IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No: EL466/15

ECD: 866/15

REPORTABLE

In the matter between:

BABALWA NONDUMISO MAGONGWA Plaintiff

and

EAST LONDON INDUSTRIAL DEVELOPMENT

ZONE (SOC) LTD Defendant

JUDGMENT

TOKOTA J:

Introduction

[1] This was one of those trials where the evidence was, for the better part thereof, based largely on reading documents rather than reliance on human memory. This of course is not to say human memory would have served a better purpose. On the contrary, contemporaneous documentary evidence is always more reliable than human memory which is fallible. Furthermore, regard being had to the manner in which the plaintiff planned to present her case, and in particular considering the time lapse, reference to documentation was inevitable. However, too much reading of documents tends to obfuscate rather than clarify the true issues for determination. This trial was largely prolonged by this reading of documents and quotations from statutes. Yet, brevity will always lubricate the wheels of justice.

Issues for determination

[2] The claim by the plaintiff is for damages she allegedly sustained through the defendant's repudiation of her contract of employment between them. The basis of the cause of action is accordingly set out in the pleadings. The defendant, East London Industrial Development Zone (hereinafter referred to as the entity or IDZ), resisted the claim. The issue for determination is whether the defendant repudiated the plaintiff's

contract of employment. The main contention is that the defendant withdrew the delegated powers of the plaintiff and thereby deprived her of her capacity to perform her duties in terms of the contract. In the alternatively, it is contended that the defendant repudiated the implied term of the contract by subjecting the plaintiff to occupational detriment and subsequently dismissing her.

The pleadings

[3] In the particulars of claim the plaintiff alleged that she was employed by the entity as a Chief Financial Officer (CFO) with effect from 1 November 2014 for a contractual period of five years. Soon after her employment and upon her having conducted some investigations she reported to the Chief Executive Officer and the Board of IDZ that the IDZ was *de facto* insolvent. She alleged that in March 2015 and consequent upon her report the defendant withdrew her delegations and authority to discharge her duties as a CFO and invested a task team, alternatively, a 'cash lab' with the powers and duties of the CFO. Furthermore the defendant appointed her subordinate to perform her duties without reference to her.

[4] She was subsequently charged with misconduct. On 14 April 2015 she was suspended from duty pending the finalisation of her misconduct enquiry. After the misconduct enquiry was finalised she was dismissed on 28 July 2015. She claimed that both the suspension and disciplinary action constituted occupational detriment as defined in the Protected Disclosures Act 26 of 2000 (the PDA or the Act). She pleaded that the conduct of the defendant amounted to a repudiation of her contract. She accepted the repudiation. Consequently she claimed that she suffered damages in the sum equal to her salary and benefits for the period spanning from 1 May 2015 to 31 October 2019.

[5] The defendant admitted employment of the plaintiff. It admitted her suspension on 14 April 2015 and pleaded that such was necessary regard being had to the nature of the charges that were preferred against the plaintiff. The defendant further admitted that the plaintiff was dismissed. It pleaded, however, that she was dismissed on 31 July 2015, pursuant to a disciplinary process which had been set in motion against her.

[6] The defendant denied that it repudiated the contract and that the plaintiff accepted such repudiation. It pleaded that the plaintiff initially participated in the disciplinary process but later elected to opt out. The defendant denied that the suspension and dismissal were unlawful and prayed that the plaintiff's claim be dismissed.

[7] The defendant also denied that the suspension or the dismissal of the plaintiff was unlawful or invalid in terms of section 3 of the PDA or at all. It further denied that the disclosures which were made by the plaintiff were protected by the PDA or that they were made by the plaintiff in good faith. It denied that such disclosures were reasonable in that the plaintiff did not have a reasonable belief that they were substantially true.

[8] In response to questions in terms of Rule 37(4) of the Uniform Rules the defendant contended that the withdrawal of delegations of authority related only to authorization of payment of creditors effective from 6 March 2015 to 31 March 2015. The withdrawal of the delegation was therefore limited both in time and scope.

The Evidence

[9] The plaintiff was the only witness who gave evidence in support of her claim.

She testified that after she was head hunted she was employed by the defendant as a CFO and assumed duties on 2 November 2014. She was employed on a fixed term contract of five years commencing on 1 November 2014. Soon after assuming duties it was brought to her attention that there was a risk that, due to a financial crisis, the entity might not be able to pay salaries of employees at the end of the month. This was brought to the attention of the Chief Executive Officer (CEO). In her opinion this risk was due to financial mismanagement. She stated that she had discovered that in the financial statement of the financial year 2013/14 an amount of R119 million was reflected as available whereas on a proper analysis there was a deficit of R23million.

[10] In order to survive that year the entity utilised the maintenance funds which were earmarked for operational functions. These were 'ring fenced' funds. The entity paid performance bonuses when it was not

performing. She recommended that the funds be replenished, but the Board did not approve the recommendation. According to her the use of those funds constituted an irregular expenditure.

[11] There were a series of properties that were bought by the entity notwithstanding that they were outside its operational zone. The first batch was the social housing project. She testified that the defendant went outside its mandate and acquired a piece of land in 2007 and embarked on a social housing project for building low cost houses. The entity spent R67million on the infrastructure on this development project but the development never took off the ground. There was never any development of that land. It applied for accreditation after spending R67 million. The application was unsuccessful. It then abandoned the project. According to her this programme is regulated by section 54(2)(d) of the Public Finance Management Act No. 1 of 1999 (PFMA) and therefore the entity needed approval of the Treasury and that of the Executive Authority.

[12] She went on to state that there were three properties that were acquired in Berlin. One property was donated by the Buffalo City Metropolitan Municipality (BCM). Berlin is 30 km away from the IDZ

zone. Kemba station was donated by BCM. The plan was to lease it to investor Langa Energy to undertake a solar energy. Transformers were installed. There was a premature expenditure which was a fruitless and wasteful expenditure. The entity has been trying to sell the transformers all but in vain.

[13] Fort Jackson land was acquired on the basis of an exception to the tender processes. The property was also outside the 5 km zone allowed to the defendant. Bridger farm properties were also outside the designated zone. The land was valued at R4 million. There was no economic sense in buying the land. The land was bought even though it failed geotechnical tests and the transaction was without the approval of the Treasury.

[14] She further testified that rental penalties were not collected. One of the entity's tenants Mr Khaya Ngqula, the director of African Sports Holdings, had leased a golf course belonging to the defendant. This was also outside the operational zone of the defendant. The rent was R3900 per month. On top of that 10% of the royalties of the annual turnover was never collected. No steps were taken to collect arrear rentals until

November 2015 which was after the **Price Water Cooper (PWC)** report was released.

[15] On 11 November 2014 she reported some of the irregularities resulting in short fall to the CEO and suggested a forensic audit.

The CEO responded on the same day and said, *inter alia*, that finance division historically had always kept information close to their chests thus creating an impression that all was well. That had been his major concern to the extent that it resulted in action being taken against some keepers after they were exposed by the Auditor General (AG). The CEO went on to say "*we need to get to the bottom of this and put processes in place to control our expenditure properly*."[1]

[16] The plaintiff felt that the process of attending to the so-called irregularities was moving at a snail's pace. She was of the view that even bonuses and performance bonuses were unwarranted. She was particularly concerned about the payment of performance bonuses when the entity was not performing well at all. She testified that the entity was

[1] Transcript p.648

paying R5 million in salaries but it was paying R7 million in performance bonuses. She had some ideas to alleviate the financial plight of the entity but those fell on deaf ears as she did not get joy from the CEO.

[17] At some stage she realised that there were some movements of funds without her knowledge as CFO. She then gave instructions to the finance officials that all movements of money from one account to another had to be made with her approval.

[18] On 1 December 2014 in an Executive Management meeting she reported that the entity was trading recklessly and that this could have dire consequences for the Directors of the entity. At that stage the CEO was overseas and one Ms Amanda Magwentshu was acting CEO. She then, together with the entity's secretary and the acting CEO, decided to alert the Board of the situation. The matter was reported to the chairperson of the Board. The chairperson met them in a meeting arranged for 2 o'clock that afternoon. They reported in detail to the chairperson how it came about that the entity was in a cash flow crisis including the non-collection of rentals and false financial statements. She testified that the attitude of the chairperson was that the entity was a responsibility of the government and therefore the government should

sort it out. He suggested that the crisis should be reported to the Department of Economic Development, Environmental Affairs and Tourism (DEDEAT). He further suggested that a special meeting of the Board should be arranged to report the matter. There was a meeting which was already scheduled to meet on 11 December 2014 and he suggested that the issue be presented at that meeting.

[19] She testified that the Board consisted of sub-committees. These were Audit and Risk committee (ARC) and Finance and Tender Committees. These committees would normally meet separately before the main Board meeting to prepare for matters for discussion. The ARC met on 9 December 2014 and Finance Committee met on 11 December 2014. The plaintiff attended both meetings and presented the financial situation at the meetings. The members of the ARC were surprised to learn of the financial situation and appreciated the fact that this was brought to their attention. Their attitude was largely positive. They even expressed the view that whoever was responsible for the crisis should be brought to book.

[20] At the Board meeting Mr Kanana, one of the Board members, was of the view that the plaintiff was an alarmist by taking the view that the

entity was trading recklessly. In his view that statement needed to be supported by a body of evidence. The Board resolved that the matter be taken up with the MEC to inform him of the projected over-expenditure.

[21] The Board tasked the plaintiff to do more investigation and come forward with reports. She arranged a meeting with the CFO of DEDEAT one Ms Sibongile Jongile (Jongile) and one Ms Micky Mama the Manager in charge of public entities at DEDEAT. They met on 17 December 2014. Jongile informed them that her department did not have money but she would approach her Head of the Department (HoD) and report back to the plaintiff. She never came back to her.

[22] After that meeting with Jongile at DEDEAT she wrote an email to the CEO suggesting a meeting with the MEC for DEDEAT. The CEO was not averse to the suggestion and indicated that in any event he had already met with the MEC who had indicated that he would meet with HoD. The CEO suggested a formal arrangement for such a meeting through the HoD. Since this was mid-December they went into recess and nothing eventuated during that period until January 2015.

[23] On 19 January 2015 the plaintiff addressed an email to the CEO attaching a draft letter to the MEC wherein she, *inter alia*, outlined the subject matter of over-expenditure. The CEO responded as follows:

> *"CFO the letter I was expecting was a letter requesting additional funding for the 10% contribution. That is what I had discussed with the MEC. The issue of over-expenditure will happen if they do not give us the 10% and DBSA does not pay on time. So it is not an urgent matter to report that rather than trying to get additional funds."*

There was an exchange of emails from which it was clear that the plaintiff and the CEO were not *ad idem* on the content of the report to the MEC. The plaintiff was of the view that her relationship with the CEO had become strained.

[24] On 25 January 2015 a letter was addressed to the MEC requesting the 10% contribution from the DEDEAT and the Department of Trade and Industry. The plaintiff was not happy with this approach. She then took it upon herself to convene what she called an "off-the-record" meeting with the chairperson of the Board in view of the fact that the resolution of the Board had not been carried out. She informed the chairperson that the MEC had not been apprised of the projected-over-

expenditure. The chairperson undertook to see to it that this was done. She did not hear anything further during January 2015.

[25] On 2 February 2015 the plaintiff met her friends at the Provincial Treasury and informed them of the cash flow crisis. She requested them to invite the defendant to talk to the Treasury about the crisis situation. This was indeed done. They were invited to a meeting that was to take place on 3 February 2015. Because she knew that the CEO would be in attendance at the meeting she realised that there were certain matters she would not be able to raise at the meeting. For this reason she arranged a secret meeting with the HoD of the Treasury on 2 February 2015. At that meeting she informed the HoD of all the irregularities plaguing the IDZ. It was at this meeting that she presented the HoD with the original presentation which was to be discussed the following day together with all other information including the list of the rentals which were collected below the market value by the defendant. She did this because she had hoped that Treasury would take steps in terms of the PFMA including bringing to book the officials that were involved in the mismanagement. She was of the opinion that the mismanagement resulted from corruption within the entity.

[26] The meeting took place on 3 February 2015. The Head of the Treasury was not present but was represented by the Deputy-Director General to chair the meeting. DEDEAT officials were also present at the meeting. The CEO was also present at the meeting. Prior to the meeting the CEO instructed her to remove some of the information in the slides. She requested him to give that instruction in writing, which he did. The meeting went ahead and she got the impression that the Treasury officials were seeing early warnings of projected over expenditure.

[27] On 12 February 2015 Mr Kanana addressed an email to the CEO in which he expressed his concern about the delay of the progress report of what had happened since 11 December 2014 when the crisis was reported. He expressed concern that there were discussions in certain quarters and stakeholders about the shortfalls in “our” cash projections and possible financial instability. There was an exchange of a series of emails in this regard which culminated in the CEO together with the plaintiff undertaking to generate an updated report on 12 February 2015. The CEO was at the Lekgotla meeting at the time and he came back on 13 February 2015.

[28] When the CEO came back from Lekgotla he reported at the Executive meeting that he had told the Premier of the cash flow issues which were as a result of the delay of payment of outstanding R38 million from DBSA. This report did not sit well with the plaintiff because she felt that the Premier had not been told the truth.

[29] She arranged a meeting with the Premier so that she could go and tell him the truth. She secured an appointment for Saturday 14 February 2015. She met with the Premier and reported to him everything and "set the record straight" by explaining exactly why the defendant was in a cash flow crisis. She informed him it was because of financial mismanagement and bad decisions that brought about the crisis. She informed the Premier of the wrong acquisition of properties outside the designated zone, misuse of maintenance fund, social housing etc. The Premier looked visibly perturbed. He undertook to talk to the MEC who would take these issues forward.

[30] Thereafter there were meetings by the Board's sub-committees which culminated in the Board's meeting of Thursday 26 February 2015. She was not present at these committee meetings as she was off sick. After those meetings she received a call from Mr Kanana, who informed

her that it was critical that she be present at the Board meeting of 26 February 2015. He informed her that at the meeting they wanted to sort out her differences with the CEO. She had to cut short her sick leave.

[31] On the appointed day the Board met with the CEO first. After the CEO was excused from the meeting she was called to meet the Board. The chairperson said something along these lines: ‘we understand that there is a problem between you and the CEO; tell us everything; we want you to take us into confidence’. She was assured that the Board was committed to resolving the issues between them. She then told the Board everything she picked up as irregular in the entity which, in her opinion, was as a result of corruption. At that meeting the Board requested her to put everything she said in writing. She was also told that what she stated would be treated as confidential. The meeting ended on a happy note with the plaintiff feeling that at last somebody had given a listening ear to her complaints.

[32] At the meeting the Board found that besides financial challenges facing the entity there was an unhealthy relationship existing between the members of the executive management. It resolved that in order to address these issues a task team be formed.

[33] Pursuant to the Board meeting of Thursday the 26 February 2015, on 2 of March 2015 the ordinary executive management (EXMA) meeting was held. The plaintiff testified that although it was a norm for the CEO to be hostile towards her, often shooting down her ideas and criticising her presentations, on this specific day he was 'particularly hostile' referring to her late submission of ARC reports. She could see that he was 'visibly angry and highly agitated' towards her

[34] After the EXMA meeting the plaintiff was very upset by the conduct of the CEO. She felt victimised in that her report was not the only one that was submitted late to the ARC. The CEO had complained of three things, first, the late submission of documents to ARC; second, the submission of documents to ARC without his approval; and, third, the issue of irregular expenditure policy that had not been 'workshopped' before implementation.[2]

[35] She felt aggrieved at the fact that her presentations were questioned by the CEO. She felt that as a Charted Accountant she was belittled.

[2] Transcript p.811

She was so upset that she could not take it anymore. She then addressed an email to one Philasande in the Treasury who was apparently her friend. She reported what had happened at the EXMA meeting and referred to the CEO as a 'fool' with whom one could not argue.

[36] Apparently there was a Board meeting on Saturday 28 February 2015. The plaintiff assumed that the exceptional hostility of the CEO in the EXMA meeting on Monday 2 March 2015 emanated from that meeting. She suspected that the Board had betrayed her by disclosing what she termed 'confidential information' which she had disclosed to it concerning the CEO.

[37] On 3 March 2015 the chairperson of the Board, expressed his concern that notwithstanding the report of a cash crisis in the entity no progress was evident by that date. The following is recorded:

> *"*[o]*n 26 February 2015 the Audit and Risk Committee tabled a briefing note to the Board recommending that a task team be assembled with the purpose of investigating the current state of affairs ELIDZ and compiling a report to the Board in this regard.*

The Board accordingly resolved that a task team be formed as per the provisions of these terms of reference."

The task team consisted of the following Board members: Mr Ayanda Kanana, Ms Natasha Anderson and Mr Eugene Jooste.

Its scope of investigation was:

"1 *The state of the ELIDZ with respect to the financial and liquidity position;*

2. The extent to which there has been a breakdown in the working relations of the executive management;

3.The manner in which the entity carries out its operations and factors which may inhibit its ability to achieve its operational objects and efficiencies;

4. The short and long term sustainability of the current business model of the organisation and how this impacts upon its ability to deliver on the mandate for which the entity was formed."[3]

[38] In order to address the above issues, the task team developed what it called 'action plan'. A 'Cash lab' was created in order to monitor payments to creditors. Its main object was to decide when and which

[3] Transcript pp.833-834; Bundle vol.4 pp.1454-1457

payments were to be made. For this reason all payments were to be approved by the CEO. There were a number of things to be done. The most relevant one for purposes of this judgment was the withdrawal of delegations. On 6 March 2015 the CEO addressed a memo to all executive managers and all managers and said: "*Please be advised that all delegations of authority relating to authorisation of payment of creditors are withdrawn from 6 March 2015 until 31 March 2015*."[4]The plaintiff contended that the task team did not have powers to withdraw delegated authority in terms of the relevant terms of reference.

[39] Although the withdrawal of delegations was addressed to the entire management and related only to authorisation of payments to creditors, and whereas the operation thereof was to commence from 6 March till 31 March 2015 the plaintiff argued that this was directed at her exclusively. I pause here to remark that this argument belies the withdrawal note itself as it is self-explanatory on the face of it. I will deal with this argument later in this judgment.

[40] Whilst the Board, through the task team, was still busy trying to investigate the problems facing the entity, the plaintiff got fed up and

[4] Plaintiff's bundle vol.4 p.1398

consulted with her attorneys. She informed them that her intentions were to report the problems to the media. They warned her that if she did so she might face dismissal. She did not heed the warning.

[41] On 3 March 2015 the plaintiff contacted a reporter of the newspaper circulating in the area, the ‘Daily Dispatch’. She made an appointment with the reporter and they met on 4 March 2015. She gave the reporter all the information contained in documents in her possession. The reporter, one Mr Mike Louw, warned her to think carefully about her conduct of publishing the information as she could face dismissal. He offered to give her time to reflect about it and would revert to her. She told him she had made up her mind and there was no room for change of stance. The information was then published in the Daily Dispatch of 7 March 2015. The article was subsequently published in the Daily Dispatch of 10 March 2015 and 11 March 2015. The newsworthy parts were the ‘cash crunch crisis of the entity’, the ‘looting’ spree of the ELIDZ by payments of ‘handshake’ of the former CFO in the sum of R2, 7 million and ‘millions of rands that were owed by the tenants’ of ELIDZ.

[42] On 13 March 2015 again the information once again appeared in another Daily Dispatch article referring to the DTI as ‘forking’ out R26 million to bail out ELIDZ’. The plaintiff testified that she had nothing to do with the latter article. The news spread to the Mail and Guardian and City Press from 10 to 16 March 2015.

[43] The plaintiff was subsequently charged with misconduct. She initially participated in the process but later decided not to attend the hearing. The misconduct enquiry was held in her absence. She was found guilty of all the charges that were preferred against her and was dismissed on 28 July 2015. She testified that the dismissal was as a result of the repudiation of her contract and she accepted the repudiation. She maintained that the defendant, through its CEO, withdrew delegations and authority to perform her work.

[44] Under cross-examination the plaintiff was asked what the Board had not done during December 2014 to January 2015 which could have resulted in her dissatisfaction. She listed the following; firstly, the Board reneged on its promise not to disclose confidential information disclosed to it on 26 February 2015; secondly, the Board appointed a task team contrary to her wishes and the task team came up with intervention plan

and withdrawal of her delegations and in a sense nominated the CEO to run finances. She said that the Board did not deal with the task team properly in that it did not reject the reports it was getting from the task team.

[45] The plaintiff was of the opinion that the task team was not performing its job in accordance with its mandate. The Board did not protect her from the occupational detriment whereas she was in essence a whistle blower. She was of the opinion that the Board should have dealt with some officials of the entity but instead it allowed the CEO to deal with her.

[46] The plaintiff conceded that despite having been requested by the Board and the task team to produce reports she never produced any. She stated that she did not understand the financial report required by the task team as referring purely to a financial report. She testified that she thought it was referring to the confidential report which was to be submitted to the Board. She therefore wanted to protect herself from anticipated victimisation by the CEO.

[47] On 12 March 2015, the date on which the plaintiff received the notice to suspend her, she went to see the Premier and informed him of the developments. The Premier undertook to speak to the MEC in relation thereto.

[48] On 13 March 2015 Mr Matengambiri was appointed as Acting CFO with delegated powers by the CEO without derogating from the withdrawal of power to authorise payments. Attorneys for the plaintiff made representations on her behalf regarding the suspension. She returned to work on 18 March 2015. She testified that despite her resumption of duty Mr Matengambiri was not relieved of the duties of CFO.

[49] It would seem that although she was happy with the creation of a task team she was not happy that it became involved in operational matters. It appears that this impression of involvement was created when the task team took the decision about the action plan. In her opinion the withdrawal of her delegations was as a result of the decision of the task team. It would seem that in hindsight she felt that the Board should have appointed an outsider to investigate her allegations of cash flow crisis and her relationship with the CEO.

[50] On 10 March 2015 the plaintiff addressed an email to the Auditor General reporting, *inter alia*, that the company was trading recklessly and that she had reported the irregularities to the Board on no less than two occasions resulting in the task committee being appointed. She was not happy that her delegations were withdrawn until 31 March 2015 and that the CEO was assigned these delegations and that he was the chairperson of a Cash lab committee. Mr Ollsson from the AG's office responded on the same day querying why these issues were not mentioned in their earlier interaction of the 9 December 2014 and demanded a response in this regard. The plaintiff testified that she never responded to the email stating that there was no time to respond thereto because on 11 March 2015 she was on sick leave. On 12 March 2015 she was served with a notice of intended suspension. She honestly stated that there was no particular reason why she did not respond when cross-examined in this regard.

[51] When the plaintiff was confronted in cross-examination as to why she did not report to the AG before running to the press she first said the AG knew about the situation relying on the PWC report and that the AG was not going to help. I must say I have reservations that she knew the

attitude of the AG. For that matter the AG complained as to why these irregularities were not reported earlier. The AG referred to the earlier communication of 9 December 2014. The PWC report she was referring to was only released after she had left the entity

[52] Although she insisted that the Board reneged on its promise to keep confidential her report she was unable to provide an answer as to how the Board would deal with her concerns if they were to be kept secret from the CEO. She maintained throughout her evidence that there was corruption and criminality but at no stage did she identify the culprits and why that was not reported to the police.

[53] In fact when questioned by this court about the corruption she was referring to she made an example of a deviation in procurement of property. It would seem her interpretation of corruption is that if a deviation is not warranted it amounts to corruption. Despite my lengthy engagement with her to clarify the criminal conduct she repeatedly referred to in her evidence I did not succeed in my endeavour to get the gist of her allegation in this regard and the basis thereof.

[54] Mr Kondlo testified that the information that was published in the Daily Dispatch was factually inaccurate. He mentioned that the plaintiff was an alarmist and the report was not balanced. It contained sensitive and confidential information relating to the tenants and exchange of emails. The report alluded to the ten Board members who had been paid over R1 million and R5, 5 million at the end of the month. To the reader, this could give the impression that by the end of the month R5, 5 million and over R1 million was paid. This was factually incorrect and misleading. Board members were not paid salaries but were paid sitting allowances for attending Board meetings. The R1 million was a cumulative annual amount not a month payment. The entity had an agreement with its tenants not to disclose any information relating to them without their express consent. The publication of their information in the media including the disclosure of their names was in breach of that contract.

[55] According to Mr Kondlo after the publication on 7 March 2015 there was an ordinary EXMA meeting on Monday 9 March 2015. Mr Tini, the chairperson of the Board, entered the meeting and was visibly angry. He informed the meeting that on Saturday there was a Board meeting which mandated him to come to the EXMA meeting to demand

declarations from all managers to the effect that none of them had anything to do with the publication in the Daily Dispatch. The declarations were to be made by the end of that business day.

[56] After the meeting the plaintiff contacted her lawyers in this regard. In the evening she addressed an email to the entity's secretary and the CEO demanding that the instructions be reduced into writing. It was in the email that she also demanded the agenda of the Board meeting over the weekend and how it was constituted and the minutes thereof reflecting the resolution of the Board.

[57] The chairperson of the Board indicated that a verbal instruction was lawful and that executive managers should comply. On the morning of Tuesday 10 March 2015 the CEO convened a meeting of the managers. The chairperson informed the plaintiff that he had received all the declarations from various managers and that her declaration was still outstanding. She persisted that she wanted that instruction in writing and in addition the information she requested must also be furnished to her.

[58] On 10 March 2015 the CEO issued written instructions to the plaintiff requiring her to make the declaration required by the Board. The plaintiff replied that she was taking legal advice in this regard. She never complied with the instructions.

[59] On 11 March 2015 a letter was addressed to the plaintiff informing her of her intended suspension and requesting her to take special leave from work with full emoluments. She was required to submit her representations in this regard by no later than 12 March 2015. She was in fact suspended with immediate effect in that she was advised not to report for duty until such time as she would have made the representations.

[60] The letter referred to above was taken to plaintiff's lawyers. On the same date they responded to the CEO's letter and said, *inter alia*, that the plaintiff was not prepared to obey unlawful instructions and that she should be reinstated to her office with the restoration of her delegated powers.

[61] The withdrawal of delegated powers was clarified in the meeting of 6 March 2015 where this is recorded in the minutes as follows:

> "*Now we are saying that step before implementing the actual payment on the system releasing the clients (indistinct) and making the payment, we can't have that. It needs to come to the CEO first, he looks at it and he says okay, no I agree, release. If he says no –no don't release and then it waits until whenever the time is right to make the release.'..."Alright maybe before you go, do you understand what is being requested, in that in your payment run you and the CEO are now co-managing that space to prioritise what is being released. We are not changing the signatories to the bank but we are enforcing that accountability factor so that both of you can be accountable for what is going out. Is that clear to you?*[5]

[62] Furthermore Mr Kanana explained what that entailed. He explained it as follows*:*

> *"...with respect to the delegations matter, we have clarified that the withdrawal means that we are adding a process where there is a collective understanding of the cash lab and the CEO*

[5] Defendant's Bundle pp.1148-1149

is included in the process in order to advise on the priority and timing of the payments to be made. It is -not stripping the CFO position of its powers but creating an environment where there is a collective understanding and appreciation of the operations and commitments. I want to remind you that management came to us with the divisions at executive and we are mending that so that there is no silo approach to treating the ailing liquidity position."[6]

[63] Mr Kondlo testified that the ARC committee took the plaintiff's reports seriously and the chairperson, Mr Kanana, wanted to know what had been done since the report in November 2014 regarding the cash flow crisis. He was anxious to know whether the entity would be able to meet its obligations in February and March 2015. The committee went further and wanted a report on the mid-term position of the entity, the worst and the best case scenario issues beyond March and measures to address the worst case scenario. The committee required meaningful measures to counter the cash flow crisis. The committee consisted of the members of the Board two of whom were Chartered Accountants and one was an experienced CFO.

[6] Plaintiff's Bundle vol.4 p.1464

[64] Mr Kondlo explained the withdrawal of delegations as serving two purposes. First, because of the limited cash flow, additional control of payments had to be made by creating co-management thereof between him and the CFO. Second, the aim was to improve collaboration between himself and CFO to fix the so-called relationship issues. Those measures were to operate only until the end of March 2015 in an attempt to address the cash flow crisis which was the nub of the plaintiff's complaint. The Board was subsequently kept informed of the steps that were being taken. There were at least two reports that were tabled before the Board in this regard. He explained therefore that the delegation only related to payment of creditors as Mr Jooste had explained at the meeting of the task team.

[65] He explained the attitude of the plaintiff as displaying lack of knowledge of how the entity operated. He did not agree with the interpretation of the 5 km zone management by the entity. He confirmed that steps were taken to address the cash flow crisis and that this was indeed remedied. He testified that the main cause of the crisis was the delay by the DBSA to pay the R38 million which it was obliged to do. He testified that there had been a clean audit of the entity for three

consecutive years. The concerns of the plaintiff were blown out of proportion. He had nothing against the plaintiff and only demanded work from her just as he did with other managers.

[66] Mr Kanana, a Board member and a Chartered Accountant, testified that the Board received reports from the plaintiff regarding financial crisis and strained working relationship between herself and the CEO. Seeing that these matters were taking time and the Board was receiving conflicting reports the Board resolved to appoint the task team to investigate these issues and come up with a way forward. Three Board members, including him, were appointed to the task team. There was an Audit Risk Committee (ARC) and a Cash Lab Committee.

[67] Soon after the ARC was appointed it had set out guidelines and timeframes for submitting reports both from the CEO and plaintiff. The task team submitted a report to the Board relating to the scope of work and deliverables and undertook to conduct investigation and deliver reports to the Board.

[68] Mr Kanana was the chairperson of the ARC. He testified that the plaintiff reported to the Board matters concerning financial crisis and strained working relationship between executive managers. Written reports were required by the ARC. The CEO was requested to submit a report on operational matters and the plaintiff was requested to submit a report on financials and liquidity of the entity. The CEO submitted his report but the plaintiff never submitted hers.

[69]. Cash Lab was formed by the task team. He testified that they had to stop the 'bleeding or the so called financial issues'. They had to get the management to stop the infighting and to be single minded in dealing with the problems that the entity was facing and not be directed by personality issues. They had to prioritise payments to SMMEs in particular and negotiate where it was needed with whatever creditor to defer payments. This had to be done by means of a collective effort by executives and the CEO had to authorise or, if necessary, sign for the payments to be released. This resulted in the withdrawal of delegations until the end of the financial year so as to ensure financial control.

[70] Mr Kanana testified that concerning withdrawal of delegations no one else was paying creditors but the plaintiff. This evidence was never

disputed. All what was required was that payment would run past a collective team and the CEO allowed signing off. It was a collective work to make sure that the SMME's were paid. Payments were prioritised, and the cycles of payments were not made daily or made when someone felt like paying. This was a collective financial management. The task team criticised the manner in which cash management was being done. They said payments should be done in cycles twice a month as opposed to daily because in that way they would not be using the opportunity to allow the money to stretch in the organisation and that was what had caused financial problems.

[71] Mr Kanana testified that the plaintiff was well aware that the issue of withdrawal of delegations only related to payments to creditors. They set a deadline for the plaintiff to bring a report on the financial situation and scenarios on the way forward by 7 March 2015. Instead of submitting the report to the task team she submitted the matter to the press.

[72] Mr Kanana, as the chairperson of the ARC, testified that because of the absence of the plaintiff and her reports they experienced difficulties in dealing with finances. They had to rely on her subordinates

to give them ‘comforts’ they needed. The task team was not involved in her suspension and disciplinary process. Although she reported financial crisis to the Board she failed to give them submissions around the issues that she had raised in December 2014.

Has the plaintiff proved her case?

Withdrawal of delegations

[73] For many years courts have laid down the approach to interpretation of statutes, written instruments and documents. The most illuminating proper approach has been succinctly put as follows:

> *“[18] …The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A*

sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[7](Footnotes omitted)

There is little or no difference in the interpretation of documents and statutes.[8]

[74] It is axiomatic that assignment of powers and duties to a functionary is designed to facilitate administrative reorganisation. It is practically impossible for the CEO to be personally involved in all aspects of the daily performance of work of the entity. Much as it is his responsibility to ensure that the objectives of the entity are fulfilled he

[7]*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13)para.18; *President of The Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35; 2019 (11) BCLR 1403 (CC) 2020 (1) SA 428 (CC) para.76;*Long Beach Homeowners Association v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* [2018] ZAECGHC 26;
2020 (2) SA 257 (ECG) para. 40
[8]*KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7;2009 (4) SA 399 (SCA);[2009] 2 All SA 523) para 39.; *Endumeni* footnote 7 para.18

can only do this by delegating to his subordinates. His subordinates do not thereby acquire rights not to be divested of those functions by the CEO in appropriate circumstances. He is accountable to the Board and therefore has a right to withdraw any delegation as the circumstances may demand.

[75] According to the job profile provided as evidence, it was the duty of the CEO to compile reports on key risks in respect of cash flow and debtors. He was required to ensure that appropriate action is taken to mitigate any risks. This must be done on a regular basis. He must make every effort to ensure that the organisation is able to achieve a clean audit.

[76] The contention by the plaintiff that she was stripped off her powers by the withdrawal of her delegated authority is based on the, action plan, as discussed in detail in paragraph [38] *supra.* The language used in the document is clear and unambiguous. The withdrawal of delegation was directed to all managers, the scope to which it related was contained in the document, was between 6 and 31 March 2015, if applied. The background to its development and the purpose thereof had been explained both at meetings where the plaintiff was present and in

evidence. How the plaintiff perceived it as referring to her alone is not apparent from the document itself and not supported by evidence.

[77] It has been argued on behalf of the plaintiff that the withdrawal of the delegation was unlawful. The basis for this contention is not clear. It seems to me that the argument is based on the premise that the Board did not withdraw the plaintiff's delegations. There was no evidence that was presented before this court that the payment delegation to the plaintiff originated from the Board. Instead from the job description of the CEO it is apparent that the power to manage cash flow vests in the CEO. The Board is not involved in the operations of the entity. There was no evidence that the CEO does not have the power to delegate and later withdraw those functions which he originally assigned to his subordinates.

[78] The undisputed evidence points to ineluctable direction and that is that the withdrawal of delegations, contrary to the plaintiff's contention, was aimed at maximizing administrative and operational efficiency. It was intended to provide adequate checks and balances, though limited in scope and time. It was neither aimed at, nor divested the plaintiff of her duties and responsibilities. The witnesses for the defendant testified

that she still exercised all her powers. Her signing authority was never amended in the various banks. She was directly involved in the payments. The only novel thing was the checks and balances introduced for the CEO and to decide on the priorities for payment. This was in line with ensuring of the financial control which was the responsibility of the CEO.

[79] No doubt the plaintiff is a brilliant Chartered Accountant. However, with respect, it seems to me that she takes herself too seriously. She boasts that she had been ‘head hunted’. She gave me the impression that her opinion was that if she made a report to the CEO and the Board, in order for the solution to be fair it must be in line with her own recommendations irrespective of the circumstances. Despite repeated explanations by various committees and individuals to her and notwithstanding the clear wording of the memo by the CEO that was addressed to ‘Executive Managers and all Managers’ she still decided to interpret it in her own way to accord with her perception, namely, that it was directed at her. Her self-aggrandisement resulted in her casting down everyone’s ideas.

[80] I gained the impression during the entire trial that she detested the CEO. She was disgruntled by the creation of a platform whereby she would have to work hand in hand with the CEO. Why she wanted payments to be done to the exclusion of the CEO remains a mystery to me. The overwhelming weight of the evidence does not support her contention that she was idle at the workplace by reason of the withdrawal of her delegations.

[81] The plaintiff was requested to submit reports but failed to do so. The complaint that she did not know which report was required is disingenuous. She knew full well that the reports related to financial crisis and irregularities as reported by her. If she was candid in the so-called confidential report about the CEO then it begs a question how did she expect the Board would investigate it without informing the CEO to defend himself? The question of victimisation also cannot fly. She had already made up her mind to leave the entity even before going to the Premier and Mr Louw. She informed the Premier, Mr Louw of the media and her lawyers when they cautioned her of the consequences of her conduct, that she already had enough.

[82] Every now and then the purpose of the withdrawal of delegation was explained to her. That explanation fell on deaf ears because that was not what she wanted to hear. For practical purposes the delegation was effectively not withdrawn in the sense that she still performed her duties notwithstanding her allegation that her powers were stripped off. There is no substance in this contention and in fact it was not supported by the evidence.

[83] Furthermore even if I am wrong on this issue, the so-called withdrawal of delegations was for a limited period and only related to payment of creditors and nothing else. It has been argued on her behalf that the withdrawal was for an indefinite period. This argument flies in the face of a written document clearly specifying the duration of withdrawal. As pointed out to the prelude of this judgment contemporaneous document is more powerful than human memory. In my view it was appropriate that the CEO should, in light of the assertions that the entity was in financial crisis, be involved and see for himself the veracity of these allegations and, if necessary, exercise his powers to avert the crisis.

[84] It is in the CEO's job profile to act as Accounting Officer of the entity and as such it was his responsibility to ensure that proper measures are in place for the payment of creditors. The fact that he might have delegated that duty to other managers, including the plaintiff, did not divest him of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty. This is in line with prescripts such as the PFMA. He had a duty to monitor the cash crisis. The plaintiff never advanced any reason why she wanted to do that alone to the exclusion of the CEO.

[85] Despite repeated requests the plaintiff failed to substantiate her allegations by failing to produce any evidence of financials. Mr Kanana described her as an alarmist. I consider her as a witness who was unduly prone to exaggeration and overstatement. The examples that come to my mind are: (a) that the entity was insolvent; (b) that the entity was trading recklessly; (c) that there was corruption. In my view the evidence which was presented to this court did not substantiate these allegations.

[86] There is no cogent reason why I should not accept the evidence of Messrs Kondlo and Kanana regarding the alleged temporal withdrawal

of some delegations. Mr Kondlo remained cool, calm and collected, despite the lengthy, searching and gruelling cross examination he was subjected to by a highly skilled and very experienced Counsel, Mr *Hodes* SC, for the plaintiff. Mr *Buchannan* SC who, together with Mr *Schultz* appeared for the defendant, described him as 'calm, measured and reflective and treated the Court and all parties with deference and respect even at times when the cross examination was pointed and aggressive'. I agree.

[87] All the legal representatives including those of the plaintiff were *ad idem* that Mr Kanana was an excellent witness. His evidence was reliable and he displayed honesty and frankness. He was also calm, cool and collected throughout his evidence. Mr *Hodes* SC who together with Mr *Quin*, described him as an 'astute' man. I agree. He possessed the ability to accurately assess the situation and deal with it to its logical advantage. He is a qualified Chartered Accountant, just like the plaintiff, but has the humility. He has broad knowledge of financials.

[88] On the other hand, the same cannot be said of the plaintiff. Granted, she is a well qualified Chartered Accountant. She was a difficult witness in the witness box. She gave me the impression that she

was taking herself too seriously as a Chartered Accountant. Generally, as a witness she did not impress me as a person who had the ability to endure in the face of adversity. While I take due cognisance of the fact that some of the questions could have required some clarifications and elaboration - her rather long-winded and rambling way of answering questions was simply part of her personality.[9]She showed an overbearing personality and a desire to control the course of events in every sphere and scope of her work regardless of the circumstances. She allowed her emotions to take over and was clouded by the dust of her suspicion of criminality and corruption. She was a voluble witness much given to discursive answers which often did not deal properly or indeed at all with the crux of the question.

[89] I appreciate the fact that she is a Chartered Accountant and that it would not be surprising for her to wish to take control of all situations relative to finances. As Mr *Buchannan* pointed out, she was frequently unable to answer questions without extensive irrelevant detail. Much of this modification and adaptation during a long period in the witness-box was of no assistance in the resolution of the issues in dispute.

[9] Transcript pp.1342-1343;1348-1351

[90] Throughout the trial she was unable to substantiate her allegations of criminality and corruption she relied on. Failure to follow procurement procedures does not necessarily imply corruption. The regulations are not inflexible in this regard. Deviation is allowed. Therefore any conduct which tends to deviate from procedures cannot simply be interpreted as corruption without further ado. Corruption is a serious allegation not to be lightly made against ones' colleagues. One needs evidence to substantiate such allegations. A mere suspicion without a scintilla of evidence is simply not enough.

[91] In the witness box she was allowed to gallop like an unbridled stallion. She hardly answered a simple question in simple terms. She would in most cases always want to read answers from documents and statutes. She overrated her knowledge of work to the extent of undermining other peoples' ideas including the AG. When a simple question was asked as to whether it was appropriate to call her senior a "fool" she gave a long-winded account outlining the circumstances as to how it came about that she referred to the CEO as a 'fool'. Even my guidance to try and help her to answer this question was unsuccessful. She found it extremely difficult to agree with my suggestion that perhaps it is possible that she was driven by anger when she used that word.

[92] She was disobedient to her seniors. She was recalcitrant and always demanded instructions to be in writing and yet she never presented the report required by the Board in writing. She always wanted her ways in everything. She detested people who disagreed with her. Her conduct in general at the workplace amounted to insubordination. The employee's duty to obey his or her employer lies at the heart of the employment relationship. Obedience implies discipline, discipline implies rules, and rules, to be effective, imply the power to impose sanctions on those who break them.[10]

[93] If she was genuine in her report about the CEO the rhetorical question is: what caused her to be angry if it was revealed to him? How did she expect the CEO to deal with the complaints if they were not brought to his attention? It is true of course that Mr Kondlo denied that the Board told him about what was discussed with the plaintiff.

[94] Furthermore, on the evidence there was no repudiation. Repudiation of a contract means a refusal to perform the duty or obligation arising from a contract owed to the other party. Repudiation is

[10] Grogan Workplace 12th edition 2017 p127

derived from the verb "*repudiate*," from the Latin word '*repudiare',* meaning to divorce or reject. The weight of the evidence was that the plaintiff was part of the ARC team. She was part of the collective of managers monitoring payments. The CEO was merely overseeing those payments and where necessary deciding on priorities to pay which creditor first. I have alluded to that evidence hereinbefore.

[95] Repudiation is a matter of inference from the facts proved. The test is whether a reasonable person would have perceived such repudiation on the conduct of the other party to a contract. There must be an indication of the conduct which can objectively be perceived as being aimed at rejecting the contractual obligation or an indication not to be bound by the terms of the contract.[11]In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[12]it was stated:

> *"The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter*

[11]*Erasmus v Pienaar* 1984 (4) SA 9 (T) at 20C – H;*Karswell v Collard* [1893] 20 ER (HL) 47; *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387A – C; *Van Rooyen v Minister van OpenbareWerkeenGemeenskapsbou*1978 (2) SA 835 (A) at 845A – 846B;; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*1984 (1) SA 1 (A): at 653B – G); *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another* 1993 (3) SA 471 (AD) at 480I – 481F; *Highveld 7 Properties (Pty) Ltd and Others v Bail*es 1999 (4) SA 1307 (SCA) at 1315F – G, 1318A – E, 1318H – J). *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 684I – 685B:

[12][2000] ZASCA 81; 2001 (2) SA 284 (SCA) ([2001] 1 All SA 581).para 16 at 294E – H.

of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach."[13]

[96] Applying the test alluded to above, I am unable to find that there was any conduct on the part of the defendant from which a perception could be inferred that there was repudiation. I therefore conclude that the plaintiff has not proven any repudiation and the claim cannot succeed on this leg.

Was the plaintiff subjected to an occupational detriment?

[97] The alternative claim is based on the repudiation relating to an occupational detriment. The plaintiff contends that charging her with matters relating to the disclosures to the press amounted to subjecting her to an occupational detriment as defined in the PDA. She contended

[13] See also *B Braun Medical (Pty) Ltd v Ambasaam CC* 2015 (3) SA 22 (SCA) para.8

that the disclosers she made to the press were protected by PDA. For this contention she relied on section 9 of the PDA.

[98] As early as mid-November 2014 in the exchange of emails between the plaintiff and the CEO she referred to the dire straits of the entity's financial position. She stated that they had to be "*very careful not to let people know the extent of our cash flow position because we do not want that information to get into the wrong hands like the media."*[14]

She therefore regarded knowledge of the situation by the media as being in the "wrong hands."

[99] It is clear that she got angry when the DEDEAT sent an email to bail out the entity for R4 million on 3 March 2015. From her perspective this was an indication that nothing was going to be done to the officials that were responsible. She felt the crisis was going to be 'swept under carpet' and she did not want to be part thereof. She felt there was 'corruption and criminality' and non-adherence to legislation. She testified that she blew the whistle because she wanted to have "a clean conscience".

[14] Transcript p.654

[100] Mr *Buchannan* submitted that when the plaintiff went to the media she was not intending to remedy any wrong. He submitted that she did so in anger and was resentful towards the CEO and the Board. She made the disclosures to vindicate her self-esteem as a professional and to embarrass the CEO and all concerned. He relied on the *dictum* of Benjamin AJ in *Letsoalo and Another v Minister of Police and Others; TRC Sesing v Minister of Police and Others*[15]for contending that when the plaintiff made the disclosures she was driven by personal animosity rather than an intention to make a disclosure to the employer as an institution.

[101] Mr *Hodes* for the plaintiff relied heavily on *Tshishonga v Minister of Justice & Constitutional Development*[16] for contending that the defendant contravened the provisions of the PDA when it disciplined and dismissed the plaintiff. That conduct, so the argument ran, constituted an occupational detriment. He submitted that the disclosures were protected by the PDA. In this regard it has been argued that the defendant breached and/or repudiated an implied term of the contract of employment.

[15][2016] ZALCJHB 124; [2016] 8 BLLR 793 (LC); (2016) 37 ILJ 1916 (LC) para. 16
[16][2006] ZALC 104; 2007 (4) SA 135 (LC); 2007 (4) SA 135 (LC); [2007] 4 BLLR 327

[102] If regard is had to the preamble of the PDA one gathers that the emphasis is placed on reporting in a responsible manner the criminal conduct of employers and other employees both in private and public entities. The Act was therefore enacted in order to:

> "*create a culture which will facilitate the disclosure of information by employees and workers relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures"*

Section 1 of the Act defines a disclosure as:

> *"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;"

[103]. It is clear from the pleadings that the plaintiff relies on section 9 of the PDA for the proposition that she was subjected to occupational detriment. Section 9 provides:

"General protected disclosure

(1) Any disclosure made in good faith by an employee or worker-

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if-

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the disclosure.

(2) The conditions referred to in subsection (1) (i) are-

(a) that at the time the employee or worker who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;

(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee or worker making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;

(c) that the employee or worker making the disclosure has previously made a disclosure of substantially the same information to-

(i) his or her employer; or

(ii) a person or body referred to in section 8,

in respect of which no action was taken within a reasonable period after the disclosure; or

(d) that the impropriety is of an exceptionally serious nature.

(3) In determining for the purposes of subsection (1) (ii) whether it is reasonable for the employee or worker to make the disclosure, consideration must be given to-

(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the impropriety;

(c) whether the impropriety is continuing or is likely to occur in the future;

(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;

(e) in a case falling within subsection (2) (c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;

(f) in a case falling within subsection (2) (c) (i), whether in making the disclosure to the employer the employee or worker complied with any procedure which was authorised by the employer; and

(g) the public interest."

[104] For a disclosure to be protected it must be made in good faith; the person making it must reasonably believe that it is substantially true; it must not be for a personal gain and in all the circumstances it

must be reasonable to make such a disclosure. The disclosure qualifies for protection if it fulfils the under mentioned conditions:

104.1 First, at the time when the employee makes the disclosure he/she must have a reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6: In this regard the complaint was made to the employer and therefore this subsection is not available to the plaintiff. The complaint was even escalated to the highest authority in the Province, the Premier. Despite this the plaintiff was not charged for misconduct. Therefore this condition was not fulfilled.

104.2 Second, in the event there is no person or body prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure must have reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer; Here again no evidence was led to show that any evidence of impropriety was likely to be concealed. On the contrary the Board took the initiative to investigate the allegations and the plaintiff was involved in that investigation. The plaintiff reported the financial crisis and made a

disclosure to the Board, the MEC and the Premier. There was nothing to conceal.

104.3 Third, the employee making the disclosure must have previously made a disclosure of substantially the same information to-

(i) his or her employer; or

(ii) a person or body referred to in section 8,

in respect of which no action was taken within a reasonable period after the disclosure. I have alluded to the fact that the disclosure was indeed made to the employer and action was immediately taken. The plaintiff was part of the action plan to alleviate the situation. Indeed funds came from the DEDEAT and DBSA as a result of action taken.

104.4 Fourth, the impropriety must be of an exceptionally serious nature. The evidence did not reveal any impropriety of such a nature that it could be classified as exceptional. The evidence of Mr Kondlo was that the report of the PWC, an independent company which was appointed to do the audit, did not pick up any criminal or major financial mismanagement.

[105]. In light of the above I find that the disclosure did not qualify as a protected disclosure.

[106]. There is another aspect why the disclosure cannot be protected. Mr *Buchannan* submitted that the facts disclosed were already known to the employer and therefore were notorious facts which fell outside the protected disclosure. For this contention he relied on two cases of the Labour and Labour Appeal Court.[17]In *Goldgro* the case of *City of Tshwane Metro Municipality v Engineering Council of SA*[18] was distinguished. Also in the present matter like *Goldgro* matter the Board was already attending to the issues and the plaintiff was a participant thereto. Accordingly on this ground as well the disclosure cannot qualify as a protected disclosure.

[107] Was the disclosure made in breach of a duty of confidentiality of the employer towards any other person? The undisputed evidence was that there were contracts between the defendant and the tenants not to disclose information relating to them. Mr Kondlo testified that the severance payment that was made to the

[17]*Beaurain v Martin N.O.*[2014] ZALCCT 16;[2014] 35 ILJ 2443 para.27;*Goldgro (Pty) Ltd v Caroline McEvoy*[2018] ZALAC 55; [2019] 40 ILJ (LAC) para.23.
[18]2010 (2) SA 333 (SCA)

former CFO was made in confidence and that there was an agreement of non-disclosure to third parties. Again in relation to the tenants he also testified that *"sensitive information about our tenants was disclosed to the media, which is a breach of confidentiality in terms of our relationship with them right from the day they get into the zone, we sign a non-disclosure agreement with them that nothing relating to their trade dealings with IDZ would be disclosed without an explicit consent from the other party, so by this we had basically broken that agreement"*

[108]. Furthermore the plaintiff signed an agreement with the defendant in her contract (clause 7.6 thereof) in terms whereof she undertook not to disclose any confidential information of the entity to third parties. The evidence led did not justify this breach of confidentiality.

[109]. Mr *Hodes* submitted that the plaintiff acted in the public interest out of a sense of ethical and professional responsibility. The question of public interest is an abstract notion. This involves setting oneself up in judgment as to whether the action or requirement to change behaviour will benefit the public overall – a far greater set of people than can be interacted with directly. It involves interference in

people's ability to go about their business. Invoking the public interest requires justification of ability and the right to decide what is for the greater good, in the face of a natural suspicion that those proposing an action in the public interest are actually acting in their own interests.

[110]. Mr *Buchannan* contended that in making the disclosure the plaintiff was motivated by her clear and unequivocal lack of respect, her anger and resentment for the CEO, her inappropriate perception of bias and her misplaced perception that the Board breached its promise for confidentiality. I am inclined to agree with this submission. She made it clear in her evidence that she did not want the investigation to be internal and that she expected an independent body from outside to be appointed. Once the Board appointed a task team to investigate her complaints she became uncooperative and failed to submit reports as requested. In my view her running to the media was unreasonable and irresponsible. I find that the disclosure was not made in good faith.

[111]. As alluded to above Mr *Hodes* relied heavily on the decision of *Tshishonga v Minister of Justice & Constitutional Development and Another*[19] for the contention that the claim on the basis of PDA should

[19][2006] ZALC 104;2007 (4) SA 135 (LC) ([2007] 4 BLLR 327; [2007] JOL 18875)

succeed. That case is distinguishable from the present case in many respects.

111.1 First, in that case the information disclosed to the media was based on true facts whereas in the present case the bulk of information was based on suspicion and personal opinion;

111.2 Second, Tshishonga had reason to believe that what he told the press was true whereas in the present matter the plaintiff lacked the basis to believe that such information was correct in that despite several requests by the Board and the task team she never submitted any report to support her allegations. On the contrary she was proved to be wrong and no official was found to be guilty of any corruption or any criminal conduct as painted by her.

111.3 Third, the disclosure in Tshishonga was substantially true hence there was no evidence from the respondent to the contrary whereas in the present matter evidence of the plaintiff was proved to be based on conjecture by the two witnesses for the defendant regarding one of whom there was a unanimous view that his evidence was impeccable.

111.4 Fourth, the respondent in Tshishonga matter failed to tender any evidence to dispel the reasonableness or otherwise of good faith on the part of the whistle-blower whereas in the present matter there was reliable evidence for the defendant which proved lack of insight by the plaintiff on the operations of the IDZ.

111.5 Fifth, in Tshishonga matter despite reports made in February 2003 to the Public Protector, in April 2003 to the Auditor General and to a member of Parliament Minister Pahad nothing was done whereas in the present matter the report was made in December 2014 to the Board and shortly thereafter the Board took steps to investigate and find solution to the cash flow crisis which investigation was successful.

Although the plaintiff took part in the action plan she failed dismally to substantiate her reports by failing to submit the reports requested from her and at times submitting late reports without documentation.

111.6 Sixth, Tshishonga only turned to the media in November 2003, almost nine months since the complaint had been lodged and nothing had been done about it. In the present matter the plaintiff was

going from door to door in the hierarchy and every time she was assured that the matter would be attended to. The Board did not waste time and immediately took steps to investigate and if possible to try and mend the relationship between her and the CEO. In a matter of days after her report she ran to the media.

111.7 Seventh, Tshishonga was unlawfully transferred to an office where he was given no work whereas in the present matter the plaintiff was part and parcel of the team investigating the cause of the cash crisis.

111.8 Eighth, the report Tshishonga made to the media was not based on personal opinion whereas in the present matter part of the information report was based on personal opinion that there was corruption and criminality. Personal opinion is not information as contemplated in the PDA. (See *Communication Workers Union and Another v Mobile Telephone Networks (Pty) Ltd.*[20]

[20](2003) 24 ILJ 1670 (LC) para.22)

[112] In all the circumstances I am of the view that the plaintiff has failed to prove on a preponderance of probabilities that the defendant has repudiated her contract of employment in any manner and is therefore not entitled to the relief sought. It is therefore not necessary to deal with quantum.

[113] What remains is the question of costs. There is no reason why costs should not follow the result. Both parties have employed two Counsel. In determining whether to allow the costs of two Counsel, the question to be asked is; was it a wise and reasonable precaution on the part of both parties to appoint two advocates? The matter is not of a complex nature. No doubt the employment of Senior Counsel on both sides has made my duty much better. Their heads of argument, though lengthy, were of great help. I am indebted to all Counsel. The manner in which the matter was conducted warranted employment of two Counsel. None of the parties argued otherwise. In my discretion therefore cost of two Counsel should be allowed.

[114] In the result the following order will issue.

The plaintiff's claim is dismissed with costs such costs to include costs consequent upon employment of two Counsel.

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B RTOKOTA
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: P B Hodes SC

C J Quin

Instructed by Nongogo, Nuku Inc.

For the defendant: R G Buchannan SC

N C F Schultz

Instructed by Smith Tabata Inc.

Dates of Hearing: 4.12.17 to 7.12.17; 8, 11, 12, 13 and 14.17; 21.05.18 to 24.05.18; 28.05.18 to 31.05.18; 4.06.18; 13.11.19 to 21.11.19; 16.03.20.

Date judgment delivered: 28 May 2020.