

SOUTH AFRICA / JUDGMENT

Mavundla v Frame Leisure Trading (Pty) Ltd (JS230/20) [2024] ZALCJHB 342; (2024) 45 ILJ 2756 (LC) (2 September 2024)

[2024] ZALCJHB 342

COURT

Labour Court Johannesburg

BEFORE

RN Daniels

CASE / FILE NUMBER

JS230/20

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FLYNOTES:

LABOUR – Dismissal – Automatically unfair – Discrimination on grounds of race – Alleged failures in payroll process that led to losses for company – Emails showing that manager did not want to engage another black person and would prefer white woman – White woman then brought in – Manager using k-word to refer to applicant – Company unwilling to indulge applicant's failings because she was black – Evidence showing that but for the applicant's race, she would not have been dismissed – Dismissal of applicant declared to be automatically unfair – Labour Relations Act 66 of 1995, s 187(1)(f).
THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Reportable
case
no: JS230/20

	In
the matter between:	SIBONGILE THEMBEKA MAVUNDLA Applicant And FRAME LEISURE TRADING (PTY) LTD Respondent Heard: Trial completed, with heads of argument filed on 13 June 2024
Delivered:	2 September 2024
Summary:	Application to declare dismissal automatically unfair and seek appropriate relief. Dismissal found to be automatically unfair. Respondent ordered to pay compensation.

JUDGMENT

DANIELS J

Introduction

- [1] The applicant, until her dismissal on 30 December 2016, was employed by the respondent. She alleges that the true reason for her dismissal was her race, and her dismissal is therefore automatically unfair in terms of section 187(1)(f) of the Labour Relations Act No. 66 of 1995 as amended (hereafter “the LRA”). On the other hand, the respondent alleges that the sole reason for her dismissal was misconduct.
- [2] Initially the applicant challenged the fairness of her dismissal at the Commission for Conciliation, Mediation, and Arbitration (hereafter “CCMA”). On 29 May 2017, the CCMA issued an arbitration award in which the commissioner found that the dismissal of the applicant was procedurally and substantively unfair. The commissioner reinstated the applicant with retrospective effect to the date of her dismissal. Following a review application, brought by the respondent, this Court reviewed and set aside the arbitration award on the basis that the CCMA had no jurisdiction to hear and determine such dispute, given the applicant’s allegation that she was dismissed on the basis of her race.
- [3] At the trial, the applicant testified on her own behalf. The respondent called only two witnesses, Ms Sharon Pillay and Mr Gilbert Ndlovu.

- [4] The material facts set out below were largely common cause, and form the backbone of this judgment. Where certain material facts were disputed, and merits separate discussion, they will be dealt with separately.

Material

facts

- [5] The respondent (“Frame”) conducts a retail business focussing on sports apparel, footwear, and accessories. Frame has a large workforce, and many different retail branches. At all material times relevant to this matter, its workforce exceeded one thousand employees based at about 140 stores nationwide. It was not uncommon for sales staff to be engaged on a fixed term contract basis. From time to time, employees may be transferred from one store to another.
- [6] The applicant, Ms Silungile Mavundla (hereafter “the applicant” or “Mavundla”) was engaged by the respondent as its payroll administrator on 4 July 2016. Mavundla was engaged, initially, on a three-month probation period. She was confirmed as a permanent employee on 10 October 2016.
- [7] Mavundla reported to Mr Tinus Pretorius (“Pretorius”) with whom, initially, she had a good relationship. She also reported to Ms Sharon Pillay (“Pillay”) who had trained her for the position.
- [8] Both Pretorius and Pillay were both managers in relation to human resources, industrial relations, and the payroll. Pretorius was the more senior of the two.

The applicant’s duties and responsibilities

- [9] One of the applicant’s duties was to ensure the correct processing of the monthly payroll. The applicant’s extensive

job description required her, inter alia, to perform the following duties:

- 9.1 Liaise daily with area managers to obtain input information for the payroll,
- 9.2 Liaise monthly with area managers for active staff listings,
- 9.3 Check each store/department/cost centre and verify complement with payroll data and report variances (attendances, terminations and new engagements),
- 9.4 Update staff movements,
- 9.5 Process and submit payroll administration on time i.e. new employees, promotions, transfers, resignations and terminations,
- 9.6 All payroll functions using the Integrity Payroll System.

[10] Employees at store level reported to the store managers who, in turn, reported to area managers. The area managers reported to the regional manager, Mr Gilbert Ndlovu. The area managers were required to maintain a “active staff list” which they would send to the payroll administrator (based at head office) on a monthly basis. Respondent explained the process as follows:

10.1 Area managers were required to send active staff lists (for all the stores in their area) to the payroll administrator between the 15th and the 20th day of every month.

10.2 The active staff list must contain the names of current employees at the time of its submission to payroll.

10.3 Final amendments could be made to the payroll on the 28th day of the month.

[11] The area managers would, in addition, send to the payroll manager a “staff termination report/s” on the first day of each month. The following requires mention:

11.1 The area managers must compile the reports, in which they must identify all employees: (i) who had resigned, (ii) whose fixed term contracts had expired, (iii) who had been dismissed, and (iv) who had absconded.

11.2 Area managers were directed to send the reports to the payroll manager by using the following email addresses: h[...] and p[...]; and to copy g[...] and j[...]. It appears that area managers were not required to send the reports to the applicant at her email address: a[...]. However, these reports contained information required by the applicant to perform the duties reflected in paragraphs 9.3 and 9.5

above.

[12] Pillay testified that, where Mavundla required information, she was required to source that information from the area managers and not the store managers. The applicant claimed that she was entitled to contact store managers for information, and she did so. In my view, little turns on this.

[13] As a result of the requirement that active staff lists identify only current employees as at the date of its submission to payroll (between 15th and 20th day of every month) there was some risk that employees who had worked until just before the submission of the report would not be paid.

[14] During her employment, Mavundla experienced difficulties securing information from area managers who would often send the active staff lists only to the human resources and payroll manager, Pretorius.[1] The documents demonstrate that, as of 21 November 2016, some area managers continued to send emails[2] attaching the active staff lists to Pretorius. Frame attempted to address this problem by ensuring that any emails addressed to

Pretorius (through his email address p[...]) were automatically forwarded to the applicant at her own email address – a[...]. It is unclear when exactly the email forwarding was introduced. Where the emails reflect “payroll” or “hr” this related to the email address of Pretorius. Where the emails reflected “admin” this related to the email address of the applicant.

- [15] Pillay testified that Mavundla was required to receive the active staff lists (which would identify only current employees), conduct a first run of the payroll (which she also referred to as “nett pay” roll) and then compare the nett pay roll against the active staff lists. If individuals appeared on nett pay roll but not on the active staff list, those individuals should be removed from the payroll. For reasons not adequately explained, the respondent insisted that Mavundla must conduct her payroll duties without any reference to the staff termination reports.
- [16] On 9 November, Pretorius addressed a letter to the applicant in which he recorded that Ms Phumzile Ncedo Nuse, had received three months salary when her name did not occur on the active staff lists for the store known as “Eastgate 2”. Pretorius notified the applicant that active staff lists must be used as a control mechanism. Significantly, Pretorius did not inform the applicant that she would face disciplinary action for the error. Pillay testified that this information, regarding Nuse, led her to investigate of Mavundla.
- [17] Between 4 and 11 November, the applicant was on leave. Although she was due back on 11 November, she only returned on 16 November. In her absence, according to Pillay, there had been no input on the payroll.
- [18] On the day after the applicant returned to work, i.e. 17 November, the respondent engaged the services of Ms Elize Coetzee (“Coetzee”). Coetzee’s work involved her assisting with duties previously been performed solely by the applicant. Pillay testified that this was necessary because there was to be a large intake of new employees at the end of
2016. Pillay was aware that Coetzee was the romantic partner of Pretorius, but vehemently denied that Pretorius had anything to do with the employment of Coetzee. Despite this, Pillay did not explain how she discovered that Coetzee was available and had the requisite skills. At the CCMA Pillay would not admit that Pretorius had brought Coetzee to her attention.[3] On the probabilities, Pillay must have been informed of this by Pretorius.
- [19] Pillay testified that, though Mavundla worked on the payroll after she returned from leave, the payroll for November was done by Pretorius and Coetzee. It stands to reason that the respondent would have not permitted the applicant to finalise the payroll by herself, given that respondent believed she had made errors earlier and it had commenced an investigation into her performance on 9 November. Given that Coetzee and Pretorius did most of the work on the November payroll, the question arises why they were not held responsible for the many errors on the November payroll. Pillay did not attempt to explain this.

- [20] On 13 December, the applicant became aware of an email from Pretorius to a recruitment agent in which Pretorius stated that Mavundla was “sinking the ship”. In protest, Mavundla sent an email to Pretorius and copied the General Manager, Mr Chris Bezuidenhout (hereafter “Chris”), and the CEO, Mr Mark Frame.
- [21] Later that day, Chris emailed the applicant and the two human resources managers (Pretorius and Pillay) calling for a meeting to discuss the email from the applicant. However, on her way to the meeting, Mavundla was told that she need not attend. At the meeting, Pillay advised Chris that she had investigated and discovered that there were several instances where Mavundla had failed to place a hold on salaries. It was decided that she should be charged with misconduct. It is unclear whether the emails (the original reason for the meeting) were discussed at all. On the probabilities, the emails were not discussed, because the applicant received no feedback from the meeting, nor was her presence required at the meeting.

Investigation and disciplinary process

- [22] On 18 December, Frame gave Mavundla notice of a disciplinary hearing at which she would face charges that she: (1) deliberately failed to process payroll information that resulted in substantial loss to the company, (2) she was insubordinate by not responding to a formal request for feedback on payroll discrepancies, (3) she had seriously breached the trust relationship between herself and Frame.
- [23] Before her disciplinary hearing the applicant attempted to secure the assistance of another employee to represent her, but failed. The applicant speculated her proposed representative had been intimidated by the company, but produced no reliable evidence to that effect.
- [24] The applicant testified that Frame withheld her December 2016 salary in an attempt to force her to acknowledge that she was liable for the losses (of approximately R50 000. 00) incurred as a result of errors on the payroll. Frame contended that her salary was withheld because it believed that she was the cause of financial losses.[4]
- [25] Before the disciplinary hearing, Pillay produced a document (hereafter the “investigation document”) identifying all the payroll errors which it alleged were caused by the applicant.
- [26] The disciplinary hearing proceeded on 22 December, before the chairperson, Mr J Nhlapo (hereafter “Nhlapo”) the national retail manager. Pillay acted as initiator, and Pretorius was called as the employer’s witness. In her written submissions,

the applicant contended that there was a plot to get rid of her to create space for the girlfriend of Pretorius. In other written

submissions, the applicant contended that the company condoned the senior managers abuse of power who, she said, ruled by fear and exploitation. The applicant threatened Frame stating that, if she was dismissed, she would “go to labour courts to expose and embarrass this company, ruin its reputation and image.”

[27] In her submissions at the hearing, the applicant advised the chairperson that her duties were to ensure that all termination reports are processed as soon as they are received from respective area managers. By contrast, Pillay testified that the applicant's

duties did not require her to engage with the termination reports, because the termination reports are produced for a different purpose – as a source document for the preparation of “variance reports” to be sent to the CEO.

[28] After the hearing, the chairperson found the applicant guilty of all the charges and dismissed her.

Applicant's meeting with the area managers

[29] To address some of the difficulties she was experiencing at work, the applicant contacted the national operations manager, Mr Gilbert

Ndlovu (hereafter “Ndlovu”) during early October 2016 and asked him to permit her to address the area managers at the next meeting to be attended by those managers. Ndlovu agreed to permit the applicant to attend and speak at the meeting, which had been arranged for 18 October 2016.

[30] At the meeting, on 18 October, the applicant advised the area managers that she was unhappy with the manner in which they were

submitting information to payroll. The applicant proposed a new excel format spreadsheet to be completed by the area managers. Ndlovu subsequently recorded that, at the meeting, the applicant:

“She started to say that she did not like the way that area managers are sending information to head office. Slu said she noticed too many things that were not done correctly and she is going to fix it. Slu said that the area managers must trust her and she is not scared of the CEO and she will approach him at any time to make any changes in the company. Slu referred to payments for overtime and staff lists. Slu stated that all overtime must be submitted to her and she will ensure that they get paid. Slu continued to say that she is in charge of payroll and human resources and all matters must be send (sic) to her directly. Slu stated that Tinus and Sharon is (sic) now doing other work and is no longer involved with the department.” (own emphasis)

[31] Ndlovu testified that the applicant's presentation to the area managers was not well received by them. Ndlovu testified that the applicant's suggestions were not viable because some area managers were not au fair with excel spreadsheets. In addition, the changes proposed by the applicant had to be approved by management, and consolidated in the form of a Standard Operating Procedure. The changes proposed by the applicant were, ultimately, never adopted. Ndlovu testified that the CEO, Mr Mark Frame, attended the first part of the meeting but he was not present to hear the applicant's proposals. The applicant disputed that the CEO was not present for that part of the meeting where she presented her proposed solutions to the payroll issues. At trial, the respondent admitted that the applicant's proposals could enhance efficiencies within payroll.

Communications between Pretorius and a recruitment agent

[32] Frame used a recruitment company, Ashton Personnel, to cater for its flexible labour needs. Ms Lesley Hitchcock (hereafter “Lesley”)

of Ashton Personnel liaised with Pretorius, the senior human resources manager.

[33] The applicant applied for, and was granted leave for the period from 4 November 2016 to 11 November 2016. On the leave form the applicant inserted the words “study leave”, through there was no category for study leave. However, by 15 November, the applicant had still not returned from leave. She advised the respondent that, being sick, she had been booked off work.

[34] On 14 and 15 November, Pretorius and Lesley exchanged a number of emails, several of which related directly to the applicant. A further exchange followed on 12 December. It is necessary to set out the contents of some of these emails which relate to the applicant (who was referred to in the emails as “Slu”):

15 November 2016 11:40

From: Pretorius

To: Lesley

MAYBE A GOOD IDEA. At this stage I feel like going to the mountains. Slu wanted study leave since 4 November until 11 Nov. She was supposed to be at work yesterday but said she is sick. This morning we were informed she is booked off until Thursday. There is so much work we employed 220 extra people for the festive period. It seems these people are not reliable anymore. Don't worry I am just sharing my frustration.....

15 November 2016 12:01

....

With regards to Slu....We need to look for a back-up but not a black again. I need someone that I can train in Industrial Relations, HR and payroll. Maybe a young graduate white female. I deliberately want to stay away from the liberal element with political agendas.

15 November 2016 12:30

From: Lesley

To: Pretorius

Don't you think Slu will last? Or are you looking for an additional person to do IR

15 November 2016 11:06:05+0000

Slu is dangerous for IR. We almost had a disaster with her making statements and influencing store staff. I need support in HR and IR and that I can use for Payroll input.

12 December 2016 12:30 PM

Just doing a follow up to see if you would consider Carol for the Creditors or if I must try to source more cv's?

12 December 2016 3:34 PM

I don't think she will fit in. We have had so much issues with Slu that another Slu will sink the ship.

(own emphasis indicated with underlining)

[35] In his emails to the recruitment agent, Pretorius stated that he did not wish to engage another black person, but he would prefer a white woman graduate. Pretorius further stated "these people are not reliable anymore". There can be little doubt that Pretorius meant that black people are not reliable anymore. Despite the patently discriminatory nature of the emails, at the CCMA, Pillay refused to concede that they were racist.[5]

[36] Frame submitted that the emails between Pretorius and the recruitment agent were irrelevant to the engagement of Coetzee and unrelated to the applicant's dismissal. I cannot accept this. The emails spoke directly to Pretorius' lack of faith in the applicant and his desire to replace her with a white woman. Pretorius conveyed that, as a black woman, she could not easily be trained. When the agent asked Pretorius whether "Slu will last"; he responded that the applicant is "dangerous". Clearly,

Pretorius was communicating to the agent that the applicant's future with the respondent was limited. Pretorius was looking for someone to assist him with payroll. Not only are Pretorius' comments deeply offensive, but they clearly conveyed his desire to displace the applicant with a white employee.

[37] Importantly, several of the incriminating emails were sent by Pretorius (to the recruitment agent) before the applicant had been

charged with misconduct.

[38] A mere two days after Pretorius emailed the recruitment agent informing her that he would like a white woman to be brought in to

assist with payroll, a white woman (Coetzee) was indeed brought in.

[39] The contents of the emails, and their timing, go well beyond establishing a credible possibility that the applicant was dismissed

because of her race. In my view, they establish a significant probability that the applicant was dismissed for her race. I will

address this further later.

Further racist conduct

- [40] Following her dismissal, the applicant was directed to collect her belongings and leave the premises. When the applicant indicated that she wished to extract and save (onto a memory stick) personal information that was stored on her work laptop, Pretorius told her that her laptop had been sent to “forensics” because blacks are criminals.
- [41] It was common cause between the parties, and recorded as such in the pre-trial minute, that shortly after the applicant had been dismissed and asked to leave the premises, Pretorius called her a “kaffir”. This deeply offensive insult was made in the presence of Pillay and the CEO, Mark Frame. Neither Pillay nor the CEO admonished Pretorius for his use of racist and derogatory language, implying that they were neither offended nor surprised. At the CCMA, Pillay denied that Pretorius had insulted the applicant in that manner. However, at trial, she did not persist with her denial. Instead, it was common cause. Pillay did not attempt to explain her volte-face.
- [42] The respondent contends that the racist comments of Pretorius, on the date of the applicant’s dismissal, are irrelevant because they occurred ex post facto the applicant’s dismissal. I cannot accept that. On the respondent’s version, Pretorius was disciplined during mid-2020 for his use of racist and derogatory language in November 2016 – more than three years earlier. Respondent’s failure to act against Pretorius immediately, or shortly thereafter, signifies that the respondent was prepared to condone, or endorse, his racist conduct. It is reasonable to infer in these circumstances that respondent, and its management, were capable of dismissing the applicant because she was black.
- [43] I am aware that the mention that the word “kaffir”, even in the context of a judgment, may be controversial. However, this court must be faithful to the evidence presented. The applicant

advised the court that, as the victim of the racial abuse, she preferred that the actual word be used throughout the trial instead

of the alternative – the “k-word”. The applicant was unwilling to allow the respondent to dilute the humiliation and indignity that she suffered at the hands of senior management. Our courts have stated that: “‘Racism is a plague and a cancer in our society which must be rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the dignity of the employee in question’.”[6] It is simply disgraceful that Frame took no action in the face of this disparaging and contemptuous conduct by Pretorius.

- [44] The applicant’s representative made the point that, despite the fact that the applicant was already dismissed, it was still necessary for the respondent to send a message to management, and other employees, that racism would not be tolerated in the workplace.

Events after the dismissal of the applicant

[45] Despite Pillay's evidence that Coetzee had been engaged on a short-term basis, Coetzee remained in Frame's employ for three and half years.

[46] Pillay testified that:

46.1 Pretorius was ultimately dismissed during February 2020 allegedly because he had insulted the applicant during November 2016 - more than three years earlier. No documentary proof was tendered into evidence to demonstrate the reason and date of his dismissal. Pillay testified that she only became aware of the racist language used by Pretorius after it had been published in the media. This was contradicted by the applicant, who testified that Pillay was present when Pretorius used derogatory and racist language.

46.2 Respondent contended that, as a result of the COVID19 pandemic, and the unrest and protests in KwaZulu Natal during July 2021, approximately four hundred to four hundred and fifty employees were dismissed for operational reasons. The applicant could not dispute this.

46.3 The respondent testified that it had restructured its finance department and the position of payroll administrator no longer exists. Instead, says the respondent, it employs a payroll manager, which position has long been occupied by another. The applicant could not gainsay this either.

Evaluation of witnesses

[47] The correct approach to the evaluation of conflicting evidence can be briefly summarised as follows:

47.1 The court must consider the credibility of witnesses, their reliability, and the probabilities.

[7] When credibility compels in one direction, but the probabilities in the other, then the probabilities must prevail.

47.2 The credibility of a witness is not a separate criteria but is inextricably bound up with a consideration of the probabilities of the case.[8] In general, credibility relates to issues such as candour and demeanour, bias - whether latent or blatant, internal contradictions

in the evidence, contradictions with what was pleaded or put on his behalf, and the probability or improbability of particular aspects of the version.

47.3 An analysis of evidence at trial should not be done on a piecemeal basis.[9]

47.4 The question is not whether a witness is truthful and reliable in all that he or she says, but whether on the probabilities the essential features of the story are true.[10]

[48] One of the factors pertinent to credibility is the balance of probabilities. Having considered the evidence of Pillay, as a whole, I am unable to find that she was a credible or reliable witness. It appears to me that the essential elements of her story, some of which are set out below, lacked transparency and integrity. Below, I identify some of her more important failings, but this is no indication that I approached her evidence on a piecemeal basis. Among other things, when evaluating her evidence, I considered that:

48.1 Having trained the applicant, Pillay had motive to embellish the nature and extent of the training she provided to the applicant. Pillay also had reason to exaggerate the applicant's competence and capability, given that she (Pillay) had decided, after the very first month of the applicant's employment that she no longer required monitoring or training. If her assessment proved incorrect, Pillay would have to take responsibility for her error in judgment. That her training of the applicant was likely deficient given the applicant's insistence that the termination reports were to be used by her in compiling the payroll - to ensure that there were no payments to individuals who were no longer employed, whereas Pillay insisted that only the active staff listings were to be used. If Pillay is correct, this would have been a cumbersome process, and could have resulted in workers who had worked for part of the month receiving no payment. In addition, Pillay method could only work if area managers sent through

the active staff listings by the 20th day of the month.

48.2 Pillay testified that the payroll administrator was the only individual with complete access to the payroll system. This version must be rejected, on the probabilities. It is highly unlikely that any employer would entrust its finances to the complete control of a newly engaged employee, who remained on probation.

48.3 Pillay testified that she considered the "variance report", statistics from one month to the next, to determine trends in relation to active stores, salaries, overtime, and workforce size. She testified that she was not required to recheck the payroll inputs by the applicant because this would have meant a duplication of work. While this may be a duplication of work, this has to be weighed against the fact that the applicant was on probation until early October. It is improbable that respondent would not check the work of a new employee who was performing such critical tasks.

48.4 Pillay testified that she motivated for the employment of Coetzee, not Pretorius. That may well be, but when asked if Pretorius had brought Coetzee to her attention, Pillay baldly denied this. Her denial rings hollow. She avoided explaining how she became aware of Coetzee's availability, skills and experience. The only reasonable explanation is that Pillay received this information from Pretorius.

48.5 At the CCMA, Pillay attempted to shield Pretorius. There, she testified that Pretorius did not insult the applicant by calling her a kaffir.[11] However, in this Court, it was common cause that Pretorius did so. Clearly, in this court, Pillay realized that her earlier version

simply would not fly. She did not attempt to explain this about face either.

48.6 In addition, at the CCMA, Pillay attempted to protect Pretorius by stating that his emails sent to the recruitment agent were not racist. However, once again, in this court, Pillay realized that she could not protect Pretorius. She did not attempt to explain why she had said that the emails were not racist.

48.7 Pillay was asked why the respondent failed to discipline Pretorius in 2016 for his use of racist and derogatory language in the workplace. Pillay indicated that, as a result of her inexperience, she was unaware of how serious the issue was. This can never be accepted. No adult person in South Africa could possibly be ignorant that the use of racist and derogatory language in the workplace is an extremely serious issue. No training or experience in human resources is required.

[49] I found the mechanical manner in which Pillay approached her evidence unsettling. I also found it strange how Pillay's recall was excellent in relation to issues advancing the case of the respondent, but vague and unclear on issues advancing that of the applicant.

Nevertheless, I will avoid drawing conclusions based on her demeanour given that, at the best of times, demeanour is tricky horse to ride. Nonetheless, I must state that I found it striking that Pillay was not prepared to make concessions. This led her evidence to assume bizarre proportions, as explained in paragraph 48.7. After carefully considering Pillay's testimony as a whole, I cannot accept that her evidence was credible or reliable. In the circumstances, where Pillay's version contradicted that of the applicant,[12] I prefer the version of the applicant.

[50] I had no difficulty with the evidence presented by Ndlovu. His evidence dealt only with the meeting between the applicant and the area managers. I agree wholeheartedly with Ndlovu that applicant had clearly exceeded the bounds of her authority. She did not understand that her position was administrative, and not managerial. However, in my view, little turns on this. The only relevance of the meeting is that it shows that the applicant that she was not receiving adequate support from her colleagues to effectively perform her duties, she was frustrated, and she wished to rectify the problems. It may be that the applicant should have adopted a less confrontational approach, but that is beside the point.

[51] There can be little doubt that Mavundla exaggerated her skills and capability. It is not unexpected that she would do so, having been treated in a thoroughly disrespectful and unfair manner by the respondent. Mavundla testified that she singlehandedly identified a number of ghost employees on the payroll. There is no evidence that she made any such discovery and I cannot accept that evidence. Assuming the applicant was lying on that occasion, the significance of that should not be overstated. We must take guidance from established principles[13] which hold that "it is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony nor that there is any probability that he is so lying. The probability is to the contrary." As previously mentioned, the question is not whether Mavundla's evidence was credible and reliable in all respects. The question is whether it was credible and reliable in material respects. In my view, Mavundla's evidence was, in material

respects, credible and reliable. Mavundla did not shy away from the compromising statements she had earlier made and she readily made concessions. Furthermore, her evidence at the CCMA, and at the Labour Court, was substantially similar and consistent with the documentary evidence.

Automatically unfair dismissal?

[52] The LRA provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated

against an employee, whether directly or indirectly, on the grounds inter alia of race. In this matter, the applicant contends that her dismissal is automatically unfair because the true reason for her dismissal is her race. By reference to the evidence presented, this Court must objectively determine the reason for the dismissal of the applicant. Our courts have provided ample guidance as to how to approach this task:

52.1 In *South African Chemical Workers Union and others v Afrox Ltd*[14] Froneman DJP (as he then was) held as follows:

“[32] The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here (compare S v Mokgethi & others 1990 (1) SA 32 (A) at 39D41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected

strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a) . If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.” (Own emphasis)

52.2 In *Kroukam v SA Airlink (Pty) Ltd*[15] Davis AJA (as he then was) held:

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

- [53] This court must first determine whether the applicant has discharged the evidential burden by raising a credible possibility that she was dismissed on the basis of her race.
- [54] In my view, the emails exchanged between Pretorius and the recruitment agent, coupled with the extreme and overt nature of the racism exhibited at the time of the applicant’s dismissal, raise a credible possibility that the applicant was dismissed because of her race. The most senior human resources manager, Pretorius, believed that the applicant was unreliable and untrainable because she was black. In addition, he wished to replace the applicant with a white female graduate. Not only are his emails racist, but they indicate that Pretorius believed that the applicant was not suitable for her position because she was black. Furthermore, the racist comments and innuendo were condoned by the respondent at the highest level. It took the respondent more than three years to discipline Pretorius, and, even then, they only did so to protect their image and reputation. The respondent cannot, belatedly, divorce itself from the racism of Pretorius.
- [55] The applicant having discharged the evidentiary burden upon her, it behoved the respondent to prove that the reason for her dismissal was not based on race. In order to achieve this, the respondent led evidence to demonstrate that the applicant was guilty of gross misconduct, hoping to undermine and eclipse the evidence indicating that Pretorius had indicated that the applicant ought to be replaced by a white woman.

The alleged misconduct

- [56] The parties agreed that the documents are what they purport to be, and all letters and emails shall be regarded as having been sent and received by the sender and the recipient (unless a party objected to any document beforehand). The documentary evidence reflected that:

56.1 The area manager named Esabel emailed, to the applicant, an active staff list on 27 September 2016,[16]

56.2 The area manager named Joseph emailed, to the applicant, an active staff list on 27 September 2016,[17]

56.3 The area manager named Sharon had emailed an active staff list to payroll on 21 November 2016,[18]

56.4 The area manager named Michael had emailed an active staff list to payroll on 21 November 2016,[19]

56.5 The area manager named Xoliswa had emailed, to the applicant, an active staff list on 27 September 2016,[20]

56.6 The area manager named Faith had emailed an active staff list to payroll on 21 November 2016,[21]

56.7 The area manager named Vumane had emailed, to the applicant and the payroll manager, an active staff list on 22 November 2016,[22]

[57] The applicant did not dispute receipt of the emails, or that a proper comparison of the active staff listing with the nett pay roll would have identified those individuals who should not have been paid salaries. At face value, this might suggest negligence on her part. However, this requires closer scrutiny. Of the seven emails referred to in para 54 above, three[23] were sent to the applicant on the 27th day of the month after 2pm. In those instances, the applicant was required to conduct the reconciliation process between the time she received the email (the afternoon of the 27th day) and some unidentified time the following day. It must be recalled that the respondent's policy was the active staff lists should be sent to payroll by the 20th day of the month and that final amendments to payroll must be done on the 28th day. The respondent's policies or procedures therefore required that payroll be given eight days to consider the active staff listings and make the relevant changes to the payroll. Instead, in at least three instances, the applicant was given, at most, a single working day.

[58] Furthermore, it must be recalled that Pillay testified that the area managers were required to send the active staff listing to the applicant before the 20th day of each month. Despite this, no disciplinary action was taken against the area managers for failing

to follow the protocol.

[59] Having dealt with the incidents of alleged negligence contemplated in paras 56.1, 56.2 and 56.5 above, I now turn to the others.

[60] The emails, referred to in paragraphs 56.3, 56.4, 56.6 and 56.7 were all sent a day or two after the deadline. More importantly, these emails all relate to the November payroll which, on Pillay's version, was done by Pretorius and Coetzee, with some assistance from the applicant. Pretorius' evidence in that respect would have been helpful. Pillay testified that the applicant only returned to work on 16 November, and, at that time, no work had yet been done on the November payroll. Coetzee commenced working a day later, on 17 November. In the circumstances, the evidence does not show that the applicant was responsible, whether in part or in full, for the errors on the November payroll. Pillay had no detailed, or personal, knowledge of how the November payroll was compiled. Only Coetzee or Pretorius could have testified that the applicant was responsible for some or all the errors on the November payroll.

[61] The respondent produced no email to the applicant from the area manager “Vumane” attaching the active staff listing for October 2016. Accordingly, respondent could not show that the applicant wrongly failed to stop payment of the salary of Tebogo

Boutlwanye for October 2016.

[62] Importantly, the respondent did not contend that the applicant acted negligently by paying employees who should not have been paid.

Instead, it contended that the applicant had acted deliberately.

Analysis

of respondent’s case

[63] There are several difficulties with the respondent’s case:

63.1 Firstly, the applicant’s employment was confirmed on 10 October 2016 and she was praised for doing her job well. Naturally this would have led the applicant to believe that there were no errors on the August and September 2016 payrolls. It was necessary for the respondent to consider the applicant’s performance during August and September 2016 to decide whether the applicant had met the required standards. Instead, for the first time, on or about 16 November 2016, the applicant was handed the investigation document suggesting she had committed one error on the August payroll and three errors on the September payroll. Had the applicant been properly trained, and supervised during August and September 2016, errors after September could have been avoided.

63.2 In respect of the October payroll, it was common cause that the applicant contacted Ndlovu at the beginning of the month. She did so to inform the area managers of her difficulties and to seek their assistance. The respondent conceded that, while the applicant was lacking in finesse, her motivations were honourable. She wished to do her work more effectively and efficiently. This does not support a finding that she deliberately made errors on the payroll. In addition, as previously explained, the applicant was clearly mistaken as to how she was required to perform her duties. She was not required to consider or use the termination forms or termination report. She was required only to use the active staff listings – even though this created some risk that employees who had worked would not be paid. Under cross examination, it was not put to the applicant that her conduct was deliberate.

63.3 In order to prove that the applicant had failed to perform her duties the respondent was required to show, in respect of the incidents on the investigation document, that the area managers had sent her the active staff listings or that the emails from the area managers (addressed to Mr Pretorius) were automatically forwarded to the applicant.

[64] The respondent produced an email dated 3 October 2016, from an area manager named “Esabel”, addressed to the applicant. Esabel informed Mavundla that an employee, Ms Pumzile Nuse (“Nuse”) was not employed at Eastgate 2 but she had been paid for August and September 2016. The applicant replied to the email and informed Esabel that she would check all the active staff lists and will place her under the correct store. Nuse was not paid thereafter. This is not proof that the applicant deliberately paid individuals who were not entitled to such monies.

[65] In light of what is set out above, I cannot accept that the applicant was responsible for the errors on the payroll. During August and September 2016, the applicant was on probation. Her managers would have checked her work, and the applicant would have expected that they would do so. There is no reason why the applicant should be held solely responsible for errors in those months. In November, the evidence showed that the applicant was not primarily or solely responsible for the payroll.

[66] Finally, even if the applicant was guilty of having performed her job in a negligent manner, that must be understood in context.

66.1 The applicant testified that she genuinely believed that her work was being checked and monitored by her managers. Her work should have been checked and inspected, when she was under probation, during both August and September 2016. In those circumstances, she would not have known that any errors would result in financial harm to the respondent.

66.2 During October 2016, the applicant tried to confront the difficulties she faced and sought the assistance of the area managers, which was blocked. This is not the conduct of an employee who simply did not care.

66.3 During November 2016, the applicant was absent for a significant chunk of the month. Upon her return to work, she worked on the

payroll, but she did not drive the process. Two others also worked on the payroll.

66.4 The applicant was new to the workplace. She was single handedly performing an extremely difficult task, with tight deadlines, and

several variables, in relation to a large workforce (exceeding one thousand employees) and approximately one hundred and forty stores nationwide. These facts, by themselves, particularly the applicant’s heavy workload, suggests that the errors on the payroll were not deliberate.

Adverse inferences

[67] In the CCMA arbitration award issued on 29 May 2017, the commissioner recorded: “in consideration of the fact that both Tinus Pretorius and Nhlapo were not called at arbitration I am bound to draw a negative inference against them”. This should have served as a warning to the respondent.

[68] Once the applicant had discharged the evidential burden, the respondent was required to prove that the applicant's race played no significant role in her dismissal. In my view, the respondent could only discharge this onus by calling Mr Nhlapo (the

chairperson of the disciplinary hearing) or Pretorius.

[69] Only Pretorius could testify that while he fantasized about replacing the applicant with a white employee, he did not or could not follow through. Furthermore, only Pretorius could testify that his evidence at the disciplinary hearing was not tainted by racism, and that he took no irregular steps to influence the outcome.

[70] Only Mr Nhlapo could testify that he applied his mind solely to the evidence before him, and he was uninfluenced by Pretorius'

agenda. In the pre-trial minute, at para 8.2, the applicant recorded that "...the disciplinary charges were merely a front used by the respondent in an effort to remove the applicant from its employ and replace her with a white employee."

[71] In its heads the respondent submits that the chairperson was not implicated during the trial as being biased or the like. I do not accept this submission. Once the applicant met the evidentiary burden demonstrating a credible possibility that she was dismissed on the basis of her race, the respondent was required to prove that race was not the dominant criterion in her dismissal. Respondent could only do this by calling the chairperson. In any event, as demonstrated in para 8.2 of the pre-trial minute, the respondent was aware of applicant's allegation that the disciplinary hearing, chaired by Mr Nhlapo, was a front.

[72] Nhlapo remains in the employ of the respondent and was an available witness. Pretorius is no longer employed by the respondent, but this does not mean that he was not an available witness. From the bar, the respondent's counsel submitted that Pretorius'

whereabouts are "anyone's guess". This was not evidence. The respondent presented no evidence that it had attempted

to contact Pretorius to persuade him to testify. In the circumstances, Pretorius must also be treated as a witness available to the respondent.

[73] In *Brand v Minister of Justice and another*[24] Ogilvie Thompson JA stated:

"Now where a witness, who is available and able to elucidate the facts, is not called by a party such failure 'leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him'. (Own emphasis)

[74] Given the circumstances, it is appropriate to draw an adverse inference from respondent's failure to call Pretorius or Nhlapo. The inference is that Nhlapo was influenced by Pretorius to dismiss the applicant, and that Pretorius was motivated to dismiss the applicant because she was black and therefore not capable of being trained.

Proximate or dominant reason for the dismissal

[75] The applicant's work performance was, perhaps, not exemplary, but it is clear that she wished to address the inefficiencies. The respondent was unwilling to indulge her failings because she was black. If the applicant were not black, the respondent would likely have taken all the necessary steps to assist her. Instead, because she was black, the respondent assumed that the applicant was incompetent, that she was incapable of being trained, and that she was possibly a criminal. The emails alone establish that the applicant was targeted because she was black. It is important to bear in mind that these emails emanated from the head of human resources and the most senior manager responsible for the payroll.

[76] The applicant had a fair defence to most of the allegations against her, as explained in paragraph 66 above. In addition, others who were also implicated in the payroll, such as Coetzee, were not disciplined. In the circumstances, the misconduct allegations were not likely the true reason for her dismissal.

[77] I believe that factual causation has been established. If the applicant was negligent in the conduct of her duties, this did not

merit dismissal. If negligence on the payroll, by itself, merited dismissal then the respondent would have considered whether Pretorius

and Coetzee should be held responsible for the errors on the November payroll. It would also have investigated whether Pillay was negligent in her supervision and training of the applicant. The different treatment of the applicant and the others (such as Pretorius and Coetzee) was likely the result of racial prejudice.

[78] In September, the active staff lists were sent to the applicant at the 11th hour, making it virtually impossible for her to effectively

perform her duties. As previously explained, in respect of the November payroll, Pretorius and Coetzee must bear responsibility.

That the respondent was prepared to punish the applicant but condone the failings of Pretorius and Coetzee speaks volumes. In my view, the applicant's failings would not have attracted dismissal if she was white.

[79] By failing to call Pretorius, the respondent could not displace the indications in the emails that he wished to replace the applicant

with a white woman. The respondent, represented by Pretorius, deemed the applicant to be unreliable because she was black. Accordingly, but for the applicant's race, she would not have been dismissed.

[80] The respondent, to demonstrate an absence of legal causation, was required to show that racism was not the main or proximate cause of the applicant's dismissal. In my view, it could only do this by calling either Pretorius or Nhlapo. The respondent did not do so, and did not explain why it failed to do so. In the circumstances, it is reasonable to conclude that racism was the main or proximate cause of the applicant's dismissal.

[81] In the result, I find the applicant's dismissal to be automatically unfair in accordance with section 187(1)(f) of the LRA.

Relief sought

[82] The applicant seeks reinstatement into her previous employment, with effect from the date of her dismissal. It is trite that reinstatement is the primary remedy and must be granted unless any of the circumstances in section 193(2)(a) to (d) of the LRA are applicable.

[83] Section 193(2)(b) states that reinstatement need not be granted where the circumstances surrounding the dismissal are such that a continued employment relationship is intolerable. In the present circumstances, a continued employment relationship would be intolerable. The trust relationship between the applicant and the respondent has been shattered and, like Humpty Dumpty, cannot be put back together again.

The applicant testified that all senior management, including the CEO, conspired against her. The applicant has threatened to expose

the company and ruin their reputation and image. The respondent cannot be expected to trust the applicant. In any event, the respondent has restructured and the post of payroll administrator no longer exists. It would not be reasonably practicable to reinstate.

[84] It is trite that compensation is a payment to offset the financial loss which has resulted from a wrongful act. In assessing the amount of compensation, the court must consider "...the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer." [25] In this matter, the applicant was dismissed eight years ago, and has been unable to find alternative employment. When considering the extent of compensation, the nature of the dismissal and the scope of the wrongful act must be considered. Here, in a highly egregious manner, the applicant was dismissed on account of her race. It is appropriate that the respondent be ordered to pay to the applicant the maximum compensation permissible.

[85] Neither party vigorously pursued costs. In the circumstances, I see no reason to make a cost order.

Conclusion

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

86.1 The respondent's dismissal of the applicant is declared to be automatically unfair in terms of section 187(1)(f) of the LRA,

86.2 The respondent is ordered to pay the applicant compensation equivalent to 24 months wages, less any statutory deductions,

86.3 The compensation must be paid within 14 days of this judgment,

86.4 Each party will bear their own costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Clifford Levin

Clifford Levin Inc

For the Respondent:

Adv F Venter

Instructed by Webber Wentzel Attorneys

[1] Pre-trial minute at para 4.16; Documents Bundle Vol II, at p133 (testimony of the respondent at the CCMA)

[2] Documents Vol I at p139: Email dated 21 November 2016 from "Sharon MOTN" to "gilbert, payroll" and copied to "hr"

[3] Transcript Vol III at p232 lines 10 – 15

[4] The applicant's December 2016 salary was finally paid to her shortly before the trial commenced during mid 2024 – more than seven years after it fell due.

[5] Documents Vol III, transcript p251

[6] Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others

(2002) 23 ILJ 863 (LAC) 2002 ILJ at para 24

[6] Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others

(2002) 23 ILJ 863 (LAC)

2002 ILJ at para 24

[7] Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA)

[8] National Employers' General Insurance Co Ltd v Jagers 1984

(4) SA 437 (E) at 440

[9] Amathole District Municipality v CCMA & others (2023) 44 ILJ 109 (LAC) at para 43

[10] Santam Bpk v Biddulph 2004

(5) SA 586 (SCA) at para 10.

[11] Documents Vol. III, transcript p 229

[12] Save for applicant's version in respect of her alleged discovery of many ghost employees on the payroll. This is discussed

further below.

[13] HC Nicholas "Credibility of Witnesses" (1985) 102 SALJ 32 at p33

[14]

(1999) 20 ILJ 1718 (LAC)

[15]

(2005) 26 ILJ 2153 (LAC)

[16] Documents Vol. 1 at p120. This email should have alerted the applicant that Ms Pumzile Nuse should not be paid a salary for September 2016.

[17] Documents Vol. 1 at p134. This email should have alerted the applicant that Ms Octavia Mabitsela should not be paid a salary for September 2016.

[18] Documents Vol. 1 at p139. This email should have alerted payroll that Ms Octavia Mabitsela should not be paid a salary for November

2016.

[19] Documents Vol. 1 at p144. This email should have alerted payroll that Mr Smilly Makatshaba should not be paid a salary for November

2016.

[20] Documents Vol. 1 at p160. This email should have alerted the applicant that Mr Smilly Makatshaba should not be paid a salary for September 2016.

[21] Documents Vol. 1 at p171. This email should have alerted payroll that Ms Tenjelwa Makuzeni should not be paid a salary for November

2016

[22] Documents Vol. 1 at p180 to 181. This email should have alerted payroll that Ms Nonqubeko Khwebulana, Tebogo Boutlwanyane and Leonard

Kruger should not be paid a salary for November 2016

[23] Those identified in paragraphs 56.1, 56.2 and 56.5

[24] 1959 (4) SA 712 (A) at 715

[25] Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others

(2007) 28 ILJ 2238 (LAC) at para 30

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