**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**CASE NO. JS 803/03**

In the matter between:

**COMMUNICATION WORKERS UNION** First Applicant

**ITSHEGETSENG, S** Second Applicant

and

**MOBILE TELEPHONE NETWORKS (PTY) LIMITED**
Respondent

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**JUDGMENT**

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**CORAM : A VAN NIEKERK AJ**

[1] This is the return day of a rule *nisi* granted after an application was heard unopposed and as a matter of urgency on 16 April 2003. In terms of the Order granted on that date, the Respondent (to which I shall refer as "MTN") was interdicted from proceeding with disciplinary action against the Second Applicant until the finalisation of this application. The substantive relief sought by the applicants is that MTN be interdicted from

proceeding with the disciplinary enquiry pending the adjudication of the unfair labour practice dispute referred by the applicants to the CCMA on 16 April 2003. The Applicants also seek an order in terms of which the suspension of the Second Applicant be lifted pending the final determination of the dispute.

[2] The Applicants seek the relief that they do on the basis that the Second Applicant's pending disciplinary hearing and the suspension are occupational detriments in terms of the Protected Disclosures Act, 26 of 2000 ("the PDA").

[3] The material facts giving rise to these proceedings are largely common cause. The Second Applicant is currently employed by MTN as a supervisor in its business improvement unit. Until some point in early 2003, a number of temporary employment agencies supplied temporary staff to the unit's Gauteng office. In March 2003, it became apparent to the Second Applicant that in what he alleges constituted a departure from previous practice, supervisors were given lists of applicants to interview, the overwhelming majority of whom were supplied by Thlalefang.

[4] On 1 April 2003, a meeting was convened between Mr Innocent Shandu, the manager of the customer services unit, and the supervisors engaged in that unit. At some point during the general meeting, at which other supervisors and members of management were present, the Second Applicant raised an allegation concerning the preferential treatment of Thlalefang, and was advised to refer the matter to the Business Risk Unit.

[5] On 4 April 2003, the Second Applicant circulated an e-mail to a group of persons, some of whom had attended the meeting on 1 April 2003. The email is the communication relied on by the Applicants as a protected disclosure, and for that reason, it is quoted in full -

*'Hi Moosa/Norman*

*I would like to raise a open secret concern to your office. In December MTN 173 GP has recruited an number of staff via the following Agencies who are proffered suppliers, Thlafang, Hola, NAPS, Ikwesi and Quest. From this recruitment we*

*saw most of Naps, and Hola and Kwesi people coming through but NAPS was leading the pack. All agencies had Intakes coming through nevertheless, but I should say upfront that except for Hola and NAPS, the agencies representatives where no where to be seen on the day of the recruitment. We had Kopano from Thlalefang continuously calling Vusimusi Masilela about how many candidates where taken from each agency, and after this disturbing situation we where told that there is a supervisor or supervisors who gave NAPS a scandal to have their agents taken in large numbers and some should come forward and confess to avoid any sanction. We later told that an investigation is going forth. That is fine and has been accepted by all of us. But what is surprising that Thlalefang has been having 100% of its candidates being taken all over CS from KZN, PLK to GP. No such investigation were conducted against supervisors, no concerns were raised by other agencies about how many recruits from each agency was done by individual agencies and business business risk was never brought to see this abnormality. We have currently recruited last week agents from Thlalefang only and they are now in training, the issue here is is this not bias shown to one agency, if so why. Should other agencies suffer because Tlhaklefang did not do a proper job on their candidates the last time? If so why is the same not done to other agencies in PLK, and KZN where Thlalegfang is in a big number. The person or persons who lodged a complain, why are they not complaining now. Who are these faceless complainants?*

> *Personally I smell a rat and think that there are senior people senior than us, who are losing revenue if Thlalefang is not placing agents at MTN thus the justification not to make staff permanent. They want to continue being fat cats and eating. This email is prompted by the meeting we had as supervisors and management to raise issues of concern in running our business. It was noted in that meeting that this email shall be sent out to raise these issues. I propose a large scale investigation on the issue of agencies and I please let this be noted that if it not handled properly the scorpions maybe engaged to conduct and investigation."*

[6] The persons who whom the e-mail was addressed are engaged in MTN's Business Risk Unit. It is not disputed that these persons aside, the e-mail was circulated to persons who had attended the meeting held on 1 April 2003 and "blindcopied" to other MTN employees, including the Chief Executive Officer and the Commercial Director.

[7] On 7 April 2003, the Second Applicant, having received no response to his e-mail sent on 4 April, sent a second e-mail.

[8] On 11 April 2003, the Second Applicant was handed a notice of suspension, and advised that he would be required to attend a disciplinary hearing on 17 April 2003. On 14 April 2003, a charge sheet was handed to the Second Applicant. The charges against him are recorded as –

> *"1. That you intentionally, deliberately circulated an e-mail insinuating that management of MTN are corrupt and/or colluding with various employment agencies in corrupt activities.*
>
> *2. That you intentionally, deliberately and disrespectfully engaged in abusive and insulting language in that you insinuated management of MTN as Fat Cats.*
>
> *3. That you made unfounded allegations against management in that you circulated an e-mail alleging that management is benefiting from recruitment processes. Through conspiracy, bribery underhanded dealings with various recruitment agencies.*
>
> *4. That you brought the company's image into disrepute in that you circulated an e-mail to MTN employees, which e-mail contained derogatory remarks, allegations of corruption .*
>
> *5. That you intentionally and deliberately conducted yourself in gross insubordination and insolence in that you circulated an e-mail containing derogatory remarks against MTN Management and its clients.*
>
> *6. That you abused company tools of trade and privileges given to you for purposes of work in that you used the same tool to circulate an e-mail to MTN employees, which e-mail has exposed the company to a huge civil suite by some of its clients."*

[9] On 16 April 2003 the Applicants initiated urgent proceedings in this Court, and the rule that is the subject of the proceedings was granted.

[10] The crisp issue that the Court is required to decide is whether for the purposes of these proceedings, the Second Applicant's communications constitute a protected disclosure as defined by the PDA. That in essence is the right on which the Applicants rely to obtain the interdictory relief they seek.

[11] It was not disputed that the Court has the power to grant interdictory relief. Section 4 (1) of the PDA provides that any employee who has been subjected, is subject or may be subjected to an occupational detriment in breach of the statute may approach this Court for appropriate relief. This Court is entitled by virtue of section 158 (1) *inter alia* to grant urgent interim relief, interdicts and orders directing the performance of any particular act.

[12] The test to be applied in determining was the subject of dispute. Mr Orr, who appeared for the Applicants, submitted that the test to be applied was that relevant to an interim interdict, which required the applicants to establish *inter alia* a clear right or a prima facie right, although open to some doubt. The approach adopted by this court to determine an applicant's right to interim relief is well established. In *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 at 714-B, the approach commonly applied in this Court, was summarised. This requires an applicant to establish a clear right or a right *prima facie* established

though open to some doubt, a well grounded apprehension of irreparable harm, a balance of convenience in favour of the granting of interim relief, and the absence of any other satisfactory remedy. The threshold test is the requirement of a *prima facie* right established though open to some doubt. Although this is often stated as a single requirement the enquiry involved two stages, once the *prima facie* right has been assessed, that part of the requirement which refers to doubt involves a further enquiry in which the Court looks at the facts set up by the Respondents in contradiction with the Applicants' case, and if there is a near contradiction or an unconvincing explanation, then the right will not be protected. If however, there is serious doubt, the applicant can not succeed (see *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 and Landman and Van Niekerk *Practice in the Labour Courts* A-18 to A-21).

[13] On the other hand, the requirements for a final interdict require the applicant to establish a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. A final interdict should only be granted in motion proceedings if the facts stated by the Respondent together with the admitted facts in the Applicant's affidavits justifies such an order, unless the Court is justified in rejecting the allegations or denials by the Respondent on the papers. (See *Plascon-Evans Paints v Van Riebeek Paints* 1984 (3) SA 623(A) at 634-F to 635-D.).

[14] Mr Pretorius SC, who appeared for MTN, submitted that the order sought by the Applicant was in effect a final interdict, albeit one that would operate for a limited period. It was consequently necessary, he submitted, for the Applicants to satisfy the test established by *Plascon-Evans.* A final

interdict is a final determination of the rights of the parties. It is intended to secure the permanent cessation of an unlawful course of conduct. The Second Applicant has been suspended and has been notified that he is to attend a disciplinary enquiry. These actions are the subject of the referral of a dispute to the CCMA, and may well be referred to this Court in due course if conciliation fails to resolve the dispute. In that sense, these proceedings are not directed at a final determination of the rights of the parties. However, if the order sought by the Applicants were to be granted, MTN would be precluded from proceeding with a disciplinary enquiry on the basis that the threat of an enquiry had been found to constitute an occupational detriment. In that sense, the order sought by the Applicants would amount to a final declaratory order to the effect that the Second Applicant has suffered an occupational detriment consequent on a disclosure that is protected by the PDA, even if it is only to operate pending a final determination by this Court of an unfair labour practice dispute. Be that as it may, I intend to deal with the matter as an application for an interim interdict and to apply the approach in *Webster v Mitchell.*

[15] Section 4 of the PDA provides that for the purposes of the Labour Relations Act, 66 of 1995 ("the LRA") any dismissal in breach of the requirement that employees may not be subject to an occupation detriment by an employer, is an automatically unfair reason for dismissal. Any other occupational detriment in breach of the same obligation is deemed to be an unfair labour practice for the purposes of the same Act. With effect from 1 August 2002, the LRA was amended to incorporate these provisions into Chapter VIII of that statute.

[16] An occupational detriment is defined in section 1 of the PDA. In relation to the working environment of an employee, the definition includes being subject to any disciplinary action, or being dismissed, suspended, demoted, harassed or intimidated, or being threatened with any of these actions.

[17] "Disclosure' is also defined in section 1 of the PDA. The definition reads as follows -

> "***disclosure"*** *means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee 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)* *....."*

[18] Section 6 of the PDA protects employees who make protected disclosures to their employers. Subsection (1) reads as follows -

> *"Any disclosure made in good faith-*
>
> *(a)* *and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or*
>
> *(b)* *to the employer of the employee, where there is no procedure as contemplated in paragraph (a)."*

[19] If a disclosure is made to an employer in terms of section 6 of the PDA, a number of conditions must be satisfied before that disclosure can be protected. The person claiming the protection must be made by a person who is an employee. The employee must have reason to believe that information in his or her possession shows, or tends to show, the range of conduct that forms the basis of the definition of "disclosure". The employee must make the disclosure in good faith. If there is a prescribed procedure or a procedure authorised by the employer for reporting or remedying any impropriety, then there must be substantial compliance with that procedure. If there is no procedure that is either prescribed nor authorised, the then the disclosure must be made to the employer. If any procedure authorised by the employer permits the making of a disclosure to a person who is not the employer, the employer is deemed to have made the disclosure. Finally, it seems to me that there ought to be some nexus between the disclosure and the detriment. I don't think that it is necessary, as Mr Pretorius implied, that the detriment be directly linked to the disclosure in the sense that an employee would be entitled to a remedy if and only if the detriment threatened or applied by the employer is so threatened or applied expressly for the making of a disclosure. This would permit unscrupulous employers to create pretexts upon which to effect occupation detriments and undermine the purpose of the PDA.

Provided that there is some demonstrable nexus between the making of the disclosure and the occupational detriment threatened or applied by the employer, the protections of the PDA should apply.

[20] I agree with the observation by Pillemer AJ in *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551 (LC) that the PDA seeks to encourage a culture of whistle blowing. The Preamble to the PDA records that it is incumbent on every employer an employee to disclose criminal or irregular conduct in the workplace, and that employees should be protected against reprisals as a result of such disclosures. Good, effective and transparent governance by employers is obviously in the broader social interest and employees should be encouraged, without fear of reprisal, to disclose information relating to suspected criminal and other irregular conduct by their employers. It is not insignificant that the PDA was originally conceived as an integral part of the Open Democracy Bill.

[21] However, as I have noted, the protection extended to employees by the PDA is not unconditional. The PDA sets the parameters of what constitutes a protected disclosure, as well as the manner of permissible disclosure by workers. The definition of "disclosure" clearly contemplates that it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA. The disclosure must also be made in good faith. An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirement of good faith. It does not necessarily follow though that good faith requires proof of the validity of any concerns or suspicions that an employee may have, or even a belief that any wrongdoing has actually occurred. The purpose of the PDA would be

undermined if genuine concerns or suspicions were not protected in an employment context even if they later proved to be unfounded. There is no doubt why disclosures made in general circumstances require in addition to good faith a reasonable belief in the substantial truth of the allegation. However more extensive the rights established by the PDA might be in the employment context, I do not consider that it was intended to protect what amounts to mere rumours or conjecture.

[22] I am satisfied that in this instance, the Second Applicant's communications on 4 and 7 April 2003 fail to meet the conditions for protection established by the PDA. The disclosure relied on by the Second Applicant as a protected disclosure was no more than an expression of a subjectively held opinion or an accusation, rather than a disclosure of information. It is clear from the judgment in *Grieve v Denel* that the disclosure considered worthy of protection in that instance was a disclosure of information that on a *prima facie* basis at least, was both carefully documented and supported. The disclosure was clearly indicative of a breach of legal obligations and possibly criminal conduct on the part of the employer concerned. In the present instance, the only information proffered by the Second Applicant (and this was conceded by his counsel) was that contained in his email dated 4 April 2003, and in particular his statement to the effect that Thlalefang was being used as a sole agency to supply temporary employees. There is no factual basis, however tenuous, in any of the Second Applicant's communications to justify the conclusion that they constituted anything other than his personal opinion that what appears to amount to a preferred supplier arrangement was improper.

There is no information offered that indicates in the slightest any impropriety on the part of any member of MTN's management. The statement –

> "*Personally, I smell rat and think that there are people senior than us who are losing revenue if Thalefang is not placing agents at MTN and thus the justification not to make staff permanent."*

is not a disclosure of information rather than an unfortunately phrased expression of the Second Applicant's personal views.

[23] A further relevant consideration is the fact that the information (such as it was) contained in the Second Applicant's email had been communicated to a general meeting prior to its transmission on MTN's computer network. The PDA contemplates and protects disclosures made in private rather than in public. This is obvious given the potential damage to the reputation of persons against whom allegations are made, an and integral element of the balance between the protection of rights to reputations and the protection of free speech in the workplace.

[24] Finally, there is the related matter of the procedure adopted by the Second Applicant in making the disclosure on which he relies. The PDA seeks to balance an employee's right to free speech, on a principled basis, with the interests of the employer. The requirement that a disclosure be made through an authorised channel is an integral element in structuring this balance. The PDA accordingly establishes as a condition for protection that a disclosure be made in accordance with a procedure that is either established or authorised. The evidence in these proceedings discloses the establishment by MTN of an elaborate system for the reporting of allegations of fraud, including a confidential "hot line". Commendable as the procedures established by MTN might be, it is not disputed that the Second Applicant was advised at the meeting held on 1 April 2003 that he should raise the matter of the alleged preference accorded to Thalefang with the Business Risk Unit. The Second Applicant sought a wider audience. He addressed his email to his peers and members of MTN's senior management. As I have noted above, the requirement of disclosure through an authorised channel is an important component of the protection accorded to whistleblowers.

There is a difference between the nature and extent of the protections afforded to internal as opposed to external disclosure. As I have noted above, an internal disclosure does not require a reasonable belief that the information disclosed tends to show that any wrongdoing has occurred. A reasonable belief that any allegation is substantially true is a condition for the protection of any external disclosure. By requiring substantial compliance with a prescribed or an authorised procedure, if information disclosed by an employee turns out to be unfounded, little if any damage will have been done to the external reputation of the employer or persons against whom allegations have been made. By failing to comply with the procedure prescribed and/or authorised by MTN for the further investigation of his allegations, the Second Applicant removed himself from the ambit of the protection granted by the PDA.

[25] The statements that the Applicants submit constitutes a protected disclosure do not, for the purposes of these proceedings and on the papers before me, constitute a protected disclosure contemplated by the PDA. This is not to say that for the purpose of any unfair labour practice proceedings, after the leading of evidence that is subjected to cross-examination, a different conclusion might not be justified. For the purposes of this application however, the Applicants have failed to establish a clear right, even one that is open to some doubt.

[26] I make the following order:

1 The Rule Nisi issued on 16 April 2003 is discharged, with costs.

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**ANDRE VAN NIEKERK**

**Acting Judge of the Labour**

Date of hearing: 8 May 2003

Date of judgment: 26 May 2003
Counsel for Applicant: Mr C Orr
Attorneys for Applicant: Cheadle Thompson Haymsom Inc

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