IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO: JS 799/04

In the matter between:

MPHO JABARI Applicant

And

TELKOM SA (PTY) LTD Respondent

JUDGMENT

MOKGOATLHENG AJ:

Introduction

[1] The applicant is a specialist investigator formerly employed by the respondent. On the 31st of August 2004 his contract of employment was terminated pursuant to an incompatibility enquiry.

[2] The chairperson of the enquiry determined that the employment relationship between the applicant and the respondent had irretrievably broken down as a result of the applicant's incompatibility within the respondent's 'corporate culture'.

[3] The applicant was aggrieved by the dismissal and referred the dispute to the Commission for Conciliation, Mediation and Arbitration (herein-after referred to as the CCMA). On the 30th of September 2004, the CCMA issued a certificate of outcome and referred the matter to the Labour Court for lack of jurisdiction.

[4] The applicant contends, that his dismissal, was automatically unfair in terms of section 187(1)(c) and (d) of the Labour Relations Act 66 of 1995,(herein-after referred to as the Act) in that,

(a) the respondent dismissed him for initiating grivience proceedings against the respondent's management.

(b) he was dismissed because he had rejected a voluntary severance package offered to him by the respondent.

[5] The applicant states that, the reasons proffered by the respondent for his dismissal, infringed his constitutional and statutory rights.

(a) Section 23 of the Constitution provides that everyone has a right to fair labour practices.

(b) Section 5(1) of the Act, precludes any discrimination against an employee for exercising any rights conferred by the Act

(c) Section 187(1) of the Act provides that;
"A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5

or, if the reason for the *dismissal* is in contravention of section 187(1),

[6] Pursuant to his dismissal, the applicant has instituted these proceedings for an order declaring that;

(a) his dismissal by the respondent was automatically unfair,

(b) the respondent be ordered to reinstate him without loss of benefits , alternatively that,

(c) the respondent be ordered to pay him compensation equivalent to 24 months salary, and,

(d) the respondent be ordered to pay the costs of the suit.

[7] Before dealing with the merits of the applicant's claim, it is apposite to address certain preliminary issues.

PRELIMINARY AND COMMON CAUSE ISSUES

[1] The applicant's case is that his dismissal, was automatically unfair. The applicant has not alleged in the alternative in his statement of case that, even if his dismissal was not automatically unfair, it was in any event unfair for other reasons. The applicant, in its statement of case, has not assailed the procedural fairness of the dismissal.

[2] It is common cause that the applicant was dismissed on the 31st of August 2004. The respondent admits the fact of the applicant's dismissal.

[3] In terms of section 192(2) of the Act, the respondent bears the onus to prove on a balance of probabilities, that the dismissal of the applicant was automatically fair.

[4] On the 9th of April 2004, the respondent, offered the applicant, a voluntary severance package, with the intention of terminating applicant's contract of employment. The applicant rejected this offer.

[5] The applicant was suspended on the 29th of April 2004, pending an incompatibility enquiry. On the 19th of May 2004, he was summoned to attend the enquiry commencing from the 25th of May 2004.

ISSUES IN DISPUTE

[1] The fundamental issues to be determined are whether;

(a) the employment relationship, has irreparably broken-down, as a consequence of the applicant's conduct and behaviour,

(b) the applicant's dismissal was automatically unfair as envisaged in terms of sections 187(1)(c) and (d) of the Act.

[2] Whether the applicant's dismissal is automatically unfair depends upon the reason for his dismissal. If the reason for his dismissal falls within section 187(1) of the Act, his dismissal is automatically unfair if it does not, his dismissal is not automatically unfair.

FACTUAL BACKGROUND

[1] In order to determine, the reason for the applicant's dismissal it is necessary to consider the evidence.

[2] Two witnesses testified on behalf of the respondent, these being, Ntleru, a manager in the respondent's investigation and security department. R Sewurain a senior manager in the respondent's human resources department, and the chairperson of the incompatibility enquiry.

[3] The applicant elected not to testify, and did not call any witnesses to testify on his behalf.

WAS THE APPELLANT'S DISMISSAL AUTOMATICALLY UNFAIR

[1] The fundamental question is whether the applicant's dismissal was automatically unfair. If answer is that the dismissal was

automatically unfair, the next issue is to be addressed is the relief the applicant should be granted.

[2] The applicant in his statement of case alleges that the reason for his dismissal was because he initiated griviences against the respondent. In support of this allegation the applicant states that the respondent offered him a voluntary severance package with the intention of terminating his contract of employment.

[3] The respondent's version is that the applicant was dismissed for legitimate reasons, these being insubordination, lack of respect, trust, honesty and incompatibility

ALLEGATIONS MADE IN THE RESPONDENT'S STATEMENT OF DEFENCE

[1] In order to appreciate and understand the precise nature of the incompatible conduct the respondent imputes to the applicant, it is necessary to consider the respondent's allegations in its statement of defence, and the evidence adduced in support of the allegations therein.

[2] The respondent states that the applicant was dismissed because the employment relationship was no longer based on mutual respect, trust and honesty as a result of the applicant's incompatibility, in that;

(a) as a consequence of the deterioration of the trust relationship, the applicant was approached to discuss

an amicable way of terminating the employment relationship,

(b) the applicant was offered a severance package, this offer was refused,

(c) the applicant was suspended and thereafter an incompatibility enquiry was held resulting in his dismissal, and,

(d) the respondent confirmed the outcome of the enquiry and terminated the employment relationship.

[3] The respondent further alleges that;

(a) the employment relationship caused frustration among other employees the applicant had to interact with on a daily basis,

(b) the trust relationship became intolerable and caused a high level of frustration and the unnecessary taking up of the respondent's resources,

(c) the applicant continuously litigated against the respondent on various issues, in most instances the applicant was unsuccessful and or withdrew the matters before trial at the CCMA or the Labour Court, and

(d) in other instances the applicant was absent to pursue his case with diligence as one would expect a litigant to pursue a case in a court of law or similar institution.

[4] The Respondent further alleges that;

(a) the applicant send threatening e-mails to Ntleru, that this created animosity, distorted and harmed the trust relationship, that this conduct constituted gross insubordination or incompatibility,

(b) the meeting held on the 8th of April 2004 was held with a view of discussing the severance of the intolerable relationship between the applicant and the respondent,

(c) the incompatibility enquiry was held as a result of the applicant's incompatibility and failure to perform his duties, and to perform within the structures of the respondent,

(d) the applicant's dismissal came as a consequence of an enquiry towards his incompatibility, and

(e) the termination of the applicant's services does not fall within the ambit of section 187 as envisaged by the Act.

THE RESPONDENT'S REASONS FOR THE APPLICANT'S DISMISSAL

THE EVIDENCE ADDUCED BY NTLERU

[1] He testified that, the employment relationship between the applicant and the respondent had irretrievably broken down. In support of this he referred to the following:

(a) The applicant, continually challenges and questions the decisions of the respondent, and does not take, and execute instructions from his superiors.

(b) The applicant is arrogant, insubordinate and un-cooperative.

(c) The applicant, habitually institutes grivience proceedings against the respondent. The applicant does not prosecute these griviences to finality.

(d) The applicant's attitude, behaviour, and general personality, has created, an irredeemable incompatibility within the employment relationship, which is contrary to the respondent's 'corporate culture'.

(e) The respondent as a result of the griviences lodged by the applicant devotes an inordinate amount of human resources, time, and funds in defending these cases.

(f) The applicant's penchant, in instituting griviences has

culminated, in a disharmonious employment environment, which has adversely affected the applicant's co-workers.

[2] Ntleru testified that on the 1st of September 2002, the applicant during the course and scope of his employment defamed a client, a certain J Kruger, that J Kruger successfully sued the applicant under case number 134052/2000, in the Pretoria magistrate's court for damages, resulting in the applicant been ordered to pay him the amount of R40 000.00, that as a result of this civil case, the Respondent has lost confidence in the applicants ability to effectively service it's customers.

THE GRIVIENCES LODGED BY THE APPLICANT

[1] Ntleru testified that, the applicant had lodged the following griviences against the respondent with the CCMA;

(a) on the 29th of April 2002, under case number GA 13932-02 the applicant accused the respondent of failing to adhere to company policies, procedure and guidelines, regarding it's performance, development and management systems,

(b) on the 8th of July 2002, under case number GA 33713-03, the applicant accused the respondent of unfair discrimination by promoting W Louis as his team leader,

(c) on the 9th of September 2002, under case number GA29612-02,the applicant accused the respondent of an

unfair labour practice in promoting J Marallich as a his supervisor,

(d) on the 18th of September 2002, under case number GA 20255-03, the applicant accused the respondent of an unfair labour practice in that the latter did not comply with it's policies and procedures in relation to promotion, and

(e) on the 18th of September 2002, under case number GA 897-03, the applicant accused the respondent of an unfair labour practice in that the respondent had unilaterally changed his conditions of employment.

THE EVIDENCE OF R SEWURAIN

[1] R Sewurain testified that, he presided at the incompatibility enquiry. He made a finding based on the totality of the evidence, that, the employment relationship between the applicant and the respondent had irretrievably broken down, that as a result he advised the applicant that his contract of employment was terminated with immediate effect.

[2] He states that he concluded that the evidence left a clear impression that the applicant habitually initiated baseless grivience proceedings which he did not pursue to finality, that these grievances were unjustifiable, and not work related.

[3] He conceded that if the evidence regarding the details of the griviences the applicant had initiated with the CCMA, and the

Labour Court, were placed before the incompatibility enquiry, he would have come to a different decision.

[4] He testified that was not aware that he the griviences initiated by the applicant, were mutually settled, finalised, or still pending, in the Labour Court.

[5] He conceded that in making his decision, he relied on Ntleru's evidence, that the applicant instituted griviences without any justifiable reasons.

[6] He concurred that in some instances, documentary evidence without corroboration from the authors thereof, could amount to hearsay evidence which is inadmissible.

THE EVENTS PRECEDING THE APPLICANT'S DISMISSAL

[1] In order to determine the validity of the reasons proffered by the respondent in justification of the applicant's dismissal it is, necessary to consider certain events which feature prominently in the factual matrix preceding such dismissal. A consideration of these events may shed light on the reasons why the applicant was dismissed and enable one to determine whether such dismissal was automatically unfair or not.

These events are:

(a) The meeting held between the applicant and Ntleru on the 8th April 2004,

(b) The purported counselling sessions held before the 8th of April 2004, and those held between the 8th of April and the 19th of May 2004,

(c) The settlement agreement wherein the respondent offers the applicant a voluntary severance package,

(d) The e-mail communication dated 8th of April 2004 which is headed, "confirmation of your proposal on terminating my services with the company", and

(e) The grievances lodged by the applicant.

THE MEETING HELD ON THE 8TH OF APRIL 2004

[1] Ntleru testified that on the 8th of April 2004 he held a meeting with the applicant. He says the purpose of this meeting, was to discuss the incompatibility of the applicant, and to afford him the opportunity to respond to the respondent's allegations with a view of remedying the perceived incompatibility.

[2] Ntleru's evidence is at variance with the respondent's statement of defence. In that statement, the respondent states that the meeting was held with a view of discussing the severing of the intolerable employment relationship, that in pursuance thereof the applicant was offered a severance package.

[3] During cross-examination it was put to the respondent that the meeting was not a counselling session, that it was convened to

offer the applicant a voluntary severance package in order to terminate the employment relationship. This assertion by the applicant is corroborated by the respondent's statement of defence. Ntleru was asked if he kept a record of the counselling session, he conceded that he did not.

[4] The respondent, sought to justify the applicant's dismissal by stating, that various counselling sessions were conducted with the latter before the 8th of April 2004 and between the 8th of April 2004 and the 19th of May 2004 in order to address and remedy the applicant's perceived incompatibility.

[5] Ntleru was asked to provide the dates of these meetings, he was not able to give specific dates when these meetings were held. He conceded that he did not have a record of the minutes of these purported counselling sessions.

THE PURPORTED COUNSELING SESSIONS BETWEEN THE 8TH OF APRIL 2004 AND THE 19TH OF MAY 2004

[1] There is no allegation in respondent's statements of defence, alleging several counselling sessions between the 8th of April 2004 and the 19th of May 2004 to support Ntleru's evidence.

[2] It was put to Ntleru that the applicant did not attended any incompatibility counselling meetings between the 8th of April 2004 and the 19th of May 2004.

[3] Under cross examination Ntleru conceded that he did not remember the dates on which these alleged counselling sessions took place. He also conceded that he did not have a record of these alleged counselling sessions. The only allegation relating to an incompatibility meeting or enquiry in the respondent statement of defence pertains to the incompatibility enquiry.

[4] It is patent that Ntleru has not succeeded in showing that he and the applicant conducted counselling sessions before and after the 8th of April 2004. It is inconceivable that if such counselling session meetings were held, there would not be any record of the minutes of such meetings.

THE SETTLEMENT AGREEMENT

[1] Ntleru testified that after the counselling session held on the 8th April 2004 with the applicant did not achieve it's purpose he offered the applicant a voluntary severance package.

[2] The important terms of the settlement agreement are the following;

(a) *Clause 2 of the preamble*

The employees services will be terminated as a result of his acceptance of a voluntary severance package offered to him by the company.

[3] *(b)* *[2] Payment Resulting from termination*

(c) *[2.1.1] a severance amount of R60 000.00(Sixty thousand rands) as a once off payment*

(d) *[2.1.2] All leave pay accrued, due and owing up to and including 31 March 2004, being an amount of R22 302.00(Twenty two thousand three hundred and two rands) which equates to 21.99 leave days.*

[4] (e) *[4] Litigation (civil and labour)*

(f) *[4.1] The company will pay the employee's legal costs (own attorney and the plaintiff's attorney's party and party costs) and the capital amount of R40 000.00(subject to an appeal, if any, being finalised and the appeal is unsuccessful) in terms of the judgement given under case number 134052/2000 (J Kruger v R Jabari Magistrate's court, Pretoria) Should the employee wish to appeal the judgement against him, he shall do so at his own cost.*

(g) *[4.2] The employee will, withdraw his action against the company, instituted in the Labour court (Johannesburg) under case number "JS 47/04" by no later than 16 April 2004. Each party to pay its own costs.*

[5] (h) *[1] <u>Termination of Employment</u>*

(i) *[1.1] Notwithstanding the signature date of this agreement, the employees services with the company, shall be*

terminated with effect from April 2004(the termination date)

[6] The contention by Ntleru that the applicant was offered a severance package after a solution could not be found in the counselling sessions is not borne out by the objective proven documentary evidence.

[7] The terms in the settlement contract show that the respondent intended to terminate the applicant's contract of employment at all costs. For instance, the respondent offered to pay the applicant's and J Kruger's legal costs in the defamation case, and also to pay the defamation damages capital in the amount of R40.000.00.

[8] The respondent urges the applicant to withdrew the action against the respondent initiated in the Labour Court case number JS 47/04 by not later than the 16th of April 2004, this request was intended to induce the applicant not to enforce his statutory rights.

[9] The applicant in his statement of claim, and in the assertions put to Ntleru, alleges that he was dismissed in breach of section 187(1)(c) and (d) because he initiated griviences against the respondent's unfair labour practices, and because he refused to accept respondent the severance package. This contention is borne out by the terms of the settlement agreement.

[10] The terms of the settlement agreement which was unilaterally drafted by the respondent, corroborates the applicant's allegations

that his dismissal was automatically unfair as envisaged in section 187(1)(c) and (d)

THE E-MAIL COMMUNICATION

[1] The applicant sent an e-mail to Ntleru on the 8th of April 2004. The contents of this e-mail where not disputed. The salient contents of the email are the following,

(a) *"Dear Molefi,*

This is the confirmation of the appointment you made yesterday to see me today this morning you changed the venue Anton Klopper's office, TTN 23rd floor."In that meeting you mentioned that, you as the management have taken a decision to terminate my services and offer me R82 000.00. In that proposal you also mention that I should drop the case that is pending 'from' the labour court JS47/04. I still do not believe my eyes and ears as far as you are concerned.

(b) *I still do not know what made you try this route and what will be your benefit*

(c) *I told you my personal matters regarding my civil claim and this is where you thought you have seen it as an opportunity to orchestrate my dismissal.*

(d) It is more disturbing for you to advice me to accept your dismissal to avoid the consequences that may follow my refusal.'

(e) You are the last person to propose that I should withdraw the case against the company for appointing Wynne improperly based on a fraudulent CV. No amount of violence or calculated threat will stop me from exercising my constitutional rights which were gained through sweat and blood'

(f) I decided to confirm our meeting in this email. This morning's exercise initiated by you amounted to psychological and emotional torture which resulted in delictual action".

[2] The e-mail supports the applicant's version that before the 8th of April 2004, the respondent had already decided to terminate his contract of employment.

[3] The applicant's version that the meeting was convened to offer him a severance package is corroborated by the settlement agreement and the respondent's statement of defence.

[4] The contents of the e-mail do not support the allegations in the respondent's statement of defence that the applicant exchanged threatening e-mails with Ntleru, or that the threats therein rendered the employment relationship intolerable.

THE GRIVIENCES LODGED ON THE 18TH OF SEPTEMBER 2002 UNDER CASE NO GA 897-03

[1] Ntleru testified that the applicant lodged a grivience against the respondent under case no GA 897-03 on the 18th of September 2002, alleging an unfair labour practice, that the applicant subsequently withdrew the case without giving any reason.

[2] It was put to Ntleru that the grivience lodged by the applicant related to the failure J Van der Merwe to implement an in-house conciliation decision made on the 16th of April 2002, that J Van der Merwe should present the applicant with a Performance and Development Management Systems Agreement (the PDMS agreement).

[3] Ntleru conceded that the PDMS agreement regulates the terms of the performance appraisal and determines the annual bonus the applicant is entitled to. It is common cause that J Van der Merwe neglected for a period of five months to present the applicant with the PDMS agreement, that this failure had a direct impact on the annual bonus the applicant was entitled to, as the performance appraisal had to be effected before the end of the financial year.

[4] Ntleru conceded that the grivience relating to J van der Merwe's failure to provide the applicant with a PDMS agreement was initiated internally in terms of the respondent's grivience procedure, that dispute was unresolved, that the applicant thereafter referred it to the CCMA as he was lawfully entitled to.

[5] Ntleru testified that the applicant did not attend the CCMA proceedings, that as a result the referral was dismissed.

[6] It was put to Ntleru that the applicant failed to attend the hearing because he did not receive the notice of set down. Ntleru after being shown the rescission ruling of the 3rd of February 2003 conceded that the applicant had a valid reason for not attending the hearing.

[7] Sewurain under cross examination also conceded that the applicant had a valid reason for failing to attend the hearing. He testified that he was not aware of these facts when he made his findings. He said had these facts been before him at the incompatibility enquiry, he possibly would have come to a different conclusion concerning this matter as a contributory factor in the breakdown of the employment relationship.

THE GRIVIENCE LODGED ON THE 18TH OF SEPTEMBER 2002 UNDER CASE NO GA 20255-03

[1] Ntleru conceded that on the 18th of September 2002 the applicant lodged a grivience against the respondent, that the matter was unresolved, that the applicant thereafter referred the matter to the

CCMA, alleging that J Marallich despite not having a degree or diploma was appointed in preference to the applicant as his manager.

[2] On the 26th of July 2003 the CCMA ruled that it had no jurisdiction to entertain the dispute. Under cross examination Ntleru conceded that the applicant had a right to refer the matter to the CCMA, that the grivience was a genuine labour dispute, that the applicant had referred this matter to the Labour Court under case no JS 1258/02 and was still pending.

[3] Sewurain conceded that the grivience initiated by the applicant regarding the appointment of J Marallich as his manager was a valid labour dispute. He testified that the details that this matter was subsequently mutually withdrawn by the respondent and the applicant, were not put before him at the incompatibility enquiry, he stated that had he been aware of this information he could possibly have come to a different conclusion in his assessment of this grivience as a contributory factor in the breakdown of the employment relationship.

THE GRIVIENCE LODGED ON THE 29TH OF APRIL 2002 UNDER CASE NO GA 13932-02

[1] Ntleru testified that on the 29th of April 2002 the applicant lodged a grivience against the respondent alleging that the respondent had not complied with its policies and procedures in terms of its Performance Development Management Systems (PDMS). He

stated that this matter was dismissed on the 30th of July 200 due to the non- attendance of the applicant.

[2] It was put to Ntleru that the applicant failed to attend the hearing because he was ill. Ntleru after being shown a medical certificate conceded that the applicant had a valid reason for not attending the hearing.

[3] Sewurain also conceded that the applicant had a valid reason for not attending the hearing, that had he been aware of this fact, he could possible have come to a different conclusion regarding the contention that the applicant had failed to attend the hearing without any valid reason and that this conduct contributed to the breakdown of the employment relationship.

THE GRIVIENCE LODGED ON THE 29TH OF SEPTEMBER 2002 UNDER CASE NO GA 29612-02

[1] Ntleru testified that the applicant lodged a grivience on the 29th of September 2002 at the CCMA regarding the promotion of J Marallich as the supervisor of the applicant, that the latter withdrew the matter from the Labour Court without any reason.

[2] Under cross examination Ntleru conceded that the applicant had a valid and genuine grivience because of his allegations that J Marallich was junior, and less qualified than him. He further conceded that this grivience was lodged internally, but was not resolved. He stated that the applicant was entitled to refer this grievance to the Labour Court. Ntleru conceded that the matter

was mutually withdrawn by both the respondent and the applicant on the 9th of March 2003.

[3] Sewurain conceded that he was not aware of the fact that this matter was mutually withdrawn, that if this information was canvassed at the incompatibility enquiry, he could possibly have come to a different conclusion in his assessment of this issue as a contributory fact or in the alleged applicant's incompatibility regarding the contention that the applicant had withdrawn this matter without any explanation.

[4] Under cross examination Ntleru conceded that the allegations relating to the griviences lodged by the applicant are all based on documentary evidence relating to the period before he was appointed as the applicant's manager and supervisor in the respondent's security and investigation department.

[5] Having regard to the concessions made by Ntleru and Sewurain in relation to the griviences lodged by the applicant, it is patent that the applicant initiated these griviences in the exercise of his constitutional and statutory rights. The applicant had valid griviences against the respondent. The applicant had a right to initiate them, and has diligently prosecuted these griviences. Some griviences have been settled or withdrawn with the mutual consent of the respondent, some are still pending in the Labour Court.

[6] In my view the contention by the respondent that the applicant lodged baseless griviences against the respondent is not valid. The respondent in its statement of defence corroborates the applicant's

version that he was dismissed because he initiated griviences against the respondent.

[7] The rationale propounded by the respondent that the applicant by initiating meritless griviences obliged the respondent to expend human resources, time and capital unnecessarily, or that this conduct by the applicant made the employment relationship untenable is not valid.

[8] The applicant has a constitutional and statutory right to lodge and pursue valid griviences against the respondent. The respondent's contention that the applicant's initiation of griviences is one of the reasons that precipitated or contributed to the breakdown of the employment relationship or that this resulted in the applicant's incompatibility is not borne out by the evidence.

[9] The allegations pertaining to the applicant's incompatibility are based on documentary evidence and are relate to the period before Ntleru became the applicant's manager and supervisor.

THE ANALYSIS AND EVALUATION OF THE REASONS PROFERRED BY THE RESPONDENT FOR THE APPLICANT'S DISMISSAL

[1] Ntleru conceded that the applicant, has not being subjected to disciplinary proceedings, that has he not been accused of committing any misconduct and has consistently and competently performed his duties in terms of his contract of employment.

[2] Ntleru conceded that the applicant was promoted to managerial level after satisfying the respondent's promotion criteria, that he has consistently received positive work performance appraisals.

[3] Ntleru testified that the applicant was not focusing on his work, as a result of being continuously engaged in litigation, that this prevented the applicant from executing his duties. If indeed this was the case, it is inexplicable why the applicant's work performance appraisals were consistently positive, and why he was promoted.

[4] Ntleru accuses the applicant of threatening him in an e-mail communication dated 8th of April 2004. An analysis of the e-mail communication shows that its contents cannot conceivably be construed as a threat. The e-mail records the applicant's views regarding Ntleru in relation to his attempts to terminate applicant's contract of employment.

[5] Ntleru testified that the applicant, continually challenged and questioned the decisions of the respondent, that the applicant does not take and execute the instructions of his superiors. If that was the situation, it is incomprehensible why the respondent did not institute disciplinary proceedings against the applicant for failing to execute lawful management orders.

[6] The applicant is accused of being arrogant, un-cooperative and insubordinate. If that state of affairs obtained, it is incomprehensible why the respondent did not institute disciplinary proceedings against the applicant for misconduct.

[7] Ntleru testified that the applicant's conduct frustrated and demoralised his co-workers and that this necessitated that the he be managed separately. The respondent did not adduce any corroborative evidence to substantiate these allegations.

[8] Ntleru accused the applicant of dishonesty, disrespectfulness, and intolerable conduct. The respondent did not adduce any evidence to substantiate these allegations, except to state that the applicant did not habitually concede the correctness and validity of any argument held with his superiors.

WAS THE APPLICANTS CONDUCT INCOMPATABLE WITHIN THE RESPONDENTS ENPLOYMENT ENVIRONMENT

[1] Incompatibility is defined, as a species of incapacity, and relates essentially, to the subjective relationship of an employee and other co-workers, within the employment environment, regarding the employee's inability or failure, to maintain cordial and harmonious relationships with his peers. Incompatibility is an amorphous, nebulous concept, based on subjective value judgments.
See Labour Relations Law fourth edition D Du Toit at page 402 Para B- 404

[2] An employer has the prerogative, to set reasonable standards pertaining to the harmonious interpersonal relationships at the workplace.

[3] An employer is entitled, where the conduct of an employee creates disharmony to;

(a) evaluate the nature and seriousness of the problem, address same, and assist the employee to overcome his personal difficulties, and,

(b) effect remedial action, and if unsuccessful, to place the employee in a position suitable to his qualifications and experience.

[4] In order to prove incompatibility, independent corroborative evidence in substantiation is required to show that an employee's intolerable conduct was primarily the cause of the disharmony. *See Subramuny v Amalgamated Beverages Industries Ltd [2000] 2780 ILJ (LC) at page 2789 G-H.*

[5] In determining the applicant's alleged incompatibility, it is appropriate to enquire whether the fault for the disharmony is attributable to the applicant's conduct in that, he was;

(a) unable to fit, within the respondent's 'corporate culture' despite attempts by colleagues and the respondent, to accommodate him and to remedy the situation, or that his conduct was unacceptable or unreasonable.

See Visagie en Andere v Prestige Skoonmarkdienste (Edms) Bpk (1995) 16 ILJ 418, 423 J (IC).

[6] The appropriate procedure in establishing whether an employee is incompatible was defined in the case of *WRIGHT V ST. MARYS HOSPITAL (1992) 13 ILJ (IC) AT 1004H, as follows;*

"The employee must be advised what conduct allegedly causes disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto; that he be given a proper opportunity of putting his version; and where it is found that he was responsible for the disharmony, he must be given a fair opportunity to remove the cause for disharmony"

[7] The respondent states that no solution could be found to address the applicant's incompatibility. The respondent did not adduce evidence mentioning the remedial options and alternatives it proposed to the applicant in order to remedy the applicant's incompatibility.

[8] There is an onus on the respondent, not only to prove incompatibility, but also, to show that the applicant is the party substantially responsible for the disharmony, and that, the proven incompatibility constitutes a fair reason for the applicant's dismissal.

[9] From a conspectus of the evidence adduced, the following emerges;

(a) the applicant has not been afforded an opportunity to confront the alleged disharmonious behavioural conduct he is accused of, and

(b) has not had the benefit of counselling, neither has he been afforded the opportunity to remedy this perceived incompatibility, if any, in order to restore an amicable employment relationship with the respondent.

[10] In my view the respondent has failed to provide reasonable grounds for concluding that the applicant's conduct was incompatible, and that the employment relationship had irretrievably broken down.

THE RELIEF

[1] The dominant reason for the applicant's dismissal is predicated on the fact that the applicant initiated grivience proceedings against the respondent's management, challenging its unfair labour practices.

[2] The secondary reason for the applicant's dismissal is based on the fact that on the 8th of April 2004, the applicant declined to accept a voluntary severance package intended to terminate the employment relationship.

[3] The respondent did not take kindly to the applicant's continual challenge of its labour practices and perceived such conduct as

insubordination. The applicant had the constitutional and statutory right to initiate and pursue griviences against the respondent, as long as his actions were motivated by a bona fide belief that the respondent was subjecting him to unfair labour practices.

[4] The respondent in pursuance of its unreasonable and illegitimate conclusion that, the applicant in acting in terms of his constitutional and statutory rights was insubordinate and undermining its authority arbitrarily decided to terminate the applicant's contract of employment without any lawful justification.

[5] The respondent's conclusion that there has been an irreparable breakdown of the employment relationship is not sustained by the objective proven facts. The altercation between the applicant and Ntleru can certainly not be regarded as a dispute rendering the employment relationship insupportable, or untenable of when the size of magnitude of the respondent's operations.

[6] In my view the reasons proffered by the respondent as the justification for the applicant's dismissal are not sustainable, the applicant was dismissed by the respondent in breach of section 187(1)(c) and (d) of the Act.

[7] The applicant seeks an order of reinstatement. This court in terms of section 193(2) of the Act is enjoined to require the respondent to re-instate the applicant unless-

(a) the employee does not wish to be re-instated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

[8] The applicant was victimised and unfairly dismissed for exercising his constitutional and statutory rights. The Constitution and 'the Act, protects employees against victimisation in the exercise of their rights.

[9] In considering whether the applicant should be reinstated, it would be fallacious to accede to the respondent's contention that the employment relationship and trust has irretrievably broken down, that under the circumstances it would be unreasonable to reinstate the applicant.

[10] The respondent was dismissed for illegitimate and unlawful reasons. It is against public policy that the respondent which has infringed the applicant's constitutional and statutory rights should be protected against the consequences of it's illegitimate and unlawful conduct by not re-instating the applicant.

[11] The failure to reinstate the applicant on the rationale propounded by the respondent, that the relationship of trust has been destroyed, would result in the denial of the applicant's constitutional and statutory rights. I am in agreement with the seminal remarks of Zondo JP in the case of *Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LAC) at page 1203 para 94 C-E*, that the omission to reinstate the applicant, would benefit the respondent, for flouting the foundational rights and democratic precepts espoused by our post- apartheid dispensation.

[12] The respondent's argument is that the applicant is not entitled to relief, no submissions were made regarding the desirability or otherwise of the applicant's reinstatement.

[13] It has not been shown that the applicant's re-instatement would be intolerable, no has it been demonstrated that it will be unreasonable and impractical to reinstate him.

[14] The applicant was dismissed on the 31st of August 2004; a period of six months has elapsed since his dismissal, this is not inordinately.

[15] No evidence was adduced with regard to the possibility that the respondent's operational requirements have changed, or that the applicant's position has become redundant.

[16] In the premises, the following order is made;

1. The dismissal of the applicant on the 31st of August 2004, is declared to be automatically unfair in terms of section 187(1) (c) and (d) of the Act;

2. The applicant is reinstated in his employment with the respondent with effect from 1st of September 2004 with full benefits;

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

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MOKGOATLHENG AJ
ACTING JUDGE OF THE LABOUR COURT

FOR THE APPLICANT:	ADV. P MOKOENA Instructed by MOHLABA MOSHOANA ATTORNEYS
FOR THE RESPONDENT:	J VAN DEVENTER OF KLAGSBRUN DE VRIES & VAN DEVENTER
DATE OF HEARING:	27 FEBRUARY 2006
DATE OF JUDGMENT:	19 MAY 2006