stated earlier, he alleged in the alternative that his dismissal was substantively and procedurally unfair and thus the parties accepted that if the Labour Court were to find the dismissal not to be automatically unfair, it would continue with the determination of whether the dismissal was substantively and procedurally unfair in terms of section 158(2)(b) of the LRA.
- [55] The Labour Court held that the appellant had failed to discharge his onus to show that any of the disclosures he made regarding the various appointments constituted protected disclosures and thus that his dismissal was automatically unfair. It held that whatever was disclosed to the Acting National Commissioner and to Nxele by the appellant was not done in good faith as he acted out of ulterior motive in response to the exclusion of his daughter from the learnership programme and the failure to interview or to promote his wife and on that basis too the disclosures were not protected.
- [56] The Labour Court further concluded that the dismissal was substantively and procedurally fair. It held that the evidence sufficiently established the misconduct in counts 1, 2 and 5. The Labour Court offered little in the way of analysis in reaching this conclusion. Its reasoning on this issue is set out in three paragraphs referring to the findings of the chairperson of the disciplinary hearing as follows:

‘During the trial before me, evidence led was more about the contravention of the provisions of the PDA and nothing really said about substantive and procedural fairness of the dismissal.I must agree with Ms Matlejoane that counts 1, 2 and 5 are individually very serious, more as they were committed by a senior person who is supposed to be exemplary. In respect of count one, Mr Baxter was senior to Mr Khumalo and in a subtle way actually told him to look for his daughter’s name and appoint her. In respect of count two, as already alluded to, he gave himself an exemption he really was not entitled to. He should have lived by example to ensure that everyone was seen as equal before the law. In count five, Mr Baxter was steering (sic) trouble at his work place. He challenged the supervisor by using a colleague. Considered individually or cumulatively, the charges justify dismissal.

The only procedural ground of merit raised is one of a delayed disciplinary hearing, which should have been held within 60 days from the suspension date. However, no demonstrable prejudice was caused to Mr Baxter. On the contrary, it prolonged the date of his dismissal. The benefit of the finding on the delay is however neutralised by the general fair procedure adopted at the internal disciplinary hearing to the point that it cannot be said that the whole procedure was vitiated by this delay.’

[57] The Labour Court made no clear finding about count 3, presumably because it believed that the misconduct in counts 1, 2 and 5 provided a fair reason for dismissal, and held that the respondents had not proved that the appellant was guilty of the misconduct in count 4.

The legislative framework

[58] Section 187(1) of the LRA lists reasons for which employees may not be dismissed (including making a protected disclosure under the PDA) and categorises such dismissals as automatically unfair. If it is proved that the employee was dismissed for any of the reasons specified in section 187(1) of the LRA, the employer cannot raise a defence based on the alleged fairness of the dismissal. The employer cannot claim that a dismissal for a proscribed reason was necessary for any other secondary reason, even if it can be argued that the dismissal was effected for a permissible reason related to the employee's conduct or capacity or the employer's operational requirements.[4]

[59] However, there may be different reasons for dismissing an employee and an employer is entitled to argue that the reason for the dismissal was not for a reason proscribed by section 187(1) of the LRA but for a fair reason based on incapacity or misconduct. The question will then trigger a causation enquiry. The essential inquiry is whether the reason for the dismissal is one proscribed by section 187(1) of the LRA, in this case the one in section 187(1)(h) of the LRA which proscribes the dismissal of an employee for making a protected disclosure.

[60] The test for determining the true reason is that laid down in *SA Chemical Workers Union v Afrox Ltd*. [5] The court must determine factual causation by asking whether the dismissal would have occurred if the employee had not made the

protected disclosure. If the answer is yes, then the dismissal is 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 disclosure was the main,

dominant, proximate or most likely cause of the dismissal. Thus, the court must inquire into the main, dominant, proximate or most likely reason for the dismissal. The employee bears the onus to establish at least a "credible possibility" that the dismissal was for a proscribed reason.[6] If the employee fails to discharge that onus, the Labour Court at its discretion may proceed to determine the substantive and procedural

fairness of the dismissal in terms of section 158(2) of the LRA, as happened in this case.

[61] The preamble to the PDA sets out its multiple purposes. Recognising that criminal and irregular conduct in organs of state (such as the department) are detrimental to good, effective, accountable and transparent governance and can cause social damage, the PDA aims to create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the work-place in a responsible manner

by providing guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures.

[62] Section 1(b) of the PDA defines a disclosure to include:

‘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 showthat a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject.’

[63] The appellant contends that the disclosures he made were made in good faith to his employer and are thus protected in terms of section 6 of the PDA. Section 3 of the PDA provides that no employee may be subjected to any occupational detriment (defined to include disciplinary action, suspension and dismissal) by his or her employer on account, or partly on account, of having made a protected disclosure. It follows then if the appellant shows that he was dismissed partly on account of having made a protected disclosure, the respondents would have contravened the PDA and his dismissal as a result would be automatically unfair in terms of section 187(1)(h) of the LRA.

[64] In order to succeed in his claim for automatically unfair dismissal, the appellant was therefore required at trial to establish the following: i) he disclosed information regarding the conduct of an employee (Nxele or other persons) of the department to his employer; ii) he had reason to believe the information showed or tended to show the failure or potential failure to comply with any legal obligation to which that employee was subject; iii) the disclosure was made in good faith; and iv) he was disciplined, suspended and dismissed on account or partly on account of having made the disclosure.

[65] The appellant argued that the disclosures he made indicated or tended to indicate that Nxele and other employees who served on the interview panels failed to comply with various legal obligations to which they were subject. In particular, reference was made to section 195(1) of the Constitution of the Republic of South Africa, 1996 which provides inter alia that the public administration must be governed along the principles of a high standard of professional ethics, accountability transparency and personnel management

practices based on ability, objectivity and fairness. Various provisions of the Public Service Regulations are also implicated. An executing authority shall determine and record composite requirements for employment in any post on the basis of the inherent requirements of the job;[7] and shall appoint a selection committee to make recommendations on appointments to a post after considering, inter alia, the training skills, competence and knowledge necessary to meet the inherent requirements of the post.[8] If an executing authority does not approve a recommendation of a selection committee she or he shall record the reasons for her or his decision in writing. The executing authority must be satisfied before making any appointment that the candidate qualifies in all respects for the post.[9]

Disclosures in terms of section 1 of the PDA

- [66] In dismissing the appellant's claim of automatically unfair dismissal, the Labour Court held in relation to all of the allegedly irregular appointments that the appellant did not have reason to believe the information he disclosed showed or tended to show the failure or potential failure to comply with any legal obligation to which the relevant employees were subject. It thus held that the disclosures were not disclosures as contemplated in the PDA. The Labour Court erred in a number of respects in this regard.
- [67] In analysing the reasoning of the Labour Court, it is important to note that the PDA does not require that the disclosures made are factually correct. The phrase "tends to show" in section 1 of the PDA intends that it is sufficient if the information in the disclosure is indicative of an impropriety.[10] Likewise, the requirement that the employee merely have a reason to believe that the information points to an irregularity does not require personal knowledge of the information disclosed. That would set too high a standard frustrating the operation of the PDA. Hearsay information, depending on its nature and cogency, may provide a basis for a reasonable belief of possible irregularity.
- [68] Turning to the facts, it is indisputable that the appellant disclosed information to both Nxele and the Acting National Commissioner regarding the conduct of the employees who were members of the various interview panels and alleged improper interference by Nxele. The "whatsapp" messages of 6 December 2013, 30 December 2013 and 13 February 2014, the letters of 14 February 2014 and the telephone conversation between the appellant and the Acting National Commissioner on 15 February 2014 (as evidenced by the reaction to it) all indicate that the appellant disclosed information of alleged impropriety in relation to the various appointments.
- [69] In relation to the appointment of Mnguni, the Labour Court held that the appellant did not have reason to believe that there was conduct showing impropriety, mainly because he relied solely on the hearsay evidence of Davids, the chair of the panel that Pillay had been recommended. This is plainly wrong. The appellant was a member of the interview panel and had joined in the unanimous decision to recommend Pillay. He testified that after the interview process, and deliberations by the panel, Pillay was the recommended candidate, with Marau in second place and Mnguni in third. This evidence was not countered in any meaningful way during cross-examination and is corroborated by the interview sheets signed off by members of the panel. The existence of a memorandum (albeit unsigned) of the deliberations reflecting the recommendation of Pillay is an indication of possible impropriety and there was no cogent basis laid to suggest that the appellant had forged such a document. Nxele's insistence that the interview panel had recommended Mnguni is not of much value. He, unlike the appellant, was not a member of the interview panel. The respondents did not call any other member of the interview panel to dispute that Pillay had been recommended or to confirm that the panel had indeed recommended Mnguni. The information disclosed to the Acting National Commissioner and to Nxele about this

appointment was therefore based on a reasonable belief that the information tended to show that there had been a legal impropriety.

[70] The Labour Court's finding in relation to the appointment of Mathenjwa was also flawed. The Labour Court relied on certain inconsistencies in the appellant's testimony about how Mathenjwa had ended up on the shortlist to dismiss the appellant's version and to conclude that there was no information showing or tending to show impropriety. In so doing, it missed the essential point that Mathenjwa ought not to have been shortlisted, interviewed or appointed as he did not meet the stipulated criteria for selection. The post required, inter alia, an NQF level 6 qualification in behavioural science and seven years relevant experience in a supervisory post. It is common cause that Mathenjwa did not have such a degree and he was originally not shortlisted for that reason. The appellant testified that he and others were told by Nxele to put Mathenjwa on the shortlist, which happened but with only two of the seven shortlisting panel members signing the shortlist. Nxele's insistence that the B. Admin degree held by Mathenjwa was equivalent to a degree in behavioural sciences is unsustainable. In the result, it is indisputable that this appointment was irregular in that the recommended candidate did not meet the advertised criteria. The information disclosed by the appellant about the appointment of Mathenjwa thus showed that there was non-compliance with a legal obligation.

[71] The Labour Court was similarly convinced that the information regarding the appointment of Mdlalose did not constitute a disclosure as contemplated in the PDA. The appellant's principal concerns about this appointment were that: i) he should have been a member of the interview panel; ii) the chairperson of the panel had previously (though many years ago) been romantically involved with Nxele; iii) Mdlalose was a friend of Nxele; and iv) Mdlalose did not have a relevant degree or seven years relevant experience in a supervisory post. Much of the evidence regarding these issues is in dispute. However, it is not disputed that Mdlalose's highest academic qualification was a teacher's diploma in biology and mathematics. The job advertisement for this post required a "relevant B Degree/National Diploma". The appellant was of the opinion

that a teaching diploma in biology and mathematics was not a "relevant" academic qualification for appointment to the

post of Head of Correctional Centre. The Labour Court held that the opinion of the appellant was not of importance since he was not a member of the interview panel and that this was a matter for Nxele. That is not correct and an insufficient basis for concluding that the appellant's conveying of the information regarding the conduct of the interview panel was not a disclosure. The appellant's belief that the post required a degree in behaviour science, administration or correctional services management was a reasonable belief; and the appointment of Mdlalose without such a qualification showed or tended to show that the interview panel may not have complied with its obligation that the candidate qualified in all respects for the post.

- [72] Mbanjwa too did not have the relevant qualifications and should not have been shortlisted. He was put on the list at the insistence of Nxele. The Labour Court held that there was no disclosure in terms of the PDA in this instance because the appellant had not disclosed to the Acting National Commissioner that he was “part of the corruption” in that he had strongly recommended Mbanjwa for appointment. Although, the appellant’s non-disclosure of his recommendation may raise doubts about his good faith, the information disclosed nonetheless showed or tended to show a failure by the panel and Nxele to comply with the applicable law.
- [73] The Labour Court held that there was no disclosure regarding the appointment of Mchunu because the appellant had not mentioned any alleged irregularities to Nxele. However, at the same time, it accepted the evidence of Mdletshe that the manner in which this appointment was concluded was irregular. The appointment was made by Nxele prior to the interview panel concluding its deliberations. The appellant, who was not a member of this panel, conceded that he had not discussed the Mchunu appointment with Nxele. He did refer to it in his letter to Nxele of 14 February 2014. He moreover emphasised in cross-examination that Nxele had played a role in this irregular appointment by signing off on it and that he (the appellant) had said as much to the Acting National Commissioner. In the premises, it is possible to infer that the appellant disclosed information to the Acting National Commissioner regarding the conduct of the interview panellists and Nxele which he had reason to believe showed or tended

to show that the members of the panel and Nxele had not complied with their legal obligations. The disclosure of that information was accordingly a disclosure as contemplated in the PDA.

- [74] It is clear therefore that the disclosures made by the appellant relating to the irregularities in the various recruitment processes constituted disclosures in terms of the PDA. They disclosed information regarding the conduct of some members of the interview panels and Nxele which the appellant had reason to believe showed or tended to show that the members of the interview panels and/or Nxele had failed to comply with legal obligations to which they were subject in terms of the Public Service Regulations. The Labour Court erred in holding otherwise.
- [75] That, however, is not the end of the matter. Before it can be held that the employer contravened the PDA by dismissing the appellant, it must be shown firstly that the disclosure was protected in terms of the PDA and secondly that the appellant’s making of the protected disclosure was the main or proximate reason for his dismissal.

Protected disclosures – the requirement of good faith

- [76] Section 1 of the PDA requires a disclosure made to an employer in accordance with section 6 to be made in good faith and in accordance with any prescribed procedure in order to be a protected disclosure.

[77] The respondents contend that the disclosures made by the appellant were not made in good faith because they were actuated mainly in response to Nxele having suspended the learnership programme in Kokstad on account of the undue influence the appellant may have brought to bear regarding his daughter. They submit that the appellant was “driven by ulterior motive, revenge or malice”. The lack of good faith, it was argued, was further borne out by the appellant’s belated disclosure to the Acting National Commissioner regarding the previous learnership programme which allegedly involved the appointment of a relative of Nxele. These events were known to the appellant and took place more than three years previously, yet he only disclosed the irregularity when his daughter’s learnership application was thwarted by Nxele.

[78] The Labour Court rightly pointed out, there were thus two triggers prompting the disclosures, both involving members of the appellant’s family. It stated:

‘The cancellation of the learnership program involving the daughter of Mr Baxter and the failure to short list and interview the wife of Mr Baxter appear to have been what infuriated Mr Baxter. He even declared that he would not “accept personal injustice to my family and those I am privileged to lead.” He displayed an attitude that he was too senior to be subjected to the ordinary rules of the Department. He refused to be searched or to have his family members subjected to ordinary prison regulations. He reached a stage in his career where he thought his team work would be constituted by those he wanted and when other panellists differed from him, he cried foul. Clearly, if his wife had been appointed to the position she applied for and if the learnership program of his daughter had not been cancelled, his subtle interference notwithstanding, and if appointments in his area were done according to his wishes, he would have been content. What Mr Baxter said upon discovering the cancellation of the leadership program is informative of his attitude. He said: “When it touches the very innocent child, I have to do what is expected of me as her father”. So the employment of his daughter by the Department was to him a high priority.’

[79] The respondents accordingly submit that the Labour Court correctly found that the appellant “was driven by ulterior motive, revenge or malice” and thus did not make the disclosures in good faith with the result that the disclosures were not protected and the employer did not contravene the PDA by dismissing the appellant.

[80] The appellant acknowledged that his daughter’s exclusion from the learnership programme played a role in his making the disclosures. He was also undeniably aggrieved by his wife’s unsuccessful application for the post of Deputy-Director: Area Co-ordinator: Corporate Services.

- [81] The appellant contends that the Labour Court ignored the evidence showing that some of his complaints regarding the appointments preceded the incident involving his family members. That is correct. The contemporaneous correspondence reflects that the appellant took up the issue of Mdlalose in a text message in early December 2013 and claims to have discussed the non-appointment of Pillay with Nxele at the Karridene Hotel in July or August 2013. He did not however formally challenge the appointments on grounds of irregularity.
- [82] It is clear that the appellant was partly motivated to make the disclosures by the umbrage he took at the perceived unfair treatment of his immediate family members. Had that not happened it is doubtful whether he would have made them. However, the exchange in text messages about Mdlalose in early December 2013, including Nxele's veiled threat to investigate the appellant's allegedly unauthorised travel, supports a finding that Nxele understood at that stage that the appellant was perturbed by certain appointments and to Nxele's irritation had raised them with other colleagues. Nxele saw this as a challenge to his authority and his threatening response probably gave the appellant pause. Additionally, the text messages between the appellant and Nxele on 13 and 14 February 2014 further indicate that the appellant had indeed raised questions about Pillay,

Mathenjwa and Mbanjwa prior to the suspension of the learnership programme.

- [83] In any event, the fact that the appellant may have acted partly out of ulterior motive does not mean that he did not act in good faith (or acted in bad faith) by making the disclosure. Good faith must be assessed contextually on a case-by-case basis, taking account of various factors at play in the specific case. Acting with an ulterior motive is not necessarily the same as acting in bad faith. Acting in bad faith in a strict sense refers to a dishonest intention or a corrupt motive. The information in the disclosures made by the appellant was in fact true in important respects. The appellant did not deceitfully manufacture information or unreasonably exaggerate the wrongdoing that had taken place. There were real problems with the manner in which appointments were being made in the region for which Nxele was responsible. The fact that the appellant acted with some personal animosity or spite is not alone sufficient to conclude that he did not act in good faith. His earlier attempts to challenge

the decisions, while somewhat tentative, and perhaps self-serving, reveal that by the time he belatedly made the disclosures (some weeks after being threatened by Nxele) he had mixed motives. In the circumstances it cannot be said that the appellant did not make the disclosures in good faith. In the result, the disclosures he made were protected disclosures in terms of the PDA and the Labour Court erred in holding otherwise.

The dominant reason for the dismissal

- [84] It is next necessary to determine the dominant reason for the dismissal. Section 3 of the PDA provides that no employee may be subjected to any occupational detriment (dismissed) by his or her employer on account, or partly on account, of having made a protected disclosure. As explained earlier, where a dismissal is in contravention of the PDA it will be

automatically unfair in terms of section 187(1)(h) of the LRA. If there are different reasons for dismissing an employee, the court must embark on a causation enquiry. The decisive inquiry therefore is whether the reason for the appellant's dismissal is one proscribed by section 187(1)(h) of the LRA or the misconduct for which he was charged. The court must determine whether the dismissal would have occurred if the appellant had not made the protected disclosure and, if not, whether such disclosure was the main, dominant, proximate or most likely cause of the dismissal.

- [85] The respondents maintain that the reason for the dismissal of the appellant was the misconduct of which he was found guilty by the disciplinary enquiry. However, neither party made any meaningful submissions regarding the causation issue. Both limited their submissions to whether, in the absence of a finding of automatically unfair dismissal, the Labour Court erred in concluding that the dismissal of the appellant was substantively and procedurally fair. However, if it is proved that the appellant was dismissed for making a protected disclosure, the respondents cannot raise a defence based on the alleged fairness of the dismissal or claim that the dismissal was necessary for other reasons related to the appellant's conduct.
- [86] Although the findings of the disciplinary enquiry and the witness statements form part of the discovered documents, it was agreed in the pre-trial minute that, while the documents were what they purported to be, the truth of their contents was not admitted and if the respondents wished to rely on such evidence the relevant witnesses would need to testify.
- [87] The first count against the appellant was that he compromised the integrity and credibility of the selection process by asking the chairperson of the panel interviewing for the learnership programme, Khumalo, if he had seen the application of his daughter with the innuendo that she should be appointed. The respondents led no evidence before the Labour Court relating to this charge. The only evidence before the Labour Court was the appellant's confirmation that he had, indeed, asked Khumalo if he had seen that his daughter had applied for a learnership. Neither Khumalo nor any other witness was called to testify before the Labour Court with regard to the appellant's comment or their interpretation of it, or to rebut the appellant's testimony that the meeting with Khumalo had occurred by chance and that his comments were motivated by pride and excitement at the fact that his daughter had decided to follow in the career choice of her parents.
- [88] The second count against the appellant was that he refused to obey security regulations by refusing to open his car boot and be searched as he entered the correctional centre on one occasion while he was on suspension. The appellant was offended by the attempt to search him and saw it as a form of harassment. He was at the time the head of the correctional centre. When faced with the attempt to search him he immediately contacted Sibutha, the Acting Head of the centre, who gave him permission to enter without being searched. Sibutha testified that she had the authority to waive the search requirement. The appellant thus clearly did not commit any misconduct in relation to this issue.

- [89] Count 3 alleged that the appellant violated his conditions of suspension by communicating by a whatsapp with a colleague, Zikalala, and “threatening to summon her to court”. The letter of suspension provided that the appellant could not contact or communicate with any employee of the department without the written permission of Nxele and the appellant is alleged to have breached this provision. The appellant does not dispute the exchange with Zikalala. The message said nothing more than that the appellant had been suspended and that Zikalala and others would be “called to court” and that the appellant wanted Zikalala to “tell the court what is happening”. The appellant accepted that he was probably technically in breach of his letter of suspension by communicating with Zikalala. However, the text was neither threatening nor an attempt to interfere in any investigation against him. The purpose of this provision was unnecessarily restrictive as the appellant was entitled to prepare his defence to the disciplinary charges without having to revert to Nxele.
- [90] Count 4 alleged that on 19 February 2014, the appellant failed to “submit sick leave” within the five day period stipulated by the directive on leave of absence in the public service. The Labour Court found there was no substance to this charge and there is no cross-appeal against that finding, indicating that there was most likely no reason for disciplinary action on this score either.
- [91] Count 5 alleged that on 20 February 2014, the appellant showed Marau the unsigned memorandum regarding the position of Regional Co-ordinator: Security in which Marau was the second recommended candidate. It was alleged that this was a misrepresentation because it was not in line with what was recommended by the interview panel. The appellant’s testimony about the recommendation was not meaningfully challenged by any other member of the interview panel and his version is corroborated by the interview lists as signed off by the panel members. There was thus no misrepresentation.
- [92] The charges against the appellant, with the exception of count 1, were thus implausible, if not trivial. They appear somewhat trumped up and support a conclusion that the real reason for Nxele taking disciplinary action against the appellant was something else. One does not have to look too far to determine that reason. The correspondence leading up to the appellant’s suspension makes it plain that Nxele took umbrage at the appellant questioning the propriety of the various appointments. This is most evident in Nxele’s threat made in the message of 9 December 2013 where he “cautioned” the appellant that he would investigate his travel and stated that he was “either asking for trouble if not challenging me and my authority” and added that “if it is the last thing we must have between us I will comply”. That is a threat of dismissal that bore no relation to any of the charges ultimately brought against the appellant. Nxele was threatening the appellant with dismissal if he continued to question the impropriety of some of the appointments.
- [93] That such was the intention is confirmed by the message sent by Nxele in response to receiving the appellant’s letter of 14 February 2014, the terms of the letter of suspension and Mdletshe’s evidence that Nxele said he intended “to deal with” the appellant. In the text message Nxele chastised the appellant for assuming that he could “dictate what must

happen in this region” and added “there is no correcting me here.” In the letter of suspension Nxele was concerned mainly with the appellant’s supposed undermining of his authority and the allegations made about him to the Acting National Commissioner. The appellant was not charged with any misconduct in that regard.

- [94] From the evidence viewed overall, therefore, it may reasonably be inferred that the appellant would not have been dismissed but for the disclosures he made. Most of the charges were a fig leaf covering the true reason for dismissal: the protected disclosures. By his own admission the appellant acted inappropriately in mentioning his daughter’s application to Khumalo. The evidence about what he said and what was intended is insufficient to make a definitive finding that he acted corruptly in that regard. But even if this conduct justified discipline of some kind, it at best served as a secondary reason subordinate to the most proximate or dominant reason. The letter of suspension, its timing, the preceding threats and the trumped up charges, taken together, establish that it was most likely that the appellant was suspended, and ultimately dismissed, because he made protected disclosures. His dismissal was “on account, or partly on account, of having made a protected disclosure” as contemplated in section 3 of the PDA. Hence, the dismissal of the appellant was in contravention of the PDA and automatically unfair. The appeal must accordingly succeed.

Relief

- [95] Section 193 of the LRA provides that where a dismissal is found to be unfair the court may order reinstatement, re-employment or compensation. The court must order reinstatement or re-employment unless: i) the employee does not wish to be reinstated or re-employed; ii) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; iii) it is not reasonably practicable to reinstate or re-employ the employee; and iv) the dismissal was merely procedurally unfair. Section 194 of the LRA requires awards of compensation to be just and equitable but limits compensation normally to 12 months’ remuneration. However, section 194(4) allows for awards of increased compensation of up to 24 months where the dismissal is automatically unfair.
- [96] The appellant seeks the primary remedy of reinstatement. Counsel for the respondents, Mr Moerane SC, submitted that if the appellant’s dismissal was found to be automatically unfair, an order of reinstatement should not be granted because the appellant’s conduct has rendered the continuation of an employment relationship intolerable. There is merit in this submission. The evidence shows that the appellant conducted himself in a less than honourable manner both as a panel member in some of the interviews and otherwise. Despite knowing that Mbanjwa did not meet the criteria for appointment, the appellant highly recommended him. He admitted during cross-examination that he had been complicit in the corruption with regard to that appointment. He also did not formally object to Mathenjwa’s appointment despite knowing that he too was not qualified for the position. He raised these appointments (albeit a while after the event) with Nxele, but failed to place on record his justifiable concerns. Moreover, when he brought these irregularities to the

attention of the Acting National Commissioner, he neglected to disclose to her that he had served on the panels recommending the appointments.

[97] Additionally, the appellant's inappropriate behaviour in relation to the applications involving his family members, while perhaps alone not sufficient to justify dismissal, reflects a disconcerting lack of judgment in one of such high rank in correctional services. He escalated the problems for the attention of the Acting National Commissioner only once he felt unfairly treated personally and possibly because his family was not given preference. This was self-serving and discloses a lack of the ethical calibre required of an officer commanding a maximum security prison. His conduct has undermined the trust relationship to a degree that renders the continuation of the employment relationship intolerable. In the circumstances, reinstatement is not an appropriate remedy.

[98] An award of just and equitable compensation in lieu of reinstatement must take account of the appellant's lengthy service, his age and importantly our finding that the appellant suffered reprisal for making a protected disclosure when he should have been shielded from further impropriety. Employers who act inappropriately against whistle-blowers should expect to be fittingly sanctioned. There is no reason why costs should not follow the result in this case.

[99] In the result, the following orders are made:

99.1 The appeal is upheld and the order of the Labour Court is substituted by the following:

"a) The dismissal of the applicant is declared to be automatically unfair.

b) The respondents are ordered to pay the applicant 18 months remuneration calculated at the rate of remuneration on the date of

dismissal.

c) The respondents are ordered to pay the costs of the application."

99.2 The respondents are ordered to pay the costs of this appeal.

JR Murphy

Acting Judge of Appeal

I agree

B Waglay

Judge President

DM Davis

Judge of Appeal

APPEARANCES:

FOR THE APPELLANT: Adv P Schumann

Instructed by Shepstone & Wylie Attorneys

FOR THE RESPONDENTS: Adv M Moerane SC and Adv L R Naidoo

Instructed by The state attorney

[1] Act 66 of 1995.

[2] Act 26 of 2000.

[3] He was acquitted on an alternative charge to count 5, which is thus no longer relevant.

[4] See J Grogan Workplace Law (10th Ed) 181 et seq.

[5] (1999) ILJ 1718 (LAC).

[6] Kroukam v SA Airlink (Pty) Ltd

(2005) 26 ILJ 2153 (LAC) at 2207F.

[7] Regulations C 1.1 and 2.

[8] Regulations D1 and D5(b).

[9] Regulations D7 and D8(a).

[10] Radebe and Another v Premier, Free State Province & others

(2012) 33 ILJ 2353 (LAC) para 33.

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