



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable

Case no: JS 65/2012

GRIESSEL, BENJAMIN QUINTON

Applicant

and

TRADE KINGS (PTY) LTD

Respondent

Heard: 12; 13; 14; 15 May 2014; 29; 30 and October 2014;

(Written closing arguments: 12 November 2014)

Delivered: 6 May 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicant claims that his dismissal by the respondent was automatically unfair as contemplated in section 187(1) (d) (i) read with sections 5 (1) and 187 (1) (f) of the Labour Relations Act¹ (the 'LRA'). In his statement of case, the applicant alleged that the basis of his claim was that he was dismissed for exercising his right to lodge an unfair discrimination dispute in terms of section 10 of the Employment Equity

¹ Act 66 of 1995

Act² (The 'EEA') at the Commission for Conciliation, Mediation and Arbitration (The CCMA). The dispute referred was in regards to alleged direct unfair discrimination and harassment of the applicant for exercising his rights to raise grievances. He further alleged that he was discriminated against on account of his marital status. He seeks an order that his dismissal was substantively and/or procedurally unfair.

- [2] In the statement of case, the applicant initially sought maximum compensation. This had however changed during his cross-examination, and he now seeks an order of reinstatement, as he contends that the source of his complaint leading to the automatically unfair dismissal claim has since been removed. The respondent opposed the claim.

Background:

- [3] The respondent is in the business of manufacturing, importing and exporting of confectionary products. The applicant started his employment with the respondent in June 2006 as a Sales Marketing Assistant, and used to report to one Grobler who was the then Managing Director. Grobler passed away in 2009 and the applicant took over his functions. This came with a significant increase in his salary in view of his additional responsibilities including setting up of factories, running the export, steel, production development, and marketing parts of the business.
- [4] In July 2010 the respondent had appointed Allan Devraj as its Managing Director. Devraj had prior to his appointment acted as a consultant for the respondent, having been recruited at the time by the applicant with the blessing of the CEO of the respondent, Zuber Moosa. It appears at the time that the applicant needed assistance and mentoring in certain aspects of the business, and it was in that regard that Devraj was brought in on a consultancy basis.

² Act 58 of 1998

- [5] The applicant was consulted on Devraj's appointment and he had thought that he would be good with the retail side of the business. The applicant's contention was that he worked closely with Devraj after his appointment as MD, and had supported him in the confectionary side of the business. He further denied that he was ever jealous of Devraj's appointment and had no problems in working with him until March 2011 when their relationship deteriorated.
- [6] Following Devraj's appointment as MD, the applicant had continued to report to Moosa until January 2011, when he was appointed as National Sales Manager for the respondent's confectionary business, following the failure of the steel aspect of the business. The applicant had occupied that position until 24 October 2011 when he was dismissed on allegations of misconduct. At the time he had earned a salary equal to R75 000.00 per month, cost to the company.
- [7] The applicant's contention is that the true or predominant reason for his dismissal was the fact that he had attempted to have grievances against Devraj resolved, and that the respondent, and in particular, Moosa, had failed to make any meaningful attempt to do so. It was further submitted that when it was clear that he would not let the grievance go unresolved, the harassment and victimization was increased by Devraj who was supported by Moosa. The applicant further submitted that in the light of the grievances, Moosa then deliberately started looking for 'dirt' on him and discovered performance issues that arose in the past, leading to the charges against him and his ultimate dismissal.
- [8] The dispute between the parties is alleged to have been triggered by formal written complaints lodged by the applicant on 20 and 25 July 2011 against Devraj. It was common cause that Moosa had met with the applicant on 26 July 2011 for three hours to discuss the said grievance. The grievance according to the applicant remained unresolved despite the possibility of him being moved to the export division of the respondent having been discussed. There is a dispute regarding whether

during these discussions, Moosa had also made an offer to pay the applicant 12 months' salary to terminate the employment relationship.

- [9] The respondent's contention was that there was a long build up to the disciplinary hearing and the applicant's dismissal on 24 October 2011. It was submitted on its behalf that the lodging of the grievance did not have an influence on the disciplinary hearing or the ultimate dismissal.

Issues for determination:

- [10] The main issues for determination as per the parties' pre-trial minutes are:

- i. Whether the dismissal of the applicant was automatically unfair;
- ii. Whether the grievances raised by the applicant and his referral of an unfair labour practice dispute to the CCMA was the '*dominant*' or *most likely cause(s) of the dismissal*. If these questions are answered in the affirmative, whether the dismissal was substantively fair/or unfair;
- iii. Furthermore, it is required of the court to determine whether the applicant's dismissal was in accordance with a fair procedure on the basis that;
 - a. The disciplinary hearing was prematurely instituted pending resolution of an unfair labour practice by the CCMA;
 - b. If so, the hearing constituted a form of harassment
 - c. The chairperson of the hearing was biased;
- iv. Whether the dismissal was for a reason listed as unfair discrimination under section 187 (1) (f) of the LRA and/or arbitrary reason related to discrimination and thus automatically unfair;
- v. Whether the applicant is entitled to any relief.

The dispute and the evidence:

- [11] The trial took six days to complete. Other than giving evidence, the applicant also called upon four other witnesses to testify on his behalf, whilst the respondent only called upon Moosa to testify on its behalf. The evidence presented covered a variety of issues, and an attempt is made

hereunder to summarise the most salient common cause and disputed facts.

- [12] The applicant's main source of discontent was Devraj. In his written complaints of 20 and 25 July 2011 addressed to Moosa, he had alleged that Devraj had subjected him to unfair treatment, discrimination, harassment, and victimization, including threats made to his job security. The applicant deemed the conduct of Devraj towards him over time to be unbecoming, unprofessional, degrading, demotivating, humiliating and insulting. He further complained that Devraj gave other employees preferential treatment.
- [13] The applicant in substantiating the complaints further testified that he believed that Devraj treated him unfairly because he thought that he (applicant) was incompetent when this was not the case. Devraj had told him in foul language that he was not good enough and that he should leave as he was looking for another National Sales Manager. He further complained that Devraj marginalised him, excluded him from the affairs of the respondent, refused to copy him in e-mails and basically subjected him to unfair discrimination on account of his open relationship with his wife. He testified that Devraj sought to micro-manage him, 'was all over him', overloaded him with work and constantly criticized him. According to the applicant, Devraj had started employing his friends from other companies, created camps in the workplace, favoured other employees, and planned to get rid of him eventually.
- [14] After the two written complaints, Moosa had held a three-hour meeting with the applicant on 26 July 2011 in order to address his concerns. Moosa's response according to the applicant was that of indifference, as he did not believe the allegations he had made against Devraj. Moosa essentially told him to work with Devraj, and to sort their differences out.
- [15] On 18 August 2011, Devraj had sent an e-mail to the applicant outlining several outstanding work related issues and making some changes in his functions. Attached to the e-mail was a copy of "*Work Level Position*

Statement - National Sales Manager” which the applicant viewed as changing his role without any discussions being held with him.

- [16] In the e-mail, the applicant was also informed that he did not require an office as he was issued with a laptop and mobile phone to respond to emergencies, and that he should move to the open plan area. When the applicant received this e-mail and the attachment, he formed the view that there was no longer a role and position for him in the company, and viewed this as a personal attack and a demotion. The applicant further saw his removal to an open plan area as favouritism, as another employee, Marianne was not moved even though she did not use her office regularly. The applicant's view was further that with these actions, Devraj sought to humiliate and belittle him, as he felt threatened by him.
- [17] The applicant was booked off sick from 19 August 2011 until 26 August 2011 and had accordingly informed Moosa initially by 'sms'. He also sent through a copy of his medical certificate in that regard. His contention was that upon receipt of a copy, Devraj had continued with the humiliation and mistrust by informing him via an e-mail that he wanted a second opinion on the nature of his ailment from a respondent's recommended doctor. This was followed by a further e-mail from Devraj to the applicant enquiring about copies of outstanding agreements and work to be done which was overdue. Devraj on the same date sent yet another e-mail to the applicant, informing him that disciplinary steps would be taken against him if his instructions were not complied with.
- [18] On the same date, Devraj informed the applicant that another person, Vinay would take his place on a trip to the Tanzanian Trade Show that had been previously planned. The applicant contended that he was excluded from the trip despite working hard towards it over three years, and he viewed this as further attacks on him and an attempt at blocking his opportunities. On 19 August 2011, in an e-mail to Moosa and in which he complained about being excluded from the Tanzanian trip, the applicant requested to be moved to the exports division and also asked Moosa to intervene in the harassment by Devraj.

- [19] Moosa's response to the applicant in one of the e-mail exchanges was that he was wrong in attributing problems to a personal vendetta and that they related more to his competency and fights with Devraj. On 19 August 2011, the applicant responded with a detailed e-mail, and persisted with his allegations against Devraj. He further stated that if the respondent held the view that he was not suited for the job, he would accept the 12 months' compensation offer allegedly made by Moosa in their meeting held on 26 July 2011 and he would move on.
- [20] In one of the e-mail exchanges, the applicant had informed Devraj that he had consulted with the CCMA, and was advised that his instruction to submit to a second medical opinion was unlawful. Devraj in return had sent e-mails to the respondent's HR division for checks to be made on whether the applicant had any sick leave days due to him, failing which his salary should be deducted if he did not have any sick leave days due to him.
- [21] Moosa's response on 20 August 2011 to one of the applicant's e-mails with the familiar complaints was that he was tired and did not know what to do anymore. He denied having made an offer of 12 months' salary for the applicant to leave, and informed him to communicate directly with Devraj. Moosa further told the applicant that he did not want him to leave and proposed the position in exports as an alternative.
- [22] The applicant further testified that Devraj and Moosa were in cahoots in attacking and being vindictive towards him. He cited instances where old issues about performance had resurfaced to find faults in him. He also made reference to Devraj's e-mail of 19 August 2011, wherein he had requested certain things to be done whilst he was on sick leave, and the fact that he was also threatened with disciplinary warnings if instructions were not carried out.
- [23] On 23 August 2011, the applicant had sent an e-mail to Moosa informing him that his attempts to meet with Devraj to resolve their differences did not yield results as he told him that he should speak to him. Moosa send

a 'sms' to the applicant, advising him that he told Devraj not to communicate with him and that since the issues related to his performance, the matter was to be referred to Labournet to handle. The applicant testified that he construed Moosa's response as a 'declaration of war'.

- [24] The applicant was due to return to work on 29 August 2011 from sick leave. On that date, Moosa received correspondence from the applicant's attorneys of record, informing him *inter alia* that the applicant had intimate knowledge of the business of the respondent and that should he join the competition, this could severely impact on the prospects of the respondent. It was further alleged on behalf of the applicant that because of the harassment and unfair discrimination by Devraj, his health had come under strain, and that an amicable solution should be reached to terminate the employment relationship.
- [25] In the correspondence to Moosa, it was suggested that the applicant should be paid 12 months' salary to take 'garden leave' to maintain confidentiality regarding the business of the respondent, since also he did not have a contract or restraint of trade. Devraj on the other hand had on the same day sent further e-mails to the applicant enquiring about work related matters.
- [26] On 31 August 2011, the applicant's attorneys of record sent follow up correspondence and continued to complain *inter alia* about unfair labour practices, discrimination, the unlawfulness of Devraj's instructions in the light of the allegations that he was not properly appointed as MD, and the fact that Devraj had appointed his daughter Natasha to a position he had created without advertising it. Moosa did not respond immediately to the correspondence from the applicant's attorneys.
- [27] The respondent had scheduled a formal grievance hearing to be held on 7 September 2011 and to be facilitated by Labournet. On 5 September 2011, the applicant's attorneys had formally informed the respondent that

the applicant would not attend the grievance hearing and raised several objections. The attorneys further insisted that he should be legally represented in the grievance hearing, failing which he would not attend.

[28] The applicant's attorneys sent another letter, accusing the respondent of having demoted the applicant and further intensifying attempts to force him to resign. On 7 September 2011 the applicant's attorneys had sent further correspondence to Moosa and effectively raised the same or similar complaints and informed him that a referral was to be lodged with the CCMA. The applicant then on 7 September 2011 referred an unfair labour practice and unfair discrimination dispute to the CCMA. The referral according to the applicant, was as a result of Moosa having handed the matter over to Labournet, and the fact that his laptop and cell phone were then taken from him.

[29] On 8 September 2011, the respondent's attorneys wrote three letters, advising the applicant *inter alia* that the respondent disputed allegations of unfair labour practice and discriminatory conduct towards him. It was further pointed out that the respondent did not want to negotiate a separation of employment with him, and concerns were expressed about threats made by him through his attorneys. It was also indicated that the respondent was still committed to dealing with the issues raised in an internal grievance proceeding, and the applicant's laptop and cell phone were removed from him in the light of the threats he had made through his attorneys.

[30] On 12 September 2011, the applicant's attorneys wrote to the respondent, and confirmed that the applicant would not attend any grievance hearing and that there was a breakdown in the trust relationship between the applicant, Moosa and Devraj. This was again confirmed in writing on 16 September 2011, and the applicant indicated that any attempts at resolving the matter should be at the level of the CCMA. In the applicant's attorneys' letter, it was also raised that a third party, (the applicant's landlord), was allegedly informed that the applicant was no longer employed by the respondent, and that the situation at

work was untenable. The respondent was threatened with further litigation in terms of the Companies Act and the contravention of the RICA (Pertaining to alleged invasion of privacy after the laptop and mobile phone were taken from him and investigated).

- [31] In his testimony, the applicant had confirmed that he did not attend the grievance hearing scheduled as he held the view that it would not be fairly conducted since it was to be facilitated by Labournet. He also contended that the grievance hearing was belated, and would not have been fair, as he was not allowed legal representation whilst Labournet handled the affairs of the respondent.
- [32] On 19 September 2011, the respondent's attorneys informed the applicant in writing that since he had made up his mind and had no intention of resolving the issues internally or to participate in the grievance hearings, that process was regarded as having been aborted. He was informed that he was henceforth suspended, and that a disciplinary hearing was to be convened on 26 September 2011 for him to answer to allegations of misconduct, which were outlined in the notice.
- [33] On 22 September 2011, the applicant lodged yet another grievance detailing the same issues he had raised before, *albeit* in more detail. On 26 September 2011, the disciplinary enquiry was postponed to 28 September 2011 and a new or revised 'charge sheet' was issued. The disciplinary enquiry was again postponed to 5 October 2011.
- [34] The dispute referred to the CCMA on 7 September 2011 was to be conciliated on 3 October 2011 and a certificate of outcome was issued. On the same date, the applicant had referred another unfair labour practice dispute to the CCMA, alleging that he was unfairly demoted from National Sales Manager to Regional Sales Manager, was removed from his office to an open plan area; his cell phone and laptop was confiscated and that 25% was deducted from his salary.
- [35] The disciplinary enquiry eventually commenced on 5 and 10 October 2011 with a chairperson from Labournet presiding. It had proceeded

despite the applicant's objections about being suspended without a hearing; the fact that he had referred two disputes to the CCMA and his requests for further documents.

- [36] On 20 October 2011, the applicant was informed that he was found guilty on four of the six charges preferred against him, and was further advised to submit mitigating circumstances. On 24 October 2011 he was then informed of his dismissal. He had referred an unfair dismissal dispute to the CCMA on 26 October 2011 and then withdrew the unfair labour practice dispute he had initially referred. A certificate of outcome pertaining to the unfair dismissal dispute was issued on 17 November 2011. On 20 January 2012, the CCMA had issued a ruling to the effect that since the dispute pertained to a dismissal on grounds of discrimination, it lacked jurisdiction to arbitrate the dispute.
- [37] Under cross-examination, the applicant conceded that his experience in retail and sales was limited as he was mostly involved in marketing and business management. He further conceded that Devraj was brought into the respondent by him as a consultant to assist him, and denied that he had wished to occupy the position of MD. He further reiterated that when Devraj started, he had supported him and had no ill feelings towards him until his attitude changed in March 2011. He further confirmed that from August 2010 he had reported directly to Moosa and even after Devraj was appointed as Managing Director.
- [38] The applicant nevertheless conceded that he had problems with the appointment of Devraj, as it was not properly done in terms of the company laws of the country. He conceded that he was appointed National Sales Manager after the respondent's steel business had gone under, and had to thereafter report to Devraj. He however denied that the problem had to do with reporting to him and contended that it was more about how Devraj dealt with employees.
- [39] The applicant contended that although Devraj was demanding and rude, he had lots of experience, and that the respondent's business grew

under him even though this was more as a result of a team effort. He testified that Devraj had simply taken over from him at the stage when the company was doing well.

[40] According to the applicant, when Devraj asked him on 18 August 2011 to vacate his office, as he wanted him to be more in the field, he saw this as a demotion to a region as he was now allocated the tasks of a regional manager. He conceded that his tasks did not require him to be office bound. He however contended that he needed his office for after hours office work and also since his position was strategic. He had however conceded that other people were moved from their offices and that Moosa as CEO, and the respondent's Finance Manager occupied the open plan area. He however still saw his removal to the open plan area as an attack and victimization after he had lodged a grievance. He attributed the problems between him and Devraj as being due to the fact that he had expressed his own opinions, which did not go down well with him.

[41] In regards to the Tanzanian Trade show trip, the applicant conceded that at the time it was scheduled, he was on sick leave and had to be replaced with another employee. He could not comment when it was put to him that eventually no one went to the trade show. He however still felt that he was being excluded and treated unfairly by Devraj when removed him from the trip.

[42] In regards to the charges preferred against him, the applicant conceded that these were not thumb-sucked as they were based on facts. He however contended that the hearing was unfair. The main issue for him was however that the disciplinary enquiry was in response to his complaints, which were not addressed.

[43] Stephen Joubert's testimony on behalf of the applicant was as follows;

[44] He was employed as an agent by the applicant and Devraj in 2010/2011, and used to encounter the applicant at least thrice a month. He described Devraj as abrupt, rude, boisterous, bullish, authoritative and a

person who liked to be feared. On a date he could not recall, he was with Devraj and another employee, Vinay when the two discussed a plan for Vinay to move to Johannesburg from the Eastern Cape in order to take over from the applicant. He and other employees were told by Devraj at about that time that the applicant was to be suspended, and that they should cut off all communication with him. Joubert further testified that he knew that there was a 'plot' to get rid of the applicant, and he had experienced instances in meetings where Devraj had in his presence, shouted and verbally abused the applicant, rubbished him for 'stuffing up' deals, and blamed him for everything. Devraj had accused the applicant of being incompetent and not good for the business.

[45] Under cross-examination, Joubert revealed that he was in fact dismissed by the respondent, and was indeed aggrieved by the dismissal, as the respondent was his blue-chip client. Joubert could not recall the dates on which the incidents he had referred to had taken place. He reiterated however that Devraj and Vinay wanted to get rid of the applicant, as they were unhappy with his performance.

[46] Donovan Reyersbach also testified on behalf of the applicant. He also described Devraj as being pleasant in the beginning. He had however become abusive towards employees, was unpopular, outspoken and bombastic. He himself was also verbally abused and shouted at by Devraj in front of other employees and Moosa did nothing despite being aware of the problems. He had also overheard Devraj verbally abusing the applicant over the phone and despite complaining to Moosa, nothing was done. He contended that the applicant on the other hand was always pleasant and never swore back at Devraj except on that one occasion when he had responded in expletive terms to the abuse by Devraj. He became aware of the grievance lodged by the applicant, but only after his suspension.

[47] Under cross-examination, Reyersbach confirmed that the respondent retrenched him in 2012. Despite his contention that he was verbally abused by Devraj, he never lodged a formal complaint. In regards to the

telephonic conversation he had allegedly overheard, his recollection was that as Devraj spoke to the applicant at the time, he did not hear the entire conversation except the swearing and verbal abuse by Devraj.

The respondent's case:

[48] Zuber Moosa, the respondent's CEO testimony is summarised as follows;

[49] The applicant was not experienced in the sales side of the business and he had proposed to him that he should get someone to mentor him. It was the applicant that had brought Devraj into the company due to his experience in the business. The applicant had however failed in his duties as National Sales Manager according to Moosa, hence the disciplinary action against him. Amongst issues mentioned were that the applicant had failed to execute material with agents, never kept records and money was given on trade deals. Although sales were increasing, the company had lost money. Moosa testified that he was shocked by allegations of unfair discrimination made by the applicant in his two formal complaints. His view was that the applicant 'blew matters out of proportion' and he had told him so in their meeting. After the meetings Moosa thought that the applicant would deal directly with Devraj, and that the matter would be resolved.

[50] Moosa confirmed that Devraj had taken away certain functions and responsibilities from the applicant, and had told him to move out of his office. He however denied that the applicant was demoted as his salary remained the same. He denied having offered the applicant 12 months' compensation, and that the issue came about as a proposal from the applicant when they looked at options on 26 July 2011. Moosa's response to the applicant at the time was that even if he was given 12 months' salary, the money would not take him anywhere. Moosa contended that the applicant was his 'own enemy', as he had refused to listen to his advise not to fight with Devraj.

- [51] The applicant according to Moosa had problems with his work performance, and in one of their encounters, he had told him that he would involve Labournet to deal with such issues. Moosa further found the letters from the applicant's attorneys to be threatening and testified that it appears that the applicant had no intention of working with Devraj as in his view, he was not properly appointed as the MD. Despite a grievance process being set up, the applicant had refused to participate in it. In the light of these factors, Moosa had concluded that the applicant had become 'out of control', was not performing, had failed to be accountable on a number of issues, and that something had to be done, hence he had involved Labournet.
- [52] Moosa denied that the applicant was victimized for raising a grievance, and contended that the problem was with his performance despite Devraj's attempts to mentor him, his failure to take advice from him, fighting with everyone, and the fact that he was the only employee to have raised discrimination issues. He conceded that Devraj was a difficult person to deal with, but contended that he was target driven and never specifically targeted the applicant alone.
- [53] Under cross-examination, Moosa reiterated that he had spoken to the applicant about his complaints, and had advised him to work well with his colleagues. He conceded that the applicant did make sales *albeit* on a small scale. In regards to issues of performance, he cited the example of POSM, outstanding issues that needed to be attended to, and that when Devraj raised these issues, the applicant would complain about victimization. As the person with ultimate responsibility for the POSM, the applicant according to Moosa was correctly charged for that issue.
- [54] Moosa further testified that after he got the first written complaint, he had to make sense of it as he had never heard Devraj swear at employees. He told the applicant to deal with the issues rather than being emotional. In regards to allegations of discrimination, Moosa contended that the applicant was 'paranoid', and that it was 'all in his head' as he wanted to become a victim. He further contended that Devraj was correct in

demanding certain things from the applicant, and to be upset when things were not done according to his standards and expectations. He denied that there were incompatibility issues between the two, and that it was the applicant who had picked up fights with Devraj.

The legal framework in respect of automatically unfair dismissal claims:

[55] Section 187 of the LRA provides that;

'Automatically unfair dismissals.-

(1) *'A dismissal is automatically unfair if the employer, in dismissing the Employee, acts contrary to section 5 or, if the reason for the dismissal is-*

(a)

(b)

(c)

(d) That the employee took action, or indicated an intention to take action, against the employer by-

i. exercising any right conferred by this Act; or

ii. participating in any proceedings in terms of this Act.

(e).....

(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.

Section 5 (1) of the LRA upon which the applicant also relied on provides that:

"No person may discriminate against an employee for exercising any right conferred by this Act"

[56] In any dismissal dispute, a duty is imposed on an employee to establish the existence of that dismissal³, and it is thereafter for the employer to prove that the dismissal was for a fair reason permitted in section 188 of the LRA. Where however an employee alleges that a dismissal was based on discrimination or some other prohibited ground, more than a mere allegation of a dismissal is required. In *Kroukam v SA Airlink (Pty) Ltd*⁴, the Labour Appeal Court dealt with the question of onus in respect of automatically unfair dismissal claims under section 187 of the LRA in the following terms⁵:

'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 circumstances envisaged in s 187 for constituting an automatically unfair dismissal.'

And

The further question then arises as to the approach to the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the 'dominant' or most likely cause of the dismissal.'

[57] In *Viney v Barnard Jacobs Mallet Securities (Pty) Ltd*⁶, it was held that:

"In order to ascertain whether a dismissal constitutes an automatically unfair dismissal in terms of s187 of the LRA, one must ascertain the true reason for such a dismissal". (Citations omitted)

Also relying on *Kroukam*, the Court in *Viney* further held that:

³ Section 192

⁴ (2005) 26 ILJ 2153 (LAC)

⁵ Per Davis AJA at paras [28] and [29]

⁶ (2008) 29 ILJ 1564 (LC) at para 37

“The starting point in this inquiry... is to determine whether the employee has produced sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Having discharged the evidentiary burden of showing that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of proving as provided for in terms of s192 of the LRA that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of providing as provided for in terms s 192 of the LRA that the dismissal was for a permissible reason as provided for in terms of s188 of the LRA”⁷

- [58] The question whether the lodging of an internal grievance constitutes an exercise of a right conferred by the LRA for the purposes of a claim under section 187 (1) of the LRA received attention in *Mackay v ABSA Group and another*⁸ where this Court held that;

“Therefore in keeping with the main object of the Act, ie of resolving all labour disputes effectively, and with the constitutional guaranteed right to fair labour practices it must follow that a purposive interpretation of section 187(1) would mean that the exercise of a right conferred by a private agreement binding on the employer and employee as well as participation in any proceeding provided for by such agreement was also contemplated in that section. As in casu, the participation by an employee in a privately agreed grievance procedure, must have been contemplated as a proceeding in terms of this Act, ie when section 187(1)(d) was enacted. This is on the basis that the disputes specifically mentioned in section 187(1) are of the same kind as the dispute in casu.”

- [59] The Court in *Barbara De Klerk v Cape Union Mart International (Pty) Ltd*⁹ followed the decision in *Mackay* in finding that the lodging of an internal appeal equally enjoys protection under the provisions of section 187 (1) (d) of the LRA. The respondent in its written heads of argument accepted that the meaning of ‘exercising any right’ or ‘participating in any

⁷ At para 48. See also *State Information Technology Agency Ltd v Sekgobela* [2012] 10 BLLR 1001 (LAC) at paras 13 to 16

⁸ [1999] 12 BLLR 1317 (LC) at para 18

⁹ Case no: C 620/2011

proceedings' as referred to in section 187 (1) (d) of the LRA does include the filing of an internal grievance.

- [60] For the purposes of this dispute therefore, it will be accepted that an employee who lodges an internal grievance should enjoy protection under the provisions of section 187 (1) of the LRA. This is for the reason that the act of lodging a grievance is merely an assertion of a right not to be treated unfairly. Support for this view as also correctly pointed out on behalf of the applicant is further found in *Jabari v Telkom SA (Pty) Ltd*¹⁰ where it was held that where the dominant reason for the applicant's dismissal in that matter was predicated on the fact that he had initiated grievance proceedings against the respondent's management, in challenging its unfair labour practices:

"The applicant had the constitutional and statutory right to initiate and pursue grievances 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."

Evaluation:

- [61] The issue of a dismissal is not in contention in this case, it being common cause that the applicant was indeed dismissed. As it was correctly pointed out on behalf of the respondent, and in line with the authorities already referred to, in order for the applicant to succeed with his claim of automatically unfair dismissal, he needs to show;

- a) That there is a credible possibility that the dismissal was due to him lodging the grievance or having referred a dispute to the CCMA.
- b) That the lodging of the grievance was the '*dominant or most likely cause of the dismissal*'.
- c) If the facts show more than one reason may have been the reason for the dismissal, the applicant must show that the lodging of the

¹⁰ (2006) 27 ILJ 1854 (LC) at 1869

grievance was the *'dominant or most likely reason for the dismissal'*.

[62] Seventy items were identified by the parties in the signed pre-trial minute as being facts in dispute, which required the court's determination. I do not intend to deal with all these factual disputes to the extent that it would not assist in determining the principal issue. These disputes arose as a consequence of a myriad of complaints, which the applicant sought to rely upon in substantiating his claim.

[63] Central to the applicant's claim however was that he was dismissed for lodging a grievance. Aligned to that contention are allegations pertaining to a referral of disputes to the CCMA in respect of alleged discrimination on account of his open marriage and an unfair labour practice dispute pertaining to the alleged demotion.

[64] Having assessed the overall evidence presented, the history and background to this dispute, and the complaints leading to the grievances it is my view that the applicant has not demonstrated that there is a credible possibility that his dismissal was due to him having lodged the grievance or having referred dispute to the CCMA. Even if the applicant's incessant complaints about victimization and harassment may have been legitimate and a source of irritation and frustration for Moosa, the lodging of the grievance or lodging of referrals to the CCMA was not the *'dominant or most likely cause'* of his dismissal. These conclusions are based on the following observations;

The grievance:

[65] It was common cause that Moosa did not formally respond to the two grievances lodged by the applicant. A meeting was however held on 26 July 2011 between the applicant and Moosa, and on the applicant's own version, that meeting took no less than three hours.

[66] Under cross-examination, the applicant had conceded that *'things'*, *'way forward'* and *'options'* were discussed in his meeting with Moosa. He

conceded that he had asked that he be paid out, and that after the meeting, Moosa had told him to work with Devraj and have meetings with him. Despite this meeting, the applicant still contended that his grievance was not dealt with as Moosa continued to sing praises for Devraj.

- [67] It cannot be doubted from the evidence presented by the applicant, Joubert and Reyersbach that Devraj's management style was brash, rude, and intemperate. Despite Moosa's claims that he had not heard Devraj use foul language, it does not seem likely that this was the case. As also apparent from the applicant's initial complaint of 20 July 2011 and Moosa's subsequent e-mails after their meeting of 26 July 2011, it cannot be doubted that the applicant's complaints against Devraj had been discussed before¹¹ and still the applicant was not satisfied. Despite Moosa's attempts at denying that Devraj's management's style towards the applicant was the latter's source of discontent, in the absence of evidence by Devraj to deny same, it is found that indeed there was cause for the applicant to complain him.
- [68] On the applicant's version, and emanating from his three hour meeting with Moosa on 26 July 2011, alternatives were looked at in resolving the matter. It is however apparent that no agreement could be reached as to how to deal with Devraj's management style, and the option of a move to export was suggested by Moosa as evident from his e-mail of 20 August 2011¹².
- [69] In the light of the above, there is no basis for a conclusion to be reached that Moosa was uninterested in resolving the matter as the applicant had alleged. I fail to appreciate what possibly could have been discussed for three hours on 26 July 2011 other than the applicant's complaints and ways and means of resolving them. The fact that the meeting did not achieve what the applicant wanted does not imply that Moosa did not deal with the grievances. It is apparent from Moosa's his e-mails and

¹¹ Annexure "QG 10" where the applicant stated that; *"As you are aware from a previous discussion I have held in confidence with you in the last 3 months...."*

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evidence, and despite his exasperations, that he wanted the employment relationship with the applicant to continue.

- [70] The submissions made on behalf of the applicant was that the true or dominant reason for his dismissal was the fact that he had attempted to have the grievance resolved and that the respondent failed to make any meaningful attempt to do so. It is however my view that in the light of what has been stated in the preceding paragraph, the applicant's contention that the respondent failed to make any meaningful attempt to resolve the grievance cannot be sustained moreso in the light of the further following observations;

70.1 Following what I can refer to as the 'peace period' between 26 July and 18 August 2011, and after Devraj's e-mail of 18 August 2011, the employment relationship between the applicant and the respondent had taken a different turn especially after Moosa had escalated the matter to Labournet. After Moosa informed the applicant that he could no longer deal with the issues he had raised, and further having formed a view that those issues pertained to the applicant's performance, he had involved Labournet to deal with them.

70.2 Attempts were then made by the respondent to formally deal with the grievances as lodged by the applicant by scheduling a grievance hearing for 7 September 2011 to be facilitated by Labournet. The applicant, through his attorneys had however rejected the grievance hearing on a variety of grounds, which in my view were clearly unreasonable. Despite his insistence that he would not attend the hearing, on 16 September 2011 the applicant's attorneys had sent 'extremely urgent' correspondence to the respondent's attorneys, confirming discussions between the attorneys wherein the applicant had indicated his willingness to submit to a grievance hearing only if his laptop was returned to him, and if he was allowed to resume his duties as National Sales Manager. The applicant's attorneys had however stated that in the

light of new developments, i.e. information having come to light through the landlord that the applicant was dismissed, and the applicant being refused to do his work, no purpose would be served by attending the hearing, and that the matter should be dealt with at the level of the CCMA.

70.3 In the light of the above, it is my view that the applicant's approach and that of his attorneys in rejecting the respondent's attempts at resolving the grievance was unreasonable. It is accepted that Moosa did not timeously deal with complaints in the formal manner that the applicant would have wanted. At the same time, it is not as if Moosa, being the CEO had not made any attempts at all in dealing with those complaints. It is further apparent that since Moosa's attempts had failed, and further since the applicant had also accused him of having acted in cahoots with Devraj, it could not possibly have been expected of Moosa to intervene any further, hence the involvement of Labournet.

70.4 The applicant's rejection of these attempts was also unreasonable in that legal representation in internal grievance hearings is not an automatic right. Furthermore, the fact that the applicant had already referred a dispute to the CCMA was not a bar to convening an internal grievance hearing, especially taking into account that the referral of the unfair labour practice and unfair discrimination dispute to the CCMA was lodged on 7 September 2011, immediately after the grievance hearing was already scheduled. It is apparent that the referral of the dispute given its timing was merely to frustrate the respondent's attempts at resolving the grievance, and an attempt to bolster a case he had been building. The same goes for the belated grievance lodged on 26 September 2011, after the applicant had on no less than three occasions informed the respondent that he was not interested in attending a grievance hearing unless on his own terms.

- 70.5 The CCMA process would have taken its course in respect of the disputes referred, and it was unreasonable for the applicant to insist that his internal grievance should be resolved at the level of the CCMA when it is not the role of that forum to resolve internal grievances.
- 70.6 It also appears that the applicant was ambivalent about whether to submit to the hearing or not. In my view, he was fixated with the alleged offer of 12 months' salary to terminate the employment relationship, and in his view, if he were to participate in such a hearing, it would only have been on his own terms. To this end then, there is no basis for a conclusion to be reached that the respondent failed to make any meaningful attempts at resolving the grievance. Instead, it was the applicant that frustrated those attempts, and his contention that subsequent disciplinary action against him was on the basis of having lodged that grievance and the respondent's failure to address the grievance is indeed without merit.

The events after 26 July 2011:

- [71] On the applicant's own version, between 26 July and 18 August 2011 there were no incidents between him and Devraj. The applicant conceded that nothing had happened that could have created any tension between them, even though he had continued to feel victimized despite having spoken to Moosa. As to what could have caused him to feel in that manner despite no incidents having taken place during that period remains unknown. Moosa's observation that the harassment and victimization was 'all in the applicant's head' is in my view not far-fetched.
- [72] As correctly pointed out on behalf of the respondent, a turning point in the parties' relationship appears to be Devraj's e-mail of 18 August 2011

with the attached “*Work Level Position Statement*”, wherein Devraj had addressed several work related matters that needed the applicant’s attention. It was submitted on behalf of the respondent that the applicant’s response to that e-mail, coupled with his conduct and statements made in his responses set the path to the disciplinary hearing. It was further submitted that the applicant’s response was an overreaction in the most bizarre fashion. I fully agree with these submissions for the following reasons;

72.1 In the e-mail¹³, Devraj had made reference to *previous* discussions held with the applicant and informed him to take immediate action on certain work related matters including;

- Taking time as National Sales Manager in trade, working with the sales agents managing and measuring effectiveness;
- To work with all inland agents including Bloemfontein;
- See key wholesale customers to establish relationships with them;
- Call identified customers;
- In terms of his position profile agreed to, to do the following;
 - Except on Fridays, to spend more time in the trade (between 8am and 4pm daily) and furnish a report daily;
 - Finalise a ‘pull thru strategy’ for a customer;
 - Display stands - all signed copies of agreements required;
 - Counter top units- an action plan was required;
 - Effective sales in rural areas;
 - Report on alternative consultants;

72.2 I did not understand the applicant’s contention to be that the work related issues that were raised by Devraj in the e-mail that needed his attention were unreasonable. Despite his contentions that these matters were not discussed with him before, he however did not raise this as an issue with Devraj immediately and had

¹³ Page 40 of the bundle

instead, viewed the e-mail as a further personal attack and a vendetta.

72.3 To a large extent, there is merit in Moosa's observations that the applicant was indeed paranoid and had viewed himself as a victim. It is accepted that the applicant's past experiences and encounters with Devraj may have been unpleasant in the light of the conclusions made about Devraj's character and management style. However, to a large extent, the applicant was no less blameworthy. Rather than addressing Devraj's requests and instructions pertaining to work related matters, his very first response in the flurry of e-mails that were exchanged between him, Devraj and Moosa was to complain about being moved from his office which he viewed as favouritism. He saw this as a continuation of victimization and effectively a demotion.

72.4 The issue of the applicant's removal from his office cannot in any manner be attributable to any form of harassment or victimisation. In my view, this issue is pure red herring in that it was common cause that Moosa and the Finance Manager occupied space in the open area. In accordance with Devraj's performance requirements, the applicant was to spend more time outside of the office in trade, working with sales agents. The applicant had conceded that he was not office bound, but had however contended that he needed his office for after hours, and also since his position was strategic. In my view, there was nothing untoward in asking the applicant to move to the open area. On his own version he was not office bound and I fail to appreciate his sense of entitlement to occupy office space. The applicant had conceded that there was a need for the finance department to have an office and I fail to appreciate what could have been more strategic in his position as compared to the need for the respondent's finance department to have its own office. As he had stated under cross-examination, the only issue of concern for him with being removed

to the open area was that Devraj had not spoken to him about it, and further that at his level, his removal from the office could have been seen as degrading. If the respondent's CEO and Finance Manager could occupy the open plan area, I fail to appreciate what could possibly have been degrading to the applicant in occupying the same space in the open plan area.

72.5 The complaint about being taken off the Tanzanian Trade Show trip is equally without merit. On 19 August 2011, the applicant had reported sick. Devraj had suggested that the applicant be replaced with Vinay on the trip, as he was sick. The applicant despite having reported sick and being out of the office between 19 and 29 August 2011 however saw his removal from the trip as further harassment. Ultimately however, no one went on that trip, and I fail to appreciate the harassment complained of.

72.6 The same conclusions should be reached in regards to the applicant's complaint that when he had submitted a copy of his medical certificate, Devraj had informed him that a second opinion should be sought on his ailment. A submission of a copy of a medical certificate is not proof that an employee is ill¹⁴. It is merely a confirmation that an employee was seen by a medical practitioner resulting in a particular diagnosis being made. An employer in the absence of a supporting affidavit from the medical practitioner to confirm the nature of the ailment complained of is entitled to question the validity of a medical certificate. Thus where appropriate, an employer is entitled to request an employee to be subjected to a second medical assessment and opinion. In this case therefore, Devraj was correct in his approach, in the light of the fact that on 18 August 2011 he had sent a detailed e-mail to the applicant on things to be done, and as Managing Director, he had expected those things to be done. It is not as if the things he had required to be done came out of nowhere, as it is apparent

¹⁴ *Mgobhozi v Naidoo NO & Others* [2006] 3 BLLR 242 (LAC)

from his e-mail that these were discussed with the applicant before. When the applicant reported sick the next day, Devraj was obliged to act. The contention that the request to submit to a second medical opinion amounted to harassment is in my view far-fetched. To link Devraj's e-mail of 18 August 2011 to further continuation of harassment and victimization as a result of having lodged a grievance is without merit.

Events leading up to the charges and the dismissal:

- [73] An analysis of the timeline of events from Devraj's e-mail of 18 August 2011 and the dismissal on 24 October 2011 in my view does not support the applicant's contention that the disciplinary hearing and ultimate dismissal was as a consequence of the grievance lodged. On 19 August 2011, Devraj had sent an e-mail to the applicant, enquiring about copies of contract agreements that were long overdue and that needed to be finalised on that day. Rather than responding to Devraj's legitimate request, the applicant sent a long e-mail to Moosa complaining about harassment, to which Moosa had responded by advising him to deal with the issues that Devraj needed to be attended to.
- [74] In the light of Devraj not receiving a response to his requests, and further in view of the fact that the applicant was exchanging numerous e-mails with Moosa whilst on sick leave, he had then sent him another e-mail about work related matters and advising him that if he did not comply, including on the issue of a second opinion from another medical practitioner, he would be issued with a warning. The applicant's response was that having sought advice from the CCMA, the instructions issued by Devraj were not lawful. He had also responded to enquiries about work related matters, and Devraj's response in return was that he needed more details on that date.
- [75] Moosa in the light of a barrage of e-mails from the applicant had on 19 August 2011 responded by stating that he had spoken to the applicant on the issues he had raised, and had implored him to work with Devraj

rather than personalising matters. He advised the applicant to deal with the work related and outstanding matters Devraj had enquired about and stated that he was now tired of the issues raised and no longer knew what to do. The applicant's response on 19 August 2011 was to continue to complain about Devraj, requesting that he be assigned to exports or alternatively he would accept the alleged offer of 12 months' salary and leave. Moosa's response was that no such an offer was made, and following from that response, another long-winded e-mail followed from the applicant in which he basically cast aspersions on the integrity of Moosa as a religious person, and also cited examples of ex-employees who were offered termination packages. He alleged that he was no longer wanted in the company. Following a further exchange of e-mails, some involving Devraj, Moosa on 23 August 2011 informed the applicant that he had since informed Devraj not to meet with him and advised that he would be contacting Labournet as the issues pertained to his performance.

Correspondence from the applicant's attorneys of record:

- [76] It is my view that the applicant's attorneys' correspondence of 29 August 2011 to Moosa set the tone of how the employment relationship between the applicant and the respondent was to unfold and ultimately come to an end. Apart from raising the familiar complaints, it was proposed to Moosa that an amicable termination of the employment relationship should be negotiated. The contents of this correspondence are indicative of the applicant's intentions of terminating the employment relationship on his terms, bearing in mind that already on 19 August 2011, he had indicated to Moosa that he should be given 12 months' salary to terminate the employment relationship. In my view, the following excerpts from the correspondence clearly dispel any notion that the grievance was indeed the main concern or reason for the termination of the employment relationship:

"8. With regard to the proposed settlement, we note that our client, by agreeing to severe (sic) the relationship, stands to lose an

income built up over about 5 years of hard work and by his total and unstinting commitment to assist you in building Trade Kings. We estimate that once he has recovered his health that will take him another 5 years, if not longer, to recover what he will be losing in income and position.

9. *Mr Griessel's projected loss in income and benefits in the medium term amounts to an estimated R10.4m. This includes bonuses he would have received as Export Manager, the position he was offered before he was advised that legal action was being contemplated for alleged performance issues. We note that these performance issues in reality relate to his deteriorating health brought about by the harassment and unfair discrimination as well as reduction of his assistants.*
10. *Our instructions are that our client is in possession of intimate knowledge of business of Trade kings and should he decide to join the competition this could severally (sic) impact on the prospects of Trade Kings. We note that there is no contract of employment and thus no restraint of in place.*
11. *Accordingly, to show good faith, our client is prepared to volunteer one year of garden leave or restraint of trade including an agreement to maintain confidentiality regarding the business of Trade Kings, including not seeking employment in the confectionary business for the duration of the restraint."*

[77] The above correspondence was followed upon with another on 31 August 2011, wherein the familiar complaints were repeated. The applicant also questioned the appointment of Devraj as MD, contending that it was not in compliance with the Companies Act 71 of 2008. The applicant indicated that he was under no obligation to follow Devraj's instructions, but however that he would do so pending the decision to proceed with legal steps via Labournet. The applicant further informed Moosa that his title as CEO and that of Devraj as MD overlapped and were in conflict with the legal requirements regarding the role and duties of executive directors. The applicant also raised the issue of the

appointment of Devraj's daughter, Natasha contending that it was nepotism and further demanded that he should be reinstated back to his office.

- [78] Having rejected the formal grievance the applicant's attorneys further informed Moosa that the applicant would not attend the grievance hearing and that Devraj's position should be the subject of investigation and not the applicants grievances, as the matter had now progressed beyond the mere the submission of personal grievances regarding Devraj's conduct.
- [79] A further letter followed on 7 September 2011 wherein the attorneys reiterated the allegations that there were attempts to force the applicant to resign, complained about his demotion, the confiscation of his laptop and cell phones and also threatened to take urgent legal action should the tools not be returned to him. Moosa was informed that a formal application would be launched with the CCMA, which was done.
- [80] Following the respondent's attorneys three responses in writing as at 8 September 2011, the applicant's attorneys in further correspondence continued with the same complaints, alleged that information was received that the applicant was no longer employed by the respondent, and that the situation at work was untenable. The respondent was threatened with further litigation in terms of the Companies Act.
- [81] On 19 September 2011, the respondent had taken a decision through its attorneys that since the applicant had made up his mind and had no intention of resolving the issues internally or to participate in the grievance hearings, that process was regarded as having been aborted, and he was henceforth suspended. He was also furnished with a list of 'charges' of misconduct against him.
- [82] In the light of the above exchange of correspondence, starting with that from the applicant's attorneys of 29 August 2011, it was apparent that the employment relationship had reached a point of no return, and was

destined for a complete breakdown. The applicant was indeed the architect of that breakdown for the following reasons;

- 82.1 It was always the applicant's contention that he never had any problems with the appointment of Devraj. This however as is apparent from correspondence of his attorneys and the applicant's own evidence was not the case. It is clear that the applicant was displeased with Devraj's appointment from the beginning, and if this was not the case, I fail to appreciate the reason he would attribute any alleged unfair treatment towards him as being due to the fact that Devraj felt threatened by him.
- 82.2 Devraj was appointed as MD in June 2010 and within the context of various complaints raised by the applicant I fail to understand the reason the appointment would suddenly become an issue in August 2011 unless as it had consistently been put to him under cross-examination, that he had designs for that position.
- 82.3 The fact that the applicant sought to divert the investigation of his grievance to that of Devraj's appointment is clearly indicative of his displeasure at the latter's appointment. This displeasure at the appointment of Devraj casts doubts on his motives for persisting with this claim.
- 82.4 Another factor leading to the breakdown is the issue surrounding whether Moosa had indeed made an offer of mutual termination of the employment relationship and the applicant's insistence that such an offer was made. Moosa's contention was that such an offer was not made and the applicant had misconstrued the context within which the discussion around the issue had come about during their meeting of 26 July 2011.
- 82.5 The applicant had however formed an intention to put an end to the employment relationship, and was determined to obtain a settlement to terminate the relationship as evident from his contentions in his e-mail of 20 August 2011 that offers of mutual

termination had been made to two other employees in the past. However, when Moosa would not yield to his demands, the applicant persisted with his familiar complaints in order to build up a case, and adopted a different and clearly disconcerting strategy. That strategy was for all intents and purposes, meant to exert pressure on Moosa to agree on a financial settlement. In my view, the applicant's conduct in this regards bordered on extortion. This is evident from his sudden and startling reference to being in possession of confidential information, which effectively could land in the competitors' hands if he left without a financial settlement being reached. It was apparent that the applicant intended to use that confidential information to gain leverage and in the light of these threats, an employment relationship between the parties could not have been sustainable thereafter. The applicant sought to terminate the employment relationship and cannot point to the lodging of a grievance as an excuse for his dismissal. Any employer under these circumstances would have felt its interests being threatened and treated any employee making such threats as being out of control.

- 82.6 It is further my view that the employment relationship between the applicant and the respondent irretrievably broke down immediately when the applicant viewed the involvement of Labournet as a 'declaration of war'. He had made it abundantly clear as far as 19 August 2011 that he no longer wished to continue with the employment relationship. He was no longer interested in having his grievance resolved, and was preparing for 'war' by referring disputes to the CCMA, diverting his attentions to the legality of the appointment of Devraj, the obvious threats he had made if he did not get the settlement he wanted and raising of all sorts of matters that made the working relationship untenable. Inasmuch as it has already been stated that Devraj was the source of the applicant's discontent, at the same time, he did not make matters easier for himself with his unreasonable stance and demands, and clear

intention to terminate the employment relationship on his own terms, including the use of threats.

The charges:

- [83] The applicant under cross-examination had accepted that the “Work Level Position Statement” attached to Devraj’s e-mail of 14 August 2011 pertained to responsibilities assigned to him as National Sales Manager. He had conceded that prior to his complaint of 20 July 2011, there were operational problems, some of which he attributed to being physically impossible to deal with. He conceded that in his position he had ultimate responsibility, but contended that Devraj had in raising some of these performance issues, ‘jumped the gun’ and failed to professionally deal with those issues. When it was put to him under cross-examination that Devraj constantly pointed out performance issues with him, the applicant’s response was that in every business there are always operational issues that arose due to some reason. He denied however that these had anything to do with his performance, and blamed some of these issues to the fact that Devraj was always assigning additional functions to him.
- [84] The first charge related to mismanagement of the Point of Sales Material (POSM), which could not be accounted for. In this regard it was alleged that the company had ordered R600, 000.00 worth of POSM and that a substantial amount of it went missing and could not be accounted for. This was discovered after an audit was done on 14 August 2011.
- [85] The applicant had conceded that as at 7 July 2011, there were already problems identified with the POSM. He however contended that this was initially not part of his responsibilities and that Devraj had merely added these as part of his responsibilities. He however conceded that the POSM was ultimately his responsibility, and that he had delegated it to other employees as he was overworked. In regards to the charges pertaining to the POSM, the applicant’s contention was that this amounted to discrimination, as by being assigned these responsibilities,

he was set up for failure by Devraj who also sought to build a case against him and ultimately to force him to resign.

- [86] The second charge related to the failure to follow procedures. In this regard it was alleged that on 30 August 2011, the applicant was requested to send out display stands only after the contracts had been signed with the relevant clients. It was alleged that only 15 contracts signed were received and that 35 display stands were placed without the signed contracts.
- [87] The third charge related to overspending on trade deals and misleading the financial manager. This incident was related to the events of 27 June 2011 after the applicant had sent an email to another company (Finro CC) and it was later discovered that the information was misleading.
- [88] The fourth charge related to poor management of subordinates. The fifth charge related to bring in the company's name into disrepute by misusing its resources. In this regard it was alleged that the applicant had utilised the company's premises and laptop to post his profile on an Internet dating site, stating that he was looking for the girls between ages 28 and 43. The applicant viewed this charge as being discriminated against on account of his open marriage with his wife. He contended that the posting of his profile on the said site was used by the respondent to imply that he was disloyal to his wife and could therefore be disloyal to the company.
- [89] The sixth charge related to incorrectly booking the company on the Tanzanian tradeshow. Other sub-charges related to continuous conflict with employees of the company, failing to carry out his duties as outlined in this job description, sharing with an external person, confidential documents of the company, which included its policies, and without its approval. The events leading to the last allegations allegedly took place on 2 February 2011.
- [90] The applicant was found guilty on the first, second, fifth and part of the sixth charge. In his evidence in chief, the applicant had contended that all

of these charges were trumped up and that he had performed his duties as required. In cross-examination however, he had conceded that some of the charges were not thumb-sucked and were indeed based on facts.

[91] As is apparent from the charges, some of them pertain to issues that arose long before the grievance was lodged, whilst some related to incidents that occurred thereafter. The applicant's signature response to literally every question under cross-examination was that he was victimized, harassed, discriminated against or there was a plot to dismiss him, even if these responses were unrelated to the question posed. In further contending that there was a 'plot' to dismiss him, Joubert had testified to over-hearing a conversation between Devraj and Vinay discussing how they should get rid of the applicant. Joubert's testimony however has to be treated with caution in the light of his concessions that he was indeed aggrieved by his dismissal by the respondent. Furthermore, it is doubted that much weight can be attached to evidence, which is clearly biased in that Joubert despite making these allegations of a plot, could not recall when it was discussed and under what context. Significantly though, Joubert had testified that Devraj and Vinay wanted to get rid of the applicant, as they were unhappy with his performance. Reyersbach's testimony was only useful to the extent that he had overheard Devraj verbally abusing the applicant over the phone even though he did not hear the entire conversation. The testimony of these witnesses does not now show in what material respects the lodging of the grievance had led to the dismissal.

[92] In the light of some of the charges coming to the fore in September 2011, it was contended that these came about as a consequence of the grievance he had lodged. I however do not believe so. As already indicated, the lodging of the grievances was not the 'dominant or most likely reason for the dismissal, and on the contrary, performance issues, *albeit* some came to the fore after the grievance was lodged, played a major role in his dismissal. This conclusion is further fortified by the following;

- 92.1 The ultimate responsibility for the POSM was that of the applicant despite his initial denials and ultimate concession. He had conceded that performance issues in this regard had been raised as far back as 7 July 2011.
- 92.2 The complaints surrounding the display stands and outstanding contracts had been raised before and also again in Devraj's e-mail of 19 August 2011.
- 92.3 There is merit in the respondent's contention that some of the charges spring from outstanding work related issues, and the courts in the light of the *Kroukam* decision should be cautious in making an inference that the reason for bringing up the charges are illegitimate.
- 92.4 Importantly however, even if the charges in question could not have led to a dismissal, it does not imply that the reason for bringing them up and the ultimate dismissal was automatically unfair based on the grievance lodged in the light of the conclusions reached elsewhere in this judgment.

The unfair discrimination claim:

- [93] A myriad of complaints were raised by the applicant in contending that he was discriminated against, including preferential treatment of other employees, being over-loaded with work, being removed from the office etc. Some of these issues have been dealt with and I could not find any substance in them. Pertinent however is the applicant's reliance on the provisions of section 187 (1) (f) of the LRA, having alleged that he was discriminated against on account of his open marriage and thus on the ground of his marital status. The allegation in regard to discrimination was in regard to the charge pertaining to joining a social friendship website ("Badoo"), where it was alleged he had looked for girls. In this regard, it was contended that Moosa went out of his way to do a Google search to discover the fact that the applicant had indeed joined this site, whilst other employees were not subjected to the same scrutiny. It was

further submitted on the applicant's behalf that he had brought evidence of other employees' Internet activities to Moosa's attention, but no charges were brought against these employees, nor were their laptops confiscated or their privacy infringed.

[94] It has always been the applicant's case that the charges against him were trumped up even though he had conceded that some of the charges were based on facts. It had however transpired during Moosa's cross-examination that he had lied about having received complaints from a fictitious customer about the fact that the applicant's profile was allegedly on the Badoo site, which could have brought the name of the respondent into disrepute.

[95] It was common cause that the applicant was not found guilty in regards to the charge of bringing the company's name into disrepute pertaining to the posting of his profile on the Badoo site. The issue however as already pointed out is that even if the charge was trumped up, and Moosa's lie became apparent, it couldn't in my view be linked to the fact that the applicant had lodged a grievance. Rather than this being a discrimination matter, and in the light of the applicant's contentions, it is more an issue that pertains to consistency in the application of discipline in view of the applicant's contention that other employees who had joined similar sites or had contravened the respondent's electronic media policy were not similarly charged. To link this charge to discrimination on the basis of the applicant's marital status is indeed far-fetched and disingenuous.

The referral of unfair labour practice:

[96] It is my view that the referral of an alleged unfair labour practice and discrimination disputes on 7 September 2011 cannot be the basis of an automatic dismissal in this case. The alleged unfair labour practice pertained to the applicant's removal from his office to the open plan area, and the alleged diminishing of his role as National Sales Manager. It is not my intention to deal with this aspect of the dispute for the simple

reason that it raises the question of the jurisdiction of this court to deal with such matters in the event of it having been found that the alleged unfair labour practice is not remotely linked to an automatically unfair dismissal. Thus even if at the end it could be argued that his removal from his office and the realignment of his tasks may have resulted in his role as National Sales manager being diminished, and thus this constituting an unfair labour practice as contemplated in section 186 (2) of the LRA, this court would lack jurisdiction to determine such a dispute in line with the reasons to be advanced below.

[97] In regards to the dispute pertaining to the alleged unfair dismissal, it has always been the case of the respondent that the dismissal had nothing to do with the lodging of a grievance and had everything to do with the applicant's performance. The respondent in the parties' supplementary pre-trial minute had indicated that this Court would lack jurisdiction to determine whether the dismissal was fair or not¹⁵.

[97] It has consistently been held in this Court and by the Labour Appeal Court in particular that this Court should not adjudicate matters that fall outside of its jurisdiction. In this regard, Waglay JP in *Jacobus Petrus Malan v Johannesburg Philharmonic Orchestra*¹⁶ held that:

"The issue of jurisdiction in respect of dismissals based either of section 191(5)(a) or (b) of the LRA has been dealt with fully in Wardlaw v/s Supreme Moulding (Pty) Ltd [2007] 6 BLLR 487 (LAC) (Wardlaw). In that matter, this Court held that while it is the applicant who will determine the nature of the dispute when referring the matter to arbitration or adjudication, the arbitrator or the court must determine whether it has jurisdiction to entertain the dispute. This Court in Wardlaw recognised that it may only become clear after all the evidence is led as to whether or not the body ceased with the matter had jurisdiction to determine the dispute referred to it. Where it is the case that the dispute is not one within the jurisdiction of the body hearing the matter it cannot determine the dispute."

¹⁵ Paragraph 7.5.15

¹⁶ Case no: JA 61/11 at para 42

- [99] The dispute resolution scheme of the Labour Relations Act is specific in regards to matters of jurisdiction. In terms of section 191(5) (b) of the LRA, when an employee alleges that his or her dismissal was automatically unfair, this Court will ordinarily adjudicate such a dispute. If however it is found that the dismissal merely relates to the conduct or capacity of the employee, in terms of section 191(5)(a) of the LRA that dispute must be referred to a bargaining council or the CCMA for arbitration.
- [100] In this case, it has already been concluded that the applicant has not established a credible possibility that the dismissal was due to him having lodged the grievance or having referred a dispute to the CCMA, or that the lodging of the grievance was the *dominant or most likely cause of his dismissal*. In the applicant's statement, it was contended that the parties' legal representatives at an arbitration hearing at the CCMA on 20 January 2012 had agreed that the matter be referred to this Court for adjudication. Mere consent however by legal representatives that a matter should be adjudicated is not sufficient to confer jurisdiction on the Court.
- [101] In general this Court does not have jurisdiction to adjudicate disputes concerning dismissals for misconduct, incapacity or other causes falling within the jurisdiction of the CCMA or Bargaining Councils. If this Court discovers that the dispute which has been referred to it for adjudication is one which the LRA requires to be arbitrated, it may stay the proceedings and refer the dispute to arbitration, or if, in terms of section 158 (2) and (3) of the LRA the parties consent, and it is expedient to do so, assume the role of the arbitrator. Furthermore, jurisdiction over such matters may be conferred in terms of the provisions of section 191 (6) of the LRA, if the Director of the CCMA has upon an application, decided that it would be appropriate to refer the matter for adjudication. In this case, none of the above provisions are applicable to confer jurisdiction on this Court to determine the unfair dismissal dispute.

Conclusions:

[102] The applicant had failed to demonstrate that the reason for his dismissal, whether fair or not, was on account of having lodged a grievance or having referred disputes to the CCMA. He was also unable to establish any other unfair conduct by the respondent over which this Court would have jurisdiction and it follows that his application should fail. Further having had regard to considerations of law and fairness, it is deemed that a cost order should not follow.

Order:

- i. The applicant's claim of an automatically unfair dismissal is dismissed.
- ii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Ms A Denton of DHD Attorneys

On behalf of the Respondent: Mr. H Lee of Snyman Attorneys

LABOUR COURT