IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 133/2017

In the matter between:

GOLDGRO (PTY) LTD **Appellant**

and

CAROLINE MCEVOY **Respondent**

Heard: **08 November 2018**

Delivered: **12 December 2018**

Summary: Alleged Protected disclosure – employee contending that her retrenchment was due to the disclosure she made concerning certain irregularities to the board of which she is a member - the employee caused her attorney to send a letter (the PD letter) to the board concerning: (1) the integrity of the facility for coins held in safekeeping, (2) the integrity of the appellant's stance on dealing with lessors to whom turnover rentals were owed, and (3) the merits of an application to place the appellant into business rescue.

Held that:

Every fact raised in the PD letter was known to every director and other members of the management and also to the auditors. Indeed, the matters were being addressed in the context of satisfying the auditors in respect of annual accounts. Terner, of Grant Thornton, the Auditors, was in conversation with employee about

these very matters and sat in on meetings of the appellant when they were addressed.

The letter does not, on the facts adduced in evidence, constitute a protected disclosure; rather is a contrived attempt to bully the employee's fellow members of the board into adopting her point of view, and an attempt to distance herself from her co-decision-makers should there be a fall-out.

Concerning the Labour Court's finding that that the retrenchment was a direct result of her refusal of the reassignment of her role, it was held that

The employee was fully aware of the financial predicament of the business, and indeed, lacked no information required reasonably by her to consider the business rationale of the retrenchment decision with its concomitant costs savings. She also was aware that she was not singled out in an aberrant redundancy but that the second stage of the restructuring was broadly based. Moreover, her redunancy as a director did not imperil her employment per se, and a reasonable alternative offer in the virtually identical role was made and, in the context of the dire financial condition of the business, unreasonably refused She had no reasonable ground for a belief that the decision was one which targeted her or that, logically, her so-called disclosures were causally connected. Order of the Labour Court set aside and appeal upheld.

Coram: Phatshoane ADJP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] Caroline McEvoy, the respondent, was successful in the court *a quo* with a claim for an automatically unfair dismissal in terms of section 187(1)(h) of the Labour Relations Act 66 of 1995 (LRA), on the grounds that the dismissal was an occupational detriment precipitated by her making a protected disclosure as contemplated by section 6 of the Protected Disclosures Act 26 of 2000 (PDA).[1] The appeal lies against that finding.

[2] The critical issues are whether a protected disclosure was made at all and in good faith, and in any event, even if such finding is correct, whether the termination of employment was causally connected thereto, and as such, constitutes an occupational detriment sustained as contemplated by section 1 of the PDA. The enquiry is into these two factual findings.

[3] The business of the appellant is trading in gold coins, especially Kruger Rands. Adjunct to the trading activity, the appellant also provided, at the option of the owners of coins, a safe deposit service. Marketing of the business was conducted in several subsidiaries through a *de facto* branch system in leased premises in various places in South Africa. The appellant company is the holding

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[1] Section 6: **Protected disclosure to employer**
(1) Any *disclosure* made in good faith-
(a) and substantially in accordance with any procedure authorised by the *employee's* or *worker's employer* for reporting or otherwise remedying the *impropriety* concerned and the *employee* or *worker* has been made aware of the procedure as required in terms of subsection (2) *(a)* (ii); or
(b) to the *employer* of the *employee* or *worker*, where there is no procedure as contemplated in paragraph *(a)*,
is a protected disclosure.
(2) *(a)* Every *employer* must-
(i) authorise appropriate internal procedures for receiving and dealing with information about *improprieties*; and
(ii) take reasonable steps to bring the internal procedures to the attention of every *employee* and *worker*.
(b) Any *employee* or *worker* who, 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 purposes of *this Act*, to be making the *disclosure* to his or her *employer.*
[S. 6 substituted by s. 6 of Act 5 of 2017 (wef 2 August 2017).]

company of several subsidiaries; unless the particular corporate entity needs to be specifically identified, they are collectively referred to as the appellant.

The case for a protected disclosure

The alleged protected disclosure relied upon by the respondent was a letter she caused her personal attorney, Clifford Green, on 21 November 2018, to send, addressed to the board of directors of Goldgro (Pty) Ltd ("the PD letter") The text reads thus:[2]

'THE BOARD OF DIRECTORS OF GOLDGRO

[the five co-directors email addresses are set out]

RE: PROTECTED DISCLOSURE ITO PROTECTED DISCLOSURES ACT 26 OF 2000

1. We act on behalf of Caroline McEvoy (our Client)

2. We are advised by our client that the company is committing the following irregularities which I have been instructed to bring to your attention:

2.1.1 Coins are held for customers in safe custody boxes.

[2]"Disclosure is defined in section 1 of the PDA to "[mean] any disclosure of information regarding any conduct of an *employer*, or of an *employee* or of a *worker* of that *employer*, made by any *employee* or *worker* who has reason to believe that the information concerned shows or tends to show one or more of the following:
(a) That a criminal offence has been committed, is being committed or is likely to be committed;
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged;
(f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
(g) that any matter referred to in paragraphs *(a)* to *(f)* has been, is being or is likely to be deliberately concealed;
[Definition of 'disclosure' substituted by s. 1 *(b)* of Act 5 of 2017 (wef 2 August 2017).]

2.1.1 It has come to the attention of our client that instructions have been given by the CEO of the company to remove some coins for use by the company with the intention of replacing them at a later date.

2.1.2 It is our considered opinion that this practice is unlawful.

2.2 Further, in terms of property leases signed by Scoin and its subsidiary Talya, a % of turnover was to be paid over to the landlord.

2.2.1 It has come to the attention of our client that an amount of R15m is due and owing by Scoin and further R12m by Tayla.

2.2.2 Our client has been advised by the CEO and Chairman that the company has no intention of paying these amounts over to the Tayla landlord.

3. Further, the company has sustained a loss of approximately R20m in the year to date September 2014. This includes a loss of R6m in September alone with further losses expected in October 2014, based on accounts still to be finalised.

3.1.1 It is the opinion of our client that the company should seek business rescue proceedings as a matter of urgency to avert the likelihood of liquidation.

4. We require your response within seven days failing which we reserve the right to take further action.'

[4] A similar formal report was made on 10 December to Grant Thornton, the appellant's auditors.[3]

[3] The Court a quo decided the matter on the basis of a section 6 disclosure to the employer and did not for that reason consider the second alleged disclosure to the auditors, Grant Thornton. Because of the rationale for the findings in the appeal, it has also been unnecessary to consider the second alleged disclosure, albeit for reason different to that of the Court a quo.

The respondent's role in the business

4.1. At the time of the PD letter, the respondent was a director of Goldgro (Pty) Ltd, having been appointed on 12 August 2014, about three months prior thereto. The respondent is a chartered accountant. She initially became employed by the appellant in March 2014. The position she initially held was General Manager, Finance in a subsidiary, Scoin.

4.2. The individuals named in the e-mail addresses were her fellow board members who were, as at 22 August 2014:

4.3. Alan Demby – Executive chairman.

4.4. Selwyn Grimsley – Group Executive Officer

4.5. Leon and Hilton Kaplan, both non-executive directors.

[5] A "Trading Board" was also appointed, which included several persons, including Michelle Rauff, the Human Resources Director, who was also at the same time as the respondent, appointed to that board. Its function as the second-tier executive management was the operational management of the several aspects of the business.

[6] The appellant retained the services of several attorneys and sought advice from time to time from each of them. Clifford Green was not one of them.

The Financial crisis in the business and its consequences

[7] It is common cause that there was a financial crisis in the business. This was learnt by the respondent shortly after taking up employment in March 2014 and she would in her role have been hands-on in endeavours to address the crisis. The nature of the crisis was primarily experienced as an acute cash flow shortage owing to plummeting sales, a reflection of broader economic woes in the country. The appellant's banker refused to extend the overdraft facility of R 45 million, which was at a point of near exhaustion.

[8] The difficulties were recognised by the board and by the broader management. The result was a series of decisions taken by the board which can be tracked through the minutes of board meetings. The thrust of the strategy adopted was a rapid and immediate contraction of business operations to slash overhead costs. This involved a restructuring of the business to render certain subsidiaries dormant, close down outlets, and retrench staff. The CEO, Grimsley took a 25% cut in salary.

[9] The financial management arm of the business was affected as were all others. This impacted on the respondent directly. In a restructuring of the financial management throughout the group, the finance function was centralised. A consequence of that restructuring was that the respondent was reassigned duties within the new centralised structure. She became, as alluded to earlier, the Group Chief Financial Officer, and was appointed to the main board, and given a 10% increase in salary. Grimsley announced on 1 August that the restructuring process was completed, a view which proved to be unjustifiably optimistic.[4]

[10] This process of restructuring was, in due course, deemed to be inadequate to meet the challenge of cutting overheads. This was plain from the financial data, monitored at this time on a daily basis. Thus, on 15 October 2014, the CEO, Grimsley, again notified all staff that a further retrenchment exercise was necessary and that the affected persons would be notified. A pertinent mention was made of the then-in-progress consolidation of the finance functions and pointedly mentioned that "…further costs savings are being sought in every aspect of the business." On 19 November, a further communiqué to all staff noted the rationalisation of subsidiaries and marketing implications.

[11] During the course of these developments, which carried on for the rest of 2014, Grimsley left the business and Demby assumed the role of CEO. Rauff was dropped from the trading board and reverted to the position and salary she had

[4] In the judgment a quo, at [21] it is said that the appellant "resolved' that the restructuring was complete. This finding of fact is incorrect; no such evidence was adduced. Moreover, an employer who declares a restructuring is complete is not inhibited from resuming the exercise, which is the implication of the erroneous finding.

formerly held prior to the first phase of restructuring. Others in management were reassigned or retrenched.

[12] The respondent left the business as a retrenchee with effect from 19 December 2014. The details relevant thereto are addressed discretely elsewhere in this judgment. Her claim is that this was the occupational detriment caused by her sending the PD letter.[5]

The subject matter of the PD letter

[13] There are three topics mentioned in the PD letter: (1) the integrity of the facility for coins held in safekeeping, (2) the integrity of the appellant's stance on dealing with lessors to whom turnover rentals were owed, and (3) the merits of an application to place the appellant into business rescue.

[14] The controversy to be decided is whether the "disclosures" of these issues can be properly construed as protected disclosures as defined.

[15] Part of the defence advanced is that the subject matter was already before the board, prior to the PD letter of 21 November. Indeed, it is true the topics were addressed, some decisions taken, and other proposals raised for consideration. The three issues are addressed in turn.

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[5] ***'occupational detriment'***, in relation to an *employee* or a *worker*, means-
(a) being subjected to any disciplinary action;
(b) being dismissed, suspended, demoted, harassed or intimidated;
(c) being transferred against his or her will;
(d) being refused transfer or promotion;
(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
(f) being refused a reference, or being provided with an adverse reference, from his or her *employer*;
(g) being denied appointment to any employment, profession or office;
(h) being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the *disclosure* of-
(i) a criminal offence; or
(ii) information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur;
(i) being threatened with any of the actions referred to in paragraphs *(a)* to *(h)* above; or
(j) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services;
[Definition of 'occupational detriment' substituted by s. 1 *(d)* of Act 5 of 2017 (wef 2 August 2017).]

[16] Coins safety:

16.1. Soon after joining the appellant, Terner, the Auditor from Grant Thornton, told the respondent that clients' coins were being removed from the vault to use for trading. Moreover, this had been noted in FY 2013, and was, despite Terner having been told the practice would stop, still happening. From this communication it was plain that the Auditors were well aware of the issue.

16.2. Any doubt about Management, or the board in particular, being aware of the practice, is dispelled by the resolution passed by the board on 17 November 2014 prohibiting the practice.

16.3. Evidence was adduced on when the coins were improperly removed. The removals in various volumes occurred from 13 December 2013. All but one removal occurred before the 17 November board resolution. One removal of 50 Kruger Rands occurred on 19 November 2014.

16.4. The PD letter omits reference to the board resolution of 17 November. Further, it makes no reference to the several dates of removal. No mention is made when the instruction by the CEO to remove the coins was made. It must be assumed that respondent's attorney was not told of these pertinent facts. Moreover, it is to be inferred from the evidence of the respondent that she never set about gathering this information and she was ignorant of the critical details of when the instruction was given or of the dates of all the removals.

16.5. Email correspondence exchanged on 8 December reveals a flurry of exchanges among the respondent, Demby and the non-executive directors about the timing of buy-backs of coins to replace the improperly removed coins; a process hamstrung by cash flow constraints.[6] The issue

[6] The judgment *a quo* at [47] held that the appellant did not take the issue seriously. This finding is inconsistent with the evidence adduced.

was put on the agenda of a board meeting scheduled for 12 December; a meeting later cancelled.

16.6. The respondent was wholly justified in being dissatisfied about the removal practice. However, was she reasonable in not informing herself fully about the circumstances? There was only one removal after the resolution; what inferences could properly be drawn? Was this removal one which flowed from an instruction given prior to the 17 November resolution? Was it a result of a fresh instruction given in defiance of the resolution? The respondent apparently did not enquire.

16.7. As a director, what was her responsibility? This aspect is addressed more fully elsewhere, however it is plain that she did not follow through on determining the relevant circumstances to determine if the board's resolution had been defied or not.

16.8. What she did do is to report to the board in the PD letter, in the vaguest of terms, facts known already to the board and in respect of which the board had taken the step to prohibit the practice. In relation to what the PD letter addressed, the board had already acted.

[17] Debts to Lessors:

17.1. Terner, had also told the respondent, shortly after she joined the appellant, of the problem regarding the computation of sums due to lessors of various shops based on turnover. The issue enjoyed considerable attention, not least because the annual accounts finalisation was being held up owing to the issue.

17.2. The record picks up the issue in a meeting on 11 June 2014 of the Audit and Risk Committee. In attendance were Terner, the respondent, Leon Kaplan Alan Demby, Grimsley, and several others. The turnover rental issue was addressed in paragraph 3.1.8 of the minute. The minute records that legal advice had been taken on the prescription of debts older than

three years, that the extent of the exposure was R4.68 m for Scoin and R9.02m for Talya. Sean Effune, the property manager was directed to negotiate with the lessors to find the “best possible solutions”.

17.3. The issue arose again on 12 August at the board meeting. There it was reported that on 31 July the matter had been discussed with the auditors. The effect it had on the preparation of the annual accounts was addressed and in particular whether a reportable irregularity had occurred. The auditors were applying their minds to the opinions of several attorneys. It was agreed that negotiations with the lessors take place. In this regard, it was said that the business’s cash flow problem had to be factored in the approach. The auditors were to be kept informed.

17.4. The next day, 13 August, a letter was sent to Grant Thornton by Grimsley and Demby addressing the treatment of the issue. The letter addressed the ground covered at the board meeting and concluded by saying that the appellant would “… in a timely manner engage with the landlords to rectify any past errors in the declaration of turnover and negotiate payment of any arrears that may arise”.

17.5. On 4 September, Sean Effune, the property manager put forward a proposal on how to tackle the issue. It was premised on a disclosure, explained as a misinterpretation, an offer to rectify, and an attempt to come to a settlement. He cautioned that ACSA was likely to be a difficult lessor to win over.

17.6. On 11 September, yet another Board meeting addressed the issue. The respondent herself reported on the financial data relevant to the turnover computations. An exposure of R27m was estimated. The respondent was directed to engage further with the calculations and inform the auditors.

17.7. The predicament of having to address a retrospective repair was fraught with several impediments, of which cash flow was the most visible. On 20

November, Grimsley wrote an e-mail that introduced a twist in ideas about prospective dealings with the lessors. It followed on a meeting held on 18 November. The text reads in full:

'Sean,

Herewith my record of the strategy arising from our meeting on 18 November. You now need to document this strategy, based on this, your understanding plus with input from AD [Alan Demby] and CME [Caroline McAvoy]. This will then be provided to the Board as a formal position at our board meeting on 12 December 2014. The paper is required by 3 December.

Scoin:

1. Identify all premises leases in respect of which we have liability for financial years 2010 – 2014 (done- attached file, tab "By Landlord")

2. Identify those in respect of which we have received turnover certificate request (green in attached).

3. Secure turnover rent certificates to meet each request. The audit requirements in the leases must be fully met. If the company's statutory auditor is required to fulfil the audit, then comply. If not, then use same auditor as previously (CME).

4. First landlord to approach is Growthpoint (Walmer, La Lucia). Liability is R12k in respect of year 2014 which is only year request was made. Negotiate settlement for 2014.

5. Remaining outstanding turnover certificates are in respect of Liberty Properties & Old Mutual Properties.

6. Commence with Liberty. Approach Mel Urdang, past Liberty Properties director, for advisory role on Liberty.

7. Report back on progress with both items 4 and 6.

8. We then consider next steps, including approach to Old Mutual.

9. For landlords where certificate is requested there is no liability, secure certificates and comply with lease obligation to provide same.

10. In respect of premises leases where no request for turnover certificates has been received, take no action.

Talya:

1. The company's Annual Financial Statements over the period 2010 to 2014 do not reflect the cost of managing the business, as this was carried by Scoin. It is estimated that the cost per year of management services provided by Scoin was R5m to R6m. If charged the company would be insolvent. The company therefore does not have funds to meet its obligations. We do not intend to engage with ACSA.

2. The CTIA store is to close no later than February 2015. You are negotiating settlement with ACSA Cape Town.

3. King Shaka rent payments cease with immediate effect.

4. Turnover certificates are not to be requested.

5. Management will dormatise this company and assess how to minimise the risk of claims from ACSA.'

(Underlining supplied)

17.8. It is plain that, as CEO, Grimsley was formulating a proposal to put before the board. It was contemplated to be the Management's viewpoint. The controversial aspects related in the main to an approach that left matters undisturbed with certain lessors, a stance that was influenced by liquidity difficulties. ACSA, in particular, would be affected. The e-mail expressly called for input from Demby and the respondent.

17.9. The respondent regarded these views as inappropriate. The same day Grimsley sent Jordaan, the risk manager, an e-mail and asked whether the approach suggested was:

'….defendable in the context of directors' responsibilities to creditors and whether in the event the company were to fail and if the directors were in fact found guilty of reckless trading , the company's insurance policy would respond.'

17.10. It was this approach to the turnover rental problem, and a report to the respondent by Oosthuizen that there were still coins unaccounted for in the safe custody facility, that, so says the respondent, triggered her concern which led to her decision to seek advice from her personal attorney. That, in turn, led to the PD letter being sent on 21 November.

17.11. The appellant's contention is that it was unreasonable to construe Grimsley's suggestions as more than a proposal, subject to advice, to be considered by the board. This proposition is sound, not least because it articulated expressly that it be an item for the board meeting of 12 December and was described as a potentially "formal Position".

17.12. The respondent was fully aware of this information. Yet the PD letter reflects no appreciation of these facts. Again, it must be assumed that her attorney was not told. The unequivocal statement in the PD letter that it had been decided that the lessor of Tayla would not be paid is false and the respondent, who had all of this information, could not have reasonably believed it to be true. In evidence, the respondent unconvincingly tried to suggest that Grimsley's view, once adopted, was the final decision, a position which is unsustainable on the text of the e-mail and when it is plain he sought advice on its feasibility.

[18] Business rescue:

18.1. The reference to a demand to business rescue does not remotely, in my view, constitute material that falls within the rubric of a "disclosure" as

defined. It has no place in a so-called protected disclosure.[7] However, the presence in this letter of that demand is significant in demonstrating the motivation for the letter.

18.2. The allusion to the losses was a fact known to all.

18.3. The respondent's *opinion* that a business rescue was appropriate is a legitimate stance to adopt on the basis of her subjective appreciation of the financial condition of the business. She had raised it and the members of the board had considered the implications. The fact that her view was a minority view does nothing to elevate it to another status.[8]

18.4. The view expressed to the contrary by Rawlings, a turnaround expert the board had recruited to advise in through the crisis, on 19 November, that because of the nature of the business, to go the route of business rescue was not viable, was no less a legitimate view. Understandably, given its source, it was likely to carry more weight than of the respondent.

[19] What can be inferred from the respondent's evidence is that prior to getting advice on 21 November, she had never heard of a protected disclosure. Indeed, judging from her evidence, it is uncertain that by the time of the trial she was any better informed in any material sense. She stated that the advice she got was that in this sort of situation a "protected disclosure" is what one did. Thus, to seek advice on protection from an occupational detriment could not have been what drove her to take advice from her personal attorney. On the probabilities, it was self-preservation that drew her to take outside advice. She expected the business to fail. She was concerned about her exposure as a director and her prospects as an employee. The demand that the board resolve to put the appellant into business rescue is the key to her attitude. The PD letter was

[7] In the judgment *a quo* at [7.3] a statement is made that the complaint in the letter about business rescue refer to a breach of section 129(7) of the Companies Act 71 of 2008. This finding is wrong as no reliance was placed on that section by the PD letter nor was any evidence adduced concerning its relevance.
[8] In the judgment a quo at [42] it is held that as CFO the respondent knew best and somehow this was relevant. The finding is wrong, illogical and irrelevant.

motivated by a desire to pressurise the board to adopt her point of view. Its import and effect must be understood in that context.

[20] It was argued that the respondent failed in her fiduciary duties as a director by so acting; that she was duty bound to argue her case in the board, and if she felt strongly enough, to resign as a last resort. Instead she took up an adversarial stance against the board of which she was a member. I agree that she completely misdirected herself. As a director she carried co-responsibility for the appellant's decisions which she herself would participate in making. By, in effect, distancing herself from the board, she committed a serious lapse of judgment. She was not justified in contriving a stratagem to try to snooker the board into capitulating to her perspective. The rubric of a "protected disclosure" is inapposite.

[21] Two other aspects of a legal nature bear mention.

[22] First, a disclosure cannot be of a notorious fact. Every fact raised in the PD letter was known to every director and other members of the management and also to the auditors. Indeed, the matters were being addressed in the context of satisfying the auditors in respect of annual accounts. Terner, of Grant Thornton, was in conversation with respondent about these very matters and sat in on meetings of the appellant when they were addressed.

[23] The question of the prior knowledge and extent of the knowledge of the persons or entity to whom the disclosure is made has been the subject of judicial consideration. In *Beaurain and Others v PHSDSBC (Labour Court, unreported, C15/2012, per Steenkamp J, 16 April 2014))* it was held that a "report" of notorious information could not constitute the substance of a protected disclosure. That case concerned poor ventilation in a hospital, the subject matter of protracted prior discussion, complaints and investigation. In *City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another*[9], Wallis JA dealt with a submission that prior knowledge by the employer of the subject

[9] (2010) 31 ILJ 322 (SCA) at para 47.

matter of the disclosure is a bar to the disclosure qualifying as a protected disclosure. That view was rejected. That situation is distinguishable from the present case; the appellant, here, was not merely "aware" of the facts; it was, through its board, actively addressing the issues and the respondent was an active participant in so doing.

[24] Second, there is a further curiosity in the notion of a director making a protected disclosure to the board of which that director is a member and is therefore already engaged with the issues, collectively, with her fellow directors. Can one, in effect, make a disclosure, as defined in the PDA, to oneself? A so-called protected disclosure to the directors of the board of which the reporter is herself a member and upon receipt of which, she along with all other directors who are in receipt of the "disclosure", are under an obligation to address the issue, is a strange procedure indeed. The policy choice inherent in the concept of a protected disclosure is that an employee who is powerless to address the problem may divulge all the embarrassing facts to the decision-makers who *can* address it and be immune from any occupational detriments for having blown the whistle. The procedure is not designed to offer a director an indirect methodology to advance her point of view in a debate about decisions to be made by the board. However, this question needs not be decided.

Conclusions

[25] Accordingly, the PD letter does not, on the facts adduced in evidence, constitute a protected disclosure; rather is a contrived attempt to bully the respondent's fellow members of the board into adopting the respondent's point of view, and an attempt to distance herself from her co-decision-makers should there be a fall-out. In short, it served her self-interest exclusively.

The absence of any causal connection between the PD letter and the redundancy of the respondent's directorship

[26] It is in my view plain that there is no demonstrable link between the PD letter and the termination of the respondent's employment. Indeed, the facts show that the termination was an outcome of her own choosing.

[27] The first of two stages in the restructuring of the business had resulted, among other aspects, in the respondent, after three months in the employ of the appellant, being taken onto the board and made the chief financial Officer in a centralised and consolidated finance function of the whole business. That decision costs the appellant an additional 10 % in salary payable to her. The second stage of the restructuring involved a further trimming of costs and among other aspects, resulted in the departure of Grimsley from the business and, among other persons affected, the dropping of respondent and of Rauff to their former status with a reversion to their former salaries. The process was addressed by the appellant as a formal redundancy in their roles as directors. In both cases, the effect of restructuring was the redundancy of their directorships not of their jobs in the business.

[28] The reaction of respondent to the section 189 letter notifying her of the theoretical danger of retrenchment, on 11 December, was, by way of a letter from her attorney, to refuse to participate in consultations and to allege an occupational detriment owing to the PD letter. Notwithstanding her formal refusal to participate, she nevertheless met Rauff twice and Demby once and was given an opportunity to be heard. She flatly refused the reassignment of her role, which *de facto* was a reversion to the status *quo* of three months earlier. The retrenchment was a direct result of that refusal.

[29] The respondent, being fully aware of the financial predicament of the business, and indeed, deeply concerned about that condition lacked no information required reasonably to consider the business rationale of the decision with its concomitant costs savings. She also was aware that she was not singled out in an aberrant redundancy but that the second stage of the restructuring was broadly based. She had no reasonable ground for a belief that the decision was one which targeted her or that, logically, her so-called disclosures were causally

connected. Despite this degree of awareness, she, ostensibly, on advice from her attorney, adopted a solid stance in which she insisted she was a victim of an occupational detriment for the dispatch of the PD letter.

[30] The thesis of the respondent's case relies heavily on the timing of the events; ie, the disclosure was followed shortly after by a rearrangement of the board resulting in a demotion – *ergo*, the one event caused the other. This line of argument conflates correlation with causation. The primary fact which contextualises the happenings of late 2014 is the dire financial straits of the appellant. Moreover, as the change to the respondent's position was largely to save money and retain her services in the role of consolidated CFO, the alterations were largely cosmetic. Her short-lived stint on the board was no real sacrifice in the context of other sacrifices being made.

[31] The case for concluding a causal connection is plainly unconvincing. On the probabilities, the restructuring was a rational response to the predicament of financial instability in which the appellant found itself. She was not being expelled from the business. Her envisioned revised role, insofar as it meant a reduction in salary, was common to several others in the management echelon. She could have carried on and expressed her points of view as before.

[32] In my view, on the probabilities, the inference is warranted that respondent contrived the PD letter to set up a complaint of an occupational detriment for financial gain because she personally had formed the view, incorrectly as it turned out, that the business could not avoid ruin.

Conclusions

[33] Accordingly:

33.1. There was no protected disclosure as contemplated by the PDA.

33.2. There was no automatically unfair dismissal.

33.3. The appeal must be upheld.

[34] The decision *a quo* must be reversed. Costs were awarded to the respondent *a quo*; it is appropriate, given the facts of the matter, that the costs order also be reversed.

[35] The respondent in opposing the appeal sought to defend a judgment in her favour. In those circumstances, it is appropriate that no costs order be made.

The Order

(1) The appeal is upheld.

(2) The order in the court *a quo* is set aside and substituted as follows:

"The application is dismissed with costs"

_____

Sutherland JA

Sutherland JA (with whom Phatshoane ADJP and Kathree- Setiloane AJA concur)

APPEARANCES:

FOR THE APPELLANT: Adv Jonathan Kaplan,

Instructed by Roy Suttner.

FOR THE RESPONDENT: Attorney Clifford Green.