IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NUMBER: C627/2007

In the matter between:

JOHN JOSEPH JANSEN Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES
OF THE REPUBLIC OF SOUTH AFRICA Respondent

JUDGMENT

LE ROUX, AJ:

1 The Applicant was employed by the Department of Correctional Services ("the Department") until his dismissal in 2007. He had been so employed for some 34 years.

2 The Applicant was appointed to the position of Head of the Admissions Centre at Pollsmoor Prison in 1997. Taking his mandate from the Constitution, the provisions of the Correctional Services Act and policies adopted by the Department itself, he set in motion a transformation programme aimed at introducing a human rights culture within the prison.

3 It appears that from 1997 until 2002 his relationship with his superiors and the Department was untroubled.

4 During 2002 he made a presentation to the Jali Commission of Enquiry. This Commission of Enquiry was investigating allegations of corruption in South African prisons. Shortly after making this presentation, he received a letter containing a death threat. The letter was investigated by the National Intelligence Agency (NIA). The NIA submitted a report in which it stated that the death threats and the allegations of corruption emanated from employees of the Department who were against transformation. It also found that there was a threat to the Applicant's life and that security measures to take care of the safety of the Applicant should be enhanced. He felt that the Department had not taken sufficient steps to protect him and his family and that his requests in this regard were ignored. Whether sufficient steps were taken to assist and protect him was a matter of contention during the course of the trial. I do not need to deal with this issue here.

5 Also during this period the Applicant became aware that allegations of corruption had been made against him. These were considered by the Jali Commission and he was exonerated. The Applicant was nevertheless upset about the way in which this issue was handled by the Department. He felt that he should have been consulted on the issue. This was also denied by the Department. Once again, it is unnecessary for me to make a finding on this issue.

6 In November 2004 the Applicant was transferred to the Goodwood Correctional Centre. It was the Applicant's version that he had been asked to take a temporary transfer in order to assist with problems that had arisen there. He later discovered by chance that he had been permanently transferred. As a result his promotion to a post at Pollsmoor Prison had not taken place. He asserted that his transfer had taken place without his knowledge and in a covert manner. Once again, this was denied by the

Department. It pointed out that this transfer had been the subject of litigation in which the Applicant had been unsuccessful.

7 During 2004 the Applicant was placed on sick leave.

8 On 3 December 2004 a photograph and an accompanying article were published in the Cape Argus. The photograph was of four employees of the Department, including the Applicant, and a fourth person conducting a press conference. At this press conference the formation of an organisation with the name "Movement Against Domination of African Minorities" was announced. (During the trial the parties used the acronym "MADAM" when referring to this organisation. It will also be utilised in this judgment.)

9 The newspaper report stated that the Applicant and the other three members of the Department, who all appeared at the press conference in the uniform of the Department, had made statements to the effect that:

9.1 the pressure group, MADAM, had been formed to oppose "black dominance" in prisons within the Western Cape;

9.2 their personal experience had shown that oppression, victimisation and marginalisation were present in the Department;

9.3 individuals were abusing their positions to oppress and victimise members of the Department, especially "African minorities";

9.4 the death of 6 prisoners as a result of two recent fires at Pollsmoor prison had been connected to a failure to transform the prison and that Pollsmoor Prison was a "time bomb"; and

9.5 the Regional Commissioner should be removed.

10 It is evident from the newspaper report, and especially the evidence of the Applicant, that one facet of the grievances expressed at the press conference was that certain employees who regarded themselves as being of Khoisan origin believed that they were being discriminated against

because of this fact. The purpose of the formation of MADAM was to further the rights and interests of the Khoisan people – which the Applicant regarded himself as being part of.

11 In February 2005 the Applicant met an official of the Department who had been sent to investigate what had occurred at the press conference. A formal submission was made to this official by MADAM.

12 During June 2005 the Applicant and the three other officials were charged with the following disciplinary offences. I quote them as set out in the relevant document

> "*1, A.3.1 GROSS INSUBORDINATION*
>
> *You grossly unsubordinated the Employer [DCS] in that on the 03/12/2004 you disregarded policy/directives in that you without permission/authority appear in media [news papers] with the Employers corporate wear.*
>
> *2, A.5.6 Publication/use of unauthorised [tested] information against the Department [DCS].*
>
> *You are alleged to have transgressed/misconducted the Department in that you Published untested information that endangers the Safety of the Department [DCS]*
>
> *3, A 2.1 Gross negligence*
>
> *You are alleged to have transgressed the above misconduct in that you Grossly Neglected to consider the possibility of the consequences that could be dangerous to human life and the Department [DCS]t*".

13 A disciplinary enquiry was convened and, after several postponements for various reasons, the Applicant was found guilty of misconduct and

dismissed. A subsequent internal appeal lodged by the Applicant was unsuccessful.

14 The Applicant challenged the fairness of his dismissal. A dispute was referred to General Public Service Sectoral Bargaining Council ("the Bargaining Council"). After conciliation failed to settle the dispute the Applicant timeously referred the dispute to arbitration. Thereafter, but before the matter had been set down for arbitration, the Applicant was advised that his dismissal was an automatically unfair dismissal in terms of section 187(1)(f) of the Act. He was therefore advised to refer the dismissal dispute to this Court.

15 Four disputes were then referred to this Court. One of these disputes, dealing with alleged unlawful deductions from the Applicant's salary, was not proceeded with. The three remaining claims are as follows:

15.1 A claim that the Applicant had been automatically unfairly dismissed in contravention of the provisions section 187(1)(f) of the Labour Relations Act, 66 of 1995 ("the Act"). The Applicant alleges that he was unfairly discriminated against on the grounds of conscience, belief and/or political opinion as listed in section 187(1)(f) and on the analogous unlisted grounds of political or cultural affiliation. He contends that he was dismissed because he expressed the view, and formed an organisation that promoted the view, that the Department was not looking after the interests of inmates and employees and discriminated against employees on ethnic and/or cultural grounds.

15.2 A claim that his dismissal was substantively and procedurally unfair. The Applicant alleges that his dismissal was substantively unfair because the conduct of which he was found guilty did not constitute misconduct in terms of the employer's disciplinary code "or otherwise". In addition, the sanction of dismissal was an

inappropriate sanction. It is further alleged that the Applicant's dismissal was procedurally unfair for various reasons namely:

15.2.1 that the chairperson of the enquiry lacked jurisdiction to conduct the enquiry;

15.2.2 that the chairperson had found the Applicant guilty of conduct for which he had not been charged, took into account inadmissible evidence, and relied on a statement made by the initiator of the hearing during closing argument; and

15.2.3 that the initiator put leading questions to witnesses and sought to introduce opinion evidence on issues that the chairperson had to decide on.

15.3 A claim that his dismissal constituted an infringement of his constitutional rights to freedom of association, freedom of expression and his right to form, join and maintain a cultural organisation. His right to freedom of association was infringed in that he was dismissed for forming, joining and taking part in the activities of MADAM. His right to freedom of expression was infringed because he was dismissed for expressing the views of MADAM and for expressing certain grievances and concerns regarding the Department's treatment of prisoners and employees. His right to form, join and maintain a cultural organisation was infringed because he was dismissed for forming, joining and taking part in the activities of MADAM, an organisation dedicated to the protection of cultural minorities, in particular persons of Khoisan origin.

16 At the commencement of the trial Adv Nyman, who appeared on behalf of the Department, raised a point relating to jurisdiction. She pointed out that the form referring the dispute to arbitration completed by the Applicant characterised the dispute as one relating to an "ordinary" unfair dismissal dispute. It did not refer to an automatically unfair dismissal dispute. She

argued further that the dispute that was conciliated was an unfair dismissal dispute and not an automatically unfair dismissal dispute. The Court therefore did not have jurisdiction to consider the automatically unfair dismissal dispute. I considered this issue and, on the strength of the decision of the Labour Appeal Court in **NUMSA v Driveline Technologies (Pty) Ltd & Another** [2000] 1 BLLR 20 (LAC) and the reasoning of Zondo JP, I came to the conclusion that this Court had jurisdiction to consider the dispute. An unfair dismissal dispute had been conciliated – irrespective of the reason proffered for the dismissal.

17 The jurisdiction to consider the dispute must, however, be seen in the light of the principle formulated in **Wardlaw v Supreme Moulding (Pty) Ltd** [2007] 6 BLLR 487 (LAC). This Court has "provisional" jurisdiction to consider, on the evidence provided, whether or not the reason for the dismissal is one in respect of which it has jurisdiction. If the evidence establishes that this is the case, the Court can then go on to consider the dispute on the merits. If, however, at some stage it becomes apparent to the Court that the dispute is one over which it does not have jurisdiction, it must refer the matter to the CCMA or relevant bargaining council for arbitration or, with the agreement of the parties, determine the dispute as an arbitrator. The parties were in agreement that if I should find that the dismissal did not constitute an automatically unfair dismissal, the matter should be referred back to the bargaining council for a consideration of the question whether the dismissal was unfair. It was on this basis that Ms Norton, who acted for the Applicant, indicated that she would not lead evidence on the issue of procedural fairness in this Court.

18 Unfortunately, what the real reason for the dismissal was, was the subject of contention and it was not possible to consider this issue without hearing all the relevant evidence.

19 Due to the fact that the dismissal dispute had originally been referred to arbitration under the auspices of the Bargaining Council the referral of the dispute to this Court took place outside the required time period. Application

was made for condonation of the late referral. Adv Nyman did not oppose the granting of condonation. After consideration of the issue I granted condonation.

Was the dismissal automatically unfair?

20 The relevant part of this section 187 reads as follows:

> "***187. Automatically unfair dismissals.—****(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-*
>
> *…….*
>
> *(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;*".

21 The facts set out above, were, unless otherwise indicated, largely common cause. What is at dispute was the reason for the dismissal. The Applicant contends that he was dismissed because he expressed the view, and formed an organisation that promoted the view, that the Department was not looking after the interests of inmates and employees and discriminated against employees on ethnic and/or cultural grounds. He was therefore dismissed by reason of his conscience, belief and/or political opinion as specifically listed in section 187(1)(f) as well as on the analogous unlisted grounds of political or cultural affiliation.

22 The Department denies this allegation and contends that the reason for the dismissal was that the Applicant committed serious acts of misconduct during the course of the press conference.

23 The decision of the Labour Appeal Court in **SA Chemical Workers Union & Others v Afrox Ltd** (1999) 20 ILJ 1718 (LAC) sets out the approach to be adopted by a Court when dealing with this type of dispute.

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

inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see paragraph [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of section 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further."

24 See also in this regard the decision in **National Union of Metalworkers of SA & Others v Dorbyl Ltd & Another** (2007) 28 ILJ 1585 (LAC).

25 I accept for the purposes of this decision that the first requirement of factual causation has been met. The question is what is the most probable inference that can be drawn from the evidence led?

26 At times in his evidence the Applicant appeared to suggest that the events set out in paragraphs four to six above namely, his transfer to Goodwood Correctional Centre, the alleged failure of the Department to protect him from the threats made against him and his family and the way in which the complaint to the Jali Commission of Enquiry was handled, was evidence that he had been automatically unfairly dismissed on the grounds set out above. However, the evidence shows that at that date MADAM had not yet been established and there was no evidence led to show that the Applicant at that time supported, or had expressed any views or taken any actions in support of, the aims and objectives espoused by MADAM.

27 Ms Norton argued that the inference that an automatically unfair dismissal took place could be drawn from the following.

28 She argued that the Department had failed to show that the Applicant had contravened any provision of the Department's disciplinary code. She cross examined Mr Mketshane, the applicant's immediate superior at length on

the formulation of the charges, what they meant and whether they had been contravened. Mr Mbewe, the chairperson of the enquiry was also questioned on this issue.

29 She strenuously pursued the argument that there was no policy or directive as referred to in the first charge stating that an employee could not appear at a press conference or in the media without authorisation, whether this was done in uniform or not. There was therefore no insubordination as mentioned in paragraph A,3.1 of the Department's disciplinary code on which this charge was based.

30 She also argued that the second charge, based on clause A 5.6 of the Department's disciplinary code, did not cover the actions of the Applicant. This clause prohibited the publication of information. What the Applicant and his colleagues had done at the press conference was to publish their own views. Furthermore, no evidence was led to show that the safety of the Department had been endangered in any way.

31 The third charged was based on clause 2.1 of the Department's disciplinary code which prohibited gross negligence in the execution of a member's duties. The Applicant and his colleagues had not been on duty when they attended the press conference. There was also no evidence to show that their actions would endanger human life.

32 She also argued that the Department had failed to prove that, even if it were to be accepted that a disciplinary offence had been committed, these actions justified dismissal. Furthermore, the way in which the charges had been formulated by selecting the most serious version of the charges found in the relevant clauses of the disciplinary code, showed that the Department was intent on dismissing the Applicant.

33 Given the fact that the Department had failed to show that the Applicant was guilty of the disciplinary charges brought against him, the only inference that could be drawn from all the evidence was that he was

dismissed because of his role in the launching of MADAM and his associating himself with the views of MADAM.

34 A consideration of the evidence given by the two witnesses called by the department, and especially the evidence of Mr Mketshane, shows that they had difficulty in justifying the way in which the disciplinary charges were formulated and in showing that the Applicant was indeed guilty of the charges brought against him. It must be accepted that the formulation of the charges left a lot to be desired. But does this mean that the most probable inference that can be drawn from the evidence was that the dominant or main reason for the dismissal was a reason found in section 187(1)(f), and in particular those alleged by the Applicant?

35 Whilst I agree that the witnesses found it difficult to justify the way in which the charges were formulated, they were nevertheless consistent and vehement in their view that the reason why the Applicant had been disciplined was because he, a senior manager, had appeared at a press conference in his departmental uniform, and had made what they regarded as inaccurate statements or opinions critical of the Department. These statements or opinions could, they felt, have impacted adversely on the Department and its members in circumstances where the Applicant had failed to take up these issues internally with the Department. It is also evident that the fact that he committed these acts whilst still on sick leave was regarded as relevant. On this they remained steadfast and believable witnesses despite extensive cross examination – especially of Mr Mketshane.

36 In my view, the most probable inference that can be drawn from the evidence is that the reason for the dismissal of the Applicant was not his membership of, or association with, MADAM, or the views he expressed in support of the aims and objectives of MADAM, but rather that the Department genuinely felt that he had committed a disciplinary offence by appearing at a press conference in a departmental uniform (in circumstances where the Department felt that permission was necessary)

and expressed inaccurate or unacceptable views regarding the Department that could have endangered the safety of employees and inmates. In coming to this decision I have taken the following statement made by Mr Mketshane to during the course of his evidence at the disciplinary enquiry into account:

> "*I must also confirm to say Mr Chairperson the movement that have been taken by these officials is the movement that undermine not only the Department of Correctional Services that but it undermines all efforts that the Government have put in place to ensure that the Government would create a better life for all. That is a kind of movement that I say would be very difficult for any organisation to have trust on such people.*"

37 The argument was put to him that this statement indicated that the reason for the disciplinary enquiry was the Applicant's membership of and association with MADAM. He explained that he was referring to the conduct of the Applicant and the other persons and that their conduct eroded the trust relationship. I accept this interpretation especially in the context of the other evidence he gave, both in this trial and in the disciplinary hearing.

38 I therefore come to the conclusion that the dismissal of the Applicant was not automatically unfair.

39 Whether the dismissal, on this evidence was fair is quite another question. This is a question to be considered by an arbitrator.

Infringement of constitutional rights

40 The Applicant also contended that, in so far as he was dismissed for making a statement to the press, this dismissal constituted an infringement of his Constitutional rights to freedom of association (section 18 of the Constitution), freedom of expression (section16) and of his right to form, join and maintain a cultural organisation (section 31).

41 The question which arises is whether this Court has jurisdiction to enforce these rights. Section157(2) grants this Court jurisdiction to adjudicate on the alleged violation of fundamental rights enshrined in Chapter 2 of the Constitution which arise from employment and from labour relations. Clearly, the rights to freedom of association and to freedom of expression are of great importance in the employment sphere. (See, for example **SA National Defence Union v Minister of Defence & Another** (1999) 20 *ILJ* 2265 (CC).) The same may not be as evident in respect of the right to form, join and maintain a cultural organisation. Nevertheless, I will accept for the purposes of this matter that these claims fall within the ambit of section 157(2)

42 The greater potential problem that the Applicant faces is whether direct reliance can be placed on the provisions of the Constitution in these circumstances.

43 In this case all the claims that the Applicant has brought are based on the fact that he was dismissed by the Department. The challenged action is that of the Department acting in its capacity as an employer. In this sense, therefore, the primary constitutional right at play is the right to fair labour practices. In the context of this dispute, the provisions of the Labour Relations Act give effect to this right. This Act provides for protection against unfair dismissal, including the right not be automatically unfairly dismissed. The remedy of reinstatement is available. If an employee is dismissed in circumstances where it is alleged that his right to freedom of association has been violated or his right to form, join and maintain a cultural organisation has been infringed he may, in the appropriate circumstances be able to succeed with a claim based on an allegation of an unfair or an automatically unfair dismissal. The same applies to an allegation based on the infringement of freedom of expression. In this case he may also utilise the provisions of the Protected Disclosure Act, 26 of 2000. In this case I have found that the Applicant was not automatically unfairly dismissed. Whether he was unfairly dismissed still has to be

determined. I should add that an employee in this position may also have common law contractual rights at his or her disposal – see **Murray v Minister of Defence**[2008] 6 BLLR 513 (SCA).

44 In this context the Applicant is not in a position to rely directly on a Constitutional right. See in this regard section 8(3) of the Constitution, **SANDU v Minister of Defence and Others** [2007] 9 BLLR 785 (CC) and **Booysen v SAPS & Another** [2008]10 BLLR 928 (LC).

45 I have found that the reason for the dismissal was that the Applicant appeared at a press conference in his uniform and made unfavourable comments about his employer. On these facts there has, in any event, been no infringement of the right to freedom of association or the right to form, join and maintain a cultural organisation. In so far as the dismissal was based on comments made by the Applicant, an argument may be made that this constituted a breach of the right to freedom of expression. It is clear that whether there has been an infringement of this right will have to be considered by weighing up the competing rights of the Department and the Applicant. This is an issue that will have to be determined by the arbitrator when considering an unfair dismissal case.

ORDER

In the light of the above I find that the dismissal of the Applicant was not automatically unfair. I also find that the Applicant's case based on the alleged infringement of Constitutional rights should also fail. The matter is stayed and referred back to the General Public Service Sectoral Bargaining Council in terms of section 158(2) of the Act for Arbitration. As indicated above, l also condoned the late referral of the dispute.

I do not think that this is a case where costs should be awarded. The Applicant raised important and valid issues that required consideration and the merits of the unfair dismissal case still have to be determined.

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LE ROUX AJ

APPEARANCES:

For the applicant:	Adv M L Norton instructed by Muller Marias Yekiso
For the respondent:	Adv R Nyman instructed by State Attorney
Date of hearing:	23-25 February 2009
Date of judgment:	8 September 2009