Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS575/09

In the matter between:

JANE EDITH ARBUTHNOT **APPLICANT**

and

SOUTH AFRICAN MUNICIPAL WORKERS' UNION PROVIDENT FUND **RESPONDENT**

Date of trial: 5-7 September 2011

Date of judgment: 15 September 2011

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant was dismissed by the respondent on 1 November 2008 after being found guilty on charges of insubordination, dishonesty and disloyalty. The applicant contends that her dismissal was automatically unfair because the reason for it was that she made a protected disclosure in terms of the Protected Disclosures Act, 26 of 2000 (PDA).

Factual background

[2] The applicant was employed by the respondent ('the fund') in June 2007 as a paralegal officer. The fund is a pension fund registered in terms of the Pension Funds Act, 24 of 1956. The applicant was dismissed after being found guilty on the charges referred to above, all of which emanated from the disclosure of documents

by the applicant to Mr Patrick Odendaal, the national benefit officer of the South African Municipal Workers Union (SAMWU). It is not disputed that the fund is what is termed a union-based fund, that SAMWU was a sponsor of the fund at the time of its establishment, and that some 99% of the fund's members are members of SAMWU.

[3] Although the disciplinary proceedings against the applicant concerned the disclosure of four documents to Odendaal, only one of these was relied on in these proceedings as constituting the basis of the protected disclosure. The document was an opinion ('the opinion') prepared for the respondent by Adv Paul Pretorius SC and Adv K Pillay, in response to instructions to advise the respondent on the potential liability, if any, of the respondent's trustees following what was referred to as the 'Fidentia scandal'. It was common cause that the fund had invested monies in the Living Hands Trust, an entity controlled by Fidentia, and that as a consequence, it had sustained a significant loss. The opinion was sought in circumstances where relationships between the union and the fund were tense, to say the least, and where questions where being asked about the trustees' liability to beneficiaries of the fund. The board ultimately resolved to seek opinion from counsel. The two issues canvassed by the opinion that are relevant to these proceedings are whether the trustees had adequately discharged their fiduciary duties in respect of oversight of the funds managed by the Living Hands Trust, and whether any potential liability had been incurred by them in relation to the procedures adopted for the assessment of the suitability of guardians to manage death benefits payable to beneficiaries who were minors.

[4] At 10:16 on 1 October 2008, the opinion was sent by the attorneys to the applicant, by email. At 13h46 on the same day, the applicant sent an email to the attorney thanking her for the opinion and stating that she would contact her once the fund's principal officer, Mfeka, had returned to the office and she had discussed it with him. At 13h47, the applicant forwarded the opinion to Odendaal, marked "for your information".

[5] The relevant parts of the opinion read as follows:

"[74] The next issue to be addressed is what action was taken by Consultant in response to the non-compliance by Living Hands and FAM with the FAIS and the Discretionary code.

[75] From the information supplied to us, the trustees did not monitor the conduct of the Living Hands Trust of FAM. Significantly, trustees did not invoke rights conferred by the Discretionary Code to demand information in relation to the handling of trust monies.

[76] In this regard, our instructions are that Consultant relied heavily on the advice given to it by its administrators Lekana.

[77] However, even where trustees rely on the services of Lekana to liaise with and administer trust monies held by living hands, the trustees cannot, in law, escape the duty of care owed to beneficiaries. In this regard, Honoré's South Africa Act of Trust 4th Edition states the following:

> *"It is not uncommon for a trustee to delegate the administration of a trust to another. This may be to a co-trustee, to a firm in which the trustee is or is not a partner, to a relative, to a suitably qualified professional person or even to a management committee. Such a course is not improper so long as it amounts only to a delegation (the appointment of another, for whose acts one is responsible, to act on one's behalf) and not to an abdication (the appointment of another to act instead of oneself, so as to relieve oneself of responsibility)….it does not relieve the trustee from the duty of supervising and checking the work of any non-trustee to whom the delegation may have been made. Indeed, the trustee retains office as trustee with primary responsibility to the beneficiaries under the trust and is accordingly at liberty at any time to revoke the delegation of authority."*

[78] Therefore, trustees cannot abdicate their responsibilities towards beneficiaries by seeking to hold Lekana responsible for its failure to monitor the Living Hands Trust.

[79] The trustees ought to have properly monitored the performance of Living Hands in order to have decided whether it was appropriate to continue making payments due to beneficiaries to the Trust. This is particularly so where statutory regime creates mechanisms to enable the close monitoring of the performance of a FSP.

[80] Failure to properly monitor amounts to a breach of the fiduciary duty of trustees to act in the best interests of beneficiaries.

> *[81] Further, the failure to keep records amounts to a breach of the fiduciary duties of trustees."*

[6] In so far as the applicant's state of mind at the time of the disclosure is concerned, she testified that prior to her forwarding the opinion to Odendaal she had raised with Mfeka regarding the requirement that a proper assessment of the guardian's capacity suitability should be made before funds were paid into trust. In particular, she was concerned that the fund did not carry out proper assessments as required by the relevant legislation and various determinations by the pension fund adjudicator. Odendaal had been concerned about the opinion and had telephoned her regularly to enquire about it. In her mind, the opinion was damning, and she was concerned that the fund would suppress it to avoid a potential liability of R150 million becoming public knowledge. She thought that Odendaal would be in a position to do something with the opinion. Under cross-examination, the applicant elaborated by saying that she was concerned for the beneficiaries and their inability to meet their obligations, and that the opinion had confronted the trustees with a conflict of interest – their fiduciary duties were owed to the beneficiaries yet they were potentially liable to the beneficiaries on account on a breach of those fiduciary duties.

[7] Mfeka testified that on his return to his office on 2 October 2008, he asked the applicant whether she had given the opinion to anyone else, which she denied. Applicant disputes this, and testified that Mfeka had said that the opinion was not to leave the office. After he said this, she phoned Odendaal, who agreed to keep the opinion confidential.

[8] On 6 October 2008, the applicant was called to Mfeka's office. Mfeka testified that in the presence of the board's chair and vice chair, he asked the applicant whether she had given the opinion to anyone. She said no. Mfeka then asked her whether she had sent the opinion to the union, which the applicant denied. He asked her whether she had sent the opinion to Odendaal, which she also denied. Mfeka then confronted the applicant with a record of the email that she had addressed to Odendaal on 1 October. The applicant then admitted that she had lied and that she had sent the opinion to Odendaal.

[9] A disciplinary hearing was then convened on the basis of the charges referred to above (insubordination, dishonesty and disloyalty) and the applicant was found guilty and dismissed.

Applicable legal principles

[10] I deal first with the principles applicable to a claim of unfair dismissal where the reason for dismissal is contended to be automatically unfair.

[11] Section 187 lists a number of reasons for a dismissal that are automatically unfair. In effect this means that if a dismissal is based on one of the listed grounds it is not open to an employer to justify the dismissal, rather the inquiry moves to remedy. As Prof Darcy du Toit observes, whether a dismissal is automatically unfair is essentially an inquiry into causation (see *Labour Law through the Cases*, at p LRA 8/28). The test for causation in cases where an automatically unfair dismissal is claimed was initially articulated by Froneman JA in *SACWU and others v Afrox (Pty) Ltd* [1999] 10 BLLR 1005 (LAC). In that case the court drew a distinction between factual and legal causation the former being a "but for" test, the latter being an inquiry into the main, dominant or proximate cause of the dismissal.

[12] In relation to the burden or onus of proof in cases where an automatically unfair dismissal is claimed, in *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) Davis JA set out the following principle:

> *"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."*

[13] Of course, the causal link between a protected disclosure and a dismissal can be easily broken if the employer is entitled too easily to point to other reasons for dismissal. In *Kroukam,* in dealing with the

issue of causation, and specifically a contention by the employer that an employee who claimed to have been victimised on account of trade union activity was dismissed for being insubordinate, Zondo JP recognised the potential for undermining the relevant statutory protections and held that if the 'dominant or principal reason or reasons' for dismissal was a reason listed in s 187(1), the dismissal was automatically unfair. He went on to say that even if the reasons found were not the dominant or principal reasons for dismissal, a dismissal was nonetheless 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 decision to dismiss employees"* (own emphasis).[1]

[14] The purpose of PDA is to encourage employees to report concerns about impropriety in the workplace and to protect those who make such reports. The PDA's constitutional pedigree is set out in *Tshishonga v Minister of Justice & Constitutional Development & another* [2007] 4 BLLR 327, and there is no need to repeat it here. Section 3 of the PDA provides that an employee who makes a protected disclosure may not be subjected to an occupational detriment by his or her employer, on account wholly or partly of having made that disclosure. The PDA establishes a tiered regime under with the justification for disclosure is set progressively higher according to the distance of the person to whom the disclosure is made from the subject of the complaint.

[15] Given the nature of the arguments advanced in this matter, a few preliminary observations are warranted. First, the PDA achieves a balancing of interests between the rights to protection of employees to make public interest disclosures,

[1] At paragraph [103].

and an employer's interests in preserving loyalty and confidentiality. The balance is struck by defining the subject matter of protected disclosures and by setting out the procedures by which disclosures must be made to qualify for protection. [2] Where an employee discloses information in accordance with the PDA, the employee is protected against dismissal, whether or not the information disclosed is confidential, and regardless of any right of the recipient to that information, or whether the recipient is already in possession of the information, or will come into possession of it in the future.

[16] The applicant relies on s 9 of the PDA. The section reads as follows:

9. General protected disclosure.—

(1) Any disclosure made in good faith by an employee—

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if—

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the disclosure."

[17] The conditions that are relevant for present purposes are subsections (2) (c) and (d). These read:

'(c) that the employee making the disclosure has previously made a disclosure of substantially the same information to—

(i) his or her employer; or

[2] See, in general, Chapter 5 of Vickers *Freedom of Speech and Employment* (2002, OUP, Oxford).

(ii) a person or body referred to in section 8,

in respect of which no action was taken within a reasonable period after the disclosure; or

(d) that the impropriety is of an exceptionally serious nature.'

[18] Section 9 (3) establishes the factors to which the court must have regard to determine the reasonableness of the disclosure. The section reads:

(3) In determining for the purposes of subsection (1) (ii) whether it is reasonable for the employee to make the disclosure, consideration must be given to—

(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the impropriety;

(c) whether the impropriety is continuing or is likely to occur in the future;

(d whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;

(e) in a case falling within subsection (2) (c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;

(f) in a case falling within subsection (2) (c) (i), whether in making the disclosure to the employer the employee complied with any procedure which was authorised by the employer; and

(g) the public interest.

Issue

[19] The fund did not dispute that the applicant's conduct in sending an email to Odendaal to which the opinion was attached was a 'disclosure' for the purposes of

the PDA. The fund contends that the disclosure was not protected, since it did not meet the requirements established by s 9. The issue to be decided can be simply stated: Whether the proximate cause of the applicant's dismissal was her having disclosed the opinion to Odendaal and if so, whether the disclosure was protected, thus rendering the applicant's dismissal automatically unfair.

Analysis

[20] To the extent that these proceedings at times appeared to take on a form of trial by proxy, it is important to emphasise what this trial is not about. It is not about the trustees liability to the union consequent on the Fidentia debacle on account of any failure to exercise proper control of funds invested in the Living Hands Trust, nor is it about the lawfulness or otherwise of the process adopted for the assessment of guardians of minor beneficiaries to determine their ability or otherwise to manage funds on behalf of minors. It is also not about whether the opinion is correct in law or not, nor is about whether the trustees subsequent to the disclosure have been found to be liable to the union and its beneficiary members on account of any breach of a fiduciary duty. The only issue before the court is that posed in paragraph [19] above.

[21] Although the apparent reasons for the applicant's dismissal were insubordination, dishonesty and disloyalty, the causation requirement was conceded by Mfeka, who stated under cross-examination that the applicant's conduct in sending the opinion to Odendaal was 'one of the main reasons' for her dismissal. That satisfies the test established by *Kroukam,* and nothing further need be said about causation.

[22] In so far as the requirements established by the PDA generally are concerned, as I have noted, the respondent did not dispute that the forwarding of the opinion to Odendaal constituted a 'disclosure' for the purposes of s 1 of the Act. The nature of the document, and in particular the fact that it constituted legal advice to which privilege may have attached, was not a matter that was canvassed by the fund during the trial. Its concession effectively means that the disclosure was of information regarding the fund's conduct that shows or tends to show a failure to comply with a legal obligation, or that a miscarriage of justice was likely to occur (see s1 of the PDA, paragraphs (b) and (c) of the definition of 'disclosure'). Further, the fund did not dispute, assuming that the requirements of s 9 are found to have been

met, that the applicant's dismissal would be an 'occupational detriment' as defined by s 1 of the PDA. It is common cause that the applicant did not make the disclosure for purposes of personal gain. For the applicant's disclosure to be protected therefore, it must be established that the applicant made the disclosure in good faith, that she reasonably believed that the information disclosed was substantially true, and that one or more of the requirements in s 9 (2) apply and that it was reasonable for the applicant to have made the disclosure.

[23] The fund submitted that the applicant had not made the disclosure in good faith since she acted other than with her employer's best interests at heart, or, put another way, that she had acted other than in accordance with the fiduciary duties that she owed her employer. This submission overlooks the nature of the protection accorded by the PDA, which cuts across obligations to advance the employer's interests to protect employees who commit acts that are by definition disloyal, but in the greater good. It seems to me that while there is a degree of overlap between the factors mentioned in s 9 (1), i.e. the requirements of good faith, a reasonable belief that the information disclosed is substantially true, and the absence of any personal gain, good faith is a discrete requirement that entails an assessment of motive in relation to the disclosure and not, as the respondent appeared to submit, in terms of any employment- related obligations of trust, confidence and loyalty. Good faith involves the deployment of an honest intention, and connotes an absence of malice or of some other ulterior purpose or motive. A motive that amounts to a promotion of personal antagonism, for example, would almost certainly serve to negate good faith, as would a disclosure motivated simply by a desire to embarrass or harass an employer (see *CWU & another v Mobile Telephone Networks (Pty) Ltd* [2003] 8 BLLR 741 (LC)).

[24] On the other hand, where an employee acts with a view to something being done about the failing that is disclosed, the disclosure is likely to be made honestly and therefore in good faith.

[25] The applicant's unshaken evidence was that in disclosing the opinion to Odendaal, she had the interests of the fund's beneficiaries at heart. The applicant identified a conflict of interest on the part of the trustees who were no doubt concerned with their own potential liability in circumstances where their fiduciary

duties lay with the beneficiaries. She thought that Odendaal, holding the position that he does in the union, would be able to act on the opinion, or have the union act on it. In this sense, the disclosure was made to a person who was manifestly interested in it – and in circumstances where the applicant was acting in the best interests of those who might benefit by it. In these circumstances, in my view, the applicant acted in good faith by making the disclosure that she did.

[26] Did the applicant reasonably believe that the information disclosed was substantially true? The threshold is not whether the information is actually true – all that is required is a reasonable belief that it is substantially true. This requirement must necessarily be read with the definition of 'disclosure' in s 1 of the Act. The definition refers to information which the employee making the disclosure has 'reason to believe... shows or tends to show' *inter alia* a failure to comply with any legal obligation. This formulation does not require an employee to believe that any wrongdoing has actually or definitely occurred; it is sufficient that the employee believes that the available evidence suggests that it has.

[27] In the present instance, the applicant's uncontradicted evidence was that she read the opinion to suggest that the trustees of the fund may be in breach of their fiduciary obligations and that they were potentially personally liable for the beneficiaries' loss. Contrary to what the respondent submitted, the correctness or otherwise of the opinion is irrelevant, as is its qualified nature. Also irrelevant is whether the trustees were subsequently found to be in breach of their fiduciary duties by a court or any regulatory body. If the PDA were to require an applicant in circumstances such as the present to wait for proof of the validity of a genuine concern or suspicion that is the subject of a disclosure, the purpose of the Act would invariably be defeated.

[28] On an assessment of the evidence, I am satisfied that at the time the applicant forward the opinion to Odendaal, she reasonably believed that the opinion to be substantially true in so far as it disclosed, potentially at least, a breach of fiduciary duty on the part of the fund's trustees and a consequent potential liability to the beneficiaries.

[29] This threshold having been met, the disclosure by the applicant is protected if (a) one or more of the conditions set out in s 9 (2) have been met, and (b) if it was

reasonable in all the circumstances of the case for et applicant to make the disclosure. In so far as s 9(2) is concerned, the applicant relies on paragraph (c) and (d) . In regard to paragraph (d), in *Theron v Minister of Correctional Services & another* (2008) 29 *ILJ* 1275 (LC), Nieuwoudt AJ expressed the view that this requirement did not mean that the employer had to be exceptionally blameworthy, it was sufficient that the consequences of the failure to comply with the obligation in question were exceptionally serious. I see no reason to depart from this construction – it resonates with the purpose of the Act and its endeavour to encourage whistleblowers in the interest of accountable and transparent governance in both the public and private sector (see *City of Tshwane Metropolitan Municipality v Engineering Council of SA & another* [2010] 3 BLLR 229 (SCA, at paragraph [42] of the judgment). Generally speaking, the consequences of any failure by trustees of a retirement fund to comply with a legal obligation would be exceptionally serious. In the present instance, the applicant's evidence was that some R150 million was lost in the Fidentia debacle . The fund put a figure of R40 million on the loss, but either way, the implications for beneficiaries are exceptionally serious, especially the minor beneficiaries whose stipends had been administered by the Living Hands Trust. For them, the consequences (which included the real possibility of being deprived of an education) could not have been more serious. The undisputed evidence was that these were the minor children of deceased members of the union, who were for the most part unskilled low wage earners, and that the stipends paid by the Living Hands Trust was in all probability the only source of income.

[30] In these circumstances, I am satisfied that the requirements of s 9 (2) (d) have been satisfied. It is not necessary therefore for me to canvass the argument that in any event s 9 (2) applied since the applicant had previously advised Mfeka that the failure properly to canvass the ability of guardians to manage benefits on behalf of minor beneficiaries was in breach of the Pension Funds Act, and that no action was taken.

[31] Turning next to the assessment of reasonableness, the list of factors in s 9 (3) is not exhaustive, nor are all of the listed factors are relevant in every case. In the present instance, of some significance is the factor listed under paragraph (a) – the identity of the person to whom the disclosure was made. The undisputed evidence was that at the time of the disclosure, Odendaal was not a trustee of the fund but in

his capacity as the union's national benefits officer, he attended board meetings and received 'board packs' prior to meetings of the board. He was also the union's primary contact person for matters relating to union members' retirement benefits, and was ultimately responsible within the union's structure for the management of these and other benefits. Had the applicant disclosed the opinion to a wider external audience, e.g. the press, it is less likely that her disclosure would be considered reasonable. But in the present instance, the opinion went no further than Odendaal, who, as I have observed, had a manifest interest in its contents. There was no breach of any duty of confidentiality towards any other person. The respondent appears to have had no measures or procedures in place for disclosure, and the absence of such mechanisms tend to support the reasonableness of an external disclosure. In my view, the disclosure of the opinion was reasonable.

[32] In summary: the applicant's disclosure of the opinion to Odendaal constituted a protected disclosure, and the fact that the disclosure was a primary reason for her dismissal has the result that her dismissal was automatically unfair for the purposes of s187 of the LRA.

Remedy

[33] The applicant seeks compensation. Section 194(3) of the LRA provides that in a case such as the present, the maximum amount that the court may award is the equivalent of 24 months' remuneration. The applicant's uncontested evidence is that she is 57 years old, and that since her dismissal, she has been unable to find meaningful employment. Her reputation has suffered, and these proceedings, it would seem, are as much about a bid to clear her name as they are about her pursuit of her statutory rights. On the other hand, the applicant was employed for a relatively short period, some 18 months. Further, in my view, it is fair to take into account the fact that when initially confronted by Mfeka, the applicant lied about whether she has disclosed the opinion to Odendaal. For the reasons stated above this is not relevant to causation, but it is a relevant factor in the assessment of compensation. Although I accept that at the time the applicant feared for her job, the fact remains that she lied to her employer. Having regard to these factors, the appropriate amount of compensation in my view is a sum equivalent to 12 months'

remuneration. The parties agreed that the applicant's remuneration at the time of her dismissal was R23 950 per month.

Costs

[34] The applicant has been substantially successful and there is no reason to deprive her of her costs.

I accordingly make the following order:

1. The applicant's dismissal was automatically unfair.
2. The applicant is awarded compensation in the sum of R 287 400.00, being the equivalent of 12 months' remuneration.
3. The respondent is to pay the costs of these proceedings.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances: For the applicant: Adv G Leslie, instructed by Malcolm Lyons & Brivik Inc

For the respondent: Adv F Venter, instructed by Thyne, Hunter, Esterhuizen Attorneys.