

IN THE LABOUR OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

JS 1024/2009

Reportable

In the matter between:

MICHELLE HARDING

Applicant

and

PETZETAKIS AFRICA (PTY) LTD

Respondent

JUDGMENT

LAGRANGE, J:

Head notes: Automatically unfair dismissal - refusal to comply with an unlawful instruction - senior employee.

Introduction

- 1) The order and summary of my findings which appear at the end of this judgment were issued on 14 August 2011. What follows hereunder is the full judgment.

The applicant's claims

Automatically unfair dismissal or unfair retrenchment

- 2] The applicant in this matter, Ms M Harding, is claiming an automatically unfair dismissal in terms of section 187 Labour Relations Act. In the alternative, she claims that she was unfairly retrenched. In either event she is also claiming certain contractual payments which she claims are due to her.
- 3] The applicant says that her dismissal was automatically unfair because she refused to summarily terminate the services of two employees contrary to instructions to that effect from the chairman and CEO of the company. The applicant believed that if she complied with the instruction she would have acted in breach both the Labour Relations Act 66 of 1995 ('the LRA'), and the Companies Act 61 of 1973 ('the Companies Act'). Consequently, she contended that she was dismissed because the respondent acted contrary to section 5 (2) (c) (iv) of the LRA. That section read with section 187 (1) deems a dismissal to be automatically unfair if an employer acts contrary to that section because it dismisses the employee because of that employee's "...past, present or anticipated... failure or refusal to do something that an employer may not lawfully permit or require an employee to do;..."
- 4] The respondent company admits that it summarily dismissed the applicant,

but denies that it did so for an impermissible reason or that it retrenched her. However, at the time the applicant's services were terminated on 2 July 2009 the respondent provided no reason for the termination. The termination letter of that date merely stated, "We regret to inform you that your employment at Petzetakis Africa is hereby terminated with immediate effect." The letter also contained an offer of a severance package of 10 months' of the applicant's total cost to company remuneration on the basis that she accepted the same in settlement of all her claims against the company arising out of her employment or termination thereof

[5] .In the respondent's answering statement filed in October 2009 it advanced alternative justifications for the applicant's dismissal. Principally, claimed it had lost confidence in the applicant in view of the company's loss-making situation by mid-2009, which demonstrated her ineffectiveness and/or negligence in failing to curb the losses. Secondly, it said the applicant failed in her duties as the company's managing director in a number of respects namely: loss of market share; increased inventory levels; cost under-recoveries; losses on bad debts; competition commission penalties; inability to increase margins; negative cash flows; loss of major customers, and insufficient attention had been paid to improving the firm's BEE status all of which the applicant failed to improve. At the time of filing its answering statement, the respondent was reticent about articulating what specific

reason for dismissal it relied upon. It was only when the pre-trial minute was concluded that it stated expressly that it terminated the applicant's services for "poor performance and/or misconduct".

Contractual claims

6] By the end of the trial, the respondent had conceded the applicant's entitlement to two of her contractual claims. The first was her claim for a *pro rata* payment of a so-called "guaranteed" bonus as at 30 June 2009 and leave pay. The respondent tendered payment of R93,000-00 in respect of the bonus. Secondly, the respondent conceded it owed the applicant six days' remuneration for leave pay. Apart from these claims, the applicant persisted with a claim for three months' notice pay in terms of her contract of employment, as amended in March 2004. She also claimed outstanding salary for the month of July 2009 on the basis that it was a practice of the company to pay employees a full salary for the month in which they were dismissed. Alternatively to this, the applicant claimed seven days payment for the period from 25 June 2009 to 2 July 2009, which she claims she was not paid for.

7] In respect of the claims which the respondent was prepared to concede, the applicant maintained that she was entitled to a guaranteed bonus amounting to R155,000-00. The difference between this sum and the amount tendered and subsequently paid by the respondent, was based on the three month

notice period, which the applicant relied on. In respect of the leave pay claim, the applicant still claims an additional six days leave over and above the six days tended by the respondent.

The material evidence

8] The hearing lasted five days and the applicant was the sole witness. I do not intend to set out all the evidence, which was considerable. For the sake of evaluating the merits of the parties' contentions about the reasons for, and fairness of, the applicant's dismissal, the following summary of the evidence in chronological order will suffice.

9] The respondent company is a virtually wholly owned subsidiary of AG Petzetakis, an Athens based holding company, which has an operating division in Greece and also owns subsidiaries in Spain and Germany. The respondent manufactures plastic hose and pipe systems and has a significant share of the local South African market for such products.

10] At the time of her dismissal, the applicant was managing director of the local company. She was first employed as a bookkeeper in 1987 by when the company was called Megapipe. Over the years she worked her way up from being a bookkeeper to cost accountant, financial manager and general manager of certain factories within the divisions of the firm, eventually rising to be the financial director of Megaflex, which at that time was a division of Murray and Roberts. Murray and Roberts sold the company to AG

Petzetakis, and in April 2001 it acquired its current name, Petzetakis Africa (Pty) Ltd ('PA'), which clearly designated it as a subsidiary of the Athens-based parent company. In July 2002, the applicant was appointed as sales and marketing director of PA.

11] In May 2006 the applicant was appointed Managing Director of the respondent, following the resignation of the previous MD, Mr T Dean who had served in that capacity for four years. She reported to the group chief executive officer, Mr I Spanudakis. As group CEO he was also the Executive Director and Chairperson of the respondent. Prior to that, between 2001 and 2006 the position was held by Mr G Petzetakis ('Petzetakis'). Petzetakis again replaced Spanudakis in December 2008 when he re-assumed the position of CEO of the group and chairman of the board of directors. He was holding these positions when he dismissed the applicant in 2009. At all times when the applicant was MD, the position of chief executive officer was held by another person appointed by the holding company.

12] The applicant was cross-examined closely on the financial performance of the company during that time she occupied the position of managing director. This was in order to try and persuade the court that the real reason for the applicant's dismissal lay in the company's financial performance. It is true that the company suffered net losses in 2006, 2008 and 2009. The losses did not end with the departure of the applicant, as the company also suffered a net loss in 2010.

13] As is set out in more detailed below, the fundamental difference between the applicant and the respondent in the interpretation of those losses is that for the most part these losses occurred not as a result of operational weaknesses in the South African operation, but owing to the addition of

various 'below the line' items in the compilation of the financial statements. The applicant was adamant that her performance was assessed on what might be referred to as gross operating profit measured in terms of net earnings before income tax and depreciation ('EBITDA'). Indeed her variable bonus was calculated on this basis and not on the basis of net after tax income which includes various items of non-operational expenditure.

^{14]} For the financial year ending 31 December 2006, PA achieved targets for earnings before income tax and depreciation (EBITDA). These targets had only been finalised in August 2006. However, even though these targets for the operational management accounts were met and resulted in a gross profit of approximately R 9.7 million, this achievement was eclipsed by various adjustments which had to be made when the full financial statements were drawn up. These reflected the company's net profitability for the year and showed that, despite achieving an operational profit of R40 million, this had to be offset against a write-off of approximately R 32.5 million for bad debts, R 9 million in settlement of product liability claims, R 2.5 million for expenses incurred in the disposal of non-performing subsidiaries, and some executive retrenchment packages of R 4,8 million. Thus there was an accumulated total of extraordinary expenditure of R 51,8 million in 2006. The applicant pointed out that these adjustments were mainly necessary because of so-called 'legacy issues' carried over from previous financial years, which had to be brought to book. Moreover, the CEO at the time, Spanudakis, had agreed to the inclusion of these items as extraordinary expenditure in the financial statements for that year as part of a clean-up of the company's financial picture.

15] The applicant maintained that her own performance was evaluated on EBITDA and therefore the net loss reflected in the financial statements had no impact on her own performance indicators. Indeed her bonus was based on these operational indicators.

16] In 2007, operating profit improved to R 431 million and net profit after tax to R 31,46 million, which meant that the company achieved 96.1% of its original budget and 99.8% of the revised budget for that year measured by EBITDA. During the same year, after consulting with Spanudakis, the applicant ended the company's collusive relationship with other competitors in the South African pipe sector and applied for a reduced penalty under the corporate leniency policy of the Competition Commission for providing information to the commission on the collusive practices in that sector.

17] According to the applicant's testimony, the firm had been involved in price-fixing activities with local competitors in the piping industry at least since 2002 and the scheme fell apart in 2005. In its answering statement of case the company suggested that the price-fixing had been at the instance of the applicant herself when she was a Sales and Marketing Director and that her activity had come to its attention, without stating exactly when it became aware of this. In her evidence, the applicant refuted the suggestion that the company was not aware of the practice, in which the managing director at the time was directly involved in.

18] The applicant testified that the annual price-fixing was determined in a meeting of the managing directors of the various competitor companies. She admitted that in her capacity as Sales manager in those years she was aware of the practice. However, within less than a year of her appointment as MD she took steps to put an end to it. In March 2007 she attended a

Nation Transformation conference in which businesses were challenged to "clean up their act" and directors were urged to take responsibility in stopping bribery, corruption, collusion and any other and ethical practices, collectively referred to as the "Unashamedly Ethical" approach to business. The applicant signed up to the programme and pledged the company to adhere to the Unashamedly Ethical policy in the conduct of its business.

19] At the end of May 2007 she held a special meeting of all sales managers to advise them that the company would no longer participate in any collusive practices with any of its competitors at any level. Before that she also held a meeting with the other competitors who had participated in the price-fixing arrangement and advised that the company would no longer be party to any of the former practices. On the basis of its cooperation with the Competition Commission the company was able to negotiate a provisional penalty of 5.3% of its turnover in its non-hose business, which amounted to R 27million. A provision for this amount then had to be made in the 2008 financial year. However, the applicant testified that since she left the firm, the Competition Commission could not obtain some of the information it needed from the Company and the penalty increased to 6.5% of the company's total turnover, amounting to R59 million. At the time of the hearing on the applicant was due to testify in forthcoming proceedings before the competition Tribunal.

20] In 2008 the EBIDTA figure was in the region of R 37 million, but a net loss of R 46.8 million still occurred. Part of this loss can be attributed to R 27.2 million which was brought into account in the income statement, in anticipation of paying the penalty to the Competition Commission discussed above. Even so, the loss would still have been in the region of 21, 5 million.

However, towards the end of 2008, the global slump impacted on all the group's operations both in Europe and South Africa. Before that, gross profits were being squeezed by rises in raw material prices. With the onset of the recession raw material prices started falling rapidly and the company attempted to retain some of the benefits of the price reduction for itself by not passing on all price reductions to customers. This assisted in improving gross profits on sales in the sense of improved margins, but the applicant cautioned that the improvements in margins would unfortunately be affected by under-recovery of costs owing to low demand in November and an early shutdown.

21] The new chief executive officer and executive chairman Petzetakis, who took over from Spanudakis in December 2008, insistent that the applicant should improve gross profit margins at a time when the applicant believed the priority was to maximise sales volumes in order to minimise under-recovery of costs. In the market conditions prevailing at the time the applicant maintained that it was very difficult to maintain, let alone raise prices to preserve margins when competitors were reducing their prices. The Independent auditor's report on the financial statements for the year ending 31 December 2008 noted as a concern that there was a net after tax loss of 46.8 million which translated into an accumulated loss of R 22.6 million and that PA was dependent on funding for ongoing operations including a rollover of existing funding, a return to profitable operations and finalising the penalty payable to the competition commission. The applicant's explanation was that the situation facing the company reflected a difficult trading environment within the context of a dismal macro-economic outlook.

22] In 2009 the trend continued. According to the applicant, the downward trend was experienced equally by the respondent's major South African

competitors and in the Greek operations of the parent company. Thus, the gross sales revenue at 31 March 2009 stood at R 119,292-00 compared with R164,190-00 for the same period in 2008. In mid-May 2009, Petzetakis accepted that the objective of expanding margins was not possible due to the heavy under-recoveries. He referred to similar situations of declining volumes in all of the group's plants. He indicated that it was not the group's intention to reduce staff headcount, but that it was now management's duty to prepare a restructuring plan to address the low volume market situation. He expressed the hope that progress in May and June would not make it necessary to implement such a plan. He also requested the applicant to present a plan addressing the issue during his planned visit in the middle of June that year. It must be mentioned that between November 2008 and March 2009, the applicant had already reduced staff numbers by 83.

23] The applicant responded to Petzetakis on 18 May 2005. She agreed with the need to reduce fixed cost structures and further advised him on continued poor conditions in the local market and PA's efforts to devise a solid and beneficial BEE structure for the company which might have some benefits during the year. The applicant confirmed that the company management would present an action plan for a worst-case scenario during the visit. Petzetakis thanked her for the response endorsing it as the "right approach to the challenges we face today."

24] There was also a further brief exchange between applicant and Petzetakis on the question of inventory levels. On 18 May 2009 Petzetakis advised the applicant that in the light of depressed sales levels the inventory number had to come down quicker and in absolute terms as well. On 19 May the applicant advised Petzetakis that very specific action plans in inventory

reduction had been adopted at a special inventory meeting the previous day and inventory management had been assigned to the firm's internal auditor. Petzetakis's response to this news was not very enthusiastic and he did not express much faith in the action plan adopted. He emphasised that what was needed was to see actual results. From this point on Petzetakis's communications became more demanding and critical. The applicant conceded that there was a change in the tone of his emails around this time.

25] On 29 May 2005, Dr D Razis, the company Vice Chairperson representing Greek management in South Africa, sent an instruction by e-mail to the PVC plant supervisors and production team advising them that as from the following Monday, 1 June 2009 Messrs A Karakontakis and Takis would be in charge of the PVC production plant in Rosslyn and that everyone was expected to follow their decisions failing which disciplinary action would be taken against them. This direction was issued without any consultation with the MD. She complained that the instruction issued by Razis had not been discussed with her at all and asked for Petzetakis's approval not to distribute the notice. It is evident from the tone of the e-mail that the applicant felt she had been severely undermined by Razis's unilateral decision on such a fundamental operational issue. Petzetakis's response was to seek to excuse Razis's conduct on the basis that he probably acted due to the shared disappointment everyone felt over the continued problems at the plant. Nevertheless, Petzetakis did confirm the lines of authority must be followed in future. He instructed the applicant and Razis to collaborate and rectify the issue themselves. I mention this because it was a recurrent theme in the applicant's evidence of acts of direct interference in PA's operations by other directors appointed by the holding company without conferring with her. While she might have been the MD, she was not free to make all operational decisions as she saw fit.

26] Starting on 9 June 2009, there was a series of e-mail communications between the applicant and Petzetakis relating to the May monthly Sales and Marketing report which the applicant forwarded to Petzetakis. The applicant reported realised sales of R 57.4 million for that month at a trading gross profit of 22.5% as against budgeted sales of R 74.3 million and what she described as an 'unrealistic' budgeted gross profit of 24%. Another feature of the report was that it mentioned that the firm's lack of BEE credentials resulted in it losing a significant order for a project of Richards Bay Minerals. The author of the report was the Sales and Marketing Director, Peter Kerr-Fox, who urged the board to consider adopting a BEE strategy on shareholding. In her own evidence, the applicant expanded on this issue explaining that the board had not got to grips with the need to demonstrate its BEE credentials at the level of shareholding, and that the smaller BEE projects the company had been focusing on were not going to yield significant results. The firm had also been reluctant to consider discounting the price of any share acquisition by a BEE group in consideration for the expected value BEE participation would bring to the firm.

27] Petzetakis responded to the Sales and Marketing report in the following terms: *"I am deeply disappointed on both the performance as well as the content of the report."* He then mentioned two points that he regarded as indicative of the nature of his concerns, namely the loss of the contract due to the firm's BEE status and the loss of a contract in Angola because the firm's PVC piping price was too high. On the first issue, he effectively accused the applicant and Sales Director of having made no proposals to implement a BEE strategy for the company. His brief e-mail ended on an ominous note:

"The only statement I would wish to make at this point is the following if you want to stay with Petzetakis, you better change your performance and your attitude and the sooner you do that the better will be." (sic)

28] The applicant responded promptly to the two points made by Petzetakis. She defended the efforts made to increase BEE participation in the sales structures of the company through, amongst other things, the formation of four BEE sales companies. At the same time she expressed her frustration at the perceived reluctance of the board to consider BEE participation at shareholder level, which she clearly believed would be far more beneficial than the structures established in marketing. She believed the latter ventures were unsustainable and cost the firm more than the benefit it might have obtained from them.

29] The applicant also specifically mentioned efforts she made as far back as 2007 when prospective BEE partners were identified and shortlisted. This had resulted in one potential investor making a formal offer to purchase shares in the company, which was rejected by the holding company. The applicant also tried to explain that it was not the company which lost the Angola project but the middleman who was not tendering at competitive prices.

30] Petzetakis reverted once more to the applicant. However, this time he made no further mention of the Angola project and acknowledged that efforts had been made on the BEE front. Nevertheless, he emphasised that what mattered was that the company was going to implement a successful BEE strategy in 2009. He then shifted the focus of his concern to the current margins of the company, and expressed his disappointment that PA was not able to take advantage of falling raw material prices in the first five months of

the year in the same way the firm's European operations had done. He complained that despite explicitly setting increased margin targets for the company to achieve, these had not materialised and under-recoveries were so low that they had in fact resulted in a declining margin.

31] Closing his e-mail Petzetakis stated: *"I will be coming to SA the last week of June where we will address all the proper restructuring work required to be done in order to achieve the initial targets. I will not be leaving your country until I'm convinced that the proper strategies in place to make up for the lost time."*

32] Responding the same day, the applicant confirmed her appreciation of the need to implement structural changes to escalate cost savings "to the next level". She confirmed that she had already commenced the legal process under the LRA and had taken legal advice on the restructuring process. A notice to staff about prospective retrenchments was to be issued on 22 June 2009. The applicant also said that representations would be made through SEIFSA to try to obtain an exemption from paying the 8.8% increase due to staff on 1 July 2009 in terms of the applicable bargaining council agreement. Two responses to this e-mail were received, one from the group chief financial officer, Mr P Petrolekas, on the same day, and another from Petzetakis, five days later, on 17 June 2009. The CFO queried whether such steps would be sufficient in the light of production volumes which had dropped by 37% compared to May 2008.

33] The more detailed response from Petzetakis on 17 June 2009 starts off by making it clear that the applicant should not start any process until his visit to South Africa, a week later, on 25 June. Petzetakis's stated reason for

stopping the process was that he wanted to ensure that certain strategic initiatives were included in the restructuring plan, two of which he mentioned. The first was the development of a lean organogram with fewer layers of authority. The second was to hold a one-day sales meeting to ensure that the sales force was properly motivated without which he believed no restructuring plan would succeed. Having instructed the applicant to stall the restructuring process, Petzetakis nevertheless instructed the applicant to *"...dismiss immediately the operations manager Mr Craig Herbst."* (original emphasis). He explained that this step was in line with his objective of achieving a lean structure and also was linked to the problem of production inefficiencies and under recoveries. He further asked the applicant to inform other employees of the reasons why the operations manager was being dismissed *"so that they would know that from now on all the employees are evaluated against their contribution to the company."*

34] Two days after the instruction to summarily dismiss Herbst, Petzetakis also instructed the applicant to summarily dismiss one Maritha van der Vyfer. His e-mail of 19 June 2009 read as follows:

"Michelle,

Regrettably I have to inform you that you are requested to terminate, effective immediately, the employment of Maritha, since she denied to give salary information to Dimitris. You may recall that my clear instructions to you were that Dimitri was allowed to have access to ALL information.

May I suggest that if you like to continue work for me to follow my

instructions, as I'm not prepared to repeat them.

Thank you."

(sic)

35] In an email reply to Petzetakis the same day, the applicant made it clear that Maritha had acted on her instructions to send salary information to herself first, which she would then forward.

36] During the course of that Friday the applicant also had three telephone conversations with Razis, who impressed Petzetakis's instructions on her. At 14h30 when the applicant arrived at the Rosslyn plant, Razis said he had received a call from John Futturios, one of the senior managers in Greece, who wanted to know if she had started to implement Petzetakis's instructions. The applicant advised Razis that she had not done so and was not planning to implement the summary dismissals. Razis told her that she'd better do it because "they will not let it go." This was clearly a reference to the management in Greece. At that stage, the applicant was still of the view that if she could communicate the difficulty posed by the two instructions to Petzetakis, she might be able to persuade him to reconsider this course of action contemplated.

37] A couple of hours later, Razis phoned again to ask if she had taken steps to implement the decision, and her response was the same as before. The applicant left the plant at 19h00 and decided she would try and reach Petzetakis on the phone to ask him if the matter could be dealt with when he

arrived in South Africa on 25 June. She hoped she could bring “some sense into the situation” without unduly upsetting the company.

38] That night, at 21h30, Razis phoned yet again to find out if the applicant had complied with the instructions. He told her that Futuros had phoned him several times and said that if she did not do what was expected of her he would fly to South Africa that weekend and do it on her behalf. On Saturday the applicant went to the office and tried to contact Petzetakis at 11h00. She received a text message in reply from Petzetakis’s secretary saying she should not bother him at that time and should wait until 25 June. The applicant persisted and eventually got hold of Petzetakis who was very irritable. She asked him if he was aware of the calls from Futurios to Razis. Petzetakis’s response was simply to ask her what she didn’t understand and that she must just do as she is told. During this conversation he apparently repeated the instruction to dismiss Herbst immediately over the weekend or at the latest on Monday morning. The applicant, in turn, appealed to him to allow her to follow the correct procedure and discuss the matter with a labour lawyer in order to protect the company against litigation.

39] The applicant said her mind was in turmoil but she was not prepared to dismiss the two employees unlawfully. Once more she was phoned by Razis, who warned her that Petzetakis and Futuros must not arrive in South Africa. He told that Futurios had said that this was a test and if she fired them she would save her job. The applicant confirmed that she could not do so.

40] The applicant says that, after considering the situation and realising that Petzetakis had a history of regularly firing people she started to clear out her personal belongings from the office. Despite her misgivings, she decided

that she must make an effort to persuade Petzetakis why it would be unlawful to summarily dismiss the two employees. Therefore, on Sunday, she drafted a lengthy e-mail explaining the reasons why she believed she could not do so.

4.1] In the e-mail response she acknowledged that Petzetakis was the chairman and CEO and that she had to follow instructions. She then briefly summarised the steps taken in 2009 to cut expenditure by R34 million and not to award staff a scheduled 8% salary increase in March.

4.2] The applicant then moved on to the heart of what was troubling her, namely the instructions to summarily dismiss the two employees in question. She reiterated that she had been advised by the firm's labour law adviser that dismissing Herbst summarily would be unlawful, but that she was prepared to initiate disciplinary procedures against him in terms of the LRA on Monday.

4.3] In relation to Van der Vyfer, she appealed to Petzetakis to reconsider the instruction to dismiss the employee because she had been acting on the applicant's own instruction not to provide salary information to anyone except through the applicant herself. Consequently, there were no legal grounds for her dismissal. The applicant also pointed out that the delay in forwarding the information to Dimitris which had arisen was merely two hours. She reminded Petzetakis too that he had confirmed that everything in the South African operation should be communicated through her. From the content of her email it appears that the instruction to dismiss Maritha had also been reiterated over the course of the weekend. She concluded her e-mail by reiterating her commitment and loyalty to the company but also said:

"I have spent many hours in turmoil this weekend, and I have come to the realisation that, for the first time in my 22 years, I have been placed in an impossible position. You have warned me on Friday that if I want to continue working for you, that I have to follow these instructions.

But these two demands are not reasonable or unlawful and therefore un-executable, they represent ultimatums that will force me to breach both the Companies Act and the Labour Relations Act. I have to fulfil my fiduciary duty as an Executive Director of the company."(sic)

4.4] The applicant received no response from Petzetakis to these representations. By now the die was cast, as subsequent events revealed.

4.5] In the early afternoon of Monday 22 June, following the usual production meeting at the Rosslyn plant, Razis spoke with the applicant alone. He advised her that he had very bad news for her, namely that Petzetakis had instructed him to find a lawyer to fire her, preferably without any remuneration. The applicant said she was at a loss for words and only managed to ask Razis what he was going to do. He confirmed he would do as he'd been told. Later that day, the applicant was asked for the company's articles of association which were forwarded to the firm's lawyers, Van Huyssteen's. The following day the applicant received a copy of a legal opinion from the lawyer's. The opinion was broad in nature and considered amongst other things: the question of the applicant's removal as a director; a potential damages claims arising from the removal of a director; and the substantive and procedural requirements for a fair dismissal. It is clear from the opinion that the attorneys were not given full instructions about the

possible reason for the applicant's dismissal at that stage. When she questioned Razis about the reason for the contemplated dismissal he said that that would be discussed with the attorneys when Petzetakis arrived.

46] It should be mentioned in passing that on the same day the applicant conducted a searching meeting with the plant manager, Herbst, in which she emphasised the importance of achieving a break even situation and reversing and recoveries as well as emphasising the importance of maintenance. She further instructed him to revise the savings forecast in preparation for a meeting with Petzetakis once he had arrived in South Africa.

47] By Wednesday that week the applicant had also learnt that Petzetakis had already approached the former HR manager at the company, Ms C Van Rensburg, who left the firm in 2006, to replace her as managing director at PA. Van Rensburg had politely declined the offer.

48] The applicant also testified that normally Petzetakis would liaise with her to make arrangements for his stay and to agree on an itinerary, but she had not heard from him. When Petzetakis eventually arrived at the plant he went straight to Razis's office without so much as greeting the applicant. The applicant then saw the firm's attorneys entering and leaving the office. Thereafter she was called in and Petzetakis started to attack her on the limits of authority. She believed that this was part of an attempt by Petzetakis to find a reason to justify dismissal. A discussion ensued about the applicable limits of authority and the applicant claimed that once she had pointed out the existing position, Petzetakis could not identify a limit of authority which she had not complied with. It appears that Petzetakis had

been under the impression that the limits of authority had already been revised in 2008, but came to realise that the draft revisions of the limits had never formally approved. The applicant tried to discuss the proposed application for exemption from the wage increases with him but Petzetakis was not interested.

49] The applicant tried to arrange another meeting with Petzetakis and had a fleeting one with him before the weekend. He was clearly reluctant to discuss the content of their previous e-mail to him and said he was in a hurry and that he would see her on Monday. When she asked if she could meet him over the weekend he responded that his weekend was full.

50] On Monday, 29 June 2009, a sales meeting was held, which was attended by salespersons from 24 branches. At that meeting the applicant's successor was also in attendance, but at the time she thought that he was a consultant. The meeting was also attended by Petzetakis. When the applicant attempted to talk to Petzetakis at the end of the meeting he said his car was waiting and he would speak to her tomorrow he left the meeting with Razis and the applicant's successor.

51] Eventually on Tuesday, 30 June 2009, Petzetakis came to the applicant's office. The applicant told him that she knew he had come to fire her. He responded that her time as MD "was up". When she asked him why he wanted her to go, he simply reiterated that it was "time for her to go". He then told her that he had so much respect for her that he would make her a non-executive director and give her projects but then she would have to agree to a restraint. The applicant said she needed time to respond and Petzetakis advised her that he would arrange a meeting with the lawyers and Razis to look at details.

52] Following this brief meeting she was advised in an e-mail from the company's lawyers to report to their offices for a follow-up meeting the next day. The body of the letter read:

"In light of your recent discussions with Mr Petzetakis on the way forward for Petzetakis Africa, and your involvement in the process and employment with Petzetakis Africa, we invite you to a meeting to be held at our offices tomorrow at 14:00 hours. The following agenda points had been determined between yourself and our Mr Johann van Huyssteen:

- 1. Severance package;*
- 2. The date of termination of employment and termination directorship;*
- 3. Consultation fees for future assistance in any project;*
- 4. Restraint of trade;*
- 5. Other matters to be discussed."*

The e-mail also mentioned that the meeting was to be held on a without prejudice basis.

53] When she attended the meeting the next day only Razis was present from the company together with the attorneys. She was advised that the meeting had been called to discuss the dismissal process. Razis said that Petzetakis had met with her and advised her she could no longer be MD and she had

agreed to this. This statement angered the applicant, who related what Petzetakis had told her, namely that 'her time was up'. She questioned how she could be dismissed in this way without any procedure been followed and said that the process had to start at the beginning. The partner chairing the meeting acknowledged that there was clearly 'adisconnect' between the company and herself. The applicant asked for a meeting with the attorneys and Petzetakis, but Razis reported that he was already on his way to the airport. The applicant then left the meeting.

^{54]}The next day the applicant received her letter of termination from the firm, together with an offer of 10 months' salary on the basis that she abandoned any claims she might have against it arising from her employment or dismissal.

Legal principles

^{55]}The test for proving that dismissal is automatically unfair has been considered by the Labour appeal Court on a few occasions. In the case of ***Kroukam v SA Airlink (Pty) Limited (2005) 26 ILJ 2153 (LAC)***, two slightly different approaches were adopted by the authors of the two judgments of the court in determining whether or not an employee had discharge the onus of proving that the reason for a dismissal was automatically unfair. Davis JA followed the approach taken in ***SA Chemical Workers Union and others v Afrox Ltd (1999) 20 ILJ 1718 (LAC)***, in holding that in order to succeed an employee must show not only that the reason was a factor in the dismissal, but that it was the main or dominant reason for the dismissal:

"[26] Mr Snyman placed considerable emphasis upon the judgment of this court in SA Chemical Workers Union and others v Afrox Ltd (1999) 20 ILJ 1718 (LAC) at para [32] where Froneman DJP set out an approach in respect of an enquiry relating to an automatically unfair dismissal in terms of s 187(1)(a) of the Act as follows:

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation, applied in other fields of law should not also be utilized here (compare S v Mokgethi and others 1990 (1) SA 32 (AD) at 39D–41A; Minister of Police v Skosana 1977 (1) SA 31 (AD) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'approximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a

cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue.... Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.'

[27] The question in the present dispute concerned the application of this test. The starting-point of any enquiry is to be found in chapter VII of the Act. Thus, if an employee simply alleges an unfair dismissal, the employer must show that it was fair for a reason permitted by section 188. If the employee alleges that she was dismissed for a prohibited reason, for example pregnancy, then it would seem that the employee must, in addition to making the allegation, at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly based on this condition. Some guidance as to the nature of the evidence required is to be found in Maund v Penwith District Council [1984] ICR 143, where Lord Justice Griffith of the Court of Appeal held at 149 that:

'It is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the

dismissal.'

[28] In my view, section 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 section 187 for constituting an automatically unfair dismissal" (at 2206F–2207G).

^{56]}By contrast, Zondo JP, held that it was sufficient if the employee established that the impermissible reason played a significant part in the decision to dismiss the employee:

"[103] However, even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees" (at 2188)"

57] Van Niekerk J in ***Van der Velde v Business & Design Software (Pty) Ltd & another*** [2006] JOL 18363 (LC) noted that:

“Willis JA, delivering the third judgment in Kroukam, noted that Zondo JP and Davis AJA had, albeit by different routes, arrived at the same factual conclusion ie that the applicant in that matter had been dismissed primarily for reasons related to his union activities, and concurred in that conclusion on the facts without expressing a view on the approaches respectively adopted by Zondo JP and Davis AJA. ... I do not think that there is any inherent conflict in the approaches adopted by Zondo JP and Davis AJA respectively.”

58] In the subsequent LAC decision in ***New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*** (2009) 30 ILJ 2875 (LAC), the full bench of the court did not attempt to decide whether either of the two approaches were more preferable than the other, because the facts of that case led to the same result whichever test was applied:

“[22] In the heads of argument prepared by the parties, there is a careful analysis of the indicated approach to determine the basis for such a dismissal. For the purposes of this judgment, it is not necessary, C however, to prefer either of the two approaches set out in Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC) to determine whether respondent was automatically unfairly dismissed. The reason is that, on either of the tests set out in the Kroukam judgments, this court must arrive at the same conclusion” (at 2882)¹

Evaluation

¹ Japie, AJ concurred with Davis, AJ and Zondo, JP also endorsed Davis, AJ's judgment except in respect of the appellant's entitlement to overtime pay.

59] As mentioned above, when the respondent finally settled on reasons for dismissing the applicant it plumped for a dismissal arising from a loss of confidence in her suitability as an MD based on incapacity or misconduct. The summary narrative of evidence on the firm's performance set out above was canvassed at trial in an effort to establish that indeed it had dismissed the applicant for legitimate reasons as set out in the respondent's answering statement and clarified in the pre-trial minute.

60] Because the respondent fielded no witness to confirm that it had indeed dismissed the applicant for an entirely legitimate reason, the respondent sought to extract a legitimate explanation for her dismissal through cross-examination alone, without exposing its own reasoning to scrutiny, despite being best placed to tender direct evidence on it.

61] Obviously, the persons best placed to give evidence on what actuated the applicant's dismissal, and in particular to rebut the *prima facie* evidence of the applicant that she was dismissed for an impermissible reason, were one of the directors who was privy to the events of the fortnight leading up to the dismissal as that would have been something peculiarly within their knowledge.

62] It is trite law that the mere fact that a party does not lead evidence in its defence does not entitle a court to draw an adverse inference against it. However, if as in this case, the applicant has established a *prima facie* case that she was dismissed for an impermissible reason and the respondent is best placed to rebut this evidence by giving direct evidence of what led it to take the decision it seems to me that an adverse inference can be drawn from its failure to lead that evidence in rebuttal. Schreiner JA, in ***Galante v***

Dickinson 1950 (2) 460 (AD) at 465, expressed the principle in the context of a claim for damages arising from negligent driving:

"In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisors are satisfied that, although he was obviously able to give very material evidence as the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination."

63] In *Galante* the court was loathe to prescribe a general principle about the effect of a party not giving evidence of matters peculiarly within its knowledge, but said the following in the context of that case:

*"...it seems fair at all events to say that in an accident case where the defendant himself was the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the applicant as opposed to the defendant."*²

64] Assuming for the moment that there are two plausible alternative explanations of the reasons for the applicant's dismissal, which I believe is being generous to the respondent, the same considerations ought to apply in this matter in evaluating the effect of the failure of the respondent to give evidence. Quite apart from not exposing its actual reasoning to direct scrutiny, even if the reasons advanced in the respondent's pleadings and the

pre-trial minute might have been capable of sustaining a dismissal of the applicant for lawful reasons, there are a number of other difficulties in accepting these reasons were indeed the ones which probably caused the respondent to dismiss her.

65] The first difficulty is that even though the respondent took legal advice at least a week before formally announcing the applicant's dismissal, it still could not articulate any potentially legitimate reason for the dismissal by the time she was issued with the notice of the summary termination on 2 July 2009. The first time it committed itself to a reason was only in October 2009 after it already had considerable time to reflect on the matter. Furthermore, the unchallenged evidence of the applicant about the course of events between receiving the first instruction from Petzetakis to dismiss Herbst and being told by Razis on 22 June 2009 that he had been instructed to obtain a lawyer in order to dismiss her, demonstrates that the critical decision was taken at that time.

66] Taking into account the express nature of the instructions in the e-mails from Petzetakis to comply with his orders to summarily dismiss the two employees in question, and the relentless calls made by Razis pressurising the applicant to comply and warning her that it was 'a test' that would cost her job if she failed it, it is very hard to avoid the conclusion that it was the applicant's failure to implement these two instructions which in fact actuated the respondent's decision to dismiss her. Everything points to the respondent having drawn a line in the sand at that juncture that would decide the continuation of the applicant's employment relationship. It may have been so that if it had not done this it might have eventually proceeded to dismiss the employee on the grounds it subsequently relied on, but the fact

remains that even if it was losing confidence in her, her response to the two instructions at that stage was a decisive factor in determining her fate. The employer's actions after she would not back down confirm this.

67] It is also important in evaluating the employer's defence to bear in mind that the reasons for dismissal which fall to be scrutinised are the reasons which the employer relied on at the time of the dismissal:

*"It is an elementary principle of not only our labour law in this country, but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where, at the time of the dismissal, the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case, the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal."*³

68] In this instance, the only explicit indication of the employer's reasons for dismissing the applicant appears from the ultimatums it gave her to summarily dismiss the employees in question or face her own dismissal. The respondent tried to make much of Petzetakis' subsequent cryptic statement that 'it was time' the applicant left, as indicative that it had decided to terminate her services because it had lost confidence in her ability to manage the company. However, it was only some months' later that the respondent was able to formulate alternative permissible reasons for its

³ **Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC)** at 206, [32].

decision, which it then sought to validate at trial by adducing evidence on which it might have relied to justify its action at the time.

69] The inference that performance was not the reason for the applicant's dismissal is reinforced by consideration of events after 22nd of June 2009. When Petzetakis finally confronted the applicant, immediately after meeting with the firm's attorneys, the issue which he raised with her was whether she had been acting within the firm's limits of authority. When the applicant brought to his attention that the limits of authority, which he was relying on, had not been finalised this ceased to be an issue and was never advanced afterwards as a reason for her dismissal. This tends to suggest that even after taking legal advice the respondent was still searching for a legitimate reason to justify the dismissal. The evidence of the applicant that the respondent had already identified her successor before she was dismissed also reinforces the inference that the decision to terminate her services was taken even before she met with Petzetakis and they debated the Limits of Authority policy.

70] Moreover, when Petzetakis was pressed by the applicant to provide the reason for her dismissal, all he could manage was to say that it was 'time' she left.

71] All of the factors mentioned above, in my view, support the conclusion that the employer most probably decided to dismiss the applicant when she did not unhesitatingly comply with the instruction to summarily dismiss Herbst and Van der Vyfer. The issue which vexed the CEO at the time was whether or not she accepted his authority unquestioningly even when his instructions required her to do something unlawful and which, in her understanding was

not in the best interests of the company to which she owed a fiduciary responsibility as a director.

72] In the circumstances, the reasons advanced for the dismissal in the respondent's answering statement appear to have been essentially *ex post facto* efforts to rationalise the dismissal on legitimate grounds. If at the time, the respondent had acted less impetuously and imperiously, and if it had deliberated more carefully before acting I accept that it might have taken a decision to dismiss the applicant on the basis of more plausible and legitimate reasons. However, such reasons that it might, with the benefit of hindsight, have relied upon cannot be retrospectively inserted into the historic chain of causation which resulted in her dismissal at the time.

73] It was suggested in argument, that applicant's refusal to dismiss the two employees without due process was merely the final straw and accordingly cannot be construed as anything more than the last factor which had a bearing on the company's decision to dismiss the applicant. In this regard, the respondent relies on the increasingly demanding and sharp tone of Petzetakis' communications to the applicant from late May 2009 which the applicant conceded.

74] The difficulty I have with this argument is that even if the feedback on the measures initiated by the applicant was increasingly critical and negative from this time, it seems inescapably clear from the ultimatums given to the applicant that if she complied with the two instructions her job was *not* at risk. Correspondingly, if she did not comply, she *would* be facing dismissal. In these circumstances, it is difficult to see her failure to comply with the instructions as anything less than central to the actual decision to dismiss her.

75] Another point which was raised by the respondent was that the applicant's characterisation of the instruction she was given merely reflected a difference of opinion between two directors about whether summary dismissal was permissible or not. However, it appears to me that the difference went much deeper than this. It is true that the applicant clearly believed that there was no good reason for Van der Vyfer's dismissal because she had been acting on the applicant's own instructions at the time. Petzetakis did not even engage with the issue of whether summary dismissal would be lawful or not, so a difference of opinion on that issue is difficult to discern.

76] Quite apart from this, the fundamental difference between Petzetakis's instruction and the applicant's approach, is that Petzetakis was simply not willing to give the applicant an opportunity to even attempt to comply with the requirements of the LRA to ensure as far as possible that the unfair dismissal provisions of the Act were not flouted: it was not that he advanced any rationale why it would not be unlawful to proceed in the manner he wished.

77] It was also argued, though unsupported by any authority, that the applicant had not demonstrated that it would have been unlawful for her to proceed with the summary dismissals as instructed. It might have been true that, at least in the case of Herbst, a case might have been made out that her dismissal was substantively fair. However in both instances, if the employees were dismissed without a fair hearing, the dismissals would in all likelihood have been in breach of the requirements of a procedurally fair dismissal under the LRA. Even if the company had good substantive grounds for

summary dismissal, which is very unlikely in Van der Vyfer's case, if the respondent wished to ensure that it did not flout the provisions of the LRA governing the procedural fairness of dismissals and the associated constitutional right to fair labour practices, then it could have acceded to the applicant's proposal that a proper disciplinary process be initiated. Instead, the instruction was to forge ahead regardless.

78] I do not understand why such action would not be construed as unlawful if it would entail a breach of a statutory and constitutional right.

79] It must also be mentioned that a considerable effort was made by the respondent to persuade the court in argument that it should take a robust view of the dismissal of an executive employee in the position of the respondent. In this regard, the respondent placed much reliance on the LAC decision in ***HPN Brereton v Bateman Industrial Corporation Ltd & Others* (Unreported Case no JA 80/99)**. In essence, the argument was that when it comes to the case of an executive employee the court should be wary of applying stringent standards in assessing the procedural fairness of the dismissal. Similarly, because of the degree of accountability that goes with positions such as that of CEO, if the incumbent fails to measure up to the performance standards set by the employer, the court should be slow to interfere with the employer's judgement in deciding to end the employment relationship when the employer decided that it had lost confidence in that individual.

80] However, in this case because I believe it is clear on the evidence that the employer has failed to displace the strong *prima facie* case that principal reason for the employee's dismissal at the time was her refusal to summarily

dismiss the two employees without a hearing, it does not assist it to try and persuade the court that it did have grounds to fairly dismiss the applicant on the basis of poor performance or misconduct, on the standards adopted in the Bateman case. There was no evidence tendered by the respondent which could explain away the natural inferences to be drawn from the conduct of its senior office bearers after the instruction to dismiss Herbst was issued, which could demonstrate that its actions were in fact founded on an assessment of the applicant's performance over the course of a number of years. It was best placed to substantiate what lay behind its actions in the fortnight leading to the applicant's dismissal, but chose not to do so. In the light of the evidence of the respondent's actions over the fortnight leading to the applicant's dismissal context, the respondent's unwillingness to expose its own reasoning at the time to scrutiny substantially weakens its attempt to persuade the court that it probably did dismiss the applicant for a permissible reason which it only articulated some months later.

81] The applicant made out a strong *prima facie* case that what was at stake at the critical time when the decision to dismiss her was taken, was her unquestioning obedience to the dictates of the CEO to the point of implementing an instruction which required her to do something unlawful. The respondent has failed to address this issue directly and the evidence for a performance based, or similar legitimate reason for the dismissal, does not answer the applicant's case.

82] In any event, I agree with the applicant's submissions that her position was not really on a par with the CEO in *Bateman's* case. The primary measure of her performance was the operational performance of the firm. She did not have the autonomy to make decisions even in respect of operational issues

and was always subject to the dictates of detailed instructions from Greece.

Conclusion

83] In summary, I am satisfied that the applicant was asked to dismiss two employees without any kind of hearing and that had she done so she would have breached the provisions of the LRA and the Constitution governing an employee's right to fair labour practices. In this sense she was expected to do something unlawful and, whatever legitimate reasons might have been relied upon instead, it was this impermissible reason which was the principle cause of her dismissal.

Contractual claims

84] As mentioned above, the unresolved contractual claims by the end of the trial were the applicant's claims for:

- a. three months' notice pay;.
- b. the *pro rata* portion of her bonus for the notice period;
- c. salary for the period 25 June to 2 July 2009;
- d. twelve days' leave pay.

85] The first two claims are clearly linked. In terms of clause 1.6 read with clause 1.3 of her contract of employment the applicant was entitled to three months' notice if her service was terminated for any reason other than retrenchment or dismissal for misconduct warranting summary dismissal at common law. In view of my findings on the reasons for her dismissal neither

of the reasons mentioned in clause 1.3 apply, and consequently the applicant was due three months' notice pay.

86] Clause 2.3.3. of the contract read with clause 2.3.2 guaranteed the applicant a pro-rata portion of the annual bonus payable in December each year provided she was not dismissed for misconduct. The respondent during the course of the trial tendered and paid her the pro-rata portion of her bonus up to the end of June 2009. In view of the finding that her service should have endured a further three months, the applicant is also entitled to the *pro rata* portion of the bonus for the notice period.

87] The applicant was paid her last salary on 25 June 2009 and claims the balance of her unpaid salary for the period between then and 2 July 2009. However, there was no evidence to suggest that she was not paid a normal month's salary in June 2009, albeit that it was paid before the end of the month as many employers do. Consequently, the only unpaid portion is for the first two days of July 2009, which is due and owing to the applicant.

88] The dispute over the balance of leave pay owing to the applicant was linked to a dispute over whether or not the applicant ought to have taken part of her annual leave due when she went on a business trip to Australia. There was no dispute that if part of her time in Australia should not have been taken as leave, she still had 12 days leave owing to her from her aggregate leave entitlements. The applicant testified that she was in Australia from 30 August to 10 September and that the trip which was principally to attend a world-wide mining indaba in Perth was approved by the CEO at the time at Spanudakis. The applicant also met with PVC manufacturer's in Sydney who

had technology which the respondent did not have. On balance, I am satisfied that the trip was approved as a business trip and she did not have to take any of her accumulated leave entitlements.

Relief

89] The applicant was employed for 22 years by the company and the manner in which her services were terminated was understandably distressing and stressful. On the other hand, the respondent did try to soften the blow of its peremptory action by offering 10 months' remuneration and it is not inconceivable that if the applicant had engaged with the respondent at the time a reasonable settlement might have been reached. There was no evidence before me that any counterproposal had been made by the applicant.

90] Further, at the time of the dismissal the company was under substantial pressure from adverse market conditions and a weak financial position. The applicant was able to set up a consultancy which serves another competitor of the respondent. In relation to the severity of the infringement of the applicant's right not be dismissed for refusing to dismiss the employees unlawfully, the character of the unlawful action she was asked to take also bears consideration. The applicant was asked to infringe a statutory and constitutional right of the targeted employees insofar as a fair procedure was concerned. The summary termination of Van der Vyfer's service without any obvious material breach on her part of the employment relationship which could justify summary dismissal would have rendered her dismissal unlawful in the contractual sense. Without detracting from the seriousness of deliberately dispensing with the employees' right to a procedurally fair dismissal, the unlawful character of what the applicant was expected to do

was civil not criminal, nor, for example, did it entail requiring her to turn a blind eye to an infringement of workplace safety requirements. These are factors which diminish the seriousness of the respondent's infringement of section 187 in my view.

Costs

91] To canvass the evidence in support of the respondent's putative justification for her dismissal, would have required considerable preparation and analysis of a variety of financial documents and production information, as well as requiring knowledge of the distinguishing features of management accounts and financial statements.

92] The volume of documentary evidence to be canvassed was also significant comprising filing as it did three lever arch files consisting of over 900 pages. Were it not for all this evidence which had to be canvassed, the case would not have required laborious preparation and would not have taken so long. Given that all this preparation was mostly necessary because of the respondent's *ex post facto* attempt to put a respectable face on the dismissal, I believe this is an appropriate case in which the respondent should pay the applicant's costs, including that of two counsel.

93] Moreover, insofar as the contractual claims are concerned it should not have been necessary for the applicant to litigate over most of them in order to obtain relief, which is an added reason for making a cost award in the applicant's favour.

Summary of findings on the applicant's claims

94] The applicant's dismissal by the respondent on 2 July 2009 was an automatically unfair dismissal in terms of section 187(1)(d) read with section 5(2)(c)(iv) of the LRA.

95] The applicant is owed twelve days' leave pay and two days' unpaid remuneration for 1 and 2 July 2009.

96] The applicant was entitled to receive three months' notice pay in terms of her contract of employment.

97] As the respondent has tendered payment of the applicant's bonus for the period ending 2 July 2009 and because her employment should have terminated on 1 October 2009, the applicant is entitled to the *pro rata* balance of her bonus for the three month notice period.

Order

98] Accordingly, it is ordered that within 21 days of full reasons for the judgment being filed, the respondent must pay the applicant the following amounts:

- a. compensation equivalent to 13 months' remuneration amounting to R 1,813,500-00;
- b. three months' notice pay amounting to R 418,500-00;
- c. the pro-rata balance of her bonus for the three month notice period, amounting to R 46,500-00;
- d. twelve days' leave pay amounting to R 55,800-00.

99] The respondent must pay the applicant's costs, including the cost of two

counsel.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 19 – 23 June 2010

Date of order: 14 September 2011

Full reasons filed on 15 September 2011

Appearances:

For the applicant: H v R Woudstra, SC assisted by P H Kirstein instructed by Couzyn, Hertsog and Horak

For the respondent: C Todd of Bowman Gillfillan Inc.