# HIGH COURT OF SOUTH AFRICA

**(GAUTENG DIVISION, PRETORIA)** 3/9/2014.

**CASE NO: 35095/2014**

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED.

3.9.2014 .....
DATE

.....
SIGNATURE

In the matter between:

**NOMADHLANGALA NDABEZITHA** Applicant

and

**PAN SOUTH AFRICAN LANGUAGE BOARD** First Respondent

**MXOLISI ZWANE** Second Respondent

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## J U D G M E N T

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**MAKGOKA, J:**

[1] The applicant approached this court seeking, by way of urgency, an order interdicting the second respondent from proceeding with a disciplinary hearing against her which was scheduled for 2- 4 June 2014, pending the finalization of an application by the applicant in which she seeks to declare as unlawful, the decision to subject her to a disciplinary hearing. The matter was opposed by both respondents. After hearing argument on 30 May 2014, the respondents undertook to not proceed with the disciplinary hearing, pending this judgment.

[2] The applicant is employed by the first respondent as head of national lexicography unit. The respondent is a juristic person established in terms of the Pan South African Language Board Act 59 of 1995. The second respondent was appointed as a caretaker chief executive officer (CEO) of the first respondent by the Minister of Arts and Culture.

[3] On 24 April 2014 the second respondent served the applicant with a notice to attend a disciplinary hearing scheduled for 2- 4 June 2014 to answer to the following charges against her: breach of confidentiality; abuse of position of trust; bringing the first respondent into disrepute and abusing the resources of the employer (the first respondent).

[4] The genesis of the charges against the applicant is an application launched in the Labour Court by the applicant and other employees of the first respondent in which they seek to declare unlawful and invalid, the appointment of the second respondent as caretaker CEO of the first respondent. In that application, the applicant and other employees of the first respondent, attached to their founding affidavit, certain confidential documents pertaining to the first respondent. Those include the Auditor-General's draft regulatory audit report and a list of the first respondent's outstanding creditors. The draft audit report contains certain adverse findings, including low morale and motivation of staff at the first respondent. The Auditor-General, in its communication, sought the view of the management of the first respondent on its findings.

[5] In this application, the applicant asserts that the disclosures referred to above, were made pursuant to, and are protected by, the Protected Disclosures Act 26 of 2000 (the Act). In terms of s 3 of the Act, no employee may be subjected to 'occupational detriment' on account or partly on account of having made a protected disclosure. In terms of s 1 of the Act, 'occupational detriment'

means, among others, to be subjected to a disciplinary hearing. The section also defines 'protected disclosure' as a disclosure made to:

" (a) a legal advisor in accordance with section 5;

(b) an employee in accordance with section 6;

(c) a member of Cabinet or the Executive Council of a province in accordance with section 7; or

(d) any other person or body in accordance with section 9, but does not include a disclosure –

(i) in respect of which the employee concerned commits an offence by making that disclosure; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advise in accordance with section 5."

[6] Section 5, in turn, provides that a protected disclosure to a legal advisor is any disclosure made to a legal practitioner or to a person whose occupation involves the giving of legal advise, and with the object of and in the course of obtaining legal advice.

[7] The respondents deny that the disclosures made by the applicant to her attorney are protected by the Act because the information was made public in the affidavit filed in the Labour Court. I think there is force in that argument. Section 5 is clearly concerned with legal privilege of attorney and client, and once documents made confidentially to an attorney become public, such as in court documents, the privilege falls away, and so does the protection afforded by s 5 of the Act. I therefore conclude that the disclosure is not one within the purview of s 5.

[8] The applicant has not asserted any disclosure in terms of s 9 of the Act, but elected to confine herself to s 5 of the Act. The former section protects any disclosure made in good faith by an employee, who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true.

Since the applicant has not sought to rely on this section, I similarly refrain from considering her application on that basis. The upshot of this is that the applicant's reliance on the Protected Disclosures Act is misplaced.

[9] The other ground on which the applicant seeks an interdict is the allegation that the second applicant is not a CEO of the first respondent, and as such the first respondent does not have the power or authority to bring disciplinary proceedings against her. She seeks an interim interdict pending the determination of an application challenging the validity of the decision by the second respondent to institute a disciplinary enquiry against her. It is convenient to discuss this aspect in the context of the requisites for an interim interdict, to which I turn.

[10] The requisites for an interim interdict are well-settled. The applicant has to establish:

(a) a *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) the balance of convenience favours the granting of the interim relief;

(d) the absence of any other satisfactory remedy.

[11] In order to establish a *prima facie* right, the applicant must establish that her right is not open to serious doubt. The applicant need not show that right on a balance of probabilities. The facts alleged by the applicant, together only with those alleged by the respondent that the applicant cannot dispute, must be considered, to determine whether the applicant should obtain relief at the trial in due course (*Spur Steak Ranches Ltd v Saddles Steak Ranch*).[1]

[1] 1996 (3) SA 706 (C).

[12] What is the *prima facie* right (although open to doubt) that the applicant asserts? She says it is the right not to be subjected to a disciplinary hearing instituted by the second respondent, as the latter is not the CEO of the first respondent. The short answer to that assertion is that a person acting in any capacity would normally have all the powers of the office he or she holds in an acting capacity. From that premise, I agree with the contention by the second respondent that for all intents and purposes, he has all the powers in terms of the law associated with those of a CEO of the first respondent.

[13] It follows that the second respondent, at least at *prima facie* level, is competent and authorized to bring disciplinary hearing against the applicant. I express a *prima facie* at this stage, quite aware that the determination of this point is pending in other *fora*. In my judgment in the associated application under case 30640/2014, I did not deem it necessary to express any view, given the nature of the broader constitutional issue raised in that matter. However, here, I am constrained to do so, since this is the applicant's most substantive contention, alongside reliance on the Protected Disclosures Act. I therefore conclude that the applicant has failed to establish a *prima facie* right. *Prima facie*, the second respondent is competent to institute a disciplinary enquiry against her.

[14] Having come to the above conclusion, it is not necessary for me to consider the other requisites for an interdict relating to irreparable harm and balance of convenience, as all of them should be present for an interim interdict to be granted. Even if my conclusions are wrong on the Protected Disclosures Act, the powers and competence of the second respondent, the absence of the irreparable harm and balance of convenience, the applicant *does* have an alternate remedy. If she is subjected to a disciplinary hearing, and adverse consequences result, she is entitled to challenge those in the relevant *fora*.

[15] In the result the application falls to fail. Costs should follow the event. I am not persuaded that costs of two counsel are warranted.

[16] In her notice of motion, the applicant prayed in the alternative that the respondents be directed to approach the chairperson of the Pretoria Society of Advocates to appoint a chairperson of the applicant's disciplinary hearing. No case was made out in the papers for this prayer, and consequently I am not inclined to consider it.

[17] In the result I make the following order:

1. The application is dismissed with costs.

**TM MAKGOKA**
**JUDGE OF THE HIGH COURT**

**DATE OF HEARING : 30 MAY 2014**

**JUDGMENT DELIVERED : 3 SEPTEMBER 2014**

**FOR THE APPLICANT : ADV. T. FAKU**

**INSTRUCTED BY : FAKU ATTORNEYS, JOHANNESBURG AND MAKHAFOLA AND VERSTER ATTORNEYS, PRETORIA**

**FOR THE RESPONDENTS : ADV. M. DEWRANCE**
**ADV. F. KARACHI**

**INSTRUCTED BY : M.B. MOKOENA ATTORNEYS, PRETORIA**