HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

....
DATE SIGNATURE

Case No: 22142/16

In the matter between:

ADILA CHOWAN Plaintiff

and

ASSOCIATED MOTOR HOLDINGS (PTY) LTD 1st Defendant
IMPERIAL HOLDINGS LIMITED 2nd Defendant
MARK LAMBERTI 3rd Defendant

***Case Summary*: Delict – *Actio legis Aquilia* – Elements – Wrongfulness – breach of employer's duty not to subject employee to occupational detriments on account of making protected disclosure as contemplated in Protected Disclosures Act 26 of 2000 – conduct wrongful – *aquilian* claim succeeds.**
Delict - *Actio Iniuriarum* – impairment of dignity – actionable injury – *iniuria* claim succeeds.

JUDGMENT

MEYER J

INTRODUCTION

[1] The plaintiff, Ms Adila Chowan, is suing the first defendant, Associated Motor Holdings (Pty) Ltd (AMH), the second defendant, Imperial Holdings Limited (Imperial) and the third defendant, Mr Mark Lamberti, in delict under the *actio legis Aquilia* for pure economic loss that she allegedly suffered

through the wrongful and intentional acts of the defendants. In the alternative, she claims payment of damages in contract from AMH as a result of its alleged repudiation of the employment contract that was concluded between her and AMH on 16 March 2012. Furthermore, she sues Imperial and Mr Lamberti for payment of damages under the *actio iniuriarum* as a result of alleged injuries to her reputation (*fama)* and to her sense of self-worth (*dignitas)*. During the course of the trial a consent order was made, separating the questions of liability and the *quantum* of damages in respect of each claim and providing for the questions of liability to be determined first.

[2] Ms Chowan was employed by AMH in the capacity of group financial manager from 16 March 2012 until she was dismissed with immediate effect at the end of September 2015. Mr Harvey Adler was AMH's chief financial officer (CFO) at the time when Ms Chowan was appointed and the director to whom she reported. During June 2012, Mr Peter Hibbit was appointed in that position of CFO. He left the employ of AMH at the end of September 2014. During October – December 2014, Ms Chowan fulfilled not only her own duties as group financial manager, but she also 'held the fort' as far as the position of CFO is concerned. Mr Ockert Janse van Rensburg was appointed in that capacity and he has been the CFO of AMH since the beginning of January 2015. Mr Manny de Canha was at all material times the chief executive officer (CEO) of AMH.

[3] AMH is a subsidiary of Imperial. Mr de Canha held ten percent and Imperial ninety percent of the shareholding in AMH. Mr de Canha sold his ten percent shareholding to Imperial about a year prior to the commencement of this trial. Since then AMH underwent a name change to Motis Corporation. Mr Hubert Brody was the CEO of Imperial until the beginning of 2014. Mr Mark Lamberti took over the reigns as CEO from him since 1 March 2014. Mr Thulani Gcabashe was a non-executive director and group chairman of Imperial's board until the end of 2015.

APPLICATION FOR ABSOLUTION AT THE END OF MS CHOWAN'S CASE

[4] Ms Chowan testified and she also called, under *subpoena*, Mr Gcabashe as a witness. Once Ms Chowan's case was closed, AMH, Imperial

and Mr Lamberti made application for absolution from the instance in respect of all Ms Chowan's claims. I granted absolution from the instance only in favour of Imperial and Mr Lamberti in respect of the contractual claim. They were not parties to Ms Chowan's employment contract on which her contractual claim is founded. As far as Ms Chowan's *aquilian* claim against AMH, Imperial and Mr Lamberti, her contractual claim against AMH and her *inuria* claim against Imperial and Mr Lamberti are concerned, I concluded that there was evidence upon which a reasonable person might find for her. I was satisfied that she had made out a *prima facie* case in respect of those claims. (see *Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26A); *Claude Neon Lights (SA) Ltd v Dunhill* 1976 (4) SA 403 (A).)

[5] Furthermore, as far as Ms Chowan's *aquilian* claim is concerned, I took heed of the following passage in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 80:

'There may be cases where there is clearly no merit in the submission that the common-law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in light of all the circumstances of the case, with due regard to the relevant factors.'

Messrs de Canha and Janse van Rensburg thereafter testified on behalf of AMH, Imperial and Mr Lamberti.

THE EVIDENCE

[6] Ms Chowan is 42 years old at present. She obtained a bachelors degree as well as an honours degree in accountancy whereafter she served the three year period articles at Deloitte & Touche, from 1997 until 2000, in order to qualify as a chartered accountant. By the time she was head-hunted for the position of group financial manager at AMH, Ms Chowan already had extensive experience as a chartered accountant and in the corporate world. Once she qualified as a chartered accountant at the end of 2000, she stayed on at Deloitte & Touche in the capacity of audit manager for about a year.

She thereafter spent about a year in the United Kingdom where she was employed at Ernst & Young. Upon her return to South Africa, she joined Rand Merchant Bank where she worked in the capacity of treasury accountant for about three years. During 2004, she joined the Central Energy Fund (CEF); first in the capacity as financial manager and she was later promoted to the position of CFO, which position she held for about three of the seven years during her employment at the CEF. There she also acted as CEO for about three months and she occupied a number of other board positions. She was exposed to and gained experience at a strategic level.

[7] At the beginning of 2012, Ms Chowan was recruited for the position of group financial manager at AMH. She was interviewed by Mr Adler and underwent psychometric tests. Before she accepted the position in what was then a new industry for her, the motor industry, she wanted an assurance from Mr Adler that opportunities would be available to her within the Imperial group 'for career progression'. She testified that he assured her that–

'[t]here would be ample career opportunities of growth within Associated Motor Holdings and at large within the Imperial Group, because Associated Motor Holdings was a major subsidiary of Imperial Holdings.'

On the strength of that assurance, so Ms Chowan testified, she accepted the permanent position offered to her by AMH and her intention was to stay there for the long term, a minimum of ten years. She also added:

'I really enjoyed working at Associated Motor Holdings and I had seen myself actually growing within the Imperial Group.'

[8] When the then CEO of Imperial, Mr Brody, appointed Mr Hibbit as the CFO of AMH when Mr Adler had been moved into the position of COO, Mr Adler explained to Ms Chowan that Mr Hibbit was only going to be the CEO 'on a two year contract and that he was also there to groom [her] into the CFO position'. Mr Hibbit, according to Ms Chowan, came from an insurance industry background and she was responsible for most functions of his position as CFO. And, as she put it when she testified, he was quite happy with her work.

[9] Mr Hibbit decided to terminate his two year contract earlier and he left AMH at the end of September 2014. He informed Ms Chowan that he would be recommending her for the position of CFO, and he accordingly requested her to undergo a psychometric test to establish whether there were any 'gaps where [she] would need some development'. Ms Chowan underwent the psychometric test and neither Mr Hibbit nor anyone else ever informed her of any such 'gaps'. Mr Hibbit further discussed with her the successor to her position as group financial manager, should she be appointed as CFO.

[10] Around May or June 2014, upon being so advised by Mr de Canha's secretary, Ms Robyn Gilfern, Ms Chowan became aware that the position of CFO at AMH had been advertised and that Mr Sass Sassenberg of the recruitment firm ATI, had been appointed by Mr Lamberti to recruit candidates to enable AMH to appoint 'a top flight CFO'. On 2 June 2014, Ms Chowan was also interviewed for the position by Mr Sassenberg. Mr de Canha also arranged a meeting for her with Mr Lamberti, which took place on 20 June 2014. Before the meeting Mr de Canha informed her that Mr Lamberti will be interviewing her for the position of CFO. At the meeting Mr Lamberti requested her to go through her *curriculum vitae* and they talked about her career progression at the various entities where she had been employed, her personal background, education and family life. At the end of the meeting Mr Lamberti informed her that she would not be appointed as the CFO. She was upset. Mr Lamberti promised her that if she gave her full support to the CFO whom he appoints, 'he promises [her] a career path within one year' and that she would be properly compensated.

[11] The next day, 21 June 2014, Ms Chowan received an email from Mr Lamberti, in which he states:

'Thank you for our meeting yesterday – I know how difficult it must have been for you.

As you reflect on your career with AMH and Imperial I would like to place the following on record:

- Manny, Osman [Mr Arbee (CFO at Imperial)] and I will only appoint an AMH CFO who you can look up to and learn from (the attached briefing document

and my note on Imperial's CFO guideline gives you some sense of the type of individual we are targeting).

- We will support you in appointing better calibre subordinates to enable you to take on more challenging work and grow your capabilities.
- I give you a personal commitment that by virtue of the executive development interventions I intend introducing to the Group, you will be a more assured and competent leader one year from now. In this regard I attach a questionnaire for a "Covenant" discussion, which I intend to implement with the 80 or so most senior executives in the Group. Working through this may provide you with some clarity on how you might like your career to evolve.

Adila you are at a defining point in your career where, building on your technical accounting skills you have the potential to make the transition from a functional specialist to someone who will provide thought leadership not only to your subordinates, but to your colleagues and to the greater Imperial group.

Manny, Osman and I are committed to assisting you on this journey and hope that your deliberations over the coming days lead you to conclude as we have, that your interests and those of Imperial will be best served by you remaining with the Group'.

[12] The selection process was led by Mr de Canha who was to recruit someone 'supported by [Imperial's] CFO Osman Arbee and [Mr Lamberti]'. Mr Sassenberg sourced 154 candidates and shortlisted ten of them. Messrs Sassenberg and de Canha interviewed those ten and three potential candidates were identified, all white males. The three were also interviewed by Messrs Lamberti and Arbee. Mr de Canha recommended that Mr Janse van Rensburg be appointed, which recommendation was accepted by Messrs Lamberti and Arbee.

[13] Ms Chowan testified that she had been disappointed and had felt let down by the company. She was overlooked when Mr Hibbit was appointed as CFO and she was again overlooked when Mr Janse Van Rensburg was appointed despite the assurance that Mr Hibbit had given her that she would be appointed. She accordingly handed in her resignation on 25 June 2014. About a week later, on 3 July 2014, a meeting was held with her to discuss her resignation. The meeting included Messrs Lamberti, Arbee and de Canha. Mr de Canha was opposed to her leaving AMH and wanted to retain her services. He arranged the meeting so that a reassurance could be given

to her ‘that [she] had career progression with the Imperial Group’. At the meeting Mr Lamberti reassured her that she would be appointed into a CFO position within one year, not necessarily within AMH, but within the Imperial Group. On the strength of that ‘comfort and assurance’ she withdrew her resignation.

[14] Mr Janse van Rensburg commenced his employment as CFO at AMH on 5 January 2015. It is not disputed that Ms Chowan gave support to the new CFO. Ms Chowan, however, did not consider him to be the ‘top flight CFO’ who she had been told would be appointed in accordance with Mr Lamberti’s new ‘vision’ and requirements for that position. His performance, according to her, was not even on *par* with that of Messrs Adler and Hibbit when they held that position and she had to assume more responsibilities with Mr Janse van Rensburg in that position. He too, I accept, had the right academic qualifications with extensive experience as a chartered accountant and in corporate life. But he, it is common cause, had no experience in the motor industry and initially he had little understanding of the Imperial Group accounting and Ms Chowan had to explain such accounting practice to him as they went along. Under cross-examination, Mr Janse van Rensburg initially downplayed Ms Chowan’s assistance to him by saying that ‘she was not that helpful’, but later he conceded that at least those parts of the ‘AMH group strategy report’ which she had compiled was helpful and that her explaining the group’s accounting policies, assumptions and the complexity of the transactions to him, was helpful. It is common cause that the relationship between Ms Chowan and Mr Janse van Rensburg was strained and that Mr de Canha often intervened in order to resolve the issues between them. It is not necessary for a determination of this action to go into any detail regarding Ms Chowan’s complaints and views relating to Mr Janse van Rensburg’s performance as CFO, which are mostly disputed issues between them. It is, however, only necessary to refer to one incident between them, which upset Ms Chowan greatly.

[15] According to Ms Chowan, on one occasion when Mr van Rensburg had gone to her office they were discussing the new company vehicles that were

being given to employees and the new taxes to be levied in respect of such benefit. During the conversation she complained to him about the colour of the car that had been given to her; it was in a shade of brown. Mr Janse van Rensburg then made a comment, saying 'well the colour of the car suits your skin'. When she objected, saying to him that that was an inappropriate comment to make, he replied that he had a light or white colour car that suited his skin colour. Mr Janse van Rensburg admits that such a comment would have been inappropriate, if made, but he denies that he made such an inappropriate comment to Ms Chowan. He agreed that a conversation in which Ms Chowan's unhappiness with the colour of her company car had been raised by her happened in her office roughly during March 2015. According to him, however, he did not respond and they 'just carried on with normal business'. When he was cross examined on the improbability of his version that he would not have responded to her complaint, he replied thus:

'Ja, she did not lodge a complaint about the car, because then I would have said can we do something about it. But she did not lodge a complaint.'

She may not have lodged a complaint, but she told him about her unhappiness, and one would have expected him to say something, even simply that she should not let that upset her.

[16] What makes Ms Chowan's version about that incident even more plausible than that of Mr van Rensburg, is the fact that she at the time mentioned the incident to Ms Uvasha Singh, a group accountant at AMH, and she volunteered to take a polygraph test, which she was entitled to undertake in terms of AMH's policy, but her request was not acceded to. That comment, Ms Chowan testified, made her feel insulted; she 'never had anyone objectify [her] and say that [her] skin colour is similar to … the colour of a car'

[17] Ms Chowan testified that after Mr Janse van Rensburg had returned from a meeting with Mr Lamberti during March 2015, he told her that Mr Lamberti had told him to tell her that she would never be a CFO in the Imperial Group, that he did not believe that she had what it takes to be one and that she should be moved to another part of the AMH group. She was very upset, because she felt Mr Lamberti had reneged on the promise that he had made to her on 20 June 2014 that she would be appointed to that position

within the Imperial Group in one year's time. She also felt that it was inappropriate for Mr Lamberti to have told Mr Janse van Rensburg to convey that message to her. He, according to her, should have spoken to her personally. She thereafter raised the matter with Mr de Canha.

[18] When he was cross-examined, Mr de Canha said that he was not aware that Mr Lamberti had told Mr Janse van Rensburg to tell Ms Chowan that she would never be appointed to the position of CFO in the Imperial Group. When Mr Janse van Rensburg was cross-examined, he confirmed that he and Mr Lamberti had a meeting during March 2015 at which meeting they discussed Ms Chowan's suitability or readiness to become a CFO. Mr Lamberti, according to him, presented him 'with the facts … as well as her appraisal form on certain development areas that she still needed.' Mr Janse van Rensburg also agreed that he and Ms Chowan had a discussion about what he and Mr Lamberti had discussed on his return to the office, but he denied that Mr Lamberti asked him to tell her that she would never become a CFO within the Imperial Group.

[19] Again, I find the version of Ms Chowan on this disputed issue to be more probable. It is undisputed that she was very upset after the conversation between her and Mr Janse van Rensburg upon his return from the meeting in question, and that was why Mr de Canha arranged another meeting for Ms Chowan with Mr Lamberti. In this regard he said:

'I arranged the meeting because I got to a boiling point and I said, look, let us all get in the same room and let us try to resolve these issues.'

Mr de Canha also conceded that Ms Chowan had 'a gripe' with Mr Lamberti because he had not made good on his promise regarding the advancement of her career path within one year. Mr de Canha also confirmed that Ms Chowan did not wish to attend yet another meeting with Mr Lamberti, because she had lost confidence and trust in him and she was exploring opportunities outside Imperial since she could not deal with the way that she was being treated.

[20] The meeting was held on 15 April 2015. Present were Ms Chowan and Messrs Lamberti, Arbee, de Canha and Janse van Rensburg. It is undisputed

that Mr Lamberti told Ms Chowan that she is 'a female, employment equity, technically competent, they would like to keep her but if she wants to go she must go, others have left this management and done better outside the company, and that she required three to four years to develop her leadership skills'. (Counsel referred to these statements by Mr Lamberti as 'the utterance' and I adhere to such nomenclature.) Ms Chowan testified that Mr Lamberti had also told her in no uncertain terms that he would not be having any more meetings with her after that one.

[21] It is common cause that Ms Chowan was extremely upset. She went to see Mr de Canha after the meeting. It is common cause between them that she considered the utterance 'totally unprofessional and unacceptable'; there was no need for Mr Lamberti to have mentioned her race and her gender; she was made to feel that the only reason why she had been employed within the Imperial Group was because she was an 'equity employment employee'; she felt that she was being discriminated against; and she was deeply hurt and insulted. Ms Chowan testified that she categorised the utterance as part of racial and gender discrimination against herself, because she had never been addressed in that manner before, it humiliated her, degraded her, objectified her, and worse, it was being said in front of other senior executives. She took exception to the utterance 'in that particular setting'. She testified-

'Because I pride myself on the fact that I am a qualified professional chartered accountant. I had built my career. I had been a CFO. And in Mark Lamberti's eyes I was being narrowed down because of my colour and being female.'

And also:

'I had built my career. I had been a CFO. I had acted as a CEO. All those achievements was (*sic*) not being recognised, apart from the fact that I am now being objectified in terms of being a female empowerment equity candidate.'

[22] Ms Chowan also felt discriminated against in the light of AMH's poor performance on diversity in the workplace at that time as far as its senior leadership was concerned. It is common cause that they were all white males, except for a white female who was the CFO of Liquid Capital. Furthermore, in the two and a half years preceding mid-2015, there had been fourteen executives appointed by AMH of whom eight were appointed since

Mr Lamberti's appointment as CEO. Except for one Indian male, they were all white males. It is, therefore, undisputable that AMH, as far as its senior management was concerned, fared very badly in redressing the imbalances and wrongs of the past. When this was put to Mr Gcabashe when he testified, he confirmed that if those statistics were true 'it could be shocking'.

[23] When Mr Hibbit was interviewed during the investigation that followed, to which I return, he, according to the investigator, described the culture and white male domination at particularly AMH's head office as follows

'Hibbit said that the Imperial Group as a whole is a very hard culture. He said he did not know that it is necessarily racist, but it is not a warm embracing culture. Typically, at AMH head office, a lot of new junior staff were not white people and he said that they would probably find it a difficult culture to accept. With regards to the hiring of senior people, he said that his view is that it is a very white male dominated group. All senior positions in AMH are held by white males except for Kerry Cassel [Chief Executive of Liquid Capital] but she is white female.'

Ms Chowan and Mr de Canha agreed with those sentiments expressed by Mr Hibbit. Also Mr Janse van Rensburg agreed that that was indeed the situation when he arrived at AMH, but, he added, it 'certainly changed now'.

[24] Ms Chowan testified that Mr de Canha had apologised to her for the comments that Mr Lamberti had made to her. He further told her that he did not see her having a career within the Imperial Group, because Mr Lamberti would be obstructive to it and that he Mr de Canha would give her a very good reference. Ms Chowan believed that she had exhausted all internal avenues available to her. She indicated to both Mr de Canha and Mr Koornhof, the human resources manager at AMH, her intention to lodge a grievance against Mr Lamberti with the chairman of the Imperial Group, Mr Gcabashe. Mr Koornhof warned her 'that it would be a career limiting move if [she] raised a grievance against a powerful man like Mr Mark Lamberti'. But he never objected to the procedure she intended to follow on the basis that it would be in breach of AMH's grievance procedure. Mr Koornhof was not called as a witness to refute Ms Chowan's evidence in this regard. Mr de Canha conceded under cross-examination that he 'understood where [Ms Chowan] was coming from'. When Ms Chowan told him of her intention to lodge a

grievance against Mr Lamberti with Mr Gcabashe, he, Mr de Canha, had done what he could do and he thus tried to accommodate her by saying that she 'must do what she has to do'.

[25] In a letter addressed to Mr Gcabashe, dated 8 June 2015, Ms Chowan raised her grievance of racial discrimination and unfair treatment against Mr Lamberti. In this regard she said the following when she testified:

'All I wanted was an apology from Mark Lamberti for insulting me and offending my human dignity, and I wanted him to honour the promise he had made.'

[26] Mr Gcabashe responded to her by letter dated 18 June 2015, wherein the following is stated;

'You have submitted a letter, which set *(sic)* out a number of allegations against the Imperial Group CEO, under the heading "Grievance against Mark Lamberti". This letter was submitted to me in my capacity as the Imperial Group Chairperson.

Despite the fact that your letter does not follow the provisions of the Grievance Procedure itself, and therefore cannot be considered as part of it, the allegations are of a very serious and most troubling nature.

It is therefore necessary that a proper and detailed investigation must take place, to determine the veracity and accuracy of your claims, and that it is only once this has been determined, that the Company will be able to decide an appropriate way forward.

You will shortly be contacted by a relevant Executive of AMH to advise you of the basis of such an investigation.'

[27] Mr Gcabashe testified that he believed an investigation was warranted because of the nature of the complaint. Mr Lamberti reported to the board of directors of Imperial and Mr Gcabashe conceded that Ms Chowan could not report the matter to anyone else, apart from him, within the hierarchy – all others would have been junior to Mr Lamberti. Once he had received Ms Chowan's grievance, he took the matter to the 'Nominations Committee' and it was resolved to get an independent investigator to investigate and take statements from various witnesses to examine the veracity of the complaints.

[28] In a letter dated 22 May 2015 addressed to Mr de Canha but handed to Mr Koornhof on 18 June 2015, Ms Chowan also reported a formal grievance

against Mr Janse van Rensburg to Mr Koornhof. Therein she essentially raised his comment to her that the colour of her car matches that of her skin and the issues which she had with his performance as CFO. She concluded by stating that she sought the following through the grievance:

'1. The responsibilities between [herself] and the CFO be defined and his responsibilities are not passed onto [her].
2. The CFO gets more involved in the detail of the business and refrains from blaming [her] for things he does not understand, which is subsequently proved to be correct.
3. He goes on a management relationship course.
4. Apologise and refrain from making any discriminatory comment, based on race, gender and ethnicity.
5. Immediately desist from undermining [her] in front of staff.'

[29] By letter dated 18 June 2015, Mr Koornhof advised Ms Chowan *inter alia* that-

'…it is proper that the person appointed to conduct this investigation has a clear field in which to operate.

It has therefore been decided that it would be most appropriate to suspend you from your normal duties, during the conduct of this investigation. I have noted that your allegations also involve your immediate line officer, Ockert Janse van Rensburg. Under these circumstances, and the undoubted difficulties and tensions that they will cause, it is my considered opinion that this is the best step to take.

The purpose of this letter is therefore to inform you that you are suspended from your duties with immediate effect. . . .

Should you wish to bring any reasons to the attention of the Company, as to why you should not be suspended, you may make written representations to me, Otto Koornof in this regard. Such representations should be made before close of business on Monday the 22nd June 2015.'

[30] Neither Mr Gcabashe nor Messrs de Canha nor Janse van Rensburg could give any plausible explanation for why Ms Chowan (who was in the position of a complainant) was summarily suspended, or why Messrs Lamberti and Janse van Rensburg were not also so suspended. Furthermore, no plausible explanation could be proffered for suspending her prior to giving her the opportunity to make representations as to why she

should not be suspended. And Mr Koornhof was not called as a witness. Ms Chowan testified that on 18 June 2015, she was marched out of the premises by Mr Koornhof, her laptop and office keys were taken from her and other employees could hear the conversation. Ms Chowan responded to the invitation to furnish reasons why she should not be suspended pending the investigation in a letter addressed to Mr Koornhof, which she submitted to him on 22 June 2015, but there was no positive outcome for her and she remained suspended.

[31] The firm of attorneys, Dewey Hertzberg Levy Inc., was appointed to conduct the grievance investigation. A senior associate of that firm, Ms Merlisha Haripal, was mandated to conduct the investigation. She held interviews with Ms Chowan, Mr Hibbit, Ms Singh, Mr Janse van Rensburg, Mr de Canha, Mr Andrew Mackey, Mr Arbee, Mr Lamberti and Mr Koornhof. Her report on the interviews was placed before me as part of the exhibits. On 24 June 2015, she interviewed Mr Koornhof. She *inter alia* reported:

'Otto [Mr Koornhof] said that he and Ockert [Mr Janse van Rensburg] then travelled to Imperial's Head Office for the 13h00 meeting with Mark [Mr Lamberti]. In that meeting, Mark explained the process that they wanted Otto to follow with Adila [Ms Chowan]. Otto said that he mentioned to Mark that he already had good insight into the issues. Mark then gave Otto the letters and asked if he had any comment or concerns. Otto said that he mentioned that there could be a problem around the suspension because in terms of the law, they would need to give her an opportunity to defend herself before she was suspended. Otto said that Mark phoned Andrew Levy in that meeting and Andrew felt that it was not going to be a problem. Andrew advised that if Adila had a problem with the suspension, she could raise it in writing. The other concern that Otto had was whether she might object against handing in her laptop as he was worried that there would be a confrontation in the office as she may have personal information on the laptop. Otto said that Mark said that if that happened, he was to get security to escort Adila off the premises.'

What is disturbing here, and not explained by any witness, is Mr Lamberti's involvement in the 'process they wanted Otto to follow with Adila' and in the suspension of Ms Chowan. Furthermore, the question raised by Ms Chowan when she testified about the independence of the investigation in the light of

the fact that the same firm which advised Mr Lamberti on her suspension had been appointed to conduct her grievance investigation, remains unanswered.

[32] The investigation was concluded by the 20th July 2015. The report of the investigation does not contain any findings nor recommendations. Mr Gcabashe testified that the record was tabled at a meeting of Imperial's non-executive directors. The report was also given to Imperial's legal advisor. The investigator also addressed that board meeting. It was then resolved that Ms Chowan's allegations against Mr Lamberti and against Mr Janse van Rensburg were 'completely without foundation' and 'devoid of substance'.

[33] By letter dated 20 July 2015, Mr Gcabashe advised Ms Chowan thus:

'I refer to the letter you submitted to me on the above date [8 June 2015], headed "Grievance against Mark Lamberti".

I also refer to your letter which although dated 22nd May 2015, was handed to Otto Koornhof on 18th June 2015 immediately after he informed you of your suspension. This letter was addressed to Manny de Canha, and was headed "Grievance against Ockert Janse van Rensburg (CFO)".

Since the matters clearly had common links, as you are aware, after consultation with the Nominations Committee of Imperial Holdings Limited, I gave instructions that the allegations in your letters be investigated by an independent outside party.

This examination has now concluded, and the statements are delivered herewith for your reference.

I am satisfied that your allegations are completely without foundation in fact, and are devoid of substance.

Accordingly your 'grievance' application is dismissed, and is now closed.

However, this does not mean that this is the end of the matter. As your actions constitute misconduct and an abuse of the grievance procedure, it has been decided to institute the disciplinary procedure. Disciplinary charges will be drawn up and issued to you by an AMH executive within a matter of days.'

[34] It is not clear, on the evidence before me, why the decision was taken to institute the disciplinary action against Ms Chowan, particularly in the light of Mr Gcabashe's decision, after he had consulted the Nominations Committee, 'that a proper and detailed investigation must take place' notwithstanding 'the fact that [Ms Chowan's] letter [addressed to him] does

not follow the provisions of the grievance procedure itself, and therefore cannot be considered as part of it', as conveyed to Ms Chowan in his letter dated 18 June 2015. Furthermore, the CEO of AMH, Mr de Canha, at the very least, acquiesced (tacitly consented) to Ms Chowan following the procedure to direct her grievance to the chairperson of the Imperial Group, that board being the only entity to which Mr Lamberti reports. Also, it was not Ms Chowan who directed her grievance against Mr Janse van Rensburg to Mr Gcabashe nor did she request that it be investigated in the same way as her grievance against Mr Lamberti. There is, in my view, much force in the argument of Adv D Mpofu SC, who appears for Ms Chowan with Adv G Badela, that once Imperial's board of non-executives had resolved that Ms Chowan's allegations were without foundation and substance, the matter should have rested right there, an issue to which I return.

[35] By letter dated 24 July 2015, Mr Koornhof informed Ms Chowan that her suspension would continue 'until such time as her disciplinary hearing has delivered its findings'. On 30 July 2015, the disciplinary charges were served on Ms Chowan. The disciplinary hearing was held on 26 and 27 August 2015. An attorney, Ms Vanessa de Souza from the law firm Garache de Souza Inc., presided. On 4 September 2015, Ms de Souza recommended that Ms Chowan be dismissed with immediate effect. AMH confirmed Ms Chowan's dismissal at the end of September 2015.

[36] Neither Mr de Canha nor Mr Janse van Rensburg instilled much confidence when they were in the witness stand. I have already referred to certain unsatisfactory features in the evidence of Mr Janse van Rensburg. A few examples, which adversely impact on the credibility of Mr de Canha, suffice: Under cross-examination he testified that he was unaware that Mr Hibbit recommended Ms Chowan to become CFO at the time when Mr Hibbit left AMH and he refused to make any concession in that regard despite the fact that it was pointed out to him that his evidence at Ms Chowan's disciplinary hearing was to the effect that he himself at the time asked Mr Hibbit whether he would recommend Ms Chowan to become CFO, which Mr Hibbit confirmed. And in answer to a question from Ms Chowan during the

disciplinary hearing, Mr da Canha answered her: 'Peter Hibbit had recommended you for the position.' Once counsel had pointed out the different passages of the exchange between him and Ms Chowan at the disciplinary hearing, the following exchange took place between counsel and Mr de Canha in this court:

'So you are aware of the recommendation by Peter Hibbit for Adila to hold the position which we know the position … [intervenes] --- Correct.

So are you prepared to change your answer … [intervenes] --- No, I am not going to change my answer.

Okay, so you stick by your answer that you are not aware that Peter Hibbit made a recommendation for Adila to hold the position? --- No.'

Mr de Canha was also evasive as to whether Ms Chowan acted as the AMH CFO for three months and on Mr Lamberti's involvement in appointing and directing the investigation against him. Furthermore, the failure to call material witnesses, such as Messrs Lamberti and Koornhof, who were available, warrants an adverse inference in all the circumstances. By contrast, Ms Chowan was a singularly impressive witness. She, in my view, is a credible witness and her evidence is reliable.

PROTECTED DISCLOSURES ACT 26 OF 2000

[37] The provisions of the Protected Disclosures Act 26 of 2000 (the PDA) are central to Ms Chowan's *aquilian* claim and her alternative contractual claim. Section 3 provides that '[n]o *employee* may be subjected to any *occupational detriment* by his or her *employer* on account, or partly on account, of having made a *protected disclosure*. The objects of the PDA, in terms of s 2(1) thereof, are:

'(a) to protect an *employee*, whether in the private or the public sector, from being subjected to an occupational *detriment* on account of having made a *protected disclosure*;

(b) to provide for certain remedies in connection with any *occupational detriment* suffered on account of having made a *protected disclosure*; and

(c) to provide for procedures in terms of which an *employee* can, in a responsible manner, disclose information regarding *improprieties* by his or her *employer*.'

[38] Section 1 defines 'disclosure' as '. . . any disclosure of information regarding any conduct of an *employer*, or an *employee* of that *employer*, made by any *employee* who has reason to believe that the information concerned shows or tends to show', *inter alia*, '. . . (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)'. A 'protected disclosure' is defined as a disclosure made to '(a) a *legal* adviser in accordance with section 5; (b) an *employer* in accordance with section 6; (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7; (d) a person or body in accordance with section 8; or (e) any other person or body in accordance with section 9, . . . ' And '"occupational detriment", in relation to the working environment of an employee' is defined as meaning, *inter alia* '(a) being subjected to any disciplinary action; (b) being dismissed, suspended, demoted, harassed or intimidated; . . . '

[39] Section 6 deals with a protected disclosure to an employer and provides as follows:

'(1) Any *disclosure* made in good faith;

(a) and substantially in accordance with any procedure *prescribed*, or authorised by the ***employee's*** *employer* for reporting or otherwise remedying the *impropriety* concerned; or

(b) to the *employer* of the *employee,* where there is no procedure as contemplated in paragraph (a),

is a *protected disclosure*.

(2) Any *employee* in accordance with a procedure authorised by his or her *employer*, makes a *disclosure* to a person other than his or her *employer*, is deemed, for the purpose of *this Act* to be making the *disclosure* to his or her *employer*.

[40] The Promotion of Equality and Prevention of Unfair Discrimination Act was enacted '[t]o give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and to prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith'. This was done, as is stated in the

preamble of that Act, *inter alia* in recognition that '[a]lthough significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes undermining the aspirations of our constitutional democracy'. Section 9 of the Constitution, as is also stated in the preamble, provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality'.

[41] Section 4(2) provides that the following should be recognised and taken into account in the application of that Act:

'(a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and

(b) the need to take measures at all levels to eliminate such discrimination and inequalities.'

[42] Section 1 defines 'discrimination' as-

'…any act or omission including a policy, law, rule, practice, conditional situation which directly or indirectly –

(a) imposes burdens, obligations, or disadvantage on; or

(b) any person or one or more of the prohibited grounds'.

The 'prohibited grounds' are:

'(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)'.

[43] Adv NA Cassim SC, who appears with Adv R Itzkin for AMH, Imperial and Mr Lamberti, argues that Ms Chowan did not make a protected

disclosure as contemplated in the PDA: First, so he argues, she lodged a grievance which did not contain a *bona fide* disclosure of any impropriety. Second, she did not do so in the reasonable belief of its truthfulness. Third, she did not report it through the appropriate reporting channel, but instead address a 'grievance' to the chairman of Imperial's board of directors. Fourth, the disclosure on which she relies is excluded from being a protected disclosure by s 9(b) of the PDA, which provides that '[a]ny disclosure made in good faith by an employee . . . who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true . . . and . . . *who does not make the disclosure for purposes of personal gain*, . . . is a protected disclosure . . .'. (Emphasis added.) I cannot agree with these submissions for the reasons that follow.

[44] Section 6 of the PDA, and not s 9, finds application in this case. The scheme of the PDA encourages internal procedures and remedies to be exhausted before the disclosure is made public. (See *Tshishonga v Minister of Justice and Constitutional Development and another* [2007] 4 BLLR 327 (LC), para 196. The requirements for protection become more onerous as the disclosure becomes more public. As was held in *Tshishonga*, para 198:

'The tests are graduated proportionately to the risks of making disclosure. Thus the lowest threshold is set for disclosures to a legal advisor. Higher standards have to be met once the disclosure goes beyond the employer. The most stringent requirements have to be met if the disclosure is made public or to bodies that are not prescribed, for example the media.'

[45] The requirements for protection of a disclosure to an employer in terms of s 6 of the PDA, read with the definition of disclosure in s 1, are that it must be 'information' that the employee 'has reason to believe' shows or tends to show the commission of a listed impropriety, the disclosure must be made 'in good faith' and substantially in accordance with any prescribed or authorised procedure for the reporting of the impropriety, or to the employer where there is no such procedure.

[46] The procedure followed by Ms Chowan in reporting her grievance to the group chairman of Imperial's board of directors was, as I have held,

consented to by the CEO of her employer, AMH. It thus follows that it was an 'authorised procedure' within the meaning of s 6(1)(a) of the PDA and, although she made the disclosure to a person other than her employer (AMH), it is, in terms of s 6(2), deemed to be one made to her employer. Furthermore, it was Mr Gcabashe, having taken the matter to the Nominations Committee, who resolved to refer Ms Chowan's grievance to an independent investigator for 'a proper and detailed investigation' and to refer her grievance against Mr Janse van Rensburg, which she handed not to him but to AMH's group human resources manager, to the same investigator for simultaneous investigation. It can in all the circumstances not be said that Ms Chowan's disclosure was an external one that falls under s 9 of the PDA and to which the more stringent requirements – *inter alia* that it may not be made for purposes of personal gain – apply in order for it to be protected.

[47] I am of the view that Ms Chowan also satisfies the requirement of 'reason to believe that the information concerned shows or tends to show' unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act. The test for determining whether an employee had the requisite 'reason to believe' is subjective and objective. The employee who makes the disclosure is required to hold the belief and that belief has to be reasonable, or as was said in *Tshishonga*, para 185, 'whether the belief is reasonable is a finding of fact based on what is believed.' The information contemplated in the definition of 'disclosure' in s 1 of the PDA includes 'such inferences and opinion based on facts which show that the suspicion is reasonable and sufficient to warrant an investigation.' (*Tshishonga,* para 179.) Furthermore, as was also held in *Tshishonga* para180,:

'The standard of quality that the information must meet is pitched no higher than requiring the impropriety to be "likely". It is enough if the information "tends to show" an impropriety. That anticipates the possibility that no impropriety might ever be committed or proven eventually. If the suspects are cleared, the protection will not be lost. "Likely" and "tends to show" must therefore mean that the impropriety can be less than an improbability but must be more than a mere possibility.'

[48] I have extensively dealt with the context in which Ms Chowan ultimately directed her grievance to Mr Gcabashe. She is academically appropriately qualified, has extensive experience as a chartered accountant and in corporate life, had held the position of CFO in the past and also acted as CEO on one occasion, she is experienced in the motor industry, she is on everyone's version technically good, she has held the fort for three months at AMH in the absence of a CFO, she enjoyed the support of two previous CFO's to be appointed in their positions as CFO when they vacated that position and Mr Lamberti himself, it is undisputed, promised her that she would be appointed into the position of CFO within the Imperial Group within one year from the time when he made that promise. Furthermore, at the time when she directed her grievance of gender and racial discrimination to Mr Gcabashe, the senior management of AMH was white male dominated and, with one exception, the last fourteen appointments were all white males. Again a white male, who had no experience in the motor industry at the time of his appointment and little understanding of the Imperial Group accounting and complexity of the transactions, was appointed as the AMH CFO, and not her. Ms Chowan's inference of racial and gender discrimination against her based *inter alia* on those facts, as well as what had been said to her by Mr Lamberti when he made the utterance, was justified and an 'impropriety' as contemplation in the PDA was, at the very least, likely. It is common cause that Ms Chowan subjectively believed that she was the victim of unfair discrimination based on race and gender. Her subjective belief, in my judgment, was a reasonable one within the meaning of the definition of 'disclosure' in s 1 of the PDA.

[49] In *Street v Unemployed Workers' Centre* [2004] 4 All ER 839 para 41, Auld LJ considered the meaning of the requirement 'in good faith' for a disclosure to qualify as a protected disclosure as contemplated in a legislative instrument - the purpose of which is to protect individuals who made certain disclosures in the public benefit and to allow them to bring an action in respect of victimisation – and attributes the following meaning to the words:

'Shorn of context, the words 'in good faith' have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus in the context of a claim

or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true of reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it is made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious purpose.'

[50] Ms Chowan's wish for an apology from Mr Lamberti for, as she viewed it, insulting her and offending her human dignity, and for him to honour the promise that he had made to her, do not seem to me to be sufficient reason to find that the disclosure had not been made *bona fide*. (Compare *Grieve v Denel (Pty) Ltd* [2003] 4 BLLR 366 (LC) para 12.) She reasonably believed in the truth of the content of her statement and made it with honesty and sincerity of intention aimed at remedying the wrong. She, in my view, has established that her disclosure to Mr Gcabashe was also made *bona fide.* There is not a single fact presented in this trial, which dissuades me from arriving at this conclusion. Ms Chowan exhausted the internal avenues available to her before she elevated an indisputably serious matter to the Imperial group chairperson. He, himself, considered her allegations to be 'of a very serious and most troubling nature', which, despite the fact that her letter to him 'does not follow the provisions of the Grievance Procedure itself', warrant 'a proper and detailed investigation'.

[51] The disclosure made by Ms Chowan, therefore, is a protected disclosure and the occupational detriments - being suspended, subjected to disciplinary action and ultimately dismissed - to which she had been subjected by her employer, AMH, on account of having made the protected disclosure are in violation of the provisions of s 3 of the PDA and unlawful.

AQUILIAN CLAIM

[52] Adv Cassim SC, on behalf of AMH, Imperial and Mr Lamberti, argues that there are a variety of tailor-made avenues available to persons in Ms Chowan's position through which to seek remedies, such as the Labour Relations Act 66 of 1995 (the LRA) and the Employment Equity Act 55 of 1998 (the EEA), which, so counsel argues, militate against extending the *aquilian* action to import wrongfulness and fashion a remedy in delict for Ms

Chowan. The fact that there are other available remedies may in an appropriate case not satisfy the requirement of wrongfulness for delictual liability to follow, but the present matter, in my view, is not such a case.

[53] In *Gcaba v Minister for Safety and Securtiy and others* 2010 (1) SA 238 (CC), Van der Westhuizen J, who wrote the unanimous judgment of the Constitutional Court, said the following:

'[52] First, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts and fora. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the *actio iniuriarum* in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalisation should be avoided.

. . .

[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and the section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and-employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies.

. . .

[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to not make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset *(in limine)*, the applicant's pleadings are the determining factor. They contain the legal basis of the claim under

which the applicant has chosen to invoke the court's competence. While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcagaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court.'
(Footnotes omitted.)

[54] Courts have refused to extend the *aquilian* action to cover certain instances, because of the probability that allowing an action would lead to unnecessary duplication or multiplicity of actions so that more harm than good can be done by such an extension. (See *Combrinck Chiro Praktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T) at 192.) But the courts have always been prepared to consider an action for pure economic loss where such loss is caused intentionally. Prof PQR Boberg *Law of Delict* (1984) Vol 1 at 105 states:
'Economic loss caused intentionally does not present the problem of indeterminate liability, for the ambit of the defendant's intention is itself the limiting factor. That is not to say that such loss is always recoverable, for it may be lawful to cause it. The requirement of wrongfulness must yet be satisfied, though it assumes a different shape.'

[55] Ms Chowan asserts her constitutional rights to equality and against unfair discrimination (s 9 of the Constitution). And she claims for loss intentionally caused. In her particulars of claim, Ms Chowan avers that AMH subjected her to occupational detriments on account or partly on account of having made the protected disclosure, and in doing so it acted in contravention of s 3 of the PDA, which provides that '[n]o employee may be subjected to any occupational detriment by his or her employer on account or partly on account of having made a protected disclosure'. She then avers that AMH, Imperial and/or Mr Lamberti owed her a legal duty not to subject her to

an occupational detriment and/or the consequential unlawful termination of her employment and/or to protect her from being exposed to racial and/or gender discrimination in the workplace, which duty, she avers, they breached. The protected disclosure, which, in terms of the particulars claim, had given rise to the legal duty, is one concerning racial and gender discrimination.

[56] Joubert *LAWSA* (2nd Ed) Vol 8 Part 1 para 74 states:

'Whether a particular statute was intended to give a person a civil remedy is a question of interpretation. The ascertainment of the presumed intention of the legislature requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. If the statute imposes a duty for the protection of a certain class of persons to which the plaintiff belongs, there is strong indication that the plaintiff was given a right which needs to be respected. However, the intention of the legislature, as reflected in the statute, might indicate otherwise. If the statute prescribes a special remedy for the enforcement of the duty, it is likely that the civil remedy was not contemplated, but this does not necessarily exclude a civil remedy.'

(Footnotes omitted.)

[57] I have mentioned that a 'disclosure' of information, in terms of s 1 of the PDA, includes information that shows or tends to show unfair discrimination as contemplated in the Promotion of Equality and the Prevention of Unfair Discrimination Act. The objects of the latter Act, in terms of s 2 thereof, include the object of giving effect to the letter and spirit of the Constitution, such as the promotion of equality and the values of the non-racialism and non-sexism. The circumstances in which that Act was enacted and the kind of mischief it was designed to prevent was the recognition of the existence of systemic discrimination and inequalities, particularly in respect of race and gender in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy, as is stated in s 4(2), and the recognition of the need to take measures at all levels to eliminate such discrimination and inequality. That Act imposes a duty for the protection of a class of persons to whom Ms Chowan belongs, she being a 42 year old Indian women. The PDA expressly does not exclude civil remedies, such as the *aquilian* action asserted by Ms

Chowan. Section 4(1) of the PDA provides that '[a]ny *employee* who has been subjected, is subject or may be subjected, to an *occupational detriment* in breach of section 3, may - (a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act 66 of 1995), for appropriate relief; or (b) pursue any other process allowed or prescribed by the law.'

[58] In *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122, Brand AJ said the following regarding the criterion of wrongfulness in the context of the law of delict:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

(Footnotes omitted.)

[59] And in *Loureiro and others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 53, Van der Westhuizen J said the following about the enquiry into the wrongfulness:

'. . . The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.'

[60] The present matter, in my view, is a classroom example of an appropriate case where delictual liability should be imposed. There are ample public-policy reasons in favour of imposing liability. The constitutional rights to equality and against unfair discrimination are compelling normative

considerations. There is a great public interest in ensuring that the existence of systemic discrimination and inequalities in respect of race and gender be eradicated. As blatant and patent as discrimination was in the days of apartheid, so subtle and latent does it also manifests itself today. The protection afforded to an employee, such as Ms Chowan, by the PDA against occupational detriments by her employer on account of having made a protected disclosure that was 'likely' to show unfair racial and gender discrimination, is one of the measures taken by the legislature to eradicate the existence of systemic discrimination and inequalities. If employers are too easily insulated from claims for harms, such as the occupational detriments to which Ms Chowan was subjected to on account of having made a protected disclosure to her employer, they would have little incentive to conduct themselves in a way that complies with the provisions of s 3 of the PDA. As was said by Van der Westhuizen J in *Loureiro*, para 56:

'. . . And policy objectives (such as the deterrent effect of liability) underpin one of the purposes of imposing delictual liability. The convictions of the community as to policy and law clearly motivate for liability to be imposed'.

[61] The requisite of causality for delictual liability to be imposed has also, in my view, been established. *But for* AMH's intentional breach of the duty not to have subjected Ms Chowan to occupational detriments on account of her having made a protected disclosure, she would not have been suspended, have undergone disciplinary action and been dismissed. That Ms Chowan has suffered some pure economic loss is undisputed - anything from one month's salary, as AMH would have it, to the equivalent of several years' employment, as she would have it. But the question of the *quantum* of her damages does not presently occupy us and will be adjudicated in due course. AMH's conduct is also linked sufficiently closely or directly to the harm suffered by Ms Chowan for legal liability to ensue. It can hardly be contended that considerations of reasonableness, justice and fairness dictate that AMH should not be held liable for the harm suffered by Ms Chowan. (See *Wille's Principles of South African Law* 9th Edition at 1130 -1133.)

[62] The duty not to subject an employee to occupational detriments on account of making protected disclosure as contemplated in Protected Disclosures Act, is one imposed upon an employer. AMH, and not Imperial nor Mr Lamberti, was Ms Chowan's employer. AMH, therefore, is liable for payment of the delictual damages proven by Ms Chowan. My conclusion on Ms Chowan's *aquilian* claim renders it unnecessary to consider her contractual claim.

INIURIA CLAIM

[63] In her particulars of claim Ms Chowan avers that she made a disclosure to AMH regarding 'allegations of racism and/or gender based discrimination perpetrated against her by means of unfair racial and gender discriminatory utterances made to her by the third defendant [Mr Lamberti] to the effect that she would not be promoted to the position of chief financial officer, despite the fact that she is a black women and an affirmative action candidate' (para 9). Ms Chowan then avers that '[t]he utterances made by the third defendant were intended by the third defendant to demean the dignity of the plaintiff, to insult her, to damage her and to injure her feelings and did have that effect, more particularly in that the words implied that she was not a meritorious employee in her own right and an inferior human being' (para 23). Those averments were denied in the plea and it is further pleaded that-

'[o]n 15 April 2015, during a meeting attended by *inter alia* the plaintiff and the third defendant, the third defendant indicated to the plaintiff that he would like nothing more than for a person of colour to be appointed by the first defendant as Chief Financial Officer, but that she would require a few years to develop for purposes of a leadership position, and that efforts would be made to facilitate her development.'

[64] However, the evidence, as I have mentioned, revealed that what had been said by Mr Lamberti on 15 April 2015 was rather that Ms Chowan is a female, employment equity, technically competent, they would like to keep her, but if she wants to go, she must go – others have left his management and done better outside the company – and that she would require three to four years to develop her leadership skills. The correct words comprising the utterance have been fully canvassed in the evidence, and are undisputed. Mr

Lamberti, although available as a witness, elected not to testify. I, therefore, consider Ms Chowan's *iniuria* claim on the basis of the utterance that is proved and not the one as formulated in her particulars of claim.

[65] What Ms Chowan has to prove in order to succeed with her *iniuria* claim for *defamation* is the publication by Mr Lamberti of defamatory matter of or concerning her. If she accomplishes this, it is presumed that the statement was both wrongful and intentional, and if Imperial and Mr Lamberti had wished to avoid liability for defamation they should have raised a defence which excludes either wrongfulness or intent, which they have not done. (*Le Roux*, paras 84-85.)

[66] The primary meaning of a statement is, as was said by Brand AJ in *Le Roux* para 87, 'the ordinary meaning given to the statement in its context by a reasonable person. An implied meaning of the statement "is regarded as part of its primary or ordinary meaning"'. Ms Chowan elected to rely on the primary or ordinary meaning of the utterance. I am unable to find that the ordinary meaning given to Mr Lamberti's words in its context by a reasonable person, is one that is defamatory of or concerning Ms Chowan.

[67] I now turn to the other part of Ms Chowan's *iniuria* claim, *viz.* her *dignity* claim. The common law requirements for a dignity claim to succeed are thus set out by Froneman J and Cameron J in *Le Roux* para 174:

'. . . What the common law requires for a dignity claim to succeed are three elements: a deliberately inflicted, wrongful act, that impairs the plaintiff's dignity.'

[68] Brand AJ said the following about a dignity claim in *Le Roux* para 138:

'In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's right to reputation and his or her right to a sense of self-worth. But under our common law "dignity" has a narrower meaning. It is confined to the person's feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual's self-respect. In the present context the term is used in the common-law sense. It is therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation.'

And further (para 143):

'. . . Broadly stated, the claim for impairment of dignity comprises both a subjective and an objective element. The subjective element requires that the plaintiff must in fact feel insulted. To satisfy the objective element our law requires that a reasonable person would feel insulted by the same conduct.'
(Footnotes omitted.)

[69] As to the subjective element, I have referred to Ms Chowan's evidence that she had never been addressed in that manner before, she was extremely upset, humiliated, degraded and objectified in terms of being a female empowerment equity candidate without recognition for the fact that she was a professional qualified chartered accountant with extensive experience and achievements, which evidence was corroborated by that of Mr de Canha, and is accepted my me. In this light the subjective element of the dignity claim is clearly established. The objective element, as was stated by Froneman J and Cameron J in *Le Roux* para 179, reflects 'outwardly', as opposed to the subjective element, which reflects 'inwardly'. The question is thus whether the reasonable person would conclude 'that objectively seen, the injury to [Ms Chowan's] feelings was palpable and reasonably felt, and hence actionable'. Such is the inevitable conclusion, in my judgment, which the reasonable person would reach about the injury to Ms Chowan's feelings.

[70] Ms Chowan has established the common law requirements for her dignity claim to succeed. Imperial and Mr Lamberti are liable, jointly and severally, for Ms Chowan's damages, as quantified in due course, as a result of the impairment of her dignity.

COSTS

[71] Ms Chowan succeeds against AMH as far as its liability for her *aquilian* damages is concerned and against Imperial and Mr Lamberti as far as their liability for her damages as a result of the impairment of her dignity are concerned. There is no reason why the general rule that costs follow the result of her claims should not find application. The question, however, is what a fair and just apportionment of their liability for Ms Chowan's costs should be, a matter that has not been addressed in argument. The costs order which I propose to make, therefore, is made on the understanding that it

is open to the parties to apply, within a reasonable time, to be heard on the question of costs and for a variation of the costs order. (See Joubert *LAWSA* Vol 3 Part 2 (2nd Ed) para 298.) Most of the evidence and counsels' addresses concern the *aquilian* and alternative contractual claims. An appropriate costs order, in my view, is for AMH to be liable for the payment of 70% of Ms Chowan's costs and for Imperial and Mr Lamberti to be jointly and severally liable for the payment of 30% of her costs. Furthermore, their liability for costs should include the costs incurred up to and including the 18th September 2017, when the trial on the questions of liability in respect of Ms Chowan's *aquilian* and dignity claims was concluded.

ORDER

[72] In the result the following order is made:

1. The first defendant is liable to pay to the plaintiff her proven *aquilian* damages.
2. The second and third defendants, jointly and severally, the one paying the other to be absolved, are liable to pay to the plaintiff her proven damages as a result of the impairment of her dignity.
3. The first defendant is to pay 70% and the second and third defendants, jointly and severally, the one paying the other to be absolved, are to pay 30% of the plaintiff's costs of suit incurred up to and including the 18th September 2017, including those of two counsel.

_____

P.A. MEYER
JUDGE OF THE HIGH COURT

Dates of hearing:	7,8,10 and 11 August and 18 September 2017
Date of Judgment:	23 March 2018
Counsel for Plaintiff:	Adv D Mpofu SC (assisted by Adv G Badela)
Instructed by:	Rogers Devachander Attorneys, Benoni c/o Hannelie Swart Attorneys, Johannesburg
Counsel for Defendants:	Adv NA Cassim SC (assisted by Adv R Itzkin)
Instructed by:	Dewey Hertzberg Levy Inc. Sandton