

SOUTH AFRICA / JUDGMENT

Phosa v Ekurhuleni Municipality (J14/22)

[2024] ZALCJHB 470 (28 November 2024)

[2024] ZALCJHB 470**COURT**

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

J14/22

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Source record**FLYNOTES:**

LABOUR – Dismissal – Protected disclosure –
Procurement irregularities – Dismissed for illness
incapacity – Plaintiff threatened with insubordination
and
unjustifiably issued with final written warning shortly after
disclosure and grievance – Connived and absurd reasons
for
dismissal – Dismissed for making protected disclosure –
Act of impunity and lawlessness – Dismissal
is automatically
unfair – Labour Relations Act 66 of 1995, s 187(1)(h).
THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case
No. J14/22

In the matter between:

MANDISA
PHOSA
Plaintiff
and
EKURHULENI
METROPOLITAN MUNICIPALITY
Defendant

Heard:

4 November 2024

Delivered:

28 November 2024

JUDGMENT

MAKHURA, J

Introduction

[1] On 10 January 2020, Mandisa Phosa, the plaintiff in these proceedings, referred to this Court for adjudication an automatically unfair dismissal dispute in terms of section 187(1)(f) and/or (h) of the Labour Relations Act[1] (LRA). In terms of these provisions of the LRA, a dismissal is automatically unfair if the reason for the dismissal is:

‘(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

(g) ...

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.’

[2] In the alternative, the plaintiff claims, in terms of section 77(3) of the Basic Conditions of Employment Act[2] (BCEA), that her dismissal was in breach of her contract of employment in that she was dismissed without following the procedure,

further alternatively, that her dismissal was substantively and procedurally unfair.

[3] I deal with the preliminary points, which I have disposed of at the commencement of the proceedings. I have, during my determination of these points indicated that my reasons will form part of the

judgment.

Statement of response not before this Court

[4] The statement of claim was served on the Ekurhuleni Metropolitan Municipality (defendant) on 7 January 2022. The defendant had ten

court days to defend the claim by delivering a statement of defence.[3] This ten-day period expired on 21 January 2022. Despite proper service, the defendant failed to file a statement of defence.

[5] Subsequently, the plaintiff applied for default judgment. This default judgment application was served on the office of the City Manager, Imogen Mashazi (Mashazi) and on the Head of Employee Relations, Xolani Nciza (Nciza) on 13 April 2022.

- [6] The default judgment application was enrolled for hearing on 30 August 2022. On 21 June 2022, the plaintiff served the notice of set down on Nciza. Despite service of the application for default judgment and the notice of set down, the defendant failed to defend the claim.
- [7] On 30 August 2022, the date of the hearing of the default judgment, the defendant filed a notice of intention to defend and its legal representatives attended Court to seek the removal of the matter from the unopposed roll on the basis that it had become opposed. This Court removed the matter from the unopposed roll. Paragraph 2 of the order read as follows:
- ‘The [defendant] shall file its statement of opposition within 10 days from the date of this order;’
- [8] On 14 September 2022, the defendant filed its statement of defence. The defence was one-day outside the ten-day period set out in the order of 30 August 2022. Significantly, the statement of defence was filed approximately eight months late without an application for condonation for its late delivery. The plaintiff raised this non-compliance through her erstwhile legal representative on 20 September 2022 and in the pre-trial minute signed by both parties on 11 August 2023. The pre-trial minute, under “objections in limine”, the plaintiff recorded that:
- ‘the [Defendant’s] response to the statement of case is defective in that it was filed out of time and its lateness has not been condoned.’
- [9] The matter was set down for trial on 4 November 2024. The matter was allocated three days. At the commencement of trial proceedings, Mr Baloyi, acting on behalf of the plaintiff, persisted with the point that in the absence of a condonation application for the late delivery of the statement of defence, the claim remains undefended and the defendant is therefore not before this Court. Mr Galananzhele, appearing for the defendant, submitted that there was no need for the defendant to apply for condonation because this Court has, on 30 August 2022, condoned the late delivery of its statement of defence. Further, Mr Galananzhele submitted that the Court did not order the defendant to apply for condonation and therefore condonation application was not necessary. Reliance was placed on paragraph 2 of the order, which I have referred to above.
- [10] Having considered the rules of this court and the submissions by both parties on the point, I found the defendant’s defence legally unsound and upheld the plaintiff’s point that the statement of defence is not before the Court. The rules of the court are there to be adhered to. Parties do not need to be informed by the Court to comply with the rules. After determining the preliminary point in favour of the plaintiff, the defendant applied for postponement.

Application for postponement

[11] Mr Galananzhele applied for the postponement of the trial. The grounds for postponements were that the defendant would like to apply for condonation of the late delivery of its statement of defence following the decision of this Court to uphold the plaintiff's preliminary point. The second ground was that the defendant did not bring witnesses to Court and the suggestion was that the matter could be decided on papers.

[12] With regard to the second ground for postponement, Mr Galananzhele submitted that he had intended to request that the matter be postponed and that the trial be decided on papers. Therefore, regardless of the Court's decision on the plaintiff's

preliminary point above, the defendant was not ready to proceed with the trial. The submission made by Mr Galananzhele was that the defendant could not secure the presence of two witnesses, which he submitted are the only witnesses, to Court. These witnesses, so Mr Galananzhele submitted, are Faith Wotshela (Wotshela), who was the plaintiff's line manager, and Nciza, the head of employee relations. The reason Wotshela and Nciza could not be secured to attend Court as witnesses is because they are either on suspension or dismissed. Mr Galananzhele readily tendered the costs of the postponement, without even taking instructions from his client.

[13] The application was opposed by the plaintiff. Properly considered, the defendant's submission is that this Court should postpone the matter, wait for the finalisation of the respective disputes with Wotshela and Nciza. If the disputes, whether internal or external, are finalised in these witnesses' favour such that they are reinstated or they return to work, then, and only then, the trial may commence. The question is what would happen to the trial if the disputes are resolved in favour of the defendant such that the witnesses' termination or suspension of employment contracts is confirmed or is found to be fair respective disputes to be finalised. My understanding of Mr Galananzhele's submission is that for as long as these witnesses are not back at work, the defendant would not call them to testify.

[14] The notice of set down was served on the parties on 15 August 2024. The defendant had sufficient opportunity to subpoena the witnesses. Alternatively, it had sufficient opportunity to bring a substantive postponement application. It has done neither.

[15] As at the date of the trial, the defendant's legal representative had not consulted the witnesses. No attempt whatsoever

was made to contact the witnesses in preparation for this case. The defendant did not know whether the witnesses would be willing to attend the trial with or without subpoena. Further, the defendant conceded during its submission on the application for postponement

that the two witnesses may still not be secured as witnesses in the next court date. The application for postponement on this ground

could not succeed.

- [16] In my view, the first ground is irrelevant because the defendant in any event had intended to apply for postponement based on the second ground. However, even if it is relevant, the defendant should have known better to bring the application for condonation. That the defendant interpreted the order of 30 August 2022 incorrectly is in the circumstances inexcusable. There is no ambiguity in the order and the rules of the court. The plaintiff informed the defendant that its statement of defence required an application for condonation. This call was not heeded.
- [17] The grounds for postponement are the defendant's own design. Mr Baloyi submitted that the tender of wasted costs would be meaningless. The plaintiff, more than two years after she referred her dispute to this Court, remains unemployed and without finality on her dispute. If the trial is postponed, the status would persist and she would be required to pay additional legal fees for preparation and appearance when the matter is re-enrolled. It was my view that the wasted costs would not remedy the prejudice that the plaintiff would suffer.
- [18] Postponing the trial would undermine the administration of justice. Labour matters are urgent matters and must be treated as such. Where a party, having been notified timeously and warned of the non-compliance with the rules of the court but elects to persist with their stance, such a party should not cry foul when the court applies the law in its administration of justice and enforces compliance with its rules.
- [19] For the above reasons, I found that it would not be in the interest of justice to postpone the trial, dismissed the application for postponement and proceeded with the trial on unopposed basis.

The material facts and evidence

- [20] The plaintiff testified that she was employed by the defendant with effect from 1 August 2019. She was appointed as a Divisional Head: Waste Management Services. She reported to Wotshela. Wotshela was the Head of the Department: Environmental Resource and Waste Management. Wotshela reported to the City Manager, Mashazi.
- [21] As a divisional head, her role was to implement the waste management plan, which included overall planning for all the regions and management of contracts for all services rendered. The defendant has three regions - North, East and South. She had 10 managers from all these regions reporting to her.
- [22] Her employment contract was terminated summarily in terms of a letter dated 11 June 2021, signed on 15 June 2021. The letter of dismissal concluded that:

‘In the above premise the municipality herewith terminates the contract of employment with yourself based on incapacity based on ill-health occasioned by occupational stress you are suffering from.’

- [23] Subsequently, the plaintiff declared and referred a dispute to the South African Local Government Bargaining Council (SALGBC) challenging her dismissal. The dispute was later referred to this Court for adjudication.
- [24] In these proceedings, the plaintiff contends that her dismissal was automatically unfair because she was discriminated against on grounds of her conscience and belief. Further, she contends that her dismissal was automatically unfair because she was dismissed for making a protected disclosure in terms of the Protected Disclosures Act[4] (PDA).
- [25] The plaintiff's evidence focused primarily on the PDA claim and Mr Baloyi submitted that this is the plaintiff's primary case. The plaintiff testified that she made a protected disclosure on 27 October 2020. This disclosure was made to the City Manager, Mashazi, in writing. In the letter titled "Protected disclosure in terms of section 6 of the Protected Disclosures Act 26 of 2000 in relation to Ms Faith Wotshela – Head of Department of Environmental Resources and Waste Management", the plaintiff wrote that the Anti-Fraud and Corruption Policy of the defendant required a disclosure to be in writing and that the purpose of her letter was to make the protected disclosure.
- [26] The letter of disclosure states that Wotshela violated the laws and made various allegations of contravention of the supply chain processes in respect of the two projects – Keep Ekurhuleni Clean and Covid-19 Service Delivery Plan.

Keep Ekurhuleni Clean

- [27] The plaintiff testified, with reference to her letter, that shortly after her appointment, she was tasked with finalising the report which was to be submitted to the Bid Adjudication Committee (BAC). In her analysis of the report and the tender specifications, she noticed the irregularities in terms of what the recommended service providers proposed. First, on the face of it, the three recommended service providers submitted the lowest bids. On further analysis, she formed the view that based on their bids, these three service providers would not be able to carry out the project because of their pricing.
- [28] As already indicated above, the defendant has three regions, the Southern, Eastern and Northern regions. This project was to continue for 36 months and service providers for each region were required to recruit and appoint employees from the community members. In total, 2 372 jobs were to be created through this project.
- [29] For the Southern region, the tender specifications required the successful service provider to recruit and appoint 952 employees, referred to as community beneficiaries, made up of 900 waste management brigades (general workers), 45 supervisors and 7 customer care coordinators. However, for the same budgeted amount, the Bid Evaluation Committee (BEC) recommended for appointment of a service provider whose bid proposal only showed that it would only recruit and appoint a total of 502 employees (instead of 952).

- [30] The Eastern region required the successful service provider to appoint a total of 870 employees – 820 waste management brigades, 41 supervisors and 9 customer care coordinators. The recommended service provider, for the same budgeted amount, was to only employ 555 employees (instead of 870).
- [31] The Northern region required the successful service provider to appoint a total of 550 employees – 520 waste management brigades, 26 supervisors and 4 customer care coordinators. The number of community members who were to benefit and get employment from the recommended service provider was reduced from 550 to 290.
- [32] Therefore, instead of the anticipated 2 372 jobs, the recommended service providers were to only recruit 1 347 employees, for the same budgeted amount of the project.
- [33] Noting these irregularities, which in her view were material and would have made the implementation of the project unsuccessful, she raised her concerns with Wotshela. However, Wotshela insisted that the plaintiff should find a way to finalise the report. The plaintiff then asked Wotshela to be excused from finalising the report and advised her that she would not be part of a process that is undertaken in contravention of good practice standards. Wotshela then brought another divisional head to finalise the report.

Covid-19 Service Delivery Plan

- [34] The defendant received funding in the amount of R145 million for the implementation of the Covid-19 Service Delivery Plan over two months, May and June 2020. This fell within the plaintiff's scope. The plaintiff prepared a draft plan and submitted it to Wotshela. Wotshela then discussed the plan with the plaintiff's subordinate and excluded the plaintiff from any further involvement. Service providers were nominated and allocated areas they would service and meetings were held without the involvement of the plaintiff. On 3 June 2020, the plaintiff sent an email to her subordinate raising concerns with the plan which was finalized without her involvement. She wrote as follows:

'I have gone through the documents that you submitted to HOD (plans for the relief funding), kindly clarify the following:

1. The allocation of street-sweepers (5000 & 3000) is not distributed evenly, it favours one service provider over the other. Why didn't you use the same principle as in the allocation of 6000 street sweepers.
2. Servicing of informal settlements: it seems that you intend to do the actual cleaning of informal settlements using compactors instead of the normal way of using tipper trucks and FEL/TLB. Please indicated why the change now?
3. The allocation list under the chronically-ill is not in line with approved BAC list (i.t.o the highest ranking).
4. Your plan also indicated that illegal dumping will be done using plant hire?'

- [35] She did not receive a response. After the implementation of the plan, in July 2020, Wotshela took leave of absence and gave the plaintiff unlimited signing powers on invoices. The plaintiff found this suspicious because it meant that all invoices submitted in respect of this project were to be signed off or approved by her.
- [36] During that period when Wotshela was on leave, she posted a message on a WhatsApp group that there would be consequence management “with intention to dismiss” to all divisional heads with unprocessed invoices, whether they are on leave or not. On this day, the plaintiff was also on leave. Wotshela posted a further message directed at the plaintiff that the finance department would need her signature specimen and that she should sign her delegations.

Events subsequent 27 October 2020

- [37] On 13 November 2020, Wotshela, in her email to the plaintiff, informed her that she was issued with a final written warning for allegedly not attending a meeting that was scheduled to end at 11h00 on 11 November 2020. On this day, the plaintiff attended at a medical practice for “intravenous iron infusion”. After she received the medical attention, she reported for duty at around 13h00. She submitted the medical note to this effect. Despite Wotshela’s knowledge that the plaintiff could not attend the meeting, which was scheduled to end at 11h00, she expected the plaintiff to find out when she came back at 13h00 whether the meeting that was scheduled to end at 11h00 ended or whether it was still proceeding. She informed the plaintiff that it was not her (plaintiff) meeting and that it was her duty as a senior manager to find out if the meeting was still continuing.
- [38] The plaintiff’s attempt to provide an explanation for not attending the meeting appeared to have irked Wotshela. On 16 November 2020, Wotshela addressed an email to the plaintiff in which she stated inter alia that:

‘A trend is emerging wherein the DH is unable to attend the HoD’s meetings and meetings she is instructed to attend because she is sick. It is becoming obvious that the DH is not of good health and therefore might not be able to discharge her duties. Kindly note that thus matter will be escalated to HR.’ [Emphasis added]

- [39] It is common cause that the plaintiff had also lodged a grievance against Wotshela in October 2020. The plaintiff complained about inter alia harassment, abuse of power, and unfair and biased treatment. The grievance meeting took place on 26 November 2020. It was chaired by Naledi Modibedi (Modibedi), the Head of the Human Resources Department. In attendance were the plaintiff, Wotshela and Nciza. The chairperson concluded:

‘1. That the Human Resources Department shall appoint an independent facilitator to deal with the challenges that exist in the Environment Resources and Waste Management Services Department.

2. That the HOD: Human Resources shall formulate the Terms of Reference for the facilitation as envisaged in 1 above.
 3. That the facilitation process shall be concluded by not later than 31st January 2021.’
- [40] The Employee Relations Department was tasked with driving the process to its conclusion. The plaintiff testified that despite the above commitments, no facilitation meeting took place and she heard nothing from the defendant. The deadline of 31 January 2021 to conclude the facilitation process was not adhered to.
- [41] The plaintiff testified that after she made the disclosure and lodged the grievance, Wotshela continued to treat her unfairly, which affected her work. She testified further that Nciza informed her that after she made the disclosure, she was considered a whistleblower. Nciza asked the plaintiff to reconsider proceeding with the disclosure as this would damage the defendant’s reputation. The lack of action on her grievance and the disclosure, and the fact that she continued reporting to Wotshela (despite her request to not report to her pending the resolution of the grievance) who continued to mistreat her affected her health and mental capacity.
- [42] On 13 April 2021, she consulted a social worker. She was booked off sick from 13 to 30 April 2021. The reason for her ill health was recorded as stress-related. On 3 May 2021, the plaintiff was admitted at the Akeso Psychological Hospital due to major depression and generalised anxiety disorder. She was treated by a specialist psychiatrist. On 10 May 2021, the specialist psychiatrist issued a medical certificate declaring that the plaintiff was unfit to work until 10 August 2021. She also prepared a report on 13 May 2021 which recorded that during her hospitalisation the plaintiff attended psychology group sessions as well as individual therapy sessions with her clinical psychologist.
- [43] On 12 May 2021, the plaintiff applied for additional sick leave and completed an incapacity referral form. In addition, she completed a consent for disclosure of medical information form, consenting that the defendant may obtain her medical record from the medical practitioners in its investigation of her medical condition. By 17 May 2021, she had submitted all the necessary documents. The defendant did not respond. The plaintiff was therefore not informed that her application for additional sick leave was approved and whether her incapacity referral had been supported or not.
- [44] On 8 June 2021, the plaintiff addressed a letter to Maripe Matjokotja (Matjokotja), the defendant’s Divisional Head: Human Resource, responsible for employee wellness.
- [45] It appears that the plaintiff’s letter above prompted a response from the defendant. On 11 June 2021, the defendant addressed a letter to the plaintiff – a letter of termination of employment. The letter noted the application for additional sick leave and the supporting documents to the incapacity referral which highlighted that the plaintiff “suffer from major depressive disorder and generalized anxiety disorder and that [her] symptoms ‘seemed to have been precipitated by her occupational stressors’ (my emphasis)”. Further, the letter

noted the recommendation that the plaintiff's time away from work would allow her to adjust to treatment and therapy.

[46] The defendant then recorded that the plaintiff's health was "deteriorating due to the exigencies of the functions that you are responsible for". The letter continued that the nature of the plaintiff's incapacity puts the defendant at a difficult position in respect of having the confidence in her to meet the challenges posed by the position she held. It recorded that the source of the plaintiff's health was due to the employment relationship that exist between her and the defendant and the functions of the position. The plaintiff was informed that the requested leave of absence would be untenable for the defendant and that there had been "challenges experienced with your work record in respect of the level of performance of your functional unit".

[47] On the investigation of the plaintiff's alleged incapacity, the defendant wrote:

'The municipality is sensitive to the requirements that an investigation into your incapacity is foundational (sic) to the determination to be made in respect of your application. The municipality is pursuance (sic) of the sensitivity attached to the obligation placed upon it in this regard notes that the nature of the incapacity and track record of your functionality in the workplace vitiates the holding of any investigation in this regard. This is informed by both the level of your position as well as the causes of your stress. It is thus apparent that your incapacity is due to the work you are performing and thus the basis is common cause to the parties. This therefore relegates the envisaged investigation to a superfluous exercise.'

[48] The letter of dismissal was signed by Nciza, the one who was required to ensure that the plaintiff's grievance was facilitated by 31 January 2021, and Wotshela, the plaintiff's line manager and the alleged perpetrator of the unfair treatment against her. The dismissal was supported by Modibedi, the chairperson of the grievance hearing that recommended facilitation process to be concluded by 31 January 2021 and the one who was expected to formulate the terms of reference of the facilitation process, and approved by Mashazi, the City Manager to whom the plaintiff referred a letter of protected disclosure and also the grievance in which she requested to not report to Wotshela pending its finalisation.

Evaluation

Automatically unfair dismissal claim

[49] The plaintiff's claim is that her dismissal was automatically unfair because it contravened the PDA on the basis that it was

carried out as a consequence of her having made the protected disclosure. The PDA defines disclosure as:[5]

'any disclosure of information regarding any conduct of an employer, or an employee or of a worker of that employer, made by an employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act No. 55 of 1998), or the Promotion of

Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or

- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;'

[50] Protected disclosure is defined as:[6]

'a disclosure made to –

- (a) a legal adviser in accordance with section 5;
- (b) an employer in accordance with section 6;
- (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
- (d) a person or body in accordance with section 8; or
- (e) any other person or body in accordance with section 9,

but does not, subject to section 9A, include a disclosure –

- (i) in respect of which the employee or worker concerned commits a criminal offence by making that disclosure; or
- (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;'

[51] Section 6 of the PDA deals with a protected disclosure made to the employer. It provides that any disclosure made in good faith in accordance with the procedure for reporting or otherwise remedying the impropriety concerned is a protected disclosure.

[52] In terms of section 3, no employee may be subjected to any occupational detriment by her employer on account, or partly on account, of having made a protected disclosure. Occupational detriment means inter alia being subjected to any disciplinary action or dismissal or harassment or being threatened with inter alia dismissal or any disciplinary action.[7]

[53] The defendant alleged that the plaintiff was dismissed because of her incapacity and poor performance. The plaintiff disputes the

defendant's reason set out in its termination letter and alleged that the true reason for her dismissal is that she made the protected disclosure. The critical question is whether but the protected disclosure, in whole or in part, the plaintiff would not have been dismissed. In *Tulwana and Another v City of Johannesburg*[8], the Labour Appeal Court (LAC) held that:

‘The question which arises for determination is whether appellants showed a sufficient causal connection between respondent's refusal to extend their contracts and the protected disclosure they had made, and then as to whether it was the latter which caused occupational detriment as defined in the PDA. Invariably, in cases of a protected disclosure, there is a diminished likelihood of a “smoking gun” being found and Courts are required to rely on inferences. In this case, the question is whether the only reasonable inference that can be drawn is that the failure to abide by the 2006 agreement and thus ensure that the appellants remained employed by respondent, subsequent to the termination of their fixed term contracts, was as a result of the protective disclosure, whether in whole or in part.

In proceedings of this nature, the inference sought to be drawn must be consistent with all the proven facts, although it needs not be the only reasonable inference. It is sufficient if it is the most probable inference. See *Katz v Katz* [2004] 4 All SA 545 (C) at para 95 and *AA Onderlinge Assuransie Bpk v De Beer* 1982 (2) SA 603 (A) at 614-615 where it was held that a plaintiff who relies on circumstantial evidence needs not prove that the inference which he or she asks the court to draw is the only reasonable inference. He or she will discharge the burden of proof if he or she can convince the court that the inference advocated is the most readily

apparent and acceptable inference to be drawn from a number of possible instances.

In this case, there is no doubt that an inference can be drawn that occupational detriment followed upon the disclosure of Dr Gule's dishonesty with regard to the scholarship money. But is it the most probable, readily apparent inference? The list of actions which constitute possible detriment is extensive, as set out earlier in this judgment...'[9]

[54] In *Baxter v Minister of Justice and Correctional Services and others*[10] (Baxter), the LAC, relying on its judgment in *SA Chemical Workers Union and others v Afrox Ltd*[11], reiterated the test as follows:

‘The test for determining the true reason is that laid down in *SA Chemical Workers Union & others v Afrox Ltd*. 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 enquire 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. 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 s 158(2) of the LRA, as happened in this case.'[12]

- [55] The plaintiff's contention is that as a result of her protected disclosure which she made to the employer, she suffered occupational detriment in the form of dismissal. This Court has to determine whether disclosure she made is protected and if so, whether her dismissal was a consequence of the disclosure she made.
- [56] The disclosure was made to the defendant as the employer. There is nothing before me to suggest that the disclosure was made in bad faith. The allegations that form part of the disclosure are, based on the evidence presented, substantially true. They relate to the breach of procurement processes, where on the face of it Wotshela and members of the BEC disregarded the tender specifications or rather, deliberately bent over backwards to disregard the tender specifications in order to accommodate and award the tender to certain service providers, with no regard whatsoever to the service delivery and the empowerment of community members who were supposed to benefit from the projects.
- [57] Shortly after the disclosure and grievance, the plaintiff was threatened with insubordination and unjustifiably issued with a final written warning for not attending a meeting which was scheduled to end at 11h00, when she only returned to the office at 13h00 after attending to receive medical attention. She was told as early as November 2020 that it was becoming obvious that she might not be able to discharge her duties due to her alleged ill health. Further, she was asked to reconsider pursuing the protected disclosure as it may damage the defendant's reputation. Despite the deadline of 31 January 2021 to facilitate her grievance, the defendant did nothing to resolve it. Her request to not report to the alleged perpetrator pending resolution of her grievance hearing was not considered, or at least not considered favourably.
- [58] When she fell ill, with medical certificates and a report describing her illness as mental-related, all the employees who were in the grievance meeting, Wotshela the line manager, Nciza the employee relations who was tasked to ensure the appointment of an independent facilitator to facilitate the grievance by 31 January 2021 and Modibedi the chairperson of the grievance hearing tasked to formulate the terms of reference, signed and supported the dismissal of the plaintiff. The dismissal was then approved by Mashazi the City Manager, who was the recipient of the protected disclosure. The allegations contained in the disclosure were not investigated.
- [59] The reasons for the dismissal as articulated in the dismissal letter are connived and absurd. The defendant in essence dismissed the plaintiff for incapacity and poor performance. It then concluded that because of the nature of the incapacity and her poor "track record", she

had lost her right to a fair procedure. Driven by the villainous lust to get rid of the plaintiff as soon as the first opportunity presents itself, with no regard to her mental wellbeing, they prepared a monotonous letter of dismissal and trampled on the fundamental right of the plaintiff to be heard before the dismissal – the right contained in her contract of employment[13].

- [60] This was an act of impunity and lawlessness on the part of Nciza, Wotshela, Modibedi and Mashazi. These four individuals have acted in utter disrespect to their respective offices and positions. There was no reason to dismiss the plaintiff for the alleged ‘incapacity’ and to dispense with the binding procedure set out in the contract. I am persuaded that the defendant’s reason for dismissal on account of incapacity must be discounted as a true reason for the plaintiff’s dismissal. The only reasonable inference, having considered Wotshela’s desire to discipline the plaintiff by issuing her an unwarranted final written warning almost immediately after the protected disclosure and grievance and the failure to investigate the serious allegations raised in the protected disclosure, the failure to attempt to resolve the grievance and the manner in which the dismissal was carried out, is that the plaintiff was dismissed for making the protected disclosure and raising serious allegations of procurement irregularities against Wotshela.
- [61] Therefore, I am satisfied that a causal link between the protected disclosure and the plaintiff’s dismissal was established and that the main, dominant, proximate or most likely cause of the plaintiff’s dismissal is her protected disclosure. Had she not made the disclosure, she would not have been dismissed, and would not have been dismissed in the manner in which she had been and for the designed, connived and absurd reasons contained in the letter. Her dismissal is accordingly found to be automatically unfair.
- [62] The claim for discrimination in my view has not been substantiated. As indicated above, the plaintiff focused primarily on the PDA claim. Accordingly, there is no sufficient evidence to find that the plaintiff’s dismissal was automatically unfair on the ground that she was discriminated against.

The breach of contract claim

- [63] The plaintiff’s alternative claim to the automatically unfair dismissal is a contractual claim. Clause 14(b) of the contract of employment provides that the defendant may terminate the employment contract for any reason recognised in law provided that it “shall” follow a fair procedure in terms of the LRA. Clause 15(c) provides that any dispute arising out of incapacity “shall” be dealt with in terms of the LRA as amended. The parties have agreed that the procedure set out in the LRA shall form part of the terms of the employment contract.
- [64] Item 10 of Schedule 8 of the Code of Good Practice: Dismissal, provides:
- ‘10 Incapacity: Ill health or injury

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
 - (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
 - (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.
 - (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.'
- [65] Despite the contractual obligation to follow the above procedure, the defendant expressly and conscientiously decided to dispense of these provisions. It made no attempt whatsoever to comply. The dismissal was carried out in breach of clauses 14 and 15 of the contract of employment.

Remedy

- [66] The remedy for automatically unfair dismissal claim is found in the LRA. The plaintiff seeks maximum compensation for her automatically unfair dismissal claim. The maximum compensation this Court can award is 24 months.[14] The conduct of the defendant was egregious. There is nothing before this Court to show that any compensation short of maximum will be just and equitable. Therefore, the plaintiff is entitled to 24 months compensation.
- [67] The plaintiff has sought, for the alternative claim of breach of contract, payment of her remuneration for 13 months. The basis for this is that she was left with 37 months and that if 24 months is awarded for automatically unfair dismissal, then she should be entitled to payment of the remainder of her contract period for the breach of contract claim.

[68] The LRA and BCEA claims are two separate causes of action. The plaintiff has elected to go for an LRA claim as her primary claim and the contractual claim as an alternative claim. If she succeeds in her primary claim, the alternative claim falls away. Her primary claim was not one of breach of contract, which could have entitled her to payment of the remainder of the contract. For these reasons, the Court shall award a remedy for the primary claim and decline to award any remedy for the alternative claim.

[69] Accordingly, the plaintiff is only entitled to 24 months compensation in terms of section 194(3) of the LRA, which is calculated as $R93\,803.33 \times 24 = R2\,251\,279.92$.

[70] In the premises, the following order is made:

Order

1. It is declared that the dismissal of the plaintiff by the defendant on 11 June 2021 is automatically unfair.
2. The defendant is ordered to pay the plaintiff compensation equivalent to 24 months remuneration, being R2 251 279.92 (Two million two hundred and fifty one thousand two hundred and seventy nine rands and ninety two cents).
3. Payment of the above amount must be made into the plaintiff's bank account (to be provided by her), within 21 court days of this

judgment.

4. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff: Mr M.M. Baloyi c/o MM Baloyi Attorneys For the Defendant: Mr J. Galananzhele c/o Galananzhele Sebela Incorporated [In point in limine and application for postponement]

[1] Act 66 of 1995, as amended.

[2] Act 75 of 1995; Section 77(3) deal with the jurisdiction of this Court and provides that "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment,

irrespective of whether any basic condition of employment constitutes a term of that contract." Flowing from section 77(3), section 77A deals with the powers of this Court and subsection (e) provides that this Court is empowered make appropriate orders, which may include "making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3),

which determination may include an order for specific performance, an award of damages or an award of compensation”.

[3] See: Rule 6(3)(c) of the Rules for the conduct of proceedings in the Labour Court, GN 1665, GG 17495 of 14 October 1996. These rules, which have since been repealed with effect from 17 July 2024, were applicable at the time the matter was referred to this Court.

[4] Act 26 of 2000.

[5] Section 1 of the PDA.

[6] Ibid.

[7] Ibid.

[8]

[2016] ZALAC 85 (26 July 2016).

[9] Ibid at paras 29 - 31.

[10] (2020) 41 ILJ 2553 (LAC); [2020] 10 BLLR 968 (LAC).

[11]

[1999] ZALAC 8; (1999) 20 ILJ 1718 (LAC).

[12] Baxter at para 60.

[13] Clauses 14 and 15 of the contract of employment.

[14] See: section 194(3) of the LRA, which provides that “The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months'

remuneration calculated at the employee's rate of remuneration on the date of dismissal”.

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