THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No. JS562/22

In the matter between:

NOMVULA MQIKELA **Plaintiff**

and

PRISTO RESPONSE TRADING **Defendant**

Heard: **29 - 30 May 2025**

Heads of Argument: **13 June 2025**

Delivered: **18 June 2025**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 18 June 2025.

JUDGMENT

MAKHURA, J

[1] The plaintiff, Nomvula Mqikela, referred an automatically unfair dismissal claim in terms of section 187(1)(d) of the Labour Relations Act[1] (LRA) against the defendant, Pristo Response Training.

[2] The facts of this matter are not controversial. The defendant provides security services. The plaintiff was employed by the defendant as a Human Resource Manager with effect from 3 June 2019. On 18 November 2020, she lodged a grievance against Samson Stimela Mapalakanye (Mapalakanye), the sole director and managing director of the defendant. The plaintiff complained about alleged unfair treatment including victimisation, abusive behaviour, favouritism which includes increasing other employees' salaries except hers, short payment of annual bonuses to the employees who in turn raised complains to her, being sidelined from human resources duties and meetings and the defendant's alleged failure to pay her *"bonus, salary adjustment and incentive bonus"*.

[3] The plaintiff complained that when Mapalakanye recruited her, they agreed that her salary would be adjusted during the salary increase of security officers and 8 months had elapsed since the adjustment of the security officers' salaries. She further complained that she had not been paid her bonus four months after her one year anniversary, and when she raised this issue with Mapalakanye, the conversation turned sour. On the incentive bonus, the plaintiff alleged that after the defendant made a huge saving, she and another employee suggested that the incentive bonus be added to their salaries, but they had received no response from Mapalakanye.

[4] The solution required by the plaintiff included a request for Mapalakanye to refrain from autocratic leadership and to treat the employees equally. The grievance was sent to Sello Moses Munyuku (Munyuku) by email. Munyuku was the plaintiff's line manager and the defendant's Operations Manager. Munyuku forwarded the grievance to Mapalakanye on the same day, 18 November 2020.

[1] Act 66 of 1995, as amended.

[5] Nothing happened insofar as the grievance was concerned until a year later when the plaintiff discussed it with Gideon Joubert Louw (Louw), the defendant's labour consultant. After their discussion, the plaintiff forwarded the grievance to Louw on 2 December 2021. Louw's company was engaged by the defendant in 2020 to provide human resources and industrial relations services. In her evidence, the plaintiff said that she had made enquiries with Munyuku since she lodged her grievance and was hoping for an amicable solution. She testified that Munyuku informed her that Mapalakanye was busy and that she decided to remain patient, hoping that the grievance would be resolved.

[6] On 19 January 2022, Louw addressed an email to Mapalakanye. He wrote:

> 'I saw the email below from Nomvula and thought long and hard on how the grievance can best be resolved. I thought it best that a neutral person assist in the facilitation of this grievance and propose a colleague of mine Liselette Loubser who can assist in facilitation and making recommendations in this grievance. Her services will be included in your retainer hours with us.
>
> Let me know if this is suitable to all parties concerned. I will then let her make contact to arrange for a suitable date for facilitation of this grievance.'

[7] On 27 January 2022, Louw addressed a further email to Mapalakanye and copied the plaintiff. He recorded that he was appointed to assist the defendant with general human resources and industrial relations matters, which included the facilitation of grievances. Further, that since the matter involved human resources and the director of the defendant, he did not want to get involved and proposed someone neutral. He continued:

> 'Be that as it may, I was advised by Mr Mapalakhanya (sic) today that he is not prepared to entertain this grievance.
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> In general, once a grievance has been lodged the agreed procedure needs to be followed in order to resolve the matter as soon as possible to bring closure to the process. If either management or the employee involved is not prepared to

> resolve the matter as per the procedure there is nothing I can do further to assist or facilitate in this grievance internally.'

[8] On the same day, the plaintiff responded to Louw's email, expressing her appreciation for his intervention in her grievance and indicating that she would proceed to seek external intervention.

[9] Mapalakanye was asked during cross-examination why he did not want to entertain the plaintiff's grievance. His response was that he was stressed and that the grievance was about personal matters and not work-related. In his evidence in chief, however, he disputed that he did not want to entertain the grievance. He said that he had a meeting with Munyuku and replied to the grievance. He also said that he gave Munyuku authority to deal with the grievance and appoint a neutral person to facilitate the grievance.

[10] On 31 January 2022, the plaintiff declared an unfair labour practice dispute and referred it to the Commission for Conciliation, Mediation and Arbitration (CCMA). She recorded that the dispute arose when she enquired about a salary increase and an incentive bonus, and sought that the defendant pay her the increase from 2020 and the incentive bonus per the agreement.

[11] Both the plaintiff and Louw testified that on 1 February 2022, Louw contacted the plaintiff telephonically and informed her of the possible retrenchment. The plaintiff testified that Louw informed her that Mapalakanye instructed him (Louw) to retrench her. It is common cause that Louw addressed an email on the same day informing the plaintiff that he was approached by Mapalakanye *"to look into the possibility of retrenching [her] as the HR manager as he want[s] to outsource this function"*. She then subsequently joined the union, the United Private Sector Workers Union (UPSWU), on the same day. The union appointed Divhani Ndou (Ndou), the current attorney of record, who was a union official at the time, to represent the plaintiff in the contemplated retrenchment.

[12] On 2 February 2022, Louw addressed an email to Ndou. He recorded that the defendant had not commenced the retrenchment process and that he had suggested a meeting between the plaintiff and Mapalakanye to discuss their differences and if necessary to negotiate a mutual separation agreement.

[13] During trial, the defendant put to the plaintiff that she knew of the possible retrenchment before 1 February 2022. In particular, it was put to her that Mapalakanye informed the employees of the possible retrenchment after the defendant lost a *"big"* contract with the Department of Water and Sanitation (DWS) in September 2021. The plaintiff disputed knowledge of this and indicated that that could be a meeting where she was not invited, which was part of her grievance. The plaintiff also disputed that the defendant lost a contract with the DWS and testified that the work with DWS was ongoing at the time of her dismissal. Mapalakanye, who was in Court during the cross-examination, testified that the contract the defendant lost was with the Department of Arts and Culture (DAC), not DWS. This led to the defendant's legal representative applying to recall the plaintiff to the witness stand. The application was granted. In dealing with this aspect, the plaintiff admitted that the DAC contract ended. She however said that the contract ended in June 2021, not September 2021 as alleged. Mapalakanye said that this contract had over 300 employees, an allegation that was disputed by the plaintiff who testified that under the DAC contract, the defendant had 99 employees.

[14] With regard to the contemplation to retrench, Mapalakanye testified in chief that the defendant contemplated retrenching after the contract with DAC ended. He said that he called the employees in November 2021 to inform them of the loss of the contract and the possible retrenchment. However, the employees who were appointed under the DAC contract were transferred to the new service provider after the expiry of the defendant's contract.

[15] During cross-examination, Mapalakanye said that he contemplated retrenching in January 2022. He was referred to the statement of defence, where the defendant

alleged that it contemplated retrenching as early as beginning of December 2021. Mapalakanye then said that the defendant contemplated retrenching in 2021.

[16] On 11 February 2022, the defendant issued a notice in terms of section 189(3) of the LRA. The notice was served on the plaintiff on 14 February 2022. The reason for the contemplated retrenchment was recorded as:

> 'The Employer experiences financial difficulties in the company and do not foresee that it will improve in the near future due to loss of contracts. A decision has therefore been taken to scale down and outsource certain functions an[d] positions.'

[17] The alternatives considered by the defendant were recorded as *"salary reductions and short time"* and these were rejected because they were not viable. The number of employees affected was one due to redundancy. In his evidence, Louw testified that he heard for the time about the retrenchment around 1 February 2022 when Mapalakanye asked him to draft the notice. Further, he testified that Mapalakanye informed him that the defendant had lost the contract and that it had outsourced the human resource services to Louw's company and therefore he did not need the position of the human resource manager.

[18] Despite Louw's evidence that he drafted the notice after discussion with Mapalakanye, Mapalakanye's evidence was that the notice was prepared by Munyuku after his discussion with him (Munyuku) and the instruction to prepare the notice. Mapalakanye also contradicted the 189(3) notice insofar as the issue of alternatives was considered. His evidence during the trial was that he would have *"accepted"* the salary reduction as an alternative and when he was referred to the notice, he said that there was a typing error. Further, Mapalakanye disputed the reason for the retrenchment insofar as it referred to the defendant outsourcing human resource functions. He said that the reason is *"wrong"*. Mapalakanye testified that despite having sight of the notice, he did not notice

these errors at the time and that he trusted Louw and Munyuku. He testified that there are no human resource duties at the site where the plaintiff was based and that is the reason for her retrenchment. This was however not part of the pleaded case nor was it put to the plaintiff. It was also not part of the reason contained in the section 189(3) notice.

[19] At least two retrenchment meetings were held, on 3 and 25 March 2022. The plaintiff had made it clear in these meetings that the retrenchment process was, as she put it, a *"mechanism"* to get rid of her. She maintained that the retrenchment was in retaliation to her grievance and the referral of the unfair labour practice dispute to the CCMA.

[20] She was notified of her dismissal on 1 April 2022, on a month's notice until end of April 2022. She referred an unfair dismissal dispute to the CCMA and subsequently referred the matter to this Court.

[21] The plaintiff has approached this Court claiming automatically unfair dismissal because she was dismissed for exercising her right in terms of section 187(1)(d) of the LRA. This section provides that:

> '(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is –
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> …
>
> *(d)* that the *employee* took action, or indicated an intention to take action, against the employer by –
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> (i) exercising any right conferred by *this Act*; or
>
> (ii) participating in any proceedings in terms of *this Act*;'

[22] The right referred to by the plaintiff in this case is her referral of an unfair labour practice dispute to the CCMA, not the grievance[2]. In the present case, there can be no doubt that whilst the plaintiff lodged a grievance in terms of the defendant's grievance procedure and/or the contract of employment, she also went further and referred a dispute to the CCMA in terms of section 186(2) of the LRA. Therefore, by referring this dispute, the plaintiff exercised her LRA right, which brings the claim squarely within section 187(1)(d). It is irrelevant whether her unfair labour practice dispute has prospects or not, as long as the dispute or claim is not frivolous or vexatious or the referral was not made *mala fide*.

[23] The defendant disputes the plaintiff's claim of automatically unfair dismissal and submits that the reason for her dismissal was related to its operational requirements and therefore fair. The plaintiff has not pleaded her case in the alternative, that is, that if the dismissal is not automatically unfair, it was nevertheless unfair in terms of section 188(1)(ii) read with section 191(5)(b)(ii) of the LRA. Therefore, if she fails to prove her case in terms of section 187(1)(d), that is the end of the enquiry and her claim should be dismissed.

[24] In *Baxter v Minister of Justice & Correctional Services & others*[3] *(Baxter)*, the Labour Appeal Court (LAC), relying on its judgment in *South African Chemical Workers Union and others v Afrox Limited*[4] *(Afrox)*, reiterated the test as follows:

> 'The test for determining the true reason is that laid down in *SA Chemical Workers Union & others v Afrox Ltd*. The court must determine factual causation by asking whether the dismissal would have occurred if the employee had not made the protected disclosure. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely

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[2] Contrast with *DBT Technologies (Pty) Ltd v Garnevska* [2020] ZALAC 26; (2020) 41 ILJ 2078 (LAC), where the LAC held that a grievance, which is lodged and processed under a grievance procedure and/or a contract of employment, relates to the employer's internal procedures and does not involve the direct exercise of a statutory right against the employer. This Court also followed the above LAC judgment in *Mkokeli v Bloomberg L P (Pty) Ltd* [2021] 6 BLLR 611 (LC); (2021) 42 ILJ 1224 (LC) at paras 16 – 20.

[3] (2020) 41 ILJ 2553 (LAC); [2020] 10 BLLR 968 (LAC).

[4] [1999] ZALAC 8; (1999) 20 ILJ 1718 (LAC).

whether such disclosure was the main, dominant, proximate or most likely cause of the dismissal. Thus, the court must enquire into the main, dominant, proximate or most likely reason for the dismissal. The employee bears the onus to establish at least a 'credible possibility' that the dismissal was for a proscribed reason. If the employee fails to discharge that onus, the Labour Court at its discretion may proceed to determine the substantive and procedural fairness of the dismissal in terms of s 158(2) of the LRA, as happened in this case.'[5]

[25] In *National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another*[6] *(Aveng)*, the Constitutional Court endorsed *Afrox*. It held that:[7]

> '[70] Determining the reason for a dismissal is a question of fact and the enquiry into the reasons for the dismissal is an objective one. One of the ways this can be done is to apply the test in *Afrox*. There is no basis on which to exclude an employer's operational requirements from consideration as a possible reason for dismissal. The causation analysis espoused in *Afrox* was premised on the fact that s 187(1)(c) use the phrase "if the reason for the dismissal is" and not the nature of the rights at play. While, admittedly, the provision itself does not place an injunction to utilise the *Afrox* test per se, I will demonstrate below that, in determining what the true reason for the dismissal is, the *Afrox* test is most useful.'
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> …
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> [74] In *Afrox* the issue was whether the dismissal occurred as a result of the employees' participation or support (or intended participation or support) in a protected strike in terms of s 187(1)*(a)* or whether it was based on the employer's operational needs by virtue of ss 188(1) and 189. The court held:

[5] *Baxter* at para 60.
[6] (2021) 42 ILJ 67 (CC); [2021] 1 BLLR 1 (CC).
[7] Ibid at paras 70 – 76.

> '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 and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not be utilized here.'

[75] And went on to state that:

> '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? … [T]he next issue is one of *legal* causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation.'

[76] In such cases, the court would determine what the factual and legal causes of the dismissal were by first asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is in the affirmative, the dismissal does not amount to an automatically unfair dismissal. If the answer is in the negative, the second leg is necessary: is such refusal the main, dominant, proximate or most likely cause of the dismissal? This means, as the Labour Appeal Court found, that the merits of the employer's decision in such circumstances must be examined.'

[26] Therefore, based on the test as formulated in *Afrox*, explicated in *Baxter* and endorsed in *Aveng*, the question is whether the plaintiff's dismissal would have occurred if she had not referred the unfair labour practice dispute to the CCMA. If the dismissal would have occurred, the plaintiff's claim should fail. If not, the next question is whether the referral of the unfair labour practice dispute was the main, dominant, proximate or most likely cause for the dismissal. If the latter question is answered in the positive, the plaintiff's claim should succeed.

[27] In *casu*, the plaintiff lodged a grievance on 18 November 2020. This grievance was ignored by the defendant. The plaintiff's testimony that she made enquiries with Munyuku who informed her that Mapalakanye was busy was not disputed. The grievance remained unattended by the defendant until she discussed it with Louw in November 2021. The plaintiff remained employed by the defendant.

[28] Louw sought to have the grievance facilitated by an independent facilitator. On 19 January 2022, Louw sought to make arrangement to start the process of facilitation of the grievance. On 27 January 2022, Louw addressed an email to Mapalakanye in terms of which he recorded that Mapalakanye was not prepared to entertain the grievance. The plaintiff, who was copied on the email, noted the contents of Louw's email and stated that she would seek assistance externally. Mapalakanye did not respond to the email from Louw nor did he respond to the plaintiff's email indicating her intention to seek external intervention. The plaintiff referred an unfair labour practice dispute to the CCMA on 31 January 2022. Within 24 hours of her referral, she was informed by Louw that the defendant intended to retrench her.

[29] The rationale for the retrenchment was financial challenges and the decision to outsource human resources services. The financial challenges were allegedly brought about by the loss of the DAC contract. This contract was lost in June 2021 according to the plaintiff's version or in September 2021 according to the defendant. The plaintiff disputed that the defendant had addressed a meeting where she was present about the contemplated retrenchment. Mapalakanye's evidence regarding the contemplated retrenchment changed with each question. In his evidence in chief, he contemplated retrenchment in November 2021. In cross-examination, it was in January 2022. However, he settled for what is set out in the statement of defence which was in 2021. Considering his evidence that the employees were transferred to the new service provider after the lapse of the DAC contract which ended in September 2021 on his version, his evidence that he held a meeting with the employees in November 2021 is rejected as improbable.

[30] Louw's evidence was that he was informed by Mapalakanye of the intention to retrench the plaintiff on 1 February 2022, which is the same day he contacted the plaintiff.

[31] As to the outsourcing of the human resources services, this was first communicated to the plaintiff by Louw on 1 February 2022 in an email where Louw informed the plaintiff that Mapalakanye asked him to look into the possibility of retrenching her because he wanted to outsource human resources. This was later recorded in the section 189(3) notice. Mapalakanye's contradiction in this regard was emphatic. He said the section 189(3) notice was *"wrong"*. He did not outsource the services. According to him, there was no human resources job in Pretoria, which is where the plaintiff was based. He said that there was no work because the defendant's clients are based outside the Gauteng province. This was, however not the case pleaded by the defendant nor was such a version put to the plaintiff.

[32] Insofar as the consideration of alternatives is concerned, Mapalakanye said that he would have accepted a salary reduction, contradicting the section 189(3) notice, which said that this alternative was considered but rejected as not viable. Once again, the section 189(3) notice contained an error according to Mapalakanye. This is further contradictory of the defendant's new case that there was no human resources function in Pretoria. If the defendant would have accepted a salary reduction to save her job, that suggests that the work remained available.

[33] There is no correlation between the section 189(3) notice, the case pleaded by the defendant in its statement and the evidence led by Louw and Mapalakanye on behalf of the defendant. Louw and Mapalakanye also contradicted themselves. Whilst Louw sought to have the *differences* between the plaintiff and Mapalakanye resolved amicably, Mapalakanye testified that there were no issues between him and the plaintiff. Louw's testimony was that he drafted the section 189(3) notice after discussion with Mapalakanye. Mapalakanye was, however, of

the view that the notice was prepared by Munyuku because that is whom he discussed the retrenchment with. There is in fact a disjuncture in the defendant's case from the time of issuing the section 189(3) notice to the oral evidence. The defendant's defence to the automatically unfair dismissal claim and its attempted justification of the retrenchment were incoherent and not credible.

[34] The evidence that the defendant contemplated retrenchment in 2021 is rejected as improbable. The probabilities, which I accept as true, are that the defendant contemplated the retrenchment of the plaintiff after receipt of the CCMA referral form on 31 January 2022.

[35] Having considered the evidence as analysed above, the defendant would not have embarked on a retrenchment process affecting the plaintiff only, if she had not referred the unfair labour practice dispute. I am satisfied that the most readily apparent and acceptable inference to be drawn from the evidence presented by both parties is that the plaintiff's referral of the unfair labour practice dispute is the main, dominant, proximate or most likely cause of her dismissal. The retrenchment was a façade, designed to hide the true reason to get rid of the plaintiff. The plaintiff has successfully established that her dismissal was automatically unfair within the meaning of section 187(1)(d) of the LRA.

[36] In her opening statement, the plaintiff submitted that she seeks maximum compensation, which is 24 months. In her closing arguments, she now seeks 20 months' compensation. Section 194(3) of the LRA provides that:

> 'The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.'

[37] Dismissing an employee for exercising her legal right using a disguised reason amounts to a misrepresentation of the true reason for the dismissal. The employer knows that the true reason is against the law and/or unsustainable and unfair and deliberately manufactures another reason to dismiss the employee.

The plaintiff has testified that she remained unemployed more than 36 months after her dismissal. Considering this evidence, her request for 20 months would in my view amount to a just and equitable compensation.

[38] The plaintiff earned R15 000.00 per month at the time of her dismissal. She is therefore entitled to R300 000.00, calculated as follows: R15 000.00 x 20 = R300 000.00.

[39] The plaintiff seeks costs of suit. The defendant left the issue of costs in the hands of this Court. The issue of costs is within this Court's discretion in terms of section 162 of the LRA. The plaintiff had to approach the Court to vindicate her right, whilst the defendant continued in its attempt to justify the misrepresentation. The Court must frown upon litigants who come before it with dirty hands. The requirements of law and fairness dictate that the plaintiff should not be out of pocket for vindicating her right. The defendant must be ordered to pay the plaintiff's costs.

[40] In the premises, the following order is made:

<u>Order</u>

1. It is declared that the dismissal of the plaintiff by the defendant on 1 April 2022 is automatically unfair.

2. The defendant is ordered to pay the plaintiff compensation in the amount of R300 000.00, being an equivalent of 20 months' remuneration.

3. Payment of the above amount must be made into the plaintiff's bank account (to be provided by her within 5 days of this judgment), within 21 court days of this judgment and order.

4. The defendant is ordered to pay the costs of suit.

M. Makhura

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Plaintiff: Mr D. Ndou

c/o Morudu D. Ndou Attorneys

For the Defendant: Mr S.J. Van Vuuren

Instructed by: M.R. Phala Attorneys