IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA61/2018

In the matter between:

DBT TECHNOLOGIES (PTY) LTD **Appellant**

and

MARIELA GARNEVSKA **Respondent**

Heard: **3 March 2020**

Delivered: **18 May 2020**

Summary: Automatically unfair dismissal ---Dismissal pursuant to exercising rights in terms s187(1)(d) of LRA 1995---employer dismissed employee for misconduct following the dismissal of grievance lodged against fellow employee---employee alleging dismissal for exercising rights---filing of grievance not amounting to taking action against employer---s 187(1)(d) concerning referral dispute to the CCMA or another governmental agency concerning employer's conduct---Labour Court not having jurisdiction. Appeal upheld.

Coram: Waglay JP, Sutherland JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the judgment of the Labour Court (Mabaso AJ) handed down on 26 January 2018 which held that the respondent's dismissal was automatically unfair in terms of section 187(1)(d) of the Labour Relations

Act[1] ("the LRA") and ordering it to pay compensation equivalent to nine months remuneration. Section 187(1)(d) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is '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.'

[2] The appellant is a private company which specialises in manufacture, supply and construction of plant sub-systems and component solutions, primarily serving the power and oil and gas end markets with both new-build and aftermarket services in South & Sub-Saharan Africa. The respondent commenced employment with the appellant in January 2010. At the time of her dismissal, she was employed as the Senior Financial Planning and Analyses Manager.

[3] On 2 February 2015, a meeting was held in the appellant's boardroom to resolve a contractual dispute between the appellant and one of its subcontractors. Various employees of the appellant and its subcontractor, including the respondent, were in attendance. Prior to the meeting, the respondent and Mr. Gregory Mailen, a Project Director in the employ of the appellant, had a disagreement during a conference telephone call. Mailen was also in attendance at the meeting. Mailen and the respondent also openly differed about the contractual dispute during the meeting. Mailen left the meeting shortly before it was adjourned. The respondent alleged that as Mailen was leaving the meeting, he hit her over the head with a file.

[4] The respondent immediately reported the matter to her supervisor, then drove home from Johannesburg to Pretoria and visited a doctor to seek medical attention. In the days following, the respondent consulted an attorney and lodged a formal grievance in terms of the appellant's grievance procedure wherein she alleged that she was assaulted by Mailen towards the end of the meeting. She also laid a criminal charge of assault against Mailen at the SAPS.

1 Act 66 of 1995.

[5] A grievance inquiry was convened and chaired by an external chairperson. The inquiry held that the alleged assault was not proved and dismissed the grievance. The respondent appealed against the initial finding and the appeal grievance hearing upheld the finding of the grievance inquiry.

[6] The appellant then charged the respondent with various counts of misconduct. Following a disciplinary enquiry chaired by a member of the Bar, the respondent was found to have committed gross misconduct for having falsely accused Mailen of assault and by preventing other employees from performing their duties. The chairperson of the enquiry recommended that the respondent be dismissed. An appeal in terms of the disciplinary code was considered by another member of the Bar, who upheld the finding that the respondent be dismissed for dishonesty. The respondent was subsequently dismissed.

[7] After conciliation failed, the respondent referred a dispute to the Labour Court in terms of section 191(5)(b) of the LRA alleging that her dismissal was automatically unfair in terms of section 187(1)(d) of the LRA. In paragraph 26 of her statement of claim, the respondent formulated the legal issues for determination as follows:

> '26.1 Was Applicant's dismissal automatically unfair in terms of section 187(1)(d) of the [LRA]?
>
> 26.2 Was the disciplinary process that was instituted against the Applicant and which led to her dismissal, instituted as a result and a direct consequence of the grievance she filed in terms of the Respondent's grievance procedure and the exercising of a right in terms of the Act?
>
> 26.3 Were the charges formulated and levelled against the Applicant a direct consequence of the Applicant exercising a right in terms of the Act?'

[8] The relief sought by the respondent in the statement of case was confined to orders declaring the dismissal to have been automatically unfair; reinstating her retrospectively to the date of dismissal; or alternatively compensation in an amount equal to 24 months remuneration. The respondent did not seek an order declaring the dismissal to be substantively and/or procedurally unfair as

contemplated in section 188(1) of the LRA. During the trial, the respondent abandoned her prayer for reinstatement and limited her claim to one for compensation.

[9] In its statement of response, the appellant denied that the dismissal was automatically unfair and that the disciplinary process was instituted against the respondent as a result of the grievance she had initiated. The disciplinary process was instituted against the respondent, it contended, on the grounds of misconduct, most particularly the making of a false allegation of assault against Mailen.

[10] The Labour Court found that the evidence established a causal *nexus* between the respondent exercising her rights to institute a grievance and her dismissal. It in effect found that the *sine qua non* and the proximate or predominant cause of the dismissal was the lodging of the grievance rather than the alleged dishonest or false accusation against Mailen. It accordingly concluded that the respondent's dismissal was automatically unfair as contemplated in section 187(1)(d) of the LRA and ordered the appellant to pay compensation equivalent to nine months remuneration within 30 days and made no order as to costs.

[11] The appellant contends on appeal *inter alia* that the Labour Court erred in finding there was evidence sufficient to establish that the dominant reason for dismissal was that envisaged in section 187(1)(d) of the LRA.

[12] The reason for the dismissal is thus in sharp dispute.

[13] Section 187 of the LRA lists reasons for which employees may not be dismissed and categorises such specific reasons as automatically unfair.[2] The categorisation of the reasons specified in section 187(1) of the LRA as automatically unfair means that they cannot be conceived as reasons related to misconduct, incapacity or operational requirements. If it is established on the evidence that the reason for the dismissal was one of those proscribed in section 187(1) of the LRA, there are two advantages. The employer can raise

2 See generally Grogan *Workplace Law* (10th Ed) Chapter 12 for a lucid exposition of the law.

no general justification based on general principles of fairness, and the employee can claim increased compensation in terms of section 194(3) of the LRA (24 months of remuneration) in the event that she does not want reinstatement. Additionally, in terms of section 191(5)(b) only the Labour Court and not the Commission for Conciliation, Mediation and Arbitration ("the CCMA") has jurisdiction to determine an automatically unfair dismissal.

[14] To reiterate: the respondent's pleaded cause of action is that she was dismissed on the prohibited ground in section 187(1)(d) of the LRA. The appellant says the reason for her dismissal was dishonest misconduct. Whether a dismissal is automatically unfair is essentially an enquiry into its causation and whether the reason for the dismissal was one of the grounds listed in section 187(1) of the LRA. The essential inquiry under section 187(1)(d) of the LRA is whether the reason for the dismissal was "that the employee took action, or indicated an intention to take action, against the employer" by exercising any right conferred by the LRA or participating in any proceedings in terms of the LRA. The test for determining the true reason is that laid down in *SA Chemical Workers Union v Afrox Ltd*.[3] The court must determine factual causation by asking whether the dismissal would have occurred if the employee had not taken action against the employer. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether the taking of action against the employer was the main, dominant, proximate or most likely cause of the dismissal.

[15] There is no evidence of any kind on record indicating that at the time of the respondent's dismissal she had taken action or indicated an intention to take action against the appellant. Her referral of a dispute (about her dismissal) to the CCMA in terms of the LRA was the only action she took against her employer and was subsequent to her dismissal. It is in any event not the respondent's case that she was dismissed because she took action, or indicated an intention to take action against the appellant. The respondent's

3 (1999) ILJ 1718 (LAC) – See also *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) para 26 et seq.

case is that the disciplinary process leading to her dismissal was instituted against her as a result and a direct consequence of the grievance she filed in terms of the appellant's grievance procedure.

[16] A grievance complaining about a fellow employee's conduct, filed in terms of a contractually agreed grievance procedure at first glance does not constitute taking action against an employer, nor ordinarily, does it involve the exercise of any right conferred by the LRA or the participation in any proceeding in terms of the LRA. The LRA does not expressly confer rights upon employees to file grievances. Nor does it establish a mechanism or proceeding for the resolution of grievances filed by employees. The only reference to the processing of grievances in the LRA is found in section 115(3)(b) of the LRA which provides that the CCMA may provide employees, employers and their bargaining agents with advice or training relating to 'preventing and resolving disputes and employees' grievances'. Hence, the only right that the LRA confers in relation to employee grievances is the right to approach the CCMA for training.

[17] In our law and practice, therefore, the right to file a grievance and to have it processed is based in contract and is derived either from any applicable grievance procedure incorporated as part of the implied terms of the individual contract of employment or from a collective agreement enforceable in terms of section 23 of the LRA.

[18] Where an employee files a grievance under a grievance procedure forming part of a collective agreement binding in terms of section 23 of the LRA, it is perhaps arguable that she exercises a right conferred (albeit indirectly) by the LRA. It does not seem that the grievance procedure applicable in this case formed part of a collective agreement. However, even if it did, such alone would not be sufficient. The respondent still faces the hurdle of showing that she was dismissed because she took action or intended to take action against the appellant prior to her dismissal and such pre-dismissal action was the proximate reason for her dismissal.

[19] As said, the filing of a grievance about the behaviour of another employee does not amount to taking action against the employer. It is a request by an employee for action to be taken to resolve an internal problem. Nor does it involve the direct exercise of a statutory right against the employer. Section 187(1)(d) of the LRA is not concerned with the filing of a grievance. It is directed rather at situations such as an employee exercising a right to refer a dispute to the CCMA or another governmental agency concerning the employer's conduct. A request by an employee to discipline another employee for alleged misconduct does not fall within the ambit of conduct targeted by the provision.

[20] Without question, were the evidence to prove that an employee was dismissed for filing a grievance, the dismissal would be unfair because it would be for a substantively unfair or invalid reason. The employee could challenge the dismissal under section 188 of the LRA and after failed conciliation could refer the dispute for arbitration under section 191(5)(a) of the LRA. But if there is no evidence that the employee was dismissed for taking or intending to take action against the employer, as in this case, the unfair dismissal will not fall into the category of automatically unfair dismissal contemplated in section 187(1)(d) of the LRA entitling the employee to proceed directly to the Labour Court in terms of section 191(5)(b) of the LRA or to increased compensation in terms of section 194(3) of the LRA.

[21] In the premises, the respondent has failed to prove her cause of action that the proximate reason for her dismissal was the one envisaged in section 187(1)(d) of the LRA and that she was dismissed for an automatically unfair reason. Consequently, the Labour Court had no jurisdiction to determine the dispute.

[22] During argument, we were referred to the decision of the Labour Court in *Mackay v Absa Group and another (Mackay)*[4] holding that the exercise of a right to lodge a grievance conferred by a private agreement between the employer and the employee falls with the ambit of section 187(1)(d) of the LRA. The Labour Court, in that case, accepted that the LRA does not make

4 [1999] 12 BLLR 1317 (LC).

explicit provision protecting an employee who lodges a grievance against his employer in terms of an internally agreed document such as a grievance procedure or code. It held however, that one of the main objects of the LRA is to give effect to and regulate the fundamental rights conferred by the Constitution of the Republic of South Africa, 1996 (Constitution) including the right to fair labour practices. The LRA, the judge reasoned, is intended to regulate and govern the relationship between employee and employer. In keeping with the LRA's main objects, all disputes arising from the employer-employee relationship must be effectively resolved. Therefore, in keeping with the main object of the Act i.e. of resolving all labour disputes effectively, and with the constitutional guaranteed right to fair labour practices, the Labour Court held it must follow that a purposive interpretation of section 187(1)(d) of the LRA 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.[5]

[23] The reasoning of the Labour Court in *Mackay* is, with respect, misdirected. There is no need to read into the language of section 187(1)(d) of the LRA an additional species of automatically unfair dismissal in order to give effect to the constitutional right to fair labour practices or to advance effective dispute resolution. Section 188 read with section 191(5)(a) of the LRA amply protects the rights of an employee who is dismissed for lodging a grievance under a private agreement and provides for effective dispute resolution by means of arbitration. The constitutional right to fair labour practices in section 23(1) of the Constitution is given effect to by the LRA. Section 187(1) of the LRA explicitly carves out particular kinds of egregious employer conduct for adjudication exclusively by the Labour Court with additional remedial powers to grant increased compensation. There is no legal basis to extend the scope of section 187(1) of the LRA by adding additional kinds of employer conduct not contemplated by the legislature when enacting the LRA, especially where it has provided adequate redress elsewhere. Moreover, the decision in

5 *Mackay* was followed and applied by the Labour Court in *De Klerk v Cape Union Mart* (2012) 33 ILJ 887 (LC).

Mackay is perhaps distinguishable from the present case. In *Mackay,* the Labour Court held that the employee had taken action against the employer at the time of his dismissal.

[24] The decision of the Labour Court in *Mackay* was overturned by this court on appeal.[6] Zondo JP (as he then was) held that there were two questions which had to be dealt with in order to uphold the finding that the dismissal was automatically unfair. The one was factual, the other legal. The factual one was 'whether the reason why the respondent was dismissed is that he had instituted a grievance against the appellants'. The legal one was whether, when an employee uses an internal grievance procedure of his employer, he can be said to be 'exercising a right conferred' on him by the LRA as contemplated by sec 187(1)(d)(i) of the LRA. If the answer to the factual question was in the negative, the legal question would fall away. The court found that the reason for the dismissal was not the fact that Mackay had instituted a grievance and thus did not determine whether the filing of a grievance involved the exercise of a right conferred by the LRA.

[25] By similar token, in the present case, there is no evidence that the respondent took any action against the appellant which led to her dismissal with the result that no automatically unfair dismissal occurred on the facts. In the result, the Labour Court erred in assuming jurisdiction over the dispute. The dispute about the substantive fairness of the dismissal should have been referred to arbitration in terms of section 191(5)(a) of the LRA.

[26] In terms of section 158(2) of the LRA, if at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Labour Court may stay the proceedings and refer the dispute to arbitration or, if it is expedient to do so, continue with the proceedings as if it were an arbitrator. The respondent made no request in its statement of case for the Labour Court to act in terms of section 158(2) of

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6 *Absa Bank Limited and Another v Mackay* (CA8/99) [2000] ZALAC 18 (22 August 2000).

the LRA in the event that it was found to lack jurisdiction under section 191(5)(b) of the LRA.

[27] The appeal must accordingly succeed. This is not a case in which fairness demands an award of costs.

[28] In the result, the appeal is upheld and the order of the Labour Court is set aside and substituted with an order dismissing the application.

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JR Murphy

Acting Judge of Appeal

I agree

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B Waglay

Judge President

I agree

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R Sutherland

Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:	Adv T Ngcukaitobi
	Instructed by Cliffe Dekker Hofmeyr
FOR THE FIRST RESPONDENT:	Adv WP Bekker
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