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13/10/21
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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 468/19

In the matter between:

SOLOMON KEKANA **Applicant**

and

RAILWAY SAFETY REGULATOR **Respondent**

Heard: **05 – 08 October 2021.**
Delivered: **13 October 2021 – *via* email to the parties.**
Summary: **A claim for automatically unfair dismissal within the meaning of section 187 (1) (h) of the Labour Relations Act (LRA)[1]. Where the principal reason for the dismissal is hidden, the *good faith* dismissal reason does not become the reason for the dismissal. It becomes the duty of the Court to penetrate through the invented reason rather than to accept it on face value. Where the Court reaches a conclusion that the invented reason (misconduct) is used to hide the real reason (making a protected disclosure) then the dismissal is automatically unfair.**

[1] Act 66 of 1995 as amended.

Reinstatement is a primary relief unless excluded, by way of evidence, by any of the exceptions in section 193 (2) of the LRA.

Contractual claims in the Labour Court are determined in terms of section 77 (3) of the Basic Conditions of Employment Act (BCEA)[2]. In order to succeed, an employee must first allege and prove the existence of an employment contract; the terms thereof; and the breach of those terms. Failure to allege and prove the terms of the contract to be enforced amounts to a failure to move from the starting block. Applicant failed to prove terms of a contract he is seeking to enforce. Section 34 of the BCEA has been breached because the respondent failed to prove that the applicant has agreed to the deduction in writing. Held: (1) the dismissal of the applicant is automatically unfair. Held: (2) the respondent is ordered to reinstate the applicant without any loss of benefits effective from the date of dismissal. Held: (3) the respondent is ordered to pay to the applicant the deducted amount of R7000.00. Held: (4) there is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction and relevant background.

[1] This is a referral made in terms of section 191 of the LRA in terms of which Solomon Kekana (Kekana) claims an automatically unfair dismissal, as well as a referral in accordance with section 77 (3) of the BCEA, in terms of which, Kekana brings a contractual claim, in which he challenges a deduction made to his salary, non-payment of a car and cellphone allowances. In addition, Kekana claims for the reimbursement

[2] Act 75 of 1997 as amended.

of the unlawful deduction from his final remuneration for the loss of the laptop that was allocated to him.

[2] The respondent, Railway Safety Regulator (Regulator) is an entity established in terms of section 4 of the National Railway Safety Regulator Act (NRSRA)[3]. The Regulator is established to oversee safety of railway transport, promote improved safety performance in the railway transport industry in order to promote the use of rail as a mode of transportation. As one of the functions of the Regulator, it is for it to conduct investigations into railway occurrences. In doing so, the Regulator is obligated to identify the root cause(s) within reasonable time after the occurrence. In order to carry out that investigative function, the Regulator is empowered to, at its discretion, appoint suitably qualified person(s) to carry any investigation. The primary purpose of investigating railway occurrences is for the prevention of similar occurrences in the future.

[3] Kekana was at the relevant time appointed by the Regulator as an Executive Manager: Occurrence Investigations. It became common cause during the trial that occurrence investigations fell under his portfolio. On 11 December 2017, Kekana agreed with Ms Tshepo Kgare (Kgare), the Acting Chief Executive Officer of the Regulator, that he would be taking annual leave in January 2018. He offered to be on standby should he be required when on annual leave.

[4] Unfortunately, whilst Kekana was on leave, on 4 January 2018, a train accident occurred at Geneva level crossing in Kroonstad in the Free State Province. Given the statutory responsibilities of the Regulator, an investigation as soon as reasonably possible was required. Two investigators were dispatched to the scene of the occurrence in order to commence with the statutory duty. Kekana had to cut his annual leave short and took the initiative to drive the investigations together with one Mr Eric Nkwinika (Nkwinika), a Principal Inspector. The investigators

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[3] Act 69 of 2008 as amended.

dispatched by Kekana and Nkwinika were unable to reach the occurrence scene timeously.

[5] On 5 January 2018, Kgare, without discussing with Kekana, procured the services of Dr Sprong using a deviation procedure, and appointed Mr Herman Bruwer (Bruwer), an Executive in her office, and the sourced Dr Sprong, purportedly using powers in terms of section 38 (8) of the NSRSA, to investigate the same occurrence. The dispatched investigators were at the scene from 4 to 6 January 2018. Kgare demanded reports, which were given to her. A number of drafts of the preliminary report were produced.

[6] Of significance, on 10 January 2018, Kekana placed a call to the Chief Financial Officer of the Regulator and disclosed the non-compliance with the Supply Chain Management (SCM) policy of the Regulator. He then distanced himself from what he considered a flawed process of the procurements that were happening.

[7] Ultimately, on 28 February 2018, Kekana made the first written disclosure of the alleged irregularities to Kgare. According to Kekana, after the disclosures, the victimization continued with Bruwer continuing to undermine him and interfering with his department. Such continuation prompted him to escalate the disclosures to the Chairperson of the Safety Committee of the board of the Regulator on 15 March 2018. Further disclosures of irregularities were made in the escalated disclosures.

[8] Seven days later, on 22 March 2018, Kekana was issued with a notice of intention to place him on a precautionary suspension. The first two allegations made in the notice of intention bore relevance to the disclosures made by Kekana. It was alleged that he failed to deploy appropriately resourced and skilled staff to the scene of the accident. Such failure on the part of Kekana was used to justify the intervention by the office of Kgare. The second allegations related to the occurrence at

Geldenhuys, on which occurrence, Kekana also disclosed some irregularities.

[9] Upon receipt of the notice of intention to suspend, Kekana on 26 March 2018 forwarded the document to the board member and informed Kgare as follows:

> "Since the issues and concerns I have raised with yourself are related to these allegations, I therefore think that it is better that these are addressed at the board level as per your email dated 22 March 2018."

[10] In addition to the intention to suspend notification, Kgare penned an email on 22 March 2018, acknowledging the two disclosures made to her on 28 February and 15 March 2018 respectively. Of significance, Kgare stated the following:

> "Since you have escalated the matter to Board level, I will account to them by making full representations on the issues raised. I have full confidence that the current Board of RSR will take appropriate action were (*sic*) there is any wrongdoing on my part or anyone else…"

[11] On the same day, 26 March 2018, the board member cautioned that Kekana must not be victimised for raising the issues. He implored Kgare to investigate and seek explanations for the alleged breach of internal processes. The following day on 27 March 2018, Kekana was placed on a precautionary suspension. On 15 May 2018, Kekana received charges of misconduct. He was charged with gross dereliction of duty in relation to the events of 4-6 January 2018. Kekana was indisposed and was unable to answer to the allegations. The disciplinary hearing was conducted in his absence. Notably, Bruwer, a person central to the disclosures was the sole main key witness at the disciplinary hearing.

[12] On 10 August 2018, the appointed chairperson, Mr Chaane (Chaane) returned a verdict of guilty in respect of all the allegations. On 7

September 2018, Chaane issued a sanction of dismissal of Kekana. On 17 September 2018, Kekana lodged an appeal. In terms of clause 9.7.3 of the Disciplinary Code of the Regulator, the CEO is empowered to appoint an appeal chairperson. Attorney Mothle (Mothle) was appointed to chair the appeal hearing. On 4 October 2018, Mothle was intend of hearing the appeal, but several postponements followed. Ultimately, the parties agreed that the appeal be determined on paper.

[13] It suffices to mention that in terms of clause 9.7.4 of the Disciplinary Code, Mothle was empowered to order a hearing *de novo* if it is found that the initial hearing contained gross procedural errors that were material to the employee's dismissal. On 5 December 2018, Mothle recommended that in the interest of justice and fairness the hearing be resumed *de novo* before a new chairperson. This he was duly empowered by the Disciplinary Code to do. That notwithstanding, Kgare on 12 February 2019 decided to accept the findings of Chaane and implemented the sanction of dismissal. This Kgare did, after she expressed the following view:

> "After considering the two rulings referred to above, I formed the view that your submissions to the appeal chairperson could not lead a reasonable trier of facts to arrive at conclusion different to that of the chairperson of the first disciplinary hearing"

[14] In the meanwhile, on 19 February 2018, the car allowance of Kekana was withdrawn after he failed to provide Kgare with information for the retention of the allowance. In addition, the salary of Kekana was reviewed following the finding that the earlier adjustment made to it was improper and that the rotational promotion lapsed after the two-year period. For a period of time when Kekana was still employed, he was paid a cellphone allowance. However, after his precautionary suspension, the allowance was withdrawn. Kekana was allocated a laptop as a tool of trade. The laptop was stolen. On the final remuneration to Kekana, the Regulator deducted an amount of R7000.00

in line with a Standard Operating Procedures (SOP) that was known to him.

[15] Aggrieved by his dismissal, the withdrawal of his allowances and the deduction of the laptop costs Kekana referred a dispute to this Court for adjudication alleging automatically unfair dismissal and a breach of his employment contract.

Evidence.

[16] To a greater degree, the relevant background facts and the evidence received by this Court had already been set out above. It suffices to mention that Kekana testified in support of his case and was the only witness in his case. In brief, he testified that he made a protected disclosure and his dismissal was as a result of making such disclosures. He believed that he did not derelict his duties as he did what was required to be done in respect of the train occurrences involved. The chairperson of the appeal exonerated him from the allegations. With regard to his contractual claim, he testified that the Regulator unilaterally adjusted his salary and deducted a certain amount as reflected by the adjusted salary on the payslips he presented in Court. He was entitled to a cellphone allowance since employment and its withdrawal upon suspension breached his employment contract because his remuneration outlined in his employment contract was reduced. He conceded during cross-examination that the cellphone allowance was only withdrawn during his suspension.

[17] Regarding the laptop, he conceded that in terms of the SOP, when a laptop allocated to an employee is lost, an amount of R7000.00 is payable. He testified that the laptop was old and he did not agree to the deduction of the costs. He testified that he wished to be reinstated.

[18] The Regulator tendered the testimony of three witnesses; namely; Kgare, Bruwer and Mr Khaya Madliwabinga (Madliwabinga). The testimony of

Madliwabinga was largely directed to the contractual claim. Given the view this Court takes at the end, it is unnecessary to narrate his testimony in this judgment. Bruwer testified virtually in another country. To a large degree, both Kgare and Bruwer were seeking to justify the dereliction allegations. Based on that the dismissal of Kekana, in their evidence, was fair.

Argument

[19] Mr Higgs (Higgs), appearing for Kekana, provided this Court with helpful written submissions. During oral submissions, he conceded that the claims for salary adjustment, cellphone and car allowance are bad in law. He however persisted with the laptop deduction claim and placed reliance on section 34 of the BCEA.

[20] On the other hand Mr Baloyi (Baloyi), appearing for the Regulator, forcefully submitted that Kekana did not make a protected disclosure. He, on his submissions, only outlined a difference of opinion or disagreement. He later relented and conceded that Kekana made a disclosure within the meaning of section 1 of the Protected Disclosure Act (PDA). He however submitted, with reference to the decision of *Baxter v Minister of Justice and Correctional Services and others*[4] that, Kekana failed to meet the legal causation test as adopted by the Labour Appeal Court (LAC). He further boisterously argued that the disclosures were not made in *good faith*. He implored this Court to dismiss the automatically unfair dismissal claim of Kekana. With regard to the contractual claim, he submitted that section 34 of the BCEA found no application. It was, he submitted, not necessary to follow the procedure outlined in the section because there was a SOP in place.

[21] He conceded that had Kgare accepted the recommendation of Mothle, Kekana would not have been dismissed. Ultimately, he argued that the entire claim should be dismissed with an appropriate order as to costs.

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[4] [2020] 41 ILJ 2553 (LAC).

Evaluation

[22] As indicated above, this trial involved two claims. The first relates to an alleged automatically unfair dismissal. The second is effectively an alleged breach of an employment contract as well as a breach of section 34 (1) (a) of the BCEA. For the sake of handiness, this Court shall deal with the contractual and breach of section 34 (1) claim first before dealing with the automatically unfair dismissal claim.

Breach of employment contract (review of salary; withdrawal of car and cellphone allowances)

[23] Section 77 (3) of the BCEA provides that the Labour Court has concurrent jurisdiction with the civil Courts to hear and determine any matter concerning a contract of employment. From this section, it is clear that what the Labour Court must determine is a matter concerning an employment contract. In other words, an employee must primarily allege and prove the existence of an employment contract as well as the terms upon which the contractual claim is predicated. In this claim, Kekana seeks a repayment of the reduced salary; payment of the car and cellphone allowances. In order to succeed; Kekana had to show that in terms of the employment contract, he is entitled to a particular salary; a car and cellphone allowances. In Court, Kekana produced his written contract of employment. The contract has no terms that suggest a particular salary or the allowances he is claiming.

[24] With regard to the salary, there is undisputed evidence that for a period of about two years, through the so-called rotation policy introduced by the erstwhile CEO, which was later withdrawn, he was promoted and his salary was adjusted based on that withdrawn policy. Once the board of the Regulator withdrew the rotation policy and the promotion lapses, there is no contractual basis to pay Kekana an adjusted salary. The claim was punted for in the pleadings as a deduction one. However, in truth, it

is a reversal of the unlawfully adjusted salary. In short, Kekana failed to show that he is contractually entitled to the adjusted salary. It is undisputed that the auditors who conducted an investigation found irregularities in the rotation policy that led to the salary adjustment. On application of the common law principle of *ex turpi causa non oritur actio* – no action can arise from an illegal act, the claim of Kekana is unenforceable.

[25] With regard to the car allowance, this was more a benefit as opposed to a contractual term. There is undisputed evidence that the board resolved to withdraw this benefit. Kekana was consulted to provide information in order to retain the benefit. He became renitence. As a result, the withdrawal of the benefit was implemented. It may well be so that Kekana would have been able to demonstrate that the withdrawal of the benefit amounted to an unfair labour practice. However, this Court lacks jurisdiction over disputes involving an unfair labour practice. Nowhere is it shown and or alleged that the terms of the car allowance policy forms part of the terms and conditions of the employment contract. Thus, a contractual claim in this regard must fail.

[26] With regard to the cellphone allowance, Kekana failed to show that he is contractually entitled to be paid a cellphone allowance. There is evidence from the Regulator that cellphone allowance is a tool of trade, which becomes suspended during a precautionary suspension. The period during which Kekana claims payment of cellphone allowance is the period when he was placed on a precautionary suspension. Again, the view I take is that since Kekana alleges that for a while since his employment he has been receiving this cellphone allowance benefit, it may well be so that he has an unfair labour practice claim with regard to its withdrawal.

[27] For all the reasons set out above, the contractual claims falls to be dismissed. I now turn to the breach of section 34 of the BCEA claim.

Breach of section 34 of the BCEA

[28] It is undisputed that Kekana was issued with a company laptop. At the time of his precautionary suspension, he was requested to return the laptop to the Regulator. It turned out that the laptop was stolen. It is also undisputed that in terms of the Standard Operating Procedure (SOP) once an employee loses a property of an employer an amount of R7000.00 is owed and leviable. It is also undisputed that when Kekana was paid his final pay, an amount of R7000.00 was deducted from his salary.

[29] The veritable issue is not the existence of the SOP, but whether Kekana has agreed, within the contemplation of section 34, to the deduction effected. Section 34 (1) of the BCEA, explicitly provides that an employer may not make any deduction from an employee's remuneration unless, subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement.

[30] It is clear from the provisions of section 34 (1) (a) that an agreement is contemplated, that agreement must be in respect of the debt and must be in writing. Although the SOP was mentioned in evidence, it was never alleged and proven that the SOP constitutes the written agreement referred to in the section. By definition, an agreement in law is a manifestation of mutual assent by two or more persons to one another. It is a meeting of minds in common intention, and it is made through offer and acceptance. It may be so that the SOP constituted a *pactum de contrahendo* (a promise to contract). Corbett JA pointed out that a promise to contract is not a contract[5]. In other words, the Regulator could have approached Kekana and indicated to him that he has in terms of the SOP agreed to agree to a deduction of a debt.

[31] Therefore, in the absence of a written agreement, the Regulator was prevented by law to make the deduction of R7000.00 from the remuneration of Kekana. Having made the deduction contrary to the law,

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[5] See *Hirschowitz v Moolman* 1985 (3) SA 739 (A) and *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA).

Kekana is entitled to be reimbursed. Mr Higgs predicated his argument on section 34 (2) of the BCEA. In the absence of a written agreement, it is not necessary to even consider whether the requirements set out in section 34 (2) (a) – (d) of the BCEA has been met.

[32] The conclusion this Court reaches is that the deduction of the R7000.00 was made contrary to the law and thus unlawful. On application of the principle of legality, the Regulator must be ordered to pay back the R7000.00 to Kekana.

[33] In passing, I do state that, it must have been simple, based on the SOP, for the Regulator to secure a written agreement from Kekana. Sadly, until then, the Regulator is gagged from making any deduction from the remuneration of Kekana. The legislator has used the phrase 'may not'. Where may is combined with not, there is no room for discretion. The phrase equates 'shall not'[6]

The automatically unfair dismissal

[34] The best way to start this part of the judgment is to say "*Yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.*"[7] Section 187 (1) (h) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is a contravention of the Protected Disclosures Act (PDA)[8] by the employer, on account of an employee having made a protected disclosures defined in the PDA.

[35] In terms of section 1 of the PDA, a disclosure means any disclosure of information regarding any conduct of an employer, or an employee of

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[6] See *Lethlake & Another v Metcash Trading* [2007] 28 ILJ 2006 (LC) and *Minister of Environmental Affairs & Tourism v Smith* 2004 (1) SA 308 (SCA)

[7] *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55.

[8] Act 26 of 2000 as amended.

that employer, made by any employee, who has reason to believe that the information concerned shows or tend to show certain aspects enumerated in subparagraphs (a) – (g) of section 1. Mr Baloyi attempted an argument that what Kekana did on 28 February 2018 and 15 March 2018 did not constitute a disclosure. However, with reference to subparagraph (g) – that any matter referred to in paragraphs (a) – (f) has been, is being or is likely to be deliberately concealed – he relented and conceded that the definitional requirements have been met. In my view, it should not have taken the reading of subparagraph (g) to make such a well-made concession. The provisions of section 1 are lucid and perspicuous. Once an employee has reason to believe that there is a possible impropriety and or non-compliance, such is sufficient for the purposes of section 1. For an example, in *Jhuti*[9], Ms Jhuti formed the view that Ms Mann was or might be infringing Ofcom's guidance reflected in the company's own policy, in terms of "Tailor-Made Incentives" (TMIs). When regard is had to the definition of a disclosure, five elements must exist, and those are: (a) disclosure of information, information being facts provided or learned about something or someone[10]; (b) the employee must believe that the disclosure is made in the public interest – not self-serving interest; (c) if the employee hold such a belief, it must be held reasonably; (d) the employee must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) – (g); and lastly (e) if the employee does hold such belief, it must be reasonably held.[11] The question whether all the five elements have been established, an evaluative judgment by the Court, in the light of all the facts of the case, is required. Often time this exercised is squared up with the reason to belief requirement as set out in the section.

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[9] Ibid FN 9.

[10] The information has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the section. See *Kilrane v London Borough of Wandsworth* [2018] ICR 1850. Those should be matters of wrongdoing – *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731.

[11] See *Williams v Michelle Brown AM* UKEAT/0044/19/OO and *T Lumb v Chief Constable of Greater Manchester Police* (EA-2020-000590-AT) dated 2 September 2021.

[36] On proper consideration of this matter, Kekana made the first disclosure to the CFO of the Regulator. To him, he disclosed that Bruwer, and Kgare have failed, are failing or are likely to fail to comply with the legal obligation to which they are subjected to. What is required is a reason to believe that the information concerned show or tends to show that failure. Section 217 of the Constitution of the Republic of South Africa (Constitution)[12] provides that when an organ of state or any institution identified in national legislation contract for goods or services, it must do so in accordance with a system, which is fair, equitable, transparent, competitive and cost-effective. On the stalwartness of section 217 of the Constitution, the Regulator is legally obliged to contract in a fair, equitable, transparent, competitive and cost effective manner.

[37] Section 217 (2) (a) provides that organs of state and institutions are not by virtue of subsection (1) prevented to implement a procurement policy providing categories of preference in the allocation of contracts. The Regulator contends that its Supply Chain Policy (SCM) allows it to deviate from the normal procurement procedures. This information arose *ex post facto* to Kekana; he was not kept in the loop when the deviation for a procurement "benefitting" his department was concocted and contrived by Bruwer and Kgare. I must point out that the SCM policy provides that a business unit must request a deviation. On the evidence of Kekana, the services procured were to be used in his business unit and him, as the executive of that business unit did not request that deviation. On the other hand, Kgare testified that she, as the accounting officer, was empowered by the legislation that begot the Regulator to be the business unit. Mercifully, in this judgment it is unnecessary to resolve that dispute. What goes is the reason to believe by Kekana. Truth of the allegation is not a requirement. If his reason to believe is accepted, there was failure to comply with a legal obligation. These matters are considered from the perspective of the employee as opposed to that of an employer.

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[12] Act 108 of 1996 as amended.

[38] Section 1 of the Public Finance Management Act (PFMA)[13] defines an irregular expenditure to mean an expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation including the PFMA. Generally, section 2 (1) of the Preferential Procurement Policy Framework Act (PPFA)[14] determines the framework of procurement. It is to be observed therein that a tendering system is contemplated. Thus, deviation from the tendering process is not normal and it is on face value unprocedural. Regulation 16A.6.4 of the Treasury Regulations, issued in terms of the PFMA, allows deviation when it is impractical to invite competitive bids. Section 1 of the PFMA also defines fruitless and wasteful expenditure to mean an expenditure which was made in vain and would have been avoided had reasonable care been exercised.

[39] In terms of section 38 of the PFMA, Kgare is legally obliged to comply and ensure compliance with the PFMA. Therefore, in an instance where an employee like Kekana has reason to believe that services are procured in an irregular manner, disclosure of such information amounts to a disclosure as defined.

[40] There is no dispute that on 5 January 2018, Kgare, in her capacity as an accounting officer deviated from the normal tendering procedures and sourced and acquired the professional services of Dr Sprong. This was done in order to attend to the statutory obligation to investigate a train accident that had happened a day before. This in the circumstances where the Regulator has employed staff responsible for investigations. On the version of Kekana, investigators employed in his department were dispatched, therefore dispatching Dr Sprong is potentially a fruitless and wasteful expenditure. It is common cause that when sourcing the services of Dr Sprong on 5 January 2018, Kekana was not involved when he is the executive responsible for investigations. Clearly, Kekana was entitled to hold a reasonable belief that Kgare was failing in her legal

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[13] Act 1 of 1999 as amended.

[14] Act 5 of 2000 as amended.

obligations. Kekana, testified, and he was not seriously challenged, that investigation work of the Regulator is a reactive as opposed to preventative exercise. It is aimed at establishing what happened and how what happened may be prevented in the future occurrences. This evidence makes logical sense, in that, the investigators cannot undo the accident. That then begs the question as to what was the urgency for to deserve a deviation from the normal procurement procedures, particularly in an instance where the Regulator has in its employ suitably qualified investigators. In the Court's view, there is a marked difference between urgency and pressure from the politicians and stakeholders, as testified to by Kgare. Such pressure cannot morph into urgency in order to justify deviation. Nevertheless, it is not the duty of this Court to find truth in the allegations made by Kekana.

[41] Further, there is no dispute that Bruwer was dispatched as a resource without the knowledge of Kekana. It became common cause that Bruwer was at that time the executive in the office of Kgare and was not appointed as an investigator. Owing to that legal difficulty, Kgare in complete machination, this Court must observe, testified that she invoked the statutory powers set out in section 38 (8) of the NRSRA. She simply does not have those powers. Those powers belong to the Regulator as an entity. Again, Kekana was entitled to hold a reasonable belief that Kgare was failing in her legal obligations.

[42] Therefore, this Court arrives at a conclusion that the first leg of the enquiry as suggested in *TSB Sugar RSA Ltd (now RCL Food Sugar Ltd) v Dorey*[15] has been satisfied. This Court is satisfied that Kekana made a disclosure to the CFO, Kgare, and the board member.

[43] The next enquiry is whether the disclosure is protected or not. In terms of section 1 of the PDA, a disclosure is protected if made to persons mentioned in subparagraphs (a) – (e). A disclosure to the CFO and Kgare meets the provisions of section 6 and 9 of the PDA. A disclosure

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[15] [2019] 40 ILJ 1224 (LAC).

to the member of the Safety Committee of the board meets the provisions of section 8 of the PDA.

[44] Section 6 requires *good faith* and where a prescribed procedure exists to substantially comply with that procedure. Kekana testified that he invoked the Ethics Code, which make provisions for reporting protected disclosures. During cross-examination, Mr Baloyi put to Kekana that his disclosures were not made in *good faith* as he was attempting to shield himself from being disciplined; that the disclosures he made were not true; and were not made to the relevant person or body. As indicated earlier, it is not a requirement that the disclosures must be true. As to *good faith*, there is no doubt in this Court's mind that the disclosures were made in *good faith*. It cannot be said that when Kekana made the disclosures, he was attempting to shield himself from being disciplined.

[45] On 10 January 2018, when he made disclosures of information about procuring services without following process and distancing himself from those processes, he had no clue that Kgare was toying with an idea to charge him for misconduct. As far as he was concerned, he had dispatched investigators to the scene of the accident. This lack of clue is fortified by the fact that Kgare testified that when she received what she considered a shoddy preliminary report by Kekana, she formed a view that Kekana has misconducted himself but did not verbalise that to him at all. The fact that she was seeking to obtain Human Resources Department advice to conduct discipline is nothing but a recent fabrication.

[46] On her own version, when she resorted to engaging Bruwer and Dr Sprong in the manner in which she did, she was actuated by the fact that Kekana had dispatched junior staff. Surely, she had all the reasons to confront Kekana who, on the undisputed testimony, had cut short his annual leave that his conduct was unbecoming given the pressure she was receiving from the Minister and the board.

[47] On the strength of the above testimony, how could Kekana have possibly known that misconduct charges were in the offing and the only way to divert those charges was to make a disclosure? It is improbable that Kekana made the protected disclosures in order to divert the non-existing charges. Kekana had no inkling that he misconducted himself and potentially facing chastisement. To demonstrate his *bona fides*, Kekana disclosed wrongdoing to the wrongdoer. He was transparent and did not even hide his identity when he made the disclosures. On acknowledging receipt of the emails of 28 February and 15 March 2018, Kgare acknowledged that what was disclosed to her was her and other persons' wrongdoing.

[48] In *Qonde v Minister of Education, Science and Innovations and others*[16], this Court stated that *good faith* means honesty or sincerity of an intention[17]. The conclusion this Court reaches is that Kekana was honest and sincere when he disclosed the information from 10 January 2018 up to and including 15 March 2018. Kekana only knew on 22 March 2018, literally few days after escalating the disclosures to the board, that he was to be disciplined.

[49] This Court is satisfied that Kekana made a protected disclosure. The last enquiry is whether Kekana was dismissed on account or partly on account of the disclosures, he made.

[50] It is common cause that Kekana was disciplined and dismissed – an occupational detriment. The Regulator contends that the reason why he was dismissed is that he misconducted himself. Kekana contends that he was dismissed because he made the disclosure in terms of the PDA. In *Kuzel v Roche Products Ltd*[18], it was held that a burden lay on an employee claiming automatically unfair dismissal to produce some evidence that the reason for the dismissal was that he or she made a

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[16] ((J874/21) dated 7 September 2021.

[17] Para 40 of the judgment.

[18] [2008] EWCA Civ 380

protected disclosure. Once that evidentiary burden is discharged, the *onus* is that of an employer to establish the contrary[19].

[51] Kekana categorically testified that he made a protected disclosure and that the dismissal occurred for reasons that he made a protected disclosure. After his testimony, and closure of his case, Mr Baloyi launched an application for absolution from the instance. That application was refused. The reasons are that the *onus* to justify the dismissal lies on the Regulator and at that time Kekana had produced credible testimony to show that he was dismissed for a proscribed reason[20].

[52] In seeking to justify the dismissal for reasons related to misconduct (invented reasons), the Regulator effectively tendered the testimony of Kgare and Bruwer. The task of the Court in this type of matters is to penetrate through the alleged invented reason rather than to allow to be swayed, as it were, by the invented reason. In *Dorey,* this Court concluded that an employee must establish a causal link between the dismissal and the protected disclosures. In seeking to find the link, this Court must look at, amongst others, the timing of the dismissal or disciplinary steps. There is no dispute that seven days after Kekana elevated the disclosure to the board, Kgare suddenly remembered that on 5 January 2018, three months ago, there was cause for the Regulator to take disciplinary steps against Kekana. Upon consideration of the allegations spelled out in the notice to suspend, Kekana observed that the allegations are related to the disclosures he made. Indeed, it turned out that a connection existed between the disclosed procurement of the services of Dr Sprong and the imposition of Bruwer into the investigations and the first two misconduct allegations that led to Kekana's initial discipline. This similar situation arose in *Dorey*.

[53] To demonstrate that the reasons were truly invented, Kekana was found guilty in *absentia*. In terms of the Disciplinary Code of the Regulator,

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[19] This was followed in *Dorey v TSB Sugar RSA Ltd* (JS287/2012) [2016] ZALCJHB 571 (3 November (2016), *per* Moshoana AJ, as he then was.

[20] See *Rockcliffe v Mincom (Pty) Ltd* [2007] 28 ILJ 204 (LC).

Kekana had the right to appeal. He appealed, and an independent attorney was appointed to chair the appeal hearing. The appeal chair recommended that a *de novo* hearing must be held. Kgare, applying her own interpretation of the Disciplinary Code, decided to reject the recommendation and thereafter dismissed Kekana on the strength of the initial discipline outcome. Perspicuously, if the independent appeal chair's recommendations were accepted a *de novo* hearing would have been held and the dismissal would have not been effected until the outcome of the *de novo* hearing, if cause to do so is found to exist. However, that situation of a *de novo* hearing would not have served the interests of Kgare because at that time she knew that Kekana had on 15 March 2018 disclosed hers and Bruwer's wrongdoings to the board. She already intimated in writing that the board would investigate the wrongdoings alleged by Kekana. Under those circumstances, it was in her interest to hide the real reason of the dismissal of Kekana. Once the initial dismissal emanating from the initial hearing is removed, as recommended by the appeal chairperson, the only reason that will remain to support the dismissal of Kekana will be the protected disclosures he made.

[54] In *Abernethy v Mott. Hay and Anderson*[21], Cairns LJ offered the following definition for the real reason for the dismissal of an employee; he said:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee"

[55] It is Kgare who knows why Kekana was dismissed despite the recommendation that a hearing *de novo* should take place in order to test the allegations, which, as admitted by her in evidence, bore relevance to the disclosures that were made against her and Bruwer. If the reason is that Kekana made a protected disclosure implicating her of wrongdoing, on the preponderance of the probabilities, she had all the reasons to hide

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[21] [1974] ICR 323.

this reason and invent a reason. It is important to state that an employee does not achieve immunity from discipline and or dismissal simply because that employee made a protected disclosure. An employee can make a disclosure and immediately thereafter misconduct himself or herself. For that reason, the protected disclosure must be the real reason for the dismissal.

[56] On the facts of this case and the probabilities weighed, the real reason must be that of Kekana having made the disclosure and not the invented reason of misconduct. In order to hide the true reason, Kgare interpreted clause 9.7.2 to suit her narrow interests. This Court had found unfairness in situations where a manager substitutes the sanction imposed by the chairperson of an enquiry[22]. In terms of the Regulator's Disciplinary Code, once the right to appeal is exercised, Kekana is entitled to an outcome of that appeal. Despite that, Kgare took it upon herself to overturn the decision of the independent chair to recommend a hearing *de novo*. It is perspicuous that getting rid of the whistle-blower reigned supreme in the mind of Kgare. After all, she is in charge, she is the accounting officer, and her view must prevail above the view of a qualified and trained lawyer. This is not a simple matter of procedural unfairness as submitted by Baloyi, but a matter of substantive fairness and legality. It must follow that had the implicated Kgare not imposed her way, a hearing *de novo* may have happened. As indicated above it was in the narrow interests of Kgare for the *de novo* hearing not to happen.

[57] The test for determining the true reason for the dismissal was laid down in *SACWU v Afrox Ltd*[23] and it is to first determine the factual causation by asking whether the dismissal would have occurred if Kekana had not make 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

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[22] See *Moloantoa v CCMA and another* (JR1281/19) [2021] ZALC 10 (31 May 2021).

[23] [1999] 20 ILJ 1718 (LAC)

causation, namely whether such making of the disclosure was the main, dominant, proximate or the most likely cause of the dismissal.[24]

[58] Just on, application of the causation test, the most likely cause of the dismissal of Kekana is the protected disclosure, taking into account that Kgare, the alleged wrongdoer, is the one who effected the dismissal. Section 47 B (1) of the English Protected Disclosures legislation employs the phrase "*on the ground that*". In interpreting that phrase, the English Courts applied causation as well. In *Aspinall v MSI Mech Forge Limited*[25], Reid HHJ stated amongst others the following:

> "For there to be detriment under section 47B 'on the ground that the worker has made a protected disclosure' the protected disclosure has to be causative in the sense of being the real reason, the core reason, the *cuasa causans*, the motive for the treatment complained of. "

[59] On the probabilities, Kgare must have had the motive to dismiss Kekana. Primarily, Kekana heavily implicates her in the disclosures he made. If her primary interest was to ensure discipline within the workplace, as exalted by the Disciplinary Code of the Regulator, she should have acted promptly and without lethargy. When she requested a comprehensive report from Kekana, she on her own testimony, knew that Kekana, had dispatched junior investigators on 5 January 2018 – an act of misconduct. When she received a shoddy preliminary report, she formed a view that Kekana derelicted his duties – an act of misconduct. That notwithstanding, she waited until the disclosures to the board to act on Kekana. It must follow that the findings made by Mr Chaane (Chaane), the initial chairperson, were made in *good faith* and based on the uncontroverted version placed before him. However, he must have known little that Kgare will base her dismissal on those findings found to

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[24] *Numsa and others v Aveng Trident Steel and another* [2019] 40 ILJ 2024 (LAC) at Para 68 and *Baxter supra* at para 84.

[25] [2002] EAT/891/01.

be wanting by Mr Mothle, the appeal chair. Given the motives of Kgare, who knew that the real reasons are proscribed, using the findings of Chaane was the most astute manner to hide the proscribed reasons. Similar to *Jhuti,* one Ms Vickers was used to decide in the absence of Ms Jhuti that Ms Jhuti was performing poorly when in truth, the real issue was about the disclosure in relation to the TMIs. Lord Wilson writing for the majority of the Supreme Court of the United Kingdom, in *Jhuti*, reached the following apt conclusion:

> "In the present case, however, the reason for the dismissal given in *good faith* by Ms Vickers (*in the present case Chaane*) turns out to be bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) (*in the present case Kgare*) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate trough the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

[60] This Court finds no conceptual hesitation to concur with the above reasoning in this matter. This Court leans comfortably to the state of mind of Kgare as opposed to the *good faith* decision of Chaane in order to find the reason for the dismissal of Kekana.

[61] In summary, for all the above reasons, this Court reaches a conclusion that Kekana made a protected disclosure and the real reason for his dismissal is that he made a protected disclosure. Such is a proscribed reason in terms of section187 (1) (h) of the LRA. Quintessentially, the dismissal of Kekana is automatically unfair. Unfairness is automatic once

the reason for the dismissal is proscribed. It is worth emphasising that regard being had to the timing of the intention to suspend, the allegation that "*given the nature of the accident and magnitude of fatalities, the OCEO had to intervene to ensure an appropriate response to the occurrence*"; there is a conspicuous connection between the protected disclosure and the discipline and the ultimate dismissal. It is not far off the mark to conclude that in acting against Kekana, Kgare was attempting to somewhat weaken the disclosure of the irregularities by glossing them with the justification to intervene because of the nature of the accident. Like in *Baxter*, the allegations serve as a fig leaf for the real reason for the dismissal.

[62] On the evidence that Kekana took the initiative to cut short his annual leave and that three investigators; namely; Kekana, Nkwinika and Ngidi were involved in the investigations; it is difficult to understand the allegations of gross dereliction of duty that was phantasmagorically invented to justify the dismissal of Kekana. It cannot be correct that only junior investigators were involved. The fact that Kekana and Nkwinika did not attend to the scene does not suggest that they were not part of the investigations. The enabling legislation require an investigation but does not prescribe how it should be carried out. The provisions of the investigation procedure drafted by Kekana were followed. More than two investigators were brought on board. Nkwinika was the lead investigator.

[63] Although truth of the disclosures is not a requirement, the fact that Bruwer and Dr Sprong were appointed irregularly is on the probabilities correct. Section 38 (8) of the NRSRA empowered the Regulator, as defined, to appoint investigators as opposed to Kgare. The Regulator as defined is the juristic person. In terms of section 8 (1) of the NRSRA, the Regulator is governed and controlled by a board of directors. In terms of section 8 (3) the board represents the Regulator and all acts performed by the board, or on its authority, are acts of the Regulator.

[64] Kgare cannot rely on section 11 to usurp, as it were, the powers of the board. Delegation requires a written resolution. No evidence was led to

demonstrate a written resolution. As indicated above, Kgare may only act on delegated powers in respect of the appointment of investigators. Nevertheless, on application of the principle of *delegate potestas non potest delegare* Kgare cannot delegate further to Bruwer to appoint investigators – Dr Sprong. The only power that Kgare can delegate is one conferred or imposed to her by the Act.

[65] In terms of section 15 of the SCM policy of the Regulator, all deviations from normal procurement processes must be requested by the business unit. There can be no doubt that the business unit responsible for occurrences is that headed by Kekana. It is common cause that on 16 January 2018, *ex post facto*, a submission was made by Bruwer to Kgare to approve the deviation in respect of the appointment of Dr Sprong. At that time, Dr Sprong had already attended to the scene and rendered an invoice for payment. Conducting an investigation cannot be an urgent or emergency work. In terms of the Act, the investigations must be conducted within reasonable time. On the face of it, the appointment of Dr Sprong does not satisfy the requirements of the SCM policy, thus an irregularity or impropriety.

[66] On the conspectus of the evidence before this Court, the allegations of gross dereliction are nothing but a ruse, and a fig leave to hide the true reason for the dismissal of Kekana.

The issue of relief

[67] In terms of section 193 (1) of the LRA the Labour Court may order the employer to reinstate the employee from any date not earlier than the date of dismissal. In terms of section 193 (2) the Labour Court must require the employer to reinstate the employee unless factors set out in subparagraphs (a) – (d) are shown to exist. So far, it is settled law that reinstatement is the primary remedy in terms of the LRA. Kekana testified that he wished to be reinstated. There is no *iota* of evidence from any of the Regulator's witnesses proving the existence of any of the

exceptions set out in subparagraphs (b) – (d). Thus, section 193 (2) obliges this Court to require the Regulator to reinstate Kekana.

[68] In the results, I make the following order:

Order

1. The dismissal of Kekana is automatically unfair.
2. The deduction of an amount of R7000.00 from the salary of Kekana is in breach of section 34 (1) of the BCEA.
3. The contractual claim of Kekana is dismissed.
4. The Regulator is ordered to reinstate Kekana effective from the date of his dismissal.
5. The Regulator is ordered to pay to Kekana the amount of R7000.00.
6. There is no order of costs.

Nasious. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	: Mr C Higgs of Higgs Attorneys, Randburg.
For the Respondent	: Mr M Baloyi of Baloyi Attorneys, Johannesburg.