IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C599/2017

In the matter between:

JOHANNES WYNAND LOUW HOFMEYR **Applicant**

and

ANDRE SAAIMAN t/a SA ENDOVASCULAR

GROUP PRACTICE **Respondent**

Date heard: October 21-23 2019

Delivered: December 3 2019-

Summary – Application of section 187(1)(c) - An individual employee cannot rely on section 187(1)(c). Post amendment, it is only section 187(1)(c) that refers to "employees" as opposed to "employee". This is because the section is concerned with ensuring that collective bargaining and the associated right to strike is not undermined. These underlying rights are collective in nature. It is not concerned with individual rights.

JUDGMENT

CONRADIE, AJ

[1] The applicant in this matter (Dr Hofmeyr) is a cardiologist who was formerly employed by the respondent (Dr Saaiman) from around June 2013 to 2 May 2017.

[2] Dr Hofmeyr first met Dr Saaiman when he worked for him as a locum in his practice, SA Endovascular Group Practice (the practice), for approximately two months between November 2011 and January 2012.

[3] During this period Dr Hofmeyr was offered a fellowship position in a hospital in Brisbane, Australia. He accepted the position and while in Australia he remained in contact with Dr Saaiman.

[4] In 2013 Dr Hofmeyr accepted an offer from Dr Saaiman for a permanent position in his practice. The position was offered with a view to Dr Hofmeyr gaining the necessary general cardiology experience. Thereafter the thinking was that Dr Hofmeyr could take over the running of the practice and become the primary cardiologist when Dr Saaiman started winding down for retirement. This understanding was also expressed to Dr Hofmeyr when he met with Dr Saaiman at his home in early 2013.

[5] The above understanding was however never concretised and as time passed it appeared that Dr Saaiman's retirement would be further delayed and that he had no intention of leaving his practice immediately.

[6] In the initial two years of working together, Dr Hofmeyr confided in and sought career advice from Doctor Saaiman concerning prospective employment opportunities that he had been offered in various other hospitals in South Africa and the possibility of taking a full-time position as a Head of Department in a hospital in Australia. He also regarded Dr Saaiman as a mentor.

[7] However, according to Dr Hofmeyr, during 2015 the relationship began to sour due to differences in their approach to medical practice; Dr Saaiman's volatile character traits, and a number of failed attempts by Dr Hofmeyr to ascertain

his future prospects and career growth within the practice. It was at this time that Dr Hofmeyr started making inquiries for positions at other medical institutions. Dr Hofmeyr felt that he could no longer trust, confide in, nor seek career advice from Doctor Saaiman since he felt that Dr Saaiman no longer had his best interests at heart.

[8] On 28 April 2017 a discussion took place in terms of which Dr Saaiman told Dr Hofmeyr that he had heard that he was joining Mediclinic Panorama in the Western Cape. Dr Saaiman indicated that he had no difficulty with Dr Saaiman taking up another position in general, either locally or overseas, but that he should not take up a position at Mediclinic Panorama or establish a practice at Netcare Kuilsriver because this would lead to unfair competition with Dr Saaiman's practice. If Dr Hofmeyr however wished to take up the position at Mediclinic Panorama, he would have to leave Dr Saaiman's employ with immediate effect.

[9] On 1 May 2017 the parties communicated further by way of WhatsApp. Dr Saaiman told Dr Hofmeyr that if he wished to remain employed at the practice, he was required to sign a restraint of trade agreement, restricting/restraining him from practicing within a negotiable radius of Kuilsriver for a period of two years after termination of employment.

[10] On 2 May 2017 the parties held a discussion during which Dr Saaiman again told Dr Hofmeyr that if he wished to continue working for him, he had to sign a restraint of trade agreement which restrained him from taking up a position at Mediclinic Panorama or establishing his own practice at Netcare Kuilsriver.

[11] Dr Hofmeyr countered with a proposal that he be allowed to continue working without signing a restraint agreement. Dr Saaiman then indicated to Dr Hofmeyr that his employment was terminated with immediate effect and that he was no longer to take care of his current patients who would be cared for by Dr Saaiman's practice. Dr Hofmeyr was also to leave the office with immediate effect.

[12] On 2 May 2017 Dr Saaiman reduced to writing his proposal that Dr Hofmeyr remain employed for a further period of two years on condition that he did not

set up a competing practice at Mediclinic Panorama or Netcare Kuilsriver, after which period Dr Hofmeyr's entire practice would be transferred to Dr Saaiman. Although this proposal was prepared on 2 May 2017, it was only handed to Dr Hofmeyr on 5 May 2017.

[13] As a result of Dr Hofmeyr's refusal to sign the restraint of trade agreement, he was dismissed on 2 May 2018.

[14] After Dr Hofmeyr was dismissed, Dr Saaiman offered, on more than one occasion, to reinstate him with back pay. Dr Hofmeyr refused the offer.

[15] In addition to Dr Saaiman paying Dr Hofmeyr all monies due to him, he also paid him a month's pay in lieu of notice.

[16] The matter was referred as an unfair dismissal dispute to the CCMA and was set down for con-arb on 12 June 2018.

[17] After conciliation failed, and a certificate to that effect was issued, the matter did not proceed to arbitration as Dr Saaiman's legal representative sought a postponement on the basis that the Dr Saaiman was overseas at the time.

[18] The matter was set down for arbitration on 23 June 2017 and again on 25 July 2017. On both occasions the matter was postponed due to the unavailability of Dr Saaiman.

[19] The matter was then set down for arbitration on 11 September 2017 on which occasion the arbitrator recused himself at the request of Dr Saaiman's counsel. As no other Senior Commissioner was available to arbitrate on that day, the parties agreed to postpone the hearing to 4, 5 and 6 October 2017.

[20] On 2 October 2017 Dr Hofmeyr filed a statement of claim in this court alleging an automatically unfair dismissal. The matter therefore did not proceed in the CCMA on 4 October 2017.

[21] In terms of the pre-trial minute, the issues to be determined by this court are recorded as follows:

21.1. *"Whether the applicant's dismissal constitutes an automatically unfair dismissal as envisaged in section 187(1)(c) of the Labour Relations Act 66 of 1995 (LRA), in that, the reason for the dismissal was to compel the applicant to accept a demand in respect of a matter of mutual interest between the respondent as employer and the applicant as employee;*

21.2. *Whether, in the alternative to paragraph 16.1 above, the applicant's dismissal was an unfair dismissal as envisaged in section 188 of the Act in that it was not for a fair reason, or in accordance with a fair procedure as envisaged in that section*;

21.3. *Whether the applicant is entitled to compensation amounting to his remuneration as at the date of termination of his employment for a period of 24 months, alternatively 12 months*".

Point *in limine*

[22] Before dealing with the above issues I need to deal with a point *in limine* which was raised in court on the morning of 21 October 2019 when the trial commenced.

[23] According to Mr Rautenbach, who appeared on behalf of Dr Hofmeyr, on Friday 18 October 2019 he was informed that Dr Saaiman intended arguing a point *in limine* based on jurisdiction pursuant to the decision of the Constitutional Court in *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and others*.[1]

[24] The argument is that this court does not have jurisdiction because the dispute between the parties was not referred to conciliation in terms of section 191 of the LRA.

[25] I do not agree that this court does not have jurisdiction to hear the matter.

[26] In his referral to conciliation, Dr Hofmeyr records the reason for his dismissal as *"I was dismissed for refusing to sign a restraint of trade agreement".*

[1] [2015] 3 BLLR 205 (CC).

[27] In *Intervalve* the Constitutional Court quoted with approval the decision of *NUMSA v Driveline Technologies (Pty) Ltd & another* [2]. In *Driveline* the facts were that the original claim referred for conciliation was based on the dismissal of the applicants for reasons relating to operational requirements, which the applicants had alleged was unfair. The amendment sought in the Labour Court was to broaden the claim by additionally alleging that the dismissal was automatically unfair as envisaged in section 187(1)(c) of the LRA. The amendment was opposed on the basis that the claim was based on an automatically unfair dismissal that had not been referred for conciliation. The Court held that a dispute is constituted by two parties holding opposing views, and in the context of section 191 of the LRA, it is a dispute where the employee party alleges that the dismissal was unfair, and the employer that it was fair.[3] The Court also pointed out that the appropriate forum for adjudication of a dispute that has not been conciliated successfully, depends on the categorisation of the dispute by reference to the broad reason for dismissal (conduct, capacity or operational requirements) or whether the employee is unaware of the reason for the dismissal.[4] The categorisation of the dispute as such, does not however constitute the dispute itself.[5] According to the court:

"It follows, therefore, from what I have said above in regard to a dismissal for operational requirements that also the reference to a dismissal as an automatically unfair dismissal is nothing more than giving a reason for the dismissal. That this is the case is confirmed by a reading of the provisions of sec 187(1) which deal with automatically unfair dismissals. It is clear from sec 187(1) that whether a dismissal is automatically unfair depends on the reason for the dismissal. Of course, once the reason for dismissal has been established, this may have various

[2] [2000] 1 BLLR 20 (LAC).
[3] At paras 36 - 37.
[4] At paras 39 – 39.
[5] At paras 40 – 42.

implications in terms of the Act which may differ from the implications which would flow from the establishment of another reason as the reason for dismissal.

An amendment of the appellants' statement of claim to the effect that the dismissal is an automatically unfair dismissal will therefore not introduce a new dispute but will simply be an allegation of another reason for dismissal or will be the reason relied upon by the appellants in the place of, or, as an alternative to, the reason of operational requirements. The dispute remains the same dispute that was referred for conciliation in terms of sec 191(1) of the Act, namely, the dispute about the fairness of the dismissal of the second and further appellants."

[28] The Court further held that:

"…I would say that a dispute about the fairness of a dismissal remains the same dispute whether or not the reason alleged as the reason for dismissal is changed, withdrawn or added to. The mere allegation of another or an additional reason for dismissal or the mere allegation of another ground of alleged unfairness does not change one dismissal dispute into as many dismissal disputes as there are alleged reasons for the dismissal or into as many disputes as there are grounds of alleged unfairness. If this was not the case, an employer could frustrate the entire processing of such a dispute by the mere device of keeping on changing the alleged reasons for dismissal.[6]"

[29] In *Driveline* the dispute was characterised as an "*alleged unfair termination of services of our members (unfair retrenchment)*". The Court held that: *"…A*

[6] At para 48.

dismissal that is automatically unfair would also fall within the ambit of the phrase: "alleged unfair termination of services of our members"…"."[7]

[30] Finally, the Court held that:

"…it matters not for purposes of jurisdiction whether at the time of the conciliation of a dismissal dispute, the reason alleged for the dismissal was operational requirements or an automatically unfair reason. The dispute is about the fairness of the dismissal. Therefore, provided the alleged reason is one referred to in sec 191(5)(b), the Labour Court will have jurisdiction to adjudicate the real dispute between the parties without any further statutory conciliation having to be undertaken as long as it is the same dismissal."[8]

[31] In the present matter, the dispute that was referred to conciliation was based on an alleged unfair dismissal. The further characterisation of the dispute as an automatically unfair dismissal in terms of section 187(1)(c) of the LRA was introduced after the issuing of the certificate of outcome, but prior to trial in the Labour Court.

[32] Ultimately, the dispute about the fairness of the dismissal was conciliated. The fact that alleged reason for the dismissal has changed makes no difference.

[33] The fact that in the one case that introduction occurred by way of an amendment application and in the other by way of a fresh referral to the Labour Court, is immaterial.

[34] The point *in limine* is therefore dismissed.

[35] I will now turn to the merits of the case.

[7] At para 55.
[8] At para 64.

Was the dismissal automatically unfair

[36] During argument, I brought the judgment of van Niekerk J in *Jacobson v Vitalab*[9] to the attention of the parties. In this case, which dealt with an exception, the court held that a single employee had no cause of action under section 187(1)(c) of the LRA, because that section only finds application in the sphere of collective bargaining.

[37] In reaching its conclusion the court took the following into account:

37.1 Under the 1956 LRA a lock-out included a tactical dismissal (termed a lock-out dismissal);

37.2 The 1995 LRA put an end to this practice by:

37.2.1 adopting a definition of 'lock-out' which excluded dismissal as a tactic in collective bargaining disputes; and

37.2.2 making a lock-out dismissal automatically unfair.

37.3 The legislator in 2014 amended the wording of the section, the express purpose of which was to *remove an anomaly* which, by virtue of the *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others*[10] and *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd*[11] decisions, discouraged employers from offering re-employment to retrenched workers. The legislator amended the wording to better reflect the intended purpose, which was to protect the integrity of the process of collective bargaining.

37.4 It was thus clear that the purpose was to "*preclude the use of dismissal as a legitimate instrument of coercion in the collective bargaining process".*

37.5 That it was not intended to apply to individual employees is fortified by the use of the plural: '*employees*' and '*them and their employer*'.

[9] (2019) 40 ILJ 2363 (LC).
[10] (2003) 24 ILJ 133 (LAC).
[11] (2003) 24 ILJ 1917 (LAC).

[38] Mr Rautenbach argued that the *Vitalab* decision was wrongly decided. According to him:

38.1 The original version of section 187(1)(c) was intended to prevent the evil of the dismissal lockout that existed under the 1956 LRA. The original version used to apply to single employees as much as to collective groups of employees.

38.2 The anomaly that was exposed by the *Fry's Metal* case and other cases, was the problem that an out and out dismissal did not satisfy the definition of an automatically unfair dismissal, as it could not be said that a dismissal was done to compel the acceptance of a demand unless the demand remained open for acceptance after the dismissal. Only a conditional dismissal would suffice.

38.3 In order to remedy the anomaly, the legislature amended section 187(1)(c) to include an out and out dismissal and thus widened the scope of the right created for employees.

38.4 When amending section 187(1)(c) the legislature also amended the term "employee" to "employees". In arguing that the plural form does not mean that single employees are not entitled to the protection offered by sub-section 187(1)(c) regard must be had to section 6 of the Interpretation Act 33 of 1957 which provides that *"words in the singular number include the plural, and words in the plural include the singular"*. Reference to employees in the amended sub-section therefore has to also apply to individual employees.

38.5 The previous sub-section included single employee's and this was not identified as an anomaly requiring amendment. On the contrary, the protection was applied by our courts to single employees.

38.6 If the legislature intended to remove the remedy from single employees, one would have expected the memorandum and the amendment to expressly state that.

38.7 If a later provision of an amendment contradicts or is inconsistent with an earlier provision of the same enactment, an attempt must first be made to interpret the two provisions in such a way that each is accorded its full effect, especially if the later one violates or modifies rights safeguarded by the former one. Only if such an attempt fails, should it be concluded that the latter provision was meant to nullify the rights created by the earlier one.

38.8 Courts are also expected to interpret legislation in accordance with constitutional rights. Section 9(1) of the Bill of Rights provides that *"Everyone is equal before the law and has the right to equal protection and benefit of the law".* Section 23(1) provides that *"Everyone has the right to fair labour practices"*. There is no way that the amendment of section 187(1)(c), in the event of uncertainty, can be interpreted contrary to the above provisions. In case of doubt, single employees should be afforded the same protection as collective groups.

[39] Ms Harvey argued that I should follow the decision in *Vitalab* for the following reasons:

39.1 The LRA gives effect to the constitutional right to fair labour practices. It does so through section 185 which provides that employees have a right not to be unfairly dismissed. Over and above this, the LRA provides in section 187 that dismissals for certain defined reasons are automatically unfair.

39.2 The automatically unfair reasons are those which clearly counter the constitutional and statutory rights. This is because, if employees could be fairly dismissed for those reasons, it would undermine the purpose of the LRA. Read in context, all the reasons proclaimed to be automatically unfair, support the structure and design of the LRA itself.

39.3 The LRA recognizes that there are many other possible unfair reasons for dismissing an employee and places the onus on the employer to prove the fairness of the reason. Where a single employee is dismissed for refusing to accept a demand, this reason is not one which

warrants special protection from the Labour Court instead of the CCMA, and the enhanced compensation attached to automatically unfair dismissals.

39.4 The decision in *Vitalab* does not take rights away from individual employees. The right not to be unfairly dismissed remains intact and well managed by the CCMA.

[40] I agree with the conclusion of Van Niekerk J, and the reasons he provides in support of his conclusion, that section 187(1)(c) does not apply to individual employees. There is however another reason why I believe that section 187(1)(c) does not apply to an individual employee.

[41] In interpreting the amended section 187(1)(c), the change from "employee" to "employees" can also be considered with reference to the underlying protection afforded by the sub-section read with the underlying protections afforded by the other automatically unfair dismissal grounds. Section 187(1)(c) provides as follows:

187. Automatically unfair dismissals.—(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5[12] or, if the reason for the dismissal is—

(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;

(b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

(c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;

[Para. (c) substituted by s. 31 of Act No. 6 of 2014.]

(d) that the employee took action, or indicated an intention to take action, against the employer by—

[12] Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act.

(e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;

(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;

(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or

[Para. (g) added by s. 42 of Act No. 12 of 2002.]

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.

[Para. (h) added by s. 42 of Act No. 12 of 2002.]

[42] All of the sub-sections refer to "employee" except sub-section (c) which now refers to "employees". So, for example, an individual employee can refer an automatically unfair dismissal dispute if there is a violation of that employee's section 5 rights, which are concerned with freedom of association. If an employee is dismissed for participating in or supporting a protected strike, that individual employee can refer an automatically unfair dismissal dispute. The same applies if an employee refuses to do any work normally done by an employee taking part in a protected strike. In both these latter instances, the intention of the legislature is to protect the constitutional right to strike and to ensure that it cannot be undermined by employers. An individual employee may also refer an automatically unfair dismissal if dismissed for exercising any of their rights in the LRA or for participating in any proceedings in terms of the LRA. This is to ensure that the rights contained in the LRA are not undermined. Individual employees can also refer automatically unfair dismissal disputes if they are unfairly discriminated against on a host of grounds or as a result of the employee's pregnancy. In addition, individual employees also have the right to refer an automatically unfair dismissal dispute in relation to a transfer in terms of section 197 of the LRA or where an

employee is dismissed for making a protected disclosure. In my view the former has been included to ensure that employers cannot undermine the LRA by transferring a business with the aim of escaping their employment law obligations to their existing employees. The latter has been included to *inter alia* underline the importance of accountable and transparent governance in a democracy. In *City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another*[13], the Supreme Court of Appeal stated that the broad purpose of the Protected Disclosures Act is *'to encourage whistleblowers in the interests of accountable and transparent governance in both the public and the private sector. That engages an important constitutional value and it is by now well-established in our jurisprudence that such values must be given full weight in interpreting legislation.'*

[43] The above grounds are concerned with freedom of association, protecting employees against unfair discrimination, ensuring that employees can exercise their rights in terms of the LRA and giving effect to the Constitution.

[44] An individual employee can utilize the automatically unfair dismissal protection in all of the above instances because what is worthy of protection are the underlying rights.

[45] Post amendment, it is only section 187(1)(c) that refers to "employees" as opposed to "employee". This is because the section is concerned with ensuring that collective bargaining and the associated right to strike is not undermined. These underlying rights are collective in nature. It is not concerned with individual rights.

[46] In the context of section 187, as dealt with above, I can see no reason why an individual dispute between an employee and employer must be afforded the enhanced protection and remedies applicable to automatically unfair

[13] (2010) 31 ILJ 322 (SCA) at para 42. See also *Ngobeni v Minister of Communications and Another* (2014) 35 ILJ 2506 (LC) at para 10 where the court stated that *"In its preamble, the PDA recognized that criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies, and can endanger the economic stability of the Republic and have the potential to cause social damage.* In *Tshishonga v Minister of Justice and Constitutional Development and Another* [2007] 4 BLLR 327 (LC) at para 10 it was stated that *"The PDA takes its cue from the Constitution of the Republic of South Africa Act No 108 of 1996. It affirms the "democratic values of human dignity, equality and freedom".*

dismissals. Such protection is simply not consistent with the scheme of section 187.

[47] In the circumstances, I find that the dispute before me is not capable of being heard as an automatically unfair dismissal dispute.

Was the dismissal substantively and procedurally fair in terms of section 188 of the LRA

Substantive fairness

[48] Ms Harvey's submissions can be summarised as follows:

48.1 The proximate reason for the dismissal was a breach of trust and that the employer's insistence that the employee sign the restraint was a practical, reasonable solution to correct the breakdown and avoid termination. If anything, the employer wanted to keep the employee, but the employment relationship could only be continued/resumed if trust could not be restored.

48.2 Having been reliably informed of the employee's secret plans on 28 April 2017, the employer confronted him. The employee's response was that he was looking for other positions, had no guaranteed position yet, and would give adequate notice.

48.3 The employer's trust in the employee had been breached. The employer required the employee to remedy the breach of trust, so that the relationship could continue, albeit on a new basis (an express, limited restraint of trade agreement). That a continued relationship depended upon this remedy was clearly communicated in the WhatsApp message of 1 May 2017.

48.4 Because the breach concerned a reciprocal duty, it was incapable of unilateral correction. The employer could not enforce the remedy, yet the consequence of failing to remedy the breach was that the relationship could not continue.

48.5 Viewed this way, it becomes clear why Dr Saaiman did not consider himself to have dismissed Dr Hofmeyr, but felt that Dr Hofmeyr had chosen to walk away from their relationship. Real life does not always easily fit into legal frameworks, and the facts of this case may only awkwardly be wedged into one or other of its possible narratives.

48.6 What is clear is that there was misconduct on the part of Dr Hofmeyr who breached his duty of loyalty and good faith, the tacit undertaking to keep Dr Saaiman informed of his plans, and his fiduciary duty to disclose his intention to compete.

48.7 It is trite that such breach of trust is a fair reason to terminate the employment relationship.

[49] Mr Rautenbach's submissions can be summarised as follows:

49.1 The dismissal was not as a result of a breach of trust. It may be that the event leading up to the dismissal for refusing to sign the restraint of trade was a perception of a breach of trust, but that was not Dr Saaiman's version at the time of the dismissal. The closest Dr Saaiman got to such a reason, was the statement in the WhatsApp message of 1 May 2017 that *"Should you decide to stay, such restoration of trust will only be achieved by the conclusion of a work condition (trade restriction) contract."*

49.2 Even if it is accepted that the real reason for the dismissal was misconduct in the form of a breach of trust, the Respondent's case does not make the grade. The principle was formulated as follows in *Council for Scientific & Industrial Research v Fijen*[14],:

"It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the "innocent" party to cancel the agreement (Angehrn and Piel v Federal Cold Storage Co Ltd 1908 TS 761 at 777-778.) On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgments in the LAC to this effect (e g Humphries & Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union (1991) 12 ILJ 1032 (LAC) 1037G). I may add that this much was not placed in issue for the respondent by Mr Scholtz. It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from naturalia contractus."

49.3 The important point is that, as ***Fijen's*** case makes clear, the duty is a mutual one. It is important further, that in this matter, the employer places reliance on a tentative understanding that the parties had at the

[14] [1996] 6 BLLR 685 (AD) at page 691-692 J.

conclusion of the original employment contract, best encapsulated by the following statement in the e-mail of Dr Saaiman of 28 May 2012:

"Ek jy en Johan kan dan sit as jy terug is en deel dan praktyk op 'n regverdige manier (sonder inkoop) tot jul later (oor 5-7 jr) oorneem. Dan kan jy my weer met 'n oggend of middag joppie help?"

49.4 It is on the basis of this loose arrangement that Dr Saaiman now claims that the parties had a special type of relationship that entailed a duty of trust or good faith that extended to a duty on Dr Hofmeyr's part to take him into his confidence about enquiries that he made that would threaten the practice by competing for its database of patients.

49.5 Our law does not impose such a duty on an employee in the normal course. According to Brassey *"When the termination of employment is contemplated or imminent, the employee may, during his free time, seek other employment, or begin establishing a business of his own …"* That duty is obviously subject to respecting the employer's confidence, and not competing with the employer while employed.[15] In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[16] the court approved of the setting up of a company in anticipation by the employee (who was also a director) of his departure, but obviously not the soliciting of clients.

49.6 It is therefore clear that the content of the duty of confidence and trust is a flexible one in the sense that it has to be assessed based on the

[15] Brassey: *Employment Law* D2 27.
[16] 1981 (2) SA 173 (T).

different facts of each case. What is perhaps more important, is that the duty is a mutual one. Dr Hofmeyr's evidence was clear that he had for several years periodically made enquiries with Dr Saaiman about his future prospects, with obvious reference to the loose arrangement that he would eventually take over the practice. These enquiries led nowhere. In particular, shortly before the events leading to his dismissal, Dr Saaiman indicated that he intended practicing for a further four years, as pointed out to him by Hofmeyr in the discussion of 2 May 2017. Dr Hofmeyr stressed that over the years it had become progressively clear to him that Dr Saaiman did not have his best interests at heart. This included an increasingly bad temper and volatility, exclusion from training and most importantly a failure to reassure him, despite a number of enquiries, that he had a future in the practice in the long term.

49.7 It is further highly significant that Dr Saaiman had already drafted an offer in terms of which he would transfer the practice to Dr's Hofmeyr and Augustyn in two years' time, but did not show the offer to Dr Hofmeyr at any stage during their discussion. Dr Saaiman's contorted attempts at suggesting that the document was on his desk and that he pointed it out, is laughable. Even if it were true that the document was lying face-up on the desk and pointed to by Dr Saaiman, that would not have informed Dr Hofmeyr of the crucial fact, namely that he was being offered the prize which he had sought for so long, and which would vindicate his many enquiries over the years. Dr Saaiman's failure to

make the offer during the meeting, is fatal to his case. It demonstrates that he had not been conducting the discussion in good faith.

49.8 Instead of offering the reasonable alternative of a transfer of the practice, Dr Saaiman demanded a restraint of trade agreement, on pain of immediate dismissal.

49.9 Dr Hofmeyr's evidence is that the meeting, notably the attempt to impose the restraint on the strength of a threat of dismissal, resulted in a breakdown of the trust relationship.

49.10 This was not a sudden event, as it had been coming on for some years, especially due to the many enquiries made by Dr Hofmeyr about his future, which essentially remained unanswered.

[50] In my view, while the dismissal may have had its origins in what Dr Saaiman regarded as a breach of trust, this was not a breach of trust in the sense which Ms Harvey tried to argue. She submitted that Dr Hofmeyr was a fiduciary employee and as such had a duty not to compete with Dr Saaiman. Once Dr Hofmeyr formed an intention to compete, when his employment ended, he was under a duty to disclose his plans in order to avoid a conflict of interest. Dr Saaiman was entitled to request Dr Hofmeyr to sign a restraint of trade in order to restore the trust.

[51] While the legal submission may be correct, this is not what drove Dr Saaiman to resort to effectively immediate dismissal. Dr Saaiman's response, when he learnt of Dr Hofmeyr's plans, were driven more by anger and disappointment than by an operational response underpinned by an appreciation of Dr Hofmeyr's failure to comply with his legal obligations as a fiduciary employee.

[52] This is clear from the following:

52.1 Dr Saaiman was enraged that Dr Hofmeyr wanted to leave. When he learned that Dr Hofmeyr wanted to go to Mediclinic Panorama he was disappointed like a father would be when losing a child.

52.2 It was put to Dr Saaiman that at paragraph 23 of his pleadings he indicated that the dismissal was for a fair reason, being the breach of Dr Hofmeyr's duty of care. He was asked if by this he meant that Dr Hofmeyr was negligent. He responded that he was not negligent, but greedy, as within six months he had taken over Dr Murray's practice as opposed to waiting for two years for him to retire. He continued to state that he dismissed him because he had already set everything up.

52.3 He further testified that Dr Hofmeyr was obliged, as a colleague, to tell him of his plans.

52.4 Dr Saaiman testified that he wanted Dr Hofmeyr to understand that if he wanted to leave, he had to leave immediately. Dr Hofmeyr wanted to build up his practice from within Dr Saaiman's practice and that it was bad business for someone to stay in a practice in order to build up their own practice. He conceded that he threatened Dr Hofmeyr and played hard ball.

52.5 It is common cause that after Dr Hofmeyr proposed that he continue working without having to sign a restraint, he was dismissed with immediate effect.

52.6 If Dr Saaiman really wanted Dr Hofmeyr to sign a restraint of trade agreement, he would have presented it to him for consideration prior to dismissing him. It is common cause that Dr Hofmeyr was dismissed on

2 May 2017, but the restraint agreement was only given to him on 5 May 2017.

[53] In the circumstances, I find that the dismissal was substantively unfair.

Procedural Fairness

[54] Ms Harvey argued the following in respect of procedural fairness

54.1 The procedure preceding the dismissal was sufficiently fair and met the requirements of the Code.

54.2 Dr Hofmeyr was aware of the allegations, and he understood them.

54.3 He had been apprised of Dr Saaiman's required remedy, and had had time, not only to consider it, but to take legal advice by the time the parties met on 2 May 2017. At that meeting, Dr Hofmeyr engaged freely with Dr Saaiman.

54.4 Although Dr Hofmeyr's intention in the meeting was to set Dr Saaiman up for an unfair dismissal claim, Dr Hofmeyr made full use of the required opportunity to state a case in response to the allegations. He was afforded the same opportunity on 28 April 2017.

[55] By no stretch of the imagination can the meeting of 2 May 2017 be equated with an opportunity for Dr Hofmeyr to state a case before the decision was taken to dismiss him. The purpose of the meeting from Dr Saaiman's side was clear. If Dr Hofmeyr wanted to remain in his employ, he had to sign a restraint. Towards the end of the discussion, Dr Saaiman alluded that Dr Hofmeyr could stay, but on the basis that he 'closed the other doors' in Cape Town. In other words, if he signed the restraint he could stay. For the rest, Dr Saaiman wanted to hear nothing. Irrespective of the consequences for Dr Hofmeyr, he had to leave immediately.

[56] I also do not believe that the immediate termination was based on Dr Saaiman's need to protect his business, after he heard rumours about Dr Hofmeyr's plans. In the meeting, Dr Hofmeyr put it to Dr Saaiman that what was actually happening was that he was being told to leave immediately on the strength of rumours. Dr Saaiman responded by saying that it is not because of rumours but because of the decision Dr Hofmeyr took.

[57] Dr Saaiman was upset and felt deeply betrayed by Dr Hofmeyr's decision. He was not meeting to take representations from Dr Hofmeyr but rather to make his condition for continued employment clear. In effect, Dr Hofmeyr was given an ultimatum. If you want to continue working for me then sign the restraint. If you do not sign you are terminated.

[58] In the circumstances, I find that the dismissal was procedurally unfair.

Remedy

[59] Ms Harvey argued that the following considerations should be taken into account if compensation is to be awarded:

59.1 Dr Hofmeyr's earnings at the time of dismissal were unusually high.

59.2 Dr Hofmeyr suffered no financial loss as a consequence of the dismissal. On the contrary, he was financially better off than he would have been had he not been dismissed, if regard is had to the fact that he:

59.2.1 received a full salary from Dr Saaiman for the months of May and June 2017 (in the amount of R414,359.26);

59.2.2 was paid for locum work during May 2017; and

59.2.3 was paid R230,000.00 in June 2017 by Dr Murray, for whom he commenced working on 3 June 2017.

59.3 Dr Saaiman made with-prejudice offers of a further R257,159.84 on 12 June 2017 and 24 July 2017, which offers, Dr Hofmeyr unreasonably refused.

59.4 Dr Hofmeyr had acted in bad faith throughout. He failed to disclose his plans to compete with Dr Saaiman, secretly recorded Dr Saaiman on 2 May 2017 with the intention of using the recording to buttress this claim, utilised Dr Saaiman's handwritten letter of 5 May 2017 solely to embarrass him, and misrepresented the facts in his CCMA claim.

59.5 Dr Hofmeyr precipitated the series of events leading to his dismissal by failing to disclose to his employer that he was in discussions with Mediclinic Panorama.

59.6 Dr Hofmeyr suffered no actual reputational damage, and his future prospects of employment were unaffected as evidenced by his immediate securing of locum work in May 2017, his employment from 3 June 2017, and the ultimate establishment of his own practice on 1 December 2017 which he still runs.

59.7 Dr Saaiman is a sole proprietor and any compensation will have to be paid from his personal savings.

[60] In *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[17] the LAC held that:

"Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a solatium and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The solatium must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[17] [2015] 11 BLLR 1081 (LAC) at paras 23-24.

"The determination of the quantum of compensation is limited to what is "just and equitable". The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride. There are conflicting decisions regarding whether compensation should be analogous to compensation for a breach of contract or for a delictual claim. In my view, and as I said earlier, because compensation awarded constitutes a solatium for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action (ie action injuriarum) for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a solatium because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In Minister of Justice & Constitutional Development v Tshishonga (Tshishonga), this Court in an award of solatium referred to the delictual claim made under the actio iniuriarum for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but were not limited to:

> *'…the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place…'.*

[61] I have already found that Dr Saaiman's decision to dismiss Dr Hofmeyr had nothing to do with his failure to comply with his legal obligations as a fiduciary employee. He was outraged that Dr Hofmeyr whom he had been grooming as a successor, was looking for alternative employment, particularly at Mediclinic Panorama. He then proceeded to terminate Dr Saaiman's employment in a most undignified manner.

[62] Dr Hofmeyr was called to the meeting on 2 May and told in no uncertain terms that if he did not sign the restraint he had to leave immediately. This, despite Dr Hofmeyr offering to continue working in terms of his existing contract and pointing out that it was a tough decision and making it clear that he did not have any job lined up. While he had been in talks with other possible employers, he had not secured alternative employment.

[63] Dr Saaiman behaved in a malicious manner. He testified that he wanted to employ *"shock tactics*" to remind Dr Hofmeyr of reality. I cannot comprehend why Dr Saaiman, who testified that he actually wanted Dr Hofmeyr to stay, would, throughout the meeting, tell him that he must leave immediately.

[64] In the end, Dr Saaiman had to pack up his things and leave immediately, with alternative arrangements being made for his patients. It must have been humiliating for him to leave in this manner.

[65] When Dr Hofmeyr was asked to describe his personal situation after he was dismissed, in particular when he broke the news to his family, he testified that "*I felt humiliated, I was in turmoil, I was uncertain, and I was inconvenienced. Although I realise that all these feelings are subjective. When I got home, my nine year old child asked me if I was fired (as a joke). I felt that my reputation had been seriously harmed. I kept wondering what all the other cardiologists would say. I thought there would be serious repercussions to my whole career. Cardiology is a small circle, which means that you are constantly in the eye. My reputation would be seriously tarnished. I did not know what to do. The day after, I made an A-Z list of possible places to work and started calling each one and tried to pick up a locum. I considered locums in Emirates and Singapore". (sic)*

[66] Even after the dismissal, Dr Saaiman behaved in an unacceptable manner in relation to Dr Hofmeyr. I say this with reference to the letter which Dr Saaiman sent to Dr Hofmeyr and his lawyer on 5 May 2017. While there are positive aspects in the letter, the bulk of it is a personal attack on Dr Hofmeyr and his professional abilities. This letter was written three days after the dismissal and there can be no justification for its contents.

[67] In deciding on the appropriate amount of compensation, I have also taken into account that Dr Hofmeyr received his salary for May and June 2017, so in that sense, he was not summarily dismissed. To a lesser extent, I have taken into account the offer of R257,159.84 which Dr Saaiman made. This offer was coupled with reinstatement which was not a viable option given the breakdown in the relationship. The offer was probably made on legal advice after Dr Saaiman's lawyers told him he was not entitled to dismiss Dr Hofmeyr in the manner he did.

[68] In the circumstances, I am of the view that four months compensation is appropriate.

[69] As far as costs are concerned, each party is to pay their own costs. While Dr Hofmeyr was successful with an ordinary unfair dismissal claim, Dr Saaiman was successful in warding off an automatically unfair dismissal claim.

[70] In the circumstances the following order is made:

Order

1. The dismissal of the applicant was not automatically unfair.
2. The dismissal of the applicant was substantively and procedurally unfair.
3. The respondent is ordered to pay the applicant the amount of R1 028 639.36 (4 x R257 159.84 per month).
4. There is no order as to costs.

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BN. Conradie

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate F Rautenbach
Instructed by:	Carelse Khan Attorneys
For the Respondent:	Advocate S Harvey
Instructed by:	De Klerk & Van Gend Attorneys