



# MASERUMULE

Corporate Employment Law

*Where results matter*

## DAMAGES FOR REFERRING TO AN EMPLOYEE AS “A FEMALE EMPLOYMENT EQUITY” CANDIDATE

*Chowan v Associated Motor Holdings (Pty) Ltd & others*

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In its decision in *Chowan v Associated Motor Holdings (Pty) Ltd & others* (2241/16 23/3/2018), the Gauteng Local Division High Court awarded delictual damages to Adila Chowan, former group financial manager of Associated Motor Holdings (AMH), who had been referred to by the chief executive officer (CEO) of Imperial Holdings Ltd, Mark Lamberti, as “a female, employment equity” candidate and ended up being dismissed.

Damages were awarded on the basis of common law delictual principles and not in terms of labour law legislation. Chowan chose not to rely on the protection provided by the Labour Relations Act, 66 of 1995 (LRA) and the Employment Equity Act, 55 of 1998 (EEA), but instead on the *actio legis Aquilia*, for pure economic loss, and the *actio iniuriarum*, for injuries to her reputation and dignity. The court will deal with the issue of quantum of damages separately to the issue of liability.

The facts of the case are as follows:

- A meeting was held during April 2015, Chowan present, as well as Lamberti, a Mr de Canha, the erstwhile CEO of AMH, a Mr Janse van Rensburg, the chief financial officer (CFO) of AMH, and a Mr Arbee, who was the CFO of Imperial Holdings at the time. At the meeting, Lamberti referred to Chowan as –

*“a female, employment equity, technically competent, they would like to keep her but if she wants to go she must go, others have left this management and done better outside the company, and that she required three to four years to develop her leadership skills.”* (referred to by the court as “the utterance”)

- Chowan is a fully qualified chartered accountant. She joined AMH, a subsidiary of Imperial Holdings, which has since been renamed Motus Corporation, in March 2012. Before accepting her appointment as group financial manager, she received assurances from a Mr Adler, the then CFO of AMH, that there would be an opportunity for career progression within the Imperial Group. It was on the strength of these assurances that Chowan accepted the appointment. She intended to remain in the employ of Imperial Holdings for a period in excess of ten years.
- A Mr Hibbit subsequently replaced Adler as CFO and Chowan was advised that Hibbit would be in the post only for two years and that she would be groomed to take over from him. Hibbit did not see out the two year period. He informed Chowan that he would recommend to management that she be appointed in his place and requested that she undergo a psychometric test to assess whether there were areas in terms of which

Chowan required development. Chowan underwent the test, but was not provided with the results thereof.

- During the process of AMH seeking to appoint a “top flight” candidate, Chowan was interviewed for the position of CFO by a recruitment firm and, thereafter, by Lamberti in June 2014. At the end of her meeting with Lamberti, Chowan was informed that her application for the position had been unsuccessful. Lamberti promised Chowan “a career path within one year” and that she would be “properly compensated”, if she fully supported the new CFO. Lamberti subsequently sent Chowan an email in which he accepted that she had the required technical accountancy skills for the position and confirmed that they would appoint a CFO who Chowan could learn from. Lamberti did communicate in the email that they had reservations regarding Chowan’s ability to fulfil a leadership role, although they felt that she had the potential to do so and gave an undertaking that management would assist her to achieve this.
- Lamberti stated that Chowan was at a defining point in her career where, building on her technical accounting skills she had the potential to make the transition from a “functional specialist” to someone who would “provide thought leadership” to her subordinates, her colleagues and the Imperial Group. Lamberti stated, too, that he believed it was in the best interests of both Chowan and the Imperial Group that she remained within the Imperial Group.
- Janse van Rensburg was appointed as CFO of AMH, with effect from January 2015. After the decision to appoint the new CFO was made, Chowan resigned. However, she withdrew her resignation after a meeting was held between her and members of the Imperial Group management, including Lamberti, during which Chowan was assured

that she would be appointed to the position of CFO within the Imperial Group within a year.

- The working relationship between Chowan and Janse van Rensburg was difficult. Janse van Rensburg had no experience of the motor industry and Chowan was required to assist him in the fulfilment of his duties in respect of the Imperial Group’s accounting policies, assumptions and complex transactions. Chowan did not consider Janse van Rensburg to be of the level of CFO that Lamberti had stated would be appointed.
- In response to a complaint made by Chowan during a meeting regarding the colour of the company vehicle which had been allocated to her, Janse van Rensburg stated “*the colour of your car suits your skin*”. The court accepted Chowan’s evidence of the meeting, the important aspects of which were denied by Janse van Rensburg. The court also accepted Chowan’s evidence that Janse van Rensburg had subsequently said to her that he had a light coloured vehicle which suited his skin, after she objected to his initial response. Chowan had volunteered to undergo a polygraph test to prove the veracity of her allegations regarding what Janse van Rensburg had said to her, which weighed in favour of the plausibility of her version of events.
- In March 2015, Janse van Rensburg told Chowan, on instruction from Lamberti, that she would never be a CFO within the Imperial Group, that Lamberti did not believe that Chowan has what it takes to be a CFO and that she should be moved to another part of AMH. Janse van Rensburg denied that Lamberti had told him to tell Chowan this, although the court accepted Chowan’s evidence in this regard. Chowan was deeply upset by this and felt that Lamberti had failed to fulfil his promise that she would be appointed as a CFO. After Chowan had raised these concerns with de Canha, the

meeting was held where Lamberti made the utterance.

- The utterance upset Chowan very much and she considered Lamberti's comments to be "totally unprofessional and unacceptable", believing that they constitute racial and gender discrimination against her. Chowan communicated this to de Canha. She testified that she was made to feel that the only reason she was employed within the Imperial Group was that she was an "employment equity" employee.
- Chowan testified that the poor diversity in AMH's senior management was a relevant factor in her being discriminated against. From the beginning of 2013 to mid-2015, of the fourteen employees who had been appointed by AMH in executive positions, all were white males, except for one Indian male. Four of these executives were appointed subsequent to Lamberti's appointment as CEO.
- Chowan lodged a grievance with a Mr Gcabashe, the chairman of the Imperial Group, in which she alleged that that she had been discriminated against on racial grounds and unfairly treated by Lamberti. Chowan testified that she sought an apology from Lamberti for insulting her and offending her dignity and that she wanted him to fulfil the promise which he had made regarding her appointment as a CFO. The lodging of the grievance was not in compliance with AMH's grievance procedure, but this non-compliance was impliedly accepted by AMH.
- Subsequent to lodging the aforementioned grievance, Chowan lodged a further grievance against Janse van Rensburg, which concerned his comments about the colour of her vehicle, matters concerning his role in relation to her and him undermining her in front of staff.
- After Chowan had advised both de Canha and a Mr Koornhof, the human resources manager at AMH, that she intended to lodge a grievance against Lamberti, Koornhof said to her that lodging a grievance against a powerful man like Lamberti would be "a *career limiting move*".
- A firm of attorneys was appointed to conduct an investigation into the grievances and Chowan was summarily suspended, in order to allow the investigator to have "a *clear field within which to operate*". Neither Gcabashe, de Canha nor Janse van Rensburg could give the court a reasonable explanation as to why Chowan was suspended and as to why Lamberti and Janse van Rensburg were not suspended. Chowan was suspended prior to being given the opportunity to make representations as to why she should not be suspended, which is a serious irregularity in respect of the procedure to be followed for a fair suspension.
- The report submitted by the independent investigator neither made findings nor recommendations and Imperial Holdings' board of non-executives resolved that Chowan's allegations were "without *foundation and substance*". Chowan was then informed that her actions constituted misconduct, on the grounds that she had abused the grievance procedure. A disciplinary hearing was held and she was subsequently summarily dismissed, on the recommendation of the independent chairperson of the hearing.
- It is patent on the facts that both Lamberti and Janse van Rensburg were involved in the process which was followed that led to Chowan being suspended. None of the witnesses gave an explanation for this.

### Claim for damages as result of economic loss

The court awarded damages against AMH for the economic loss which Chowan suffered through the wrongful and intentional acts of her employer in contravening section 3 of the Protected Disclosures Act, 26 of 2000 (PDA), by subjecting her to occupational detriments as a result of her having made protected disclosures.

It was held that the suspension imposed on Chowan, the disciplinary hearing which was held regarding her conduct and her subsequent dismissal constituted occupational detriments in terms of the PDA and that the grievances which she had lodged constituted protected disclosures to her employer in terms of section 6 of the PDA. The court held that AMH, as Chowan's employer, was liable for these damages, but that Imperial Holdings and Lamberti were not liable, as they were not Chowan's employer. The PDA only places obligations on employers.

As regards the decision to impose liability on the employer for economic loss suffered by Chowan, the following excerpt from the judgment indicates the important factors which were considered by the court.

*"[60] The present matter, in my view, is a classroom example of an appropriate case where delictual liability should be imposed. There are ample public-policy reasons in favour of imposing liability. The constitutional rights to equality and against unfair discrimination are compelling normative considerations. There is a great public interest in ensuring that the existence of systemic discrimination and inequalities in respect of race and gender be eradicated. As blatant and patent as discrimination was in the days of apartheid, so subtle and latent does it also manifests itself today. The protection afforded to an employee, such as Ms Chowan, by the PDA against occupational detriments by her employer on account of having made a protected disclosure that was 'likely' to show unfair racial and gender discrimination, is one of*

*the measures taken by the legislature to eradicate the existence of systemic discrimination and inequalities. If employers are too easily insulated from claims for harms, such as the occupational detriments to which Ms Chowan was subjected to on account of having made a protected disclosure to her employer, they would have little incentive to conduct themselves in a way that complies with the provisions of s 3 of the PDA."*

The court dismissed the defendants' arguments that the High Court did not have jurisdiction to hear the matter and that delictual liability should not be extended to matters of the nature of the one before the court, because Chowan had alternative remedies available to her in terms of the EEA and the LRA. In doing so, the court made it clear that the effect of section 157 of the LRA is that remedies which lie in the High Court and Equality Court in respect of labour and employment-related disputes may be heard by those courts and only cannot be dealt with by those courts where the LRA creates specific remedies in terms of which the Labour Court has exclusive jurisdiction.

### Claim for damages as result of injuries to reputation and dignity

The court found that Chowan had established a claim regarding the infringement of her dignity. However, it found that she had not established a claim for defamation. The three defendants were held jointly and severally liable for damages resulting from the impairment of Chowan's dignity.

The court distinguished between the concept of dignity in terms of our Constitution and in terms of the common law. The constitutional meaning of dignity is wider than the common law meaning and covers a number of different values, for example, it protects an individual's right to reputation and the right to a sense of self-worth. However, under the common law, the meaning is narrower and is confined to the person's feeling

of self-worth. The court held that the term had been used by Chowan in the common law sense and that, therefore, the issue of reputation forms part of her claim for defamation.

The claim for the impairment of one's dignity comprises both a subjective and objective element. The court held that the subjective element, which requires that the individual must in fact feel insulted, was clearly established. This is based on the evidence that Chowan had never been addressed in that manner before and that she was "*extremely upset, humiliated, degraded and objectified*" by being labelled as a female employment equity candidate, without recognition of her professional qualifications, extensive experience and achievements. Furthermore, it had been said in the presence of senior executives in the business. The objective element, which centres on the question of whether the reasonable person would conclude that Chowan had suffered palpable and actionable injury to her feelings, was also established.

To be successful in her claim for defamation, Chowan was required to prove that Lambert's utterance is considered defamatory material. Chowan elected to rely on the ordinary meaning of the utterance to prove her claim and the court held that the ordinary meaning given to Lambert's words by the reasonable person, in context, is not defamatory of her.

#### Common law claim instead of statutory claim

It is not clear from the court's decision why Chowan decided not to pursue a claim in terms of the LRA and/or the EEA. She had available to her the option of referring a dispute to the CCMA for unfair dismissal or automatically unfair dismissal. If Chowan were to allege that unfair discrimination was linked to the reason for her dismissal, she would have a claim for automatically unfair dismissal in terms of section 187(1)(f) of the LRA. This would be the approach adopted by most employees in Chowan's position, which makes her decision to pursue

remedies in terms of the common law all the more interesting.

Chowan may have avoided the remedies mentioned above, because she did not want to be reinstated or because she considers the maximum amount of compensation in terms of a claim for automatically unfair dismissal, being two years' salary, to be insufficient reparation for the economic loss which she suffered and the injuries which she alleged she suffered to her name and dignity.

Employers should pay regard to the possibility of employees pursuing delictual claims in the event of their dismissal or where they allege that their rights have been infringed. Employers should be especially awake to this possibility in the case of senior employees, for a number of reasons, including the high risk of reputational damage linked to increased publicity of organisational employment relations at the level of senior management and the high financial risk resulting from potential claims, due to the higher remuneration received by such employees and the increased risk of reputational damage.

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