IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JS 898/04

Heard: 2 November 2006
Delivered electronically: 26 December 2006

In the matter between:

M M TSHISHONGA **Applicant**

AND

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **First Respondent**

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Second Respondent**

JUDGMENT

Introduction

1. Are disclosures to the media about impropriety in the workplace protected under the Protected Disclosures Act 26 of 2000 (PDA)? What is a disclosure? When does it qualify for protection? What remedies are appropriate for compensating a victim of an occupational detriment?

2. These are some of the questions that have to be answered in the first claim before the Labour Court for compensation arising from the PDA.[1]

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1 Previous decisions of the Labour Court were interdicts. *Communication Workers Union v*

Applicant's evidence

3. The applicant was employed in 1978 in the department of justice (the department) in Venda as a Director-General. In 1994 he became a Deputy Director-General when the various departments of justice amalgamated. He was the Managing Director of the Masters' office business unit (the unit).

4. One of his tasks was to eradicate corruption that riddled the administration of insolvent estates, particularly around the appointment of liquidators. After a brainstorming exercise with the staff, it was resolved that a panel would be established to appoint liquidators.

5. In 2002 the first respondent, the former Minister of Justice, Dr Penwell Maduna, telephoned the applicant from Cape Town to inform him that he was with a friend, Mr Enver Motala, who would be contacting the applicant because he, Motala, was knowledgeable about liquidations.

6. In February 2002 Motala met the applicant for lunch in Pretoria. He expressed his dissatisfaction with the way in which he was being sidelined by the procedure for appointing liquidators. Mr Lategan, an Assistant Master in the Pretoria Master's office was, he said, very knowledgeable about liquidators and their appointment and that he should be engaged when appointing them. The Minister, he said, liked the applicant very much and

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Mobile Telephone Network (Pty) Ltd (above)*; (Grieve v Denel (Pty) Ltd (2003) 24 ILJ 551 LC*). Compensation was considered in two reported arbitrations viz *H and M Ltd (2005) 26 ILJ 1739* and *Rand Water Staff Association and Rand Water (2001) 22 ILJ 1461*

that he had great respect for the Minister. The discussion ended with the applicant being wary of Motala. It was clear to him that Motala wanted to influence him for his own purpose by abusing his relationship with the Minister.

7. Two insolvency practioners bodies wanted to merge. About 8 February 2002, they met under the chairmanship of the applicant. Prior to the meeting, Motala had telephoned the applicant to inform him that the Minister wanted him to attend the meeting. The applicant was unhappy about acceding to the request. He informed Dr Seriti, the erstwhile chairman of one of the merging associations. Dr Seriti was concerned. At the meeting he said it was not proper for Motala to attend whilst other liquidators were excluded. Furthermore, it was a meeting of the executive members of the practioners' bodies. Motala nevertheless remained in attendance throughout the meeting, despite the discomfort it caused to the participants.

8. About 15 February 2002, the Minister telephoned the applicant expressing dissatisfaction with the way in which liquidators were being appointed. He directed the applicant to convene a meeting with the staff so that he could address them.

9. The meeting was attended by South African Commercial Catering and Allied Workers Union (SACCAWU) and South African Revenue Services (SARS). Motala attended again as the only liquidator. The Minister announced that he was unhappy with the way in which Motala was being sidelined. The chairperson of the panel for appointing liquidators, Irene

Mokgalabone, had prepared a report which she distributed at the meeting. She explained why Motala was not appointed. (See evidence of Mokgalabone)

10. The discussion ended on the note that as the Minister was made aware of the procedure, if anyone was unhappy they could approach the applicant first before contacting the Minister. In the applicant's opinion, the matter was resolved.

11. While the applicant was on leave in July 2002, Mr Koos Van der Merwe, the Senior Manager: Inland who was deputizing for him, telephoned to inform him that Mr Farouk Vahed, the Master of the High Court in Pietermaritzburg, had been instructed by the Minister to appoint Motala as liquidator in the Retail Apparel Group (RAG) liquidation. Van der Merwe wanted to know how to assist Vahed.

12. The applicant advised Van der Merwe to get help from the department's legal advisors so that the Minister can be informed as to what his powers were. Van der Merwe replied that legal advice had already been obtained and that the Minister did not agree with it. The applicant then directed Van der Merwe to inform Vahed to exercise his discretion in terms of the law and that Vahed should get the Minister's instructions in writing if they were beyond his powers.

13. On his return to work the applicant asked Vahed to prepare a report on this episode. (The Vahed report)

14. RAG was liquidated in May 2002.

15. Four liquidators originally appointed to the RAG enquiry successfully challenged the appointment of Motala in the High Court in Kwazulu Natal. The Court confirmed the opinion of the department's legal advisers, viz that the Minister did not have the power to instruct the Master to appoint liquidators.

16. The Minister's appeal to the Supreme Court of Appeal was dismissed.[2]

17. About 12 September 2002, while the decision of the Supreme Court of Appeal was pending, the Minister instructed the applicant to convene a meeting between Lategan, the second respondent, ie Director-General Vusi Pikoli, Vahed and himself. At that meeting the Minister announced that he was appointing Lategan as acting Assistant Master in Pietermaritzburg to oversee the appointment of the liquidators in the RAG case.

18. The applicant was surprised. He did not expect the Minister to appoint his subordinate without first approaching him. He wondered how the Minister even knew of Lategan without engaging the applicant. Furthermore, it was unheard of that an Assistant Master from one jurisdiction could be appointed to act in another jurisdiction and in a specific case.

19. Although RAG was one of the largest liquidations in the country involving claims in excess of R1 billion, Vahed had been

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2 *Minister of Justice v Firstrand Bank Ltd and Others 2003 (6) SA 636*.

reluctant to follow the Minister's instructions for the further reason that it did not justify five liquidators.

20. Lategan appointed Motala as the fifth and lead liquidator in the RAG liquidation after he became acting Assistant Master in Pietermaritzburg.

21. The procedure for appointing liquidators was that the company in liquidation would requisition a person to be appointed. It was not open to Lategan to make an appointment without a recommendation or requisition. Lategan's relationship with Motala was also unusual. The Finance Week of 14 April 2004[3] published a testimonial issued on 7 March 2001 in which he praised Motala "unashamedly".[4]

22. The RAG enquiry in terms of s 417 of the Companies Act No 61 of 1973 proceeded in Sandton. Motala's attorney, Brian Khan and two advisors, viz Soraya Hassim and Ratif Bhana, who were also related or personally associated with Motala, were appointed.

23. During a meeting held in January 2003 to discuss how to deal with the Minister and Motala, the Director-General admitted to Mokgalabone and the applicant that he was unhappy about their relationship and remarked that the Minister became "agitated" whenever something was said about Motala.

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24. At about 21h00 on 28 January 2003 the applicant received a telephone call at his home from the Minister informing him that he was with the trade union who was up in arms because it believed that its interests were not being taken seriously when liquidators were appointed. The Minister accused the applicant of not helping him in the RAG matter and of bad-mouthing him. He declared that the applicant would be “the first casualty”. He raged on that he was removing the applicant as head of the unit with immediate effect and that he did not care where the Director-General placed him. He refused to hear any response from the applicant.

25. The applicant became numb with disbelief that the Minister could be so insensitive. He telephoned the Director-General that evening to report the incident. The Director-General was also shocked. They agreed to discuss the matter the following day.

26. At the discussion the next day it was clear that the Minister had already contacted the Director-General. The applicant questioned how a politician could instruct the Director-General as an administrator to remove the applicant and why the Director-General would execute the instructions without following prescribed procedures. He wanted to ask the Minister for reasons for removing him. The Director-General replied that the Minister would not give reasons.

27. On 4 February 2003 Enver Daniels, the Chief State Law Advisor, was appointed to take over the applicant’s responsibilities as the

Managing Director of the unit.[5]

28. According to media reports, the Minister had allegedly hinted that the applicant had an axe to grind after being rapped over the knuckles for poor work performance. The applicant believed that his performance was a matter that should have been raised by the Director-General not the Minister. He denied that his performance was ever in question. At his disciplinary enquiry, the Director-General acknowledged that he "did a good job" in cleaning up the Department and that he "sent a message of clean and good corporate governance.[6] In the letter dated 19 February 2003 in which the Director-General gave the applicant notice of his removal to the position of Managing Director in the office of the Director-General, he assured the applicant that he needed his expertise.[7]

29. The applicant reported to work daily but was given no work in his new position.

30. On the Applicant's recommendation made when he managed the unit, the Director-General had commissioned a forensic investigation into corruption. Mr Kinghorn prepared a report on his investigations (the Kinghorn report). Mr Mckensie, who had been seconded to the department by Business Against Crime to investigate corruption in the Master's office, oversaw the preparation of the report. He gave the applicant a copy in the first week of February 2003. Copies of the Kinghorn and the Vahed

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6 A10, A19
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reports were also given to the Director-General. The Director-General did not act on either report.

31. In the absence of any response from the Director-General to these reports, the applicant went to the Public Protector in February 2003. He discussed his complaint with Adv Van Rensburg of the Public Protector's office and left copies of the reports with him.

32. Not having heard from the Public Protector, the applicant lodged the complaint with the Auditor-General's Office on 16 April 2003.[8] Apart from acknowledging receipt of the complaint the following day[9], the applicant received no further response from the Auditor-General.

33. Thereafter the applicant met with Adv Khutswana from the Public Protector's office. She had since been assigned his complaint. He received a letter dated 12 May 2003 from her informing him that his complaint relating to his treatment as a public servant should be referred to the Public Service Commission (PSC). The allegations about irregularities in the appointment of liquidators in the RAG matter were to be handled by Mrs Fourie from the Public Protector's office.[10] His complaint to the Auditor-General had also been redirected to the Public Protector to avoid duplication.

34. Later in May 2003 the applicant received a call from Fourie

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requesting a signed copy of the Vahed report. He referred her to Vahed in Pietermaritzburg. He heard nothing further about the investigation from the Public Protector's office.

35. The applicant then turned to Minister Pahad as a member of the Cabinet. Minister Pahad said that it seemed that the Minister was not right; but he was not prepared to get involved. Instead, he urged the applicant to meet the Director-General and the Minister. He offered to help the Director-General set up the meeting as he had good relations with the Minister. The applicant thought that was a good idea and asked the Director-General to convene the meeting. He agreed to do so but the meeting did not take place.

36. On 6 October 2003 he telephoned Fourie for a progress report. She informed him that nothing had been done because there was no official complainant. The applicant persisted that he was the complainant and offered to go to her offices again to discuss the matter. Fourie said that she would confer with the Public Protector and revert shortly thereafter. The applicant did not hear from her again.

37. Frustrated by the lack progress in investigating the complaint, the applicant conferred with an investigative journalist on 6 October 2003, after Fourie failed to revert to him. He held a press conference two days later.

38. The Director-General telephoned to discourage him from approaching the media.

39. The applicant issued a press statement in which he set out information about the alleged improprieties.[11] To justify his suspicion that there was a questionable relationship between the Minister and Motala he informed the media that Motala received liquidations to the value if R 583m from July 2000 to September 2003. Other liquidators received liquidations to the value of R1m or so. He included statistics of Motala's appointments in his press release.

40. Much publicity followed.

41. The Minister responded with a press release explaining that he initially acted in response to a request by SARS to appoint Motala. After his decision was set aside by the High Court Lategan appointed Motala without his intervention.[12]

42. The headlines of *Sunday Independent* of 12 October 2003 read "Maduna throws in the towel." Nepotism and corruption in the department were cited as some of the reasons for the Minister deciding not to be available to serve as a Minister the following year.[13]

43. On 8 October 2003 *The Sowetan* reported that President Mbeki was intending to appoint a judicial commission of enquiry into the allegations of corruption against the Minister.[14] A commission

11 A105
12 A108-109
13 A198-A200
14 A173

was not established. Instead, an internal committee headed by Advocates Nkosi and Seth Nthai was commissioned to investigate corruption in liquidations. The applicant testified before the committee. To date the committee has produced no reports of its investigations of which the applicant is aware.

44. The Minister telephoned him after an article was published in *The Citizen*[15] and shouted that he would not get any job in this country.

45. Publicly, the Minister allegedly described the applicant on national television as "a dunderhead", "a relic of the Bantustans of old who was accommodated by Maduna's people in the new order and who was now biting the hand that fed him."[16] He was also alleged to have said that the applicant was a timid public servant who could not box himself out of a wet paper bag.

46. The applicant lodged a complaint of criminal defamation against the Minister. The police obtained a transcript of the broadcast and submitted it to the Director of Public Prosecutions. He declined to prosecute and advised the applicant to pursue a civil claim.

47. The applicant was suspended on 13 October 2003 pending disciplinary action because, it was alleged, he should not have held a press conference to reveal sensitive issues about the Ministry and the department without following protocol, nor

15 A174
16 A344

should he have made defamatory remarks about the Minister to the media.[17]

48. In a further letter dated 23 October 2003 to the Public Protector the applicant placed on record that he had been suspended and that he suspected that the Minister would instruct the Director-General to charge him for misconduct.[18]

49. On 27 October 2003 the applicant was subpoenaed to testify at the RAG enquiry. He did not fit the criteria for relevant witnesses in terms of s 417(1) of the Companies Act. Although he suspected that he was being subpoenaed in order to be discredited, he nevertheless attended the enquiry with a legal representative. Adv Stephan Du Toit, the evidence leader, badgered him with questions that were not relevant to the RAG liquidation. He asked the applicant why he went to the press about the corruption allegations. Such questions were relevant to a disciplinary enquiry against him. Their relevance to a s 417 enquiry was also challenged by Adv Broster, SC who represented another party at the enquiry.

50. The applicant received a message via his professional assistant that the Director-General wanted him to return documents.

51. He sought a meeting with the Director-General to clarify precisely what documents were sought. The Vahed and Kinghorn reports had been impounded at the RAG enquiry. The applicant did not

17 A110, A113
18 A155E

want to hand over documents that would assist in his defence.

52. The Director-General did not meet with the applicant. Instead, on 14 November 2004 he obtained a *rule nisi* against the applicant interdicting him from disclosing privileged information or documents of the department to the RAG enquiry and to any other person and called for the return of all documentation in his possession which were obtained without authorization and which belonged to the department.[19] The *rule nisi* was discharged on 16 November 2004.[20]

53. The applicant was charged with misconduct on 5 December 2003.[21]

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19 A149 – A152

20 A351

21 The charges were:

"Charge 1: That the applicant, during October 2003, made allegations against Mr Penwell Meduna (who was at the time the Minister of Justice and Constitutional Development), to the effect that Mr Meduna (sic) had a *"questionable relationship"* with Mr Enver Motala, a liquidator appointed to handle the RAG liquidation. In this regard Mr Tshishonga contravened:

1.1 Clause C3.4 of the Pubic Service Code of Conduct ("the Code"), which requires that an employee must use the appropriate channels to air her or his grievances or to direct representations.

1.2 Clause C4.10 of the Code, which states that an employee must *"report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest"*.

Charge 2: That the applicant accused Mr Maduna of:

2.1. Undermining the rule of law by acting outside the scope of his powers; and in this regard, acting contrary to the discretionary powers of the Masters of the High Court;

2.2. Nepotism;

2.3. Abuse of infrastructure and staff of the Department for the purposes of advancing his personal interests; and

2.4. Endangering South Africa's criminal justice system;

2.5. By doing so he infringed the Minister's constitutional right to his dignity.

Charge 3: That the applicant refused without just or reasonable cause to return all documents relating to the RAG case after having been instructed to do so by a person having authority, namely Mr V Pikoli, the Director-General of the

54. He challenged his suspension successfully and without opposition in the Labour Court. On 28 January 2004 he was reinstated in the position of Managing Director of the unit pending arbitration to be conducted under the auspices of the General Public Service Sectoral Bargaining Council.[22]

55. The department refused to comply with the Labour Court order because of his alleged misconduct.

56. His suspension persisted until 20 July 2004 when, following the disciplinary enquiry conducted by an independent chairperson appointed by the department, the applicant was found not guilty.

57. After the disciplinary hearing, the applicant contacted the Director-General to get his job back and to ensure that the department did not deem his employment to be terminated on the grounds of abscondment. When they met the Director-General refused to reinstate the applicant despite the Labour Court order and being found not guilty of the charges. He contended that the trust had broken down and that they should talk about a settlement. To avoid the risk of being deemed to have absconded, the applicant secured a letter from the Director-General confirming that he was on indefinite leave. Negotiations began which culminated in the applicant's employment being

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Department ('the DG'). This amounts to gross insubordination.

Charge 4: That the applicant disclosed to the media the administration of liquidations by the Office of the Master of the High Court of which he was in charge. By this conduct he had disclosed official information for personal gain and the gain of others."

Charge 4 was withdrawn.

22 A331

terminated by agreement.

Evidence of Irene Mokgalabone

58. Mokgalabone was employed by the department in 1995 as an Assistant Master.

59. She corroborated the applicant regarding the establishment of a panel of Assistant Masters to appoint liquidators. The rationale was that it was easier to bribe or corrupt an individual but not fifteen members of a panel. Prior to the establishment of the panel, the function of appointing liquidators was rotated amongst individual Assistant Masters.

60. She attended the meeting called by the Minister on 15 February 2002. She found the meeting strange firstly, because the Minister had not visited the Masters' office before. Secondly, he was accompanied by one liquidator only, viz Motala. Thirdly, the purpose of the visit was puzzling. The Minister wanted to know why Motala was not being appointed. Mokgalabone presented the Minister with a written report explaining why Motala was not appointed in certain cases and especially in response to requisitions from SARS. [23]

61. She informed the Minister that the requisitions from SACCAWU, the trade union that nominated Motala, had not been completed properly to enable the panel to assess what the value of the claims were and how many claimants supported the nomination.

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23 A228 - A261

62. The panel members expressed their concern that the corruption uncovered was the tip of the iceberg. Part of the problem, they said, was the absence of a regulatory framework for selecting liquidators. As far as Mokgalabone was concerned, the Minister's queries had been addressed adequately.

63. Mokgalabone then turned to testify about the panel's comparative report regarding insolvency appointments for the periods 2000 to 2001, ie the period immediately before the panel was established, during its operation between the end of 2001 to April 2003 and after it disbanded from April to September 2003.[24] This report had been prepared for the Minister and the industry.

64. The comparative analysis showed that when the panel appointed liquidators, the work was spread more widely and evenly. When the panel disbanded, Motala got the bulk of the liquidations.

65. Dr M S Motshekga of Sechaba Trust (Pty) LTD had responded to the report by writing to the Minister on 12 March 2003 to compliment the panel and Mokgalabone in particular about its "transparent and fair" system of appointments.[25] Mr K S Manamela, a liquidator from Legae Trust, wrote to Mokgalabone on 25 October 2002 recording his appreciation of the work of the panel.[26]

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24 A280 - 329
25 A275
26 A277

66. Under cross examination, the work of the panel became even clearer. On a daily basis all appointments of liquidators were pinned to a board on the first floor of the Master's office. Even after Mokgalabone left the service she was able to complete the report up to September 2003 with the other members of the panel. She gathered information whenever she went to the Master's office. The panel met over weekends or after hours. It took it upon itself to complete the report up to September 2003 for the sake of transparency.

67. She wanted to get the report "out there" so that the public would know that the panel did a good job. Mr Hulley probed further to establish why a person who was no longer employed by the department would take the trouble to complete the report, sometimes at the expense of her new employer's time. To this she responded convincingly that she had a passion for the insolvency industry having been involved in its restructuring.

68. It emerged that before the panel was appointed, white males mainly were appointed as liquidators. The number of previously disadvantaged individuals (PDI's) (ie white females, Coloured, Africans, Indians and disabled) increased from 13 in 2000 before the panel was established to 18 in 2001 and to 112 in 2002[27] when the panel made the appointments. The number of PDI's who received appointments in big liquidations rose from 12 in 2001 to 73 in 2002 and plummeted to 26 between April to September 2003.[28]

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28 A316

69. Motala had received 8 appointments as liquidator for the total value of R265 000 between 27 June 2000 to 31 December 2000. From 1 January 2001 to 31 December 2001 Motala ranked fourteen on the list of liquidators after having 67 appointments and was second highest in terms of the value of the estates to which he was appointed. For the greater part of 2001 appointments were made by individual Assistant Masters and not the panel.

70. Between 1 January 2002 to 31 December 2002 Motala dropped to 10th in terms of the value of the liquidations in which he was appointed and had 38 appointments. Between April and September 2003 Motala escalated to the top of the list of PDI's receiving 39 appointments to the total value of R309 787 000. Of this, 11 appointments were in respect of claims above the value of R5000.[29]

71. Mokgalabone was challenged on the basis that white males got the bulk of the liquidation work from the panel. One Mr Lyn was cited as an example. He had 3 appointments to the value of R1m in 2000, 8 appointments to the value of R184,5m in 2001 and 42 appointments to the value of R292,1M in 2002. Mokgalabone explained that Lyn was favoured by the banks as a liquidator. He was appointed on requisition.

72. The PDI's were identified by an asterisk on the list of liquidators. Mokgalabone elaborated that the asterisk implied that 90% of

29 A315

those liquidators' appointments had been "discretionary" as distinct from appointments on requisition. A discretionary appointment was made by the panel when a PDI was teamed with a liquidator who was not a PDI or who had been appointed on requisition.

73. Two lists of insolvent estates were kept – one for estates above R5m and the other for estates below R5m. A roster of liquidators was maintained for each list. Discretionary appointments followed the list alphabetically. As there were many more estates below R5m, the roster in respect of small estates went through faster with many PDI's getting more appointments.

74. The list of liquidators was updated by the panel on a daily basis. In the absence of a regulatory body to supervise the appointment of liquidators, a monitoring committee was established with representatives of the executive committees of the practioners' bodies. The panel interviewed all the candidate liquidators in the presence of the committee before they were allowed on to list. It also inspected all the appointments made by the panel on a monthly basis.[30]

75. With regard to appointments on requisition, the panel had to appoint the nominated liquidator if the requisition was in order. The panel did spot checks to establish whether the requisitions were in order. It was not possible to check every requisition because of capacity constraints. The panel also referred fraudulent claims to the Scorpions. By way of example

30 A281

Mokgalabone testified that many requisitions received from SARS were rejected because the assessments were not attached. As a result the value of the SARS' interest as creditor could not be assessed.

76. SARS' assessments were liquid claims. That gave SARS an advantage over most other creditors whose claims had still to be proved. If an assessment was higher than other claims, then SARS' nominee would be appointed. SARS' assessments were sometimes questionable. It submitted claims when it owed a refund. On other occasions it failed to produce an assessment even after Mokgalabone had asked for it. Thus the panel could not assume SARS' requisitions were valid in spite of its preferred status. Because of its status the panel had to be especially vigilant.

77. Mr Hulley disputed that the discretionary appointments were made fairly. He questioned how one PDI (Ledwaba) could get 14 appointments to the value of R19,5m whilst another PDI, Bahm got one appointment valued at R40 000. Mokgalabone explained that liquidators came on to and left the panel at different times. Bahm might have been on the panel for a short time in 2002. Similarly, Mandela Magato came on to the list later in 2002; hence he received only 3 appointments.[31] When it was pointed out to her that Makgato was already on the list for 2001[32], she explained that there could have been two Makgato's. She might have confirmed that if she telephoned someone all the Master's

31 A307
32 A297

office to check the files.

78. There was no request that Mokgalabone be allowed to make the telephone call. Nor was the court prepared to stand the matter down to allow her to do so as it was always open to the respondents to refute Mokgalabone's testimony by producing the Master's office files.

79. In March 2003 Mokgalabone and Van der Merwe were instructed to meet the Minister at his offices.

80. They waited outside his office for thirty minutes before being invited into the room where about thirty people were assembled. The meeting had already been discussing Mokgalabone before she arrived. The complaint of the liquidators assembled seemed to have been about the appointment of white liquidators. The Minister was angry with Mokgalabone and Van der Merwe and encouraged the others to also voice their complaints. He told Mokgalabone and Van der Merwe that they could leave the department or sue him but he would fight to the bitter end.

81. After the meeting, the Acting Master, Mr Jordaan and Van der Merwe assembled the panel. Jordaan praised them for their work saying that since the panel started appointing liquidators, he had never received a compliant. Van der Merwe directed them to report to Lategan thenceforth as he was the Director: Insolvency.

82. This arrangement embittered the members of the panel as it meant that their success in transforming the industry would be

reversed as the authority to appoint liquidators reverted to one individual. Lategan could overturn their recommendations.

83. In a letter dripping with bitterness and disappointment, the panel informed Jordaan that it was disbanding.[33]

84. Jordaan replied by letter dated 9 April 2003[34] repeating his appreciation of the work of the panel and reminding them of their duties regarding the appointment of liquidators in future.

85. Frustrated by this turn of events, Mokagalbone resigned and accepted appointment as a Manager: Estates with ABSA Trust in July 2003. As her resignation was forced by intolerable circumstances in the workplace she considered claiming for unfair dismissal from the department. On advice, she abandoned such action as the "fish was too big" and she was "small fry". She had overcome her grievance by the time she completed the comparative report. She currently holds the position of Regional Manager: Wills at ABSA.

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33 A313; Extracts from the letter read as follows : "1)The appointment of Mr Lategan to act as supervisor over the appointment of liquidators creates the impression (in the Master's Office as well as the Insolvency industry) that the panel did not do the appointments correctly or that there was corruption involved. If that is the case (that the panel did appointments incorrectly or there was corruption involved), the current panel members are not suitable to continue therewith.

2) The panel had a circular issued regarding the guidelines used to make appointments, which, if deviated from, creates a lot of problems in the industry. If the panel's decisions were to be overruled, the panel would not be in a position to defend such decision, which would cause the panel to lose credibility

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7) It is not the duty of Assistant Masters to attend to appointments.

The Assistant Masters attended to the appointments in an effort to clear the tarnished name of the Master's Office, Pretoria, created by the suspension of certain Deputy Masters. Obviously this effort was not good enough for the Department/Minister."

34 A278

Submissions for Applicant

86. The applicant's case was brought squarely within the four corners of the PDA. Mr Woudstrar, SC took the court through the general principles on protected disclosures. He examined firstly, what the requirements were for a disclosure by reference to the definition of that word in s 1(a) and (b) of the PDA.[35] Secondly, he answered the question whether the disclosure was protected affirmatively by referring to s 5, s 6, s 7, s 8 and s 9 of the PDA.

87. Thirdly, he supported his submission that disclosure to the media was protected in terms of s 9 by submitting that a "wide and unqualified" meaning should be attributed to the word "any" in 9(1). [36] He referred to the manual issued to public service managers by the PSC [37] and a Master's Degree dissertation.[38] Particular requirements of s 9 were discussed to show that the applicant complied fully in that the disclosure was

35 *Communication Workers Union v. Mobile Telephone Network (Pty) Ltd* (above)*; H and M (above); Darnton v The University of Surrey 2003 IRIR 133; H & M Limited [2005] 26 ILJ 1737 at 1781F -G.*

36 *Commissioner for Inland Revenue v Ocean Manufacturing Ltd 1990 (3) SA 610 (A) at 611H; R v Hugo 1926 AD 268 at 271; Hayne and Company v Kaffrarian Steam Mill Company Ltd 1914 (AD) 363 at 371; H & M Limited* (above)

37 A352 - 354

38 Juliette Van Rooyen *The Desirability of a Culture of Whistle-blowing*

made in good faith, in the reasonable belief that the allegations were substantially true and for no personal gain.

88. Fourthly, he submitted that the applicant was subjected to an occupational detriment as defined in s 1 (a) (b) and (1) of the PDA.

89. Fifthly, he invited the court to draw an adverse inference from the respondents' failure to testify[39] and to admit certain hearsay evidence.[40]

90. Sixthly, the applicant's claim for the costs of legal representation for defending himself at the enquiry was based on s 186(2)(b) and (d) and s 191(13) read with s 193 (4) and s 194(4) of the LRA and s 4(2)(b) of the PDA. The quantum of the compensation should be assessed on the basis that it is a solatium for an unfair labour practice.[41] The claim for legal

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39 *Elgin Fireclays Ltd Webb 1947 (4) SA 744 (A); ABSA Investment Management Services (Pty) Ltd v Crowhurst (2006) 2 BLLR 107 (LAC)*

40 *Hewan v Kourie NO and Another 1993 (3) SA 233 (TPD) at 238G-239A and 241A-E*

41 *Pedzinski v Andisa Securities [Pty] Limited (2006) 2 BLLR 184 (LC);* Brassey: *Commentary on the Labour Relations Act at A4-154*; *Johnson & Johnson [Pty] Limited v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) at 99D-F; Fauldien and Others v The House of Trucks [Pty] Limited (2002) 23 ILJ 2259 at para. 11 and 12; National Industrial Workers Union and Others v Chester Wholesale Meats KZN [Pty] Limited (2004) 25 ILJ 123 (LC); Members of the Executive Council for Tourism and Environmental and Economic Affairs: Free State v Nondumo and Others (2005) 26 ILJ 1337 (LC); Prinsloo v Harmony Furnishers [Pty] Limited (1992) 13 ILJ 1593 (IC); Ellerine Holdings Ltd v Du Randt (1992) 13 ILJ 611 (LAC) at 612E-F; Intertech Systems [Pty] Limited v Sowter (1997) 18 ILJ 689 (LAC); Christian v Colliers Properties (2005) 5 BLLR 479 (LC)*

costs was patrimonial and should be allowed.[42]

91. Lastly, the applicant sought a punitive order for costs.

Submissions for the Respondents

92. The disclosures were not protected under the PDA firstly, because they were made to the news media which is not a body contemplated under the PDA,[43] and secondly, because they were not made in a responsible manner as envisaged in s 3(1)(c)[44] of the PDA.

93. In the absence of any South African cases on the incidence of the onus in proceedings under the PDA, he referred to case law from the United Kingdom (UK) to show that the applicant bore the onus of proving that his actions fell within the terms of the PDA. [45]

94. Returning to South African authorities on the onus of proof generally[46] and in employment contracts specifically[47] Mr Hulley contended that the onus lay with the applicant to justify that the

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42 *Ferodo [Pty] Limited v De Ruyter (1993) 14 ILJ 974 (LAC)* which cited Anderman, *The Law of Unfair Dismissal* (2nd edition); *Intertech Systems [Pty] Limited v Sowter (1997) 18 ILJ 689 (LAC).*

43 *Communication Workers Union v Mobile Telephone Network (Pty) Ltd* (above)

44 Para 3.2.2 of Respondents' Heads. This reference is incorrect and should probably read "s 8(1)(c)".

45 *The United Kingdom's Employment Rights Act, 1996* as amended by the *Public Interest Disclosure Act 1998; Street v Unemployed Workers' Centre [2004] 4 All ER 839 (CA) at 842e; [2004] EWCA Civ 964 ("Street")*

46 *Pillay v Krishna 1946 AD 946 at 951 – 952; Mabaso v Felix 1981 (3) SA 865 (A) at 873E*

47 *Coolair Ventilator Co. (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W); May v Raw & Co. (1881) 2 NLR 158; Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) at 527F-H)*; McQuoid-Mason *The Law of Privacy in South Africa* (1978) at p. 189.

respondents were not entitled to exercise their powers of dismissal, discipline and suspension and to prove that his actions fell within the terms of the PDA, specifically s 9.

95. "Information" in the definition of disclosure in s (1)(1) of the PDA, means "facts or knowledge provided or learned."[48] Personal opinion is not information contemplated in the PDA.[49] The applicant did not have "reason to believe" in the truth of the disclosures.[50] He relied on the Vahed and Kinghorn reports and his own knowledge to conclude that "the Minister had played an integral role in ensuring the appointment of Motala".[51] The Kinghorn report did not state that the Minister was party to corruption involving R950 000,00. Nor did he know the identity of the person reporting to Kinghorn. Further investigations had to be done and the applicant was unaware and made no enquiries to establish whether they had been undertaken.

96. The applicant was aware that the Minister was taking up the cudgels on behalf of SARS in wanting Motala to be appointed. The Minister was therefore not furthering his own interests. The applicant's "reasonable belief" that the Minister was guilty of "alleged corruption" was an indication of his bad faith as there is no such crime as "alleged corruption".[52]

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48 *Oxford English Dictionary*
49 *Communication Workers Union v Mobile Telephone Network (Pty) Ltd* (above)
50 *Minister of Law and Order v Hurley & Another 1986 (3) SA 568*
51 Para 26 of Respondents' Heads. It was in fact common cause that Motala was appointed on the Minister's instructions which were declared to be unlawful.
52 Para 28 of the Respondents' Heads

97. A disclosure made in good faith[53] is not one that is deliberately aimed at embarrassing or harassing an employer.[54] The applicant's disclosure was inspired by a personal grudge against the Minister. It was made one week after the Minister "sidelined" him. He chose not to refer his complaint to the PSC. He failed to investigate whether there was an innocent explanation for the Minister's conduct despite the Vahed report suggesting that there might be such an explanation.

98. "Gain" is defined in the Collins English Dictionary as "to acquire (something desirable); obtain". It has been interpreted in the context of s 30 and s 31 of the Companies Act to mean

> "a commercial or material benefit or advantage, not necessarily a pecuniary profit, in contradistinction to the kind of benefit or result which a charitable, benevolent, humanitarian, philanthropic, literary, scientific, political, cultural, religious, social, recreational or sporting organisation, for instance, seeks to achieve."

99. The applicant had an axe to grind. He did not have "clean hands" or "pure motives." His actions were not "truly selfless or altruistic." He testified at the disciplinary enquiry that he made the disclosure because the department was not settling with him and because he (without reason) feared for his life. For these reasons the applicant disqualified himself from claiming the protection under the PDA.

100. The respondents persisted in justifying the charge of

53 *Street* (above) *at 842a – 843b*
54 *Communication Workers Union v Mobile Telephone Network (Pty) Ltd* (above)

insubordination because the applicant refused to return the department's documents, despite the *rule nisi* being discharged and the applicant being found not guilty at the disciplinary enquiry. The contention was that the PDA did not authorize the applicant to remove and withhold documentation from the employer.

101. With regard to the relief claimed, the respondents acknowledged that compensation involves the payment of a sum of money[55] for pecuniary and non-pecuniary loses[56] subject to fairness to both parties.[57]

102. The applicant was not dismissed and has been fully remunerated. As his claim is based on alleged insults and ill treatment short of defamation[58] there is no reason to link his claim to his remuneration the amount of which, in any event, has not been proved. The applicant's claim was delictual and none of the factors for assessing compensation for damages to his personality[59] were canvassed during the trial.

103. The respondents deny that the applicant is entitled to costs of legal representation at the disciplinary enquiry as they were incurred at his instance. Furthermore, as a matter of policy employees should not be able to recover such costs.

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55 *Russell NO & Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd 1975 (1) SA 110 (A) at 145D – E*
56 *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (above)
57 *Whall v Brandadd Marketing (Pty) Ltd (1999) 20 ILJ 1314 (LC)*
58 *Brenner v Botha* 1956 (3) SA 257 (T)
59 Neethlings, *Law of Personality* (1995), p. 217

104. Costs should follow the result.

Legal issues for determination

105. The crux of the case was whether the applicant's disclosures to the media were protected under the PDA. Ancillary issues that arose include the relevance and admissibility of documentary evidence, the relevance of the evidence of Mokgalabone, the onus of proof, whether the applicant's suspension from duty and disciplinary proceedings constituted "occupational detriment" as contemplated in the PDA and therefore unlawful, whether the applicant's claim for compensation was delictual, and whether the applicant's claim for costs of procuring legal representation for his disciplinary enquiry was competent.

106. The PDA takes its cue from the Constitution of the Republic of South Africa Act No 108 of 1996. It affirms the "democratic values of human dignity, equality and freedom". In this respect its constitutional underpinning is not confined to particular sections of the Constitution such as free speech or rights to personal security, privacy and property. Although each of these rights can be invoked by whistle-blowers, the analysis in this case is from the perspective of the overarching objective of affirming values of democracy, of which the particular rights form a part. Democracy embraces accountability as one of its core values. Accountability, dignity and equality are the main themes flowing through the analysis that follows.

Evidence

107. The starting point is to clarify the relevance, admissibility, quality and weight to be attached to the oral and documentary evidence.

Respondents' failure to testify

108. The applicant testified in person and called one witness Mokgalabone to corroborate his evidence regarding certain meetings with the Minister and the Minister's interventions regarding the appointment of liquidators, and Mokgalabone's own knowledge of operations in the Master's office regarding liquidations.

109. The respondents led no evidence. No explanation was tendered for this failure. They were material witnesses. For instance, only the Minister could explain his relationship with Motala and whether he said that he was his friend. Only he could say why he wanted Motala to attend meetings which were not opened to other liquidators, why he was dissatisfied with the way in which the panel operated, whether, and if so, why he circumvented the ruling of the Kwazulu Natal High Court by having Lategan appoint Motala while the decision of the Supreme Court of Appeal was awaited, why he took the extraordinary step of appointing Lategan to act as Assistant Master in another jurisdiction in a specific case, why he summarily sidelined the applicant without following any procedures, whether he made derogatory, unsubstantiated remarks about the applicant to the media, whether he lied about the applicant being taken to task for poor performance and not knowing Motala "from a bar of soap" after he had disclosed to the applicant that Motala was his friend

and whether he subjected the applicant to occupational detriment.

110. Only the Director-General could explain why he removed the applicant from his position as the Managing Director of the unit to a post that did not even exist without ensuring that his removal was procedurally and substantively lawful and fair, why he did not resist this instruction from the Minister, why he discouraged the applicant from asking the Minister for reasons for sidelining him, why he did not act on the Vahed and Kinghorn reports, and if he did, what the outcome was and whether he subjected the applicant to occupational detriment.

111. Their evidence was relevant to show that any belief that the applicant held was reckless, dishonest, unreasonable or in bad faith. And any action against the applicant was lawful and justified.

112. The failure of a party to call a witness is excusable in certain circumstances,[60] such as when the opposition fails to make out a *prima facie* case.[61] But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.[62]

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60 *R v Bezuidenhout 1954 (3) SA 188 (A); S v Kelly 1980 (3) SA 301 (A);* Hoffman and Zeffertt *The South African Law of Evidence* 4th Edition 604

61 *SA Veterinary Council and Another v Veterinary Defence Association (2003) 2 All SA 156 (SCA) at para 27,43*

62 *Elgin Fireclays Ltd v Webb* (above)**;** *ABSA Investment Management Services [Pty] Ltd v Crowhurst* (above) *at 113*

That inference is strengthened if the witnesses have a public duty to testify.

113. The respondents are publicly accountable for the actions against the applicant. Their defence is paid from public funds as will any compensation award. They owe the applicant and the public an explanation. The claim is not against them as individuals but in their official capacities.

114. Their failure to testify results in a dearth of factual material on their side which makes it impossible to exercise any discretion in their favour.[63]

115. There was no suggestion from Mr Hulley that the respondents were not available or able to testify. In fact, there was no explanation at all for why they did not testify.

116. The court must therefore accept the evidence for the applicant, qualified by its probative value.[64]

Probative value of the applicant's evidence

117. As a mature, legally trained, former public servant who had extensive experience in a senior position in the department, the applicant was measured and meticulous in the presentation of his evidence. He was unwavering in every material respect. His responses were complete and coherent.

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63 *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd (2006) 2 All SA 632 (W) at para 17*
64 *S v Ndlovu and Others 2002 (6) SA 305 at 307J-308 A*

118. Whistle-blowers who do not also have a personal grievance against the employer are exceptional. Caution has to be exercised in assessing the evidence of a whistle-blower who is consumed by ulterior motives. Such a person will not be as reliable as one who is driven by the singular desire to prevent or stop wrongdoing. Unquestionably, the applicant was aggrieved by the way the respondents treated him. That does not automatically disqualify from being a reliable witness. His grievance for being removed from his post as the Managing Director of the unit was manifestly legitimate. That triggered the disclosures.

119. The more credible were his disclosures, the greater the risk he was to the Minister, the fiercer his retaliation, the stronger the legitimacy of his grievance and the more reliable was his evidence. Retaliating against the applicant as the messenger instead of responding to his message strengthened the applicant's credibility.

120. How the applicant went about making the disclosures also impacted on his credibility. He willingly accepted Minister Pahad's suggestion that he meets with the Minister because he genuinely wanted to find a resolution to the impasse. Fame and heroism were not forces that drove him to make the disclosures to the media. He was therefore unlikely to colour his evidence for dramatic effect.

Relevance and Reliability of Mokgalabone's evidence

121. Mr Hulley submitted that the evidence of Mokgalabone was irrelevant because it was not her state of mind that had to be tested but that of the applicant's. In those respects that her evidence was relevant, it was not reliable as it was contrived to favour the applicant, so he submitted.

122. Mokgalabone's evidence was relevant firstly, to corroborate the applicant's evidence in certain material respects.

123. Secondly, the applicant had to show that his reliance on information about the workings of the panel was reasonable and that it was gleaned from someone who was involved operationally in the system. He had to also show that there was a rational, objectively fair procedure for appointing liquidators which was achieving transformation of the liquidation industry by spreading work equitably to PDI's, that the system worked well, and consequently, that the Minister's interference in seeking the appointment of Motala was unjustified.

124. Mokgalabone was unhappy about the treatment she and the panel received from the Minister. However, she was not so close or disposed to the applicant to tailor her evidence in his favour. The applicant had asked the office manager for someone who could assist him with information about the work of the panel. Mokgalabone obliged. She set about preparing her affidavit even before discussing the matter with the applicant. They met once before the press conference. Her "passion for the industry" as she described it, inspired her to testify.

125. Mokgalabone was a reliable witness because she was knowledgeable about the operations of the Master's office and the liquidation industry. She corrected Mr Hulley when he put it to her that the panel did not have a mandate to investigate the claims filed by SARS and other creditors because claims were proved at the first meeting of creditors. Claims, she said, were not proved at the first meeting of creditors. Ninety-nine percent of claims were simply lodged at the first meeting without the creditors attending.

126. The more she was cross-examined, the more she exuded confidence. As a legally qualified person she understood what information she needed to adduce to verify the panel's report. She firmly resisted suggestions that she was not knowledgeable about the contents of the report. Her calm replies veiled her irritation at being challenged about her personal knowledge of the work of the panel.

127. She was genuinely committed to ensuring that the unit was corruption-free and transformed to represent PDI's fairly. The panel was keenly conscious of the potential for corruption if responsibility for appointing liquidators rested with an individual instead of a panel. She understood what needed to be changed to eliminate corruption and had implemented a plan that was working to achieve that end.

128. Her responses were direct, unequivocal, firm and confident. To the suggestion that SARS was "deeply aggrieved" by the handling of the requisitions by the Mater's office she replied that

the panel members too were also “deeply aggrieved” by SARS’ behaviour.

129. Where her memory failed her and whenever it was suggested that she was not testifying truthfully or correctly she was keen to check the files in the Master’s office to verify her testimony. If the panel’s report was contrived and not drawn from data in the Master’s office she would have been reluctant to refer to the source documents. The respondents could have called her bluff if they genuinely believed that she was misleading the court by producing the files themselves.

130. Her evidence is admitted in all material respects.

Contradiction

131. In one respect the applicant and Mokgalabone contradicted each other. The applicant testified that he got the data about Motala’s appointments from Mokgalabone and that he had received the panel’s report from which the data was extracted after the press release.

132. Mokgalabone could not recall whether the applicant had a copy of the report at their meeting on 5 October 2003 or at the press conference. She was aware that eventually he did have a copy. She explained it to him briefly as the focus of the meeting was on her affidavit.

133. Mokgalabone had seen the applicant's press statement[65] only after it had been released. She could not recall giving him the statistics concerning the number of liquidations awarded to Motala. She denied that she would have done the calculations herself as she was not good with numbers. She recalled pointing out the R30m discrepancy between the panel's report and the press release but by then the press statement had already been released.

134. The relevance of the contradiction, it was submitted, was that the applicant was bent on putting the Minister in a bad light. He inflated the value of the liquidations in which Motala was appointed by R30m and did not bother to verify his data.

135. From the way in which the witnesses testified on this aspect, it seemed that their inconsistency stemmed more from their loss of memory than any deliberate attempt to mislead the court. The inconsistency does not show the witnesses to be necessarily dishonest. It is also not material as the error does not detract from the central thrust of the applicant's claim namely, that Motala was getting the lion's share of the liquidations.

Documentary evidence

136. Both parties tendered bundles of documents on the basis that they were what they purported to be, that they were authentic and could be before court without proof, but the truth of their contents was not admitted and had to be proved in the ordinary

65 A105 - 106

course. With regard to the record of the disciplinary enquiry, there was the further admission that it was correct.

137. Other documents in the bundles included press clippings, judgments, court orders and a document titled “Whistle-blowing - a Guideline for Public Sector Managers-Promoting Public Sector Accountability, Implementing the Protected Disclosure Act.”

138. Mr Hulley objected on several occasions to the applicant being examined on the contents of the press clippings on the basis that the applicant’s evidence about their contents amounted to hearsay.

139. The admission pertaining to the status of the documents, limited as it was, is nevertheless sufficient evidence to show what information was available to the applicant and whether he could rely on them to form a reasonable belief to justify his disclosures to the media. In *International Tobacco Co (SA) Ltd v United Tobacco Co’s (South) Ltd 1953 (3) SA 343 (W)*, evidence of rumours conveyed to a traveler were admitted as proof that rumours were circulating, not that the rumours were true.[66] *Wright v Does d Tatham 1837 (7) Ad and El 313* was a decision in which letters written to a testator were admissible to prove not the truth of their contents but that the testator was a person of reasonable intelligence and understanding and that he therefore had testamentary capacity.[67]

66 Zeffertt *et al The South African Law of Evidence* (2003) at 363
67 Zeffertt *et al* (above) at 363-364

140. The documents are divisible on the basis of those that were available when the disclosures were made and those that were generated later. The former are relevant to prove the reasonableness of the applicants belief when he made the disclosures. The latter are relevant to prove whether his belief remained reasonable throughout, whether they fortified his initial belief and whether he had reason to withdraw his disclosures or this action.

Evidence of theTelevision Broadcast

141. Mr Hulley submitted that the evidence of the broadcast on national television during October 2003 when the Minister allegedly referred to the applicant in disparaging terms[68] was inadmissible as it was hearsay. The authenticity of the recording that was broadcast had to be proved[69] in order to substantiate his delictual claim for compensation. The broadcasters or other persons having direct knowledge of their contents had to attest to the truth of their contents before the broadcasts could be admissible as proof of his claim in delict.

142. Whether the applicant's claim is delictual is discussed under "remedy". The evidence that the applicant sought to have admitted is firstly, the fact that there was a broadcast of statements attributed to the Minister. That is not in dispute. The fact of the broadcast is admissible and relevant as evidence of material that shaped the applicant's belief.

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68 A344; A198 – A200

69 *S v Ramgobin and Others 1986 (4) SA 117 (N)*

143. Secondly, the applicant wanted the Minister's statements that were broadcast admitted as evidence. What is in dispute is whether the Minister said what he is alleged to have said. Proof is required that the Minister issued the statements.

What is hearsay?

144. Under the common law hearsay was defined as

> ''oral or written statements made by persons who are not parties and are not called as witnesses(.They) are inadmissible to prove the *truth* of the matters stated… [70]

145. S 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines it as

> ''evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

146. The statements were allegedly made by the Minister. Under the common law the statements are hearsay as the Minister did not testify.

147. In terms of the statutory definition the alleged utterances are also hearsay because their probative value depends on the credibility of the Minister.[71]

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70 Hoffman and Zeffertt (above) at 623; *Estate De Wet v De Wet 1924 CPD 341 at 343*
71 Hoffman and Zeffertt (above) at 127; *Hewan v Kourie NO and another 1993 (3) SA 233 (T)*

Admissibility

148. Are the utterances admissible as an exception to the hearsay rule?[72]

149. The constitutional right to a fair trial is at the heart of the question as to whether hearsay evidence is admissible.[73] Hearsay is inadmissible because it cannot be tested by cross-examination and is therefore unreliable.[74]

150. The singular consideration for the admissibility of hearsay under s 3(1)(c) Law of Evidence Amendment Act is the interests of justice.[75] The interests of justice is not dependant on whether the declarant testifies. Nor is the disavowal or non-confirmation of a statement enough to prevent it from being admitted, if it is in the interests of justice to do so. Its reliability can be weakened if it is disavowed or not confirmed.[76] Prejudice which is always

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72 s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 states:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) …
(b) …
(c) the court, having regard to-
  (i) the nature of the proceedings;
  (ii) the nature of the evidence;
  (iii) the purpose for which the evidence is tendered;
  (iv) the probative value of the evidence;
  (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

73 *S v Ndlovu* (above) *@ 307 C; G-H*
74 *S v Ndlovu* (above) *308 C*
75 *Shaik v The State* (1) [2007] SCA 134 (RSA) at 170-171
76 *S v Ndlovu para 31-32*

present when hearsay is admitted against a party will not usually outweigh the interests of justice.[77] To outweigh the interests of justice it will have to be prejudice of the kind suffered by accused if the prosecution is allowed to reopen its case to lead hearsay evidence after the accused have closed their case.[78]

151. Safeguards must be applied to ensure a fair trial whenever hearsay is tendered. What would be appropriate safeguards could be different for criminal and civil trials[79]. In criminal cases where an accused against whom the statement is sought to be used is unrepresented, the court must exercise greater caution.

152. These are civil proceedings in which the parties are legally represented and are themselves legally trained.[80]

153. They are in terms of the PDA and the LRA. The movement towards "good, effective, accountable and transparent governance"[81] is the overarching purpose of the PDA. Fairness is the cornerstone of the LRA. Both statutes serve to protect employees as vulnerable people.

154. Governance in the public service is at issue. So is the credibility and dignity of the Minister and the applicant. Both were high ranking public figures. As the utterances were broadcast the public is owed an explanation. The public has an expectation

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77 *S v Ndlovu para 13; 49*
78 *S v Mbanjwa and Others (2003) 1 All SA 740 (D) at 741 d-e*
79 *Executor Estate Phillips v Government of the RSA 2003 (3) All SA 575 at 581a; S v Shaik v The State* (above)
80 Contrast with *S v Ndlovu* (above) *at 307 D-E*
81 Preamble to PDA

created by s 195(1) of the Constitution that public administration would be governed by democratic values and principles, including the following:

> "(f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated."

155. An overly technical approach that excludes the content of the Minister's statements would defeat the purposes of the statutes and the scheme of the Constitutional project which they are designed to serve[82]. The nature of the proceedings therefore, favour the admission of the hearsay statements in the interest of justice.[83]

156. The nature of the hearsay sought to be admitted[84] is the oral evidence of the applicant that the Minister made the statements. It was not disputed that the statements were broadcast. Only the authenticity of the broadcast was put in issue to deny that the Minister said what was broadcast.

157. That happened when Mr Hulley objected to the applicant being examined on the contents of the broadcast. Nothing was specifically pleaded in the statement of case or defence about the broadcast. The applicant mentioned it in the Minutes of the

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82 *Meledad v National Employers General Insurance Co Ltd 1992 (1) SA 494 (W) at 498I-499G*; *Executor Estate Late Phillips v Government of the RSA* (above) *at 580*

83 S 3(1)(c)(i) of the *Law of Evidence Amendment Act*

84 S 3(1)(c)(ii) of the *Law of Evidence Amendment Act*

Pretrial Conference of 27 January 2005 in the context of elucidating the relief claimed and the criteria to be considered to assess compensation. The broadcast is one of several factors that the applicant wants to be considered in support of his claim for 12 months remuneration. When the respondents requested further particulars for trial no particulars were sought about the broadcast or any other aspect of the calculation of compensation.

158. It follows from this that the purpose for which the hearsay is tendered[85] is firstly not central to the applicant's case. It was limited to proving the amount of the compensation claimed. Courts are slow to admit hearsay if it is central to the case.[86] Secondly, the applicant had no prior notice that a challenge would be pitched during the trial at the admissibility of the content of the statements that were broadcast. Although no reasons were advanced as to why someone was not available and able to testify, it is not hard to see why the applicant called no one. The Minister was the best person to say whether he issued the statements.

159. In *Executor Estate late Phillips* (above) the probative value of sworn evidence tested under cross-examination and found to be credible by a previous court was held to be high[87]. In *S v Ndlovu* (above) the Supreme Court of Appeal allowed a warning statement by one accused to be admitted against a co-accused before the defence had closed its case.[88] In the recent criminal

85 S 3(1)(C(iii)
86 *Executor Estate Late Phillips v Government of the RSA* (above)
87 *Executor Estate Late Phillips v Government of the RSA* (above) at 583b
88 *S v Mbanjwa and others (2003) 1 ALL SA 740 D at 741e*

case of *Shaik v The State* (above), the Supreme Court of Appeal expanded the limits of the interest of justice to admit hearsay evidence of an encrypted fax which was central to one of the main charges.[89] Despite it being common cause that the author of the encrypted fax was unreliable and dishonest, the court found that it was highly improbable that the content of the fax would have been false.[90]

160. The probative value of the evidence in this case[91] is enhanced by the following:

160.1. The fact that the statements were broadcast is not in dispute.

160.2. The broadcast was on national television. The broadcaster's reputation for credible, reliable and accurate reporting would have been at risk if it disseminated false information. Moreover, it could find itself being disciplined by the media regulatory authorities.

160.3. There was no retraction or correction by the broadcaster or the Minister despite the potentially defamatory content of the statements.

160.4. The broadcast was reported on in the print media, also without attracting any retraction or correction from the Minister.

161. In *Shaik v The State*, the author of the encrypted fax refused to come to South Africa to testify. The Supreme Court of Appeal

89 *Shaik v The State* para 169-179
90 *Shaik v The State* para 174
91 S 3(1)(c)(iv) of the *Law of Evidence Amendment Act*

admitted the fax because it was open to the accused to call him as a witness or apply to have his evidence obtained on commission.

162. In this case the reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depends[92] was because that person was the Minister, who failed to testify. He had direct knowledge of what he said. Unlike Shaik who had the advantage of having attended meetings where the fax was discussed, the applicant was not present when the Minister allegedly made the statements. Contesting the authenticity of the statement lay firmly, if not exclusively, within his grasp. The applicant would have been at a disadvantage if the Minister testified and denied having made the statement. He chose not to testify and must bear the adverse consequences of that election.

163. Whereas, in *Shaik v The State* (above) the court found that the accused would not be prejudiced because cross-examination of the author of the fax was unlikely to yield positive results for them[93] any prejudice that the Minister might endure by the admission of the content of the broadcast[94] could have been avoided if he had testified.

164. That is a factor[95] that leads inevitably to a finding that on the probabilities, the Minister did make the statement. As a highly

92 S 3(1)(c)(v) of the *Law of Evidence Amendment Act*
93 *Shaik v The State para 177*
94 S 3(1)(c)(vi) of the *Law of Evidence Amendment Act*
95 S 3(1)(c)(viii) of the *Law of Evidence Amendment Act*

qualified lawyer he would have been aware that the statements were potentially defamatory and that his failure to correct any inaccuracies in the broadcast could aggravate damages.

165. In all the circumstances the evidence of the content of the broadcasts is admitted in the interests of justice.

The philosophy and purpose of the PDA

166. Internationally, there is growing recognition that whistleblowers need protection.[96] Whistle-blowing is healthy for organizations. Managers no longer have a monopolistic control over information.[97] They have to be alert to their actions being monitored and reported on to shareholders and the public. Everyone is alive to their loyalty to the organization. As a safe alternative to silence, whistle-blowing deters abuse.[98]

167. If employees did not turn a blind eye or were not afraid to rock the boat and if employers did not turn a deaf ear or blame the messenger instead of heeding the message, many catastrophes could have been averted.[99]

168. Whistle-blowers are not *impipis,* a derogatory term reserved for apartheid era police spies. Whistle-blowing is neither self-serving

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96 *G. Stencell v The Crown, Grievor v. The Crown in Right of Ontario (Office of the Provincial Auditor), Employer Ontario Public Service Grievance Board 1996 WL 1791337 (Ont.P.S.G.B.) 1996 CarswellOnt 3335 para 187 -189;* Richard Calland *et al Whistle-Blowing around the World – Law, Culture and Practice* (2004); John Bowers Q.C. *et al Whistleblowing - the new law (1999)*

97 Calland *et al* 6

98 Calland *et al* 7

99 Bowers (above) Chapter 1

nor socially reprehensible. In recent times its pejorative connotation is increasingly replaced by openness and accountability.[100] Employees who seek to correct wrongdoing, to report practices and products that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer. Still, of 230 whistleblowers in the United Kingdom and the USA, a 1999 survey found that 84 percent lost their jobs after informing their employer of fraud, even though they were not party to it.[101]

169. Employees have a responsibility to disclose criminal and other irregular conduct in the workplace.[102] Public servants have an obligation to report fraud, corruption, nepotism, maladministration and other offences.[103] A company can have a cause of action against its directors for failing in their duty to report wrongdoing.[104]

170. Employees also have to act in the employer's best interest, to observe its right to confidentiality, to be loyal and ultimately to preserve its viability, good name and reputation.

171. These obligations are owed to the employer as an organization and to the state as the employer in the case of public servants. It does not attach to individuals.[105] The defence raised by a director that he was simply doing what "the company" wanted of

100 Bowers (above) 12
101 Bowers (above) 10
102 Preamble to the PDA
103 Clause 4.10 of the Public Service Code of Conduct
104 *RBG Resources Plc v Rastogi [2002] EWHC 2782; 2002 WL 31784514*
105 *Stencell v The Crown para* 191

him even though this was fraudulent, would be unsustainable as a company has a legal identity separate from its directors.

172. The duty of confidence and loyalty to the employer is not absolute that it can protect an employer or other employees who act wrongfully.[106] It is not breached if, for instance, a teacher discloses to a former employee or trustee of a school that a student, who is the sister of the principal, was alleged to have mistreated children.[107] Likewise, reporting genuine concerns about the way a company is operating to a shareholder is not an external disclosure.[108]

173. To manage the conflict between the duty to disclose and the duty of confidence, employers must make available effective internal procedures for reporting wrongdoing.[109] They should also ensure that its policy on the management of confidential information is clear and consistently applied.[110]

174. The overarching motivation for the PDA and similar legislation internationally is to protect employees who disclose information about improprieties by their employers or other employees.[111] Employees have insider information of wrongdoing and are usually first to detect it. Inherent in the jurisprudence is the acknowledgment that employees are vulnerable people. They

106 *Stencell v The Crown para* 190 *RBG Resources Plc v Rastogi* (above); *A Horing General* (?)
107 *Mama East African Women's Group, Trustees of v Dobson [2005] UKEAT 0219_05_2306 (23 June 2005)*
108 *H and M* (above)
109 *Stencell v The Crown*
110 *Stencell v The Crown para 195*
111 *Stencell v The Crown para 189*

are especially vulnerable because by disclosing information about the employer and other employees, conflicts arise with their duty of loyalty and confidence which exposes them to retaliation. Although employers and employees have an obligation to disclose wrongdoing, statutory protections exist only for employees.[112]

175. An equally important aim of the PDA and the very reason for protecting whistle-blower employees is "to promote the eradication of criminal and other wrongful conduct in organs of state and private bodies."[113] This aim is not recaptured in the objects clause of the PDA.[114] Framed as it is in the context of labour law, sight can easily be lost of the aim of having a crime-free and healthy environment.[115] The PDA assumes that employers and other recipients of information would investigate complaints but it imposes no obligation on them to do so. The trauma which a whistle-blower undergoes can come to naught if nothing is done to investigate the disclosures or act against wrongdoers. Any remedy awarded to the whistle-blower ultimately by a court is in that instance a pyrrhic victory.

176. The PDA is conceived as a four-staged process that begins with an analysis of the information to determine whether it is a disclosure. If it is, the next question is whether it is protected. The third stage is to determine whether the employee was subjected

112 Preamble to PDA; s 2 of PDA
113 Preamble to the PDA
114 S 2(1) of the PDA
115Borak S.W: *The legacy of "Deep throat": The disclosure process of the whistleblower Protection Act Amendments of 1994 and the No Fear Act of 2002 59 U*. Miami L. Rev. 617 (July, 2005) at 619

to any occupational detriment and lastly, what the remedy should be award for such treatment. It is not an enquiry into wrongdoing but about whether the employee deserves protection. Structured in this way the inclination to shift the emphasis from the conduct and credibility of the wrongdoer to that of the whistle-blower is real.

177. As the PDA focuses narrowly on protecting whistle-blowers, it can fall short of producing outcomes that satisfy its crime fighting aims.[116] Employees who are more concerned with getting their message out and less fearful of retaliation, could be disappointed.

Disclosure

178. ‘‘Disclosure” in s 1 of the PDA means any disclosure of “information” about the conduct of “any employer by an employee who has reason to believe” that the information “shows or tends to show” certain “improprieties”.”[117]

179. The requirement is that information must be disclosed. Information includes but is not limited to facts. By its nature uncovering impropriety often starts with a suspicion. Information would include such inferences and opinion based on facts which show that the suspicion is reasonable and sufficient to warrant an investigation.

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116 Borak 621

117 The definition of a “qualifying disclosure” in s 1 of the Public Interest Disclosure Act 1998 (PIDA) inserted after Part IV of the Employment rights Act 1996 as s 43B(1) and (2) in the United Kingdom, is substantively incorporated into the definitions of “disclosure” and impropriety” in the PDA

180. The standard of quality that the information must meet is pitched no higher than requiring the impropriety to be "likely". It is enough if the information "tends to show" an impropriety. That anticipates the possibility that no impropriety might ever be committed or proven eventually. If the suspects are cleared, the protection will not be lost.[118] "Likely" and "tends to show" must therefore mean that the impropriety can be less than a probability but must be more than a mere possibility.[119]

181. "Smelling a rat" is not information.[120] Nor are unsubstantiated rumours.[121]

182. In the nature of disclosures about impropriety, embarrassment follows. Embarrassment therefore cannot disqualify reports from being disclosures.

Impropriety

183. "Impropriety" includes the following categories of conduct irrespective of whether it occurs in or outside South Africa or whether South African law or that of any other country applies to the impropriety:

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118 In *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local Union 771, through its Officers, Charles D. Gumulcak, President and Bert J. Royer, Business Manager Her Majesty The Queen ex rel Linda Merk SKQB 332, 2006 C.L.L.C 210-029, 50 C.C.E.L (3d) 306 at para 20 ("Merk")*. Merk blew the whistle on two supervisors of the union which employed her as a bookkeeper. Although the supervisors were cleared of any wrongdoing, she was nevertheless compensated for loss of income.

119 *Kraus v Penna Plc 2003 WL 22769581 (EAT) [2004] I.R.L.R. 260; Boulding v Land Securities Trillium (Media Services) Ltd 2006 WL 1666956 (EAT) para 25*

120 *Communication Workers Union v Mobile Telephone Network (Pty) Ltd* (above)

121 Bower (above) 19

183.1.a criminal offence has been committed, is being committed or is likely to be committed;

183.2. a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

183.3. unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or

183.4. any matter referred to in paragraphs (a) to (f) of the definition which has been, is being or is likely to be deliberately concealed[122]

184. The disclosure must be of improprieties. Disclosure about disagreements with the employer's policy is not disclosure of impropriety.[123] Information may be in the public interest, eg whether an employer contributes to the coffers of a particular political party, but that would not by itself be an impropriety.

"(R)eason to believe"

185. The text "(a)ny employee who has reason to believe"[124] pitches the test as subjective in that the employee who makes the disclosure has to hold the belief. It is objective in the sense that

122 s 1 of the PDA; for the UK equivalent see the definition of "qualifying disclosure" in s 43B(1) and (2) of PIDA

123 *The Alberta Union of Provincial Employees and The Government of the Province of Alberta with respect to The Grievance of Guy Smith 1111 WL 6044 Alberta Arbitration Board Para 90 ("Guy Smith")*.

124 The PIDA equivalent is "in the reasonable belief of the worker" s 43(B)(1) of PIDA

the belief has to be reasonable. Whether the belief is reasonable is a finding of fact based on what is believed.[125] Thus if the employer clearly has no legal obligation, the employee's belief that he does cannot be reasonable.[126] Conversely, if some wrong doing is occurring which does not fall within the definition of impropriety, but the employee reasonably believes that it does, reporting it would still qualify as a disclosure if the employee reasonably believes that it does amount to an impropriety.[127]

186. The PDA does not require an employee to prove the truth of information disclosed.[128] If the employee believes that the information is true it would fortify the reasonableness of his belief,[129] from which, in turn, his *bona fides* can be inferred.[130]

187. The requirement of "reason to believe"[131] cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. Disclosure of hearsay would, depending on its reliability, be reasonable.

188. A teacher who received a complaint from a student that another student mistreated children at the crèche was found to have had a reasonable belief that the information she disclosed tended to show that a criminal offence had been committed and that it

125 *Boulding* (above)
126 *Kraus v Penna Plc (*above)
127 Bower (above) 19
128 *Communication Workers Union v Mobile Telephone Network (Pty) Ltd* (above) *at para 21*; *H & M Ltd* (above)
129 *Darnton v University of Surrey* (above)
130 *Street* (above)
131 Or "reasonable belief" as required in s 43B(1) of the PIDA

warranted investigation as "ostensibly serious allegations."[132]

189. Reliance on official documents of the employer to formulate a belief would likewise be reasonable even if the employee does not have personal knowledge of the truth of their contents.

190. A mistaken belief or one that is factually inaccurate can nevertheless be reasonable[133], unless the information is so inaccurate that the public can have no interest in its disclosure.[134]

191. Seldom is there a whistle-blower who does not also have an axe to grind or who is not obsessed or pre-occupied with personal issues. If the primary or exclusive purpose of reporting is to embarrass or harass the employer the reasonableness of the employee's belief is questionable.

192. Malcontents and employees who slander the employer without foundation or disagree on the way the organisation is managed do not enjoy whistle-blower protection.[135] Thus a shop steward who was also a public servant was validly disciplined for issuing statements to the media concerning the government's social policy on child welfare. His statements went beyond labour relations issues.[136] The state needs to have employees who can

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132 *Mama East African Women's Group, Trustees of v Dobson* (above) *para 4* quoting *para 12 and 14* of judgment of Employment Tribunal

133 *Darnton v University of Surrey 2002 WL 31676347 (EAT); [2003] I.C.R. 615; [2003] I.R.L.R. 133; De Haney v Brent MIND, 2003 WL 21047338 (EAT);* Bowers (above) 19

134 *Stencell v The Crown para 222*

135 *Stencell v The Crown para 196*; *Guy Smith* (above)

136 *Guy Smith* (above)

put aside their personal views and implement its policies.

193. Mr Stencell, an Accountant employed by the office of the Financial Auditor lodged three complaints to the Premier of Ontario. The first complaint was personal concerning discrimination against him as a natural parent who was denied the same benefits as an adoptive parent. The other complaints related to possible fraud. The arbitration panel found that his belief was in good faith; that he was mistaken in his analysis; the information he disclosed was inaccurate and therefore not of public interest; that he did not exhaust his internal remedies and that his personal complaint seriously diluted his claim for protection against employer punishment.[137] The panel found that the employer had spent time and energy to investigate and explain its "measured conclusions" about his concerns, but that Stencell remained unconvinced not because of the quality of its explanations but his fixed idea that his perception of the facts was correct.[138]

194. An explanation that is becoming more common for employees reporting information about their employers – and one at which the PDA is specifically targeted – is that some employees care enough to want to see that the wrongs of the employer and other employees are put aright so that their workplace in particular and society in general can benefit. That could be a response to a

137 *Stencell v The Crown* para 201, 218, 222 and 225
138 *Stencell v The Crown para 218*

moral or legal calling[139], a fear for the health[140] or economic well-being of the public[141], or the organisation[142] or simply a desire to see that justice is done. Such employees are entitled to a safe environment which would protect them against the risks of disclosure.

What is a protected disclosure?

195. A "protected disclosure" [143] means "a disclosure made to-

a. a legal adviser in accordance with section 5;

b. an employer in accordance with section 6;[144]

c. a member of Cabinet or of the Executive Council of a province in accordance with section 7[145];

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139 eg the disclosures by Victoria Johnson who exposed attempts by some politicians in the City of Cape Town to misrepresent that public opinion favoured changing certain street names. (Calland *et al* 42-52)

140 eg the disclosure by Jiang Yamyong who blew the whistle on Chinese governments cover up of the true scale of the Severe Acute Respiratory Syndrome (SARS) virus (Calland *et al* 53-60)

141 eg the disclosures by Sherron Watkins of accounting irregularities at Enron Corporation (Calland *et al* 61-72

142 eg Cynthia Cooper's fear of retaliation was outweighed by her concern for the importance of exposing Worldcom's unlawful accounting practices (Borak 621).

143 s 1 of PDA

144 A protected disclosure to an employer is

"(1) 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), is a protected disclosure.

(2) Any employee who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her employer, is deemed, for the purposes of this Act, to be making the disclosure to his or her employer."

145 S 7 Protected disclosure to member of Cabinet or Executive Council

Any disclosure made in good faith to a member of Cabinet or of the Executive Council of a province is a protected disclosure if the employee's employer is-

(a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;

(b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or

d. a person or body in accordance with section 8[146];

e. or 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 advice in accordance with section 5"

196. Consistent with the approach in Canada[147], the United Kingdom[148] and the United States of America[149], the scheme of the PDA encourages internal procedures and remedies to be exhausted before the disclosure is made public.

197. Good faith is not a requirement for disclosures to a legal advisor.[150] It is a requirement for any disclosure to the

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(c) an organ of state falling within the area of responsibility of the member concerned.

146 S 8 Protected disclosure to certain persons or bodies

(1) Any disclosure made in good faith to-

(a) the Public Protector;

(b) the Auditor-General; or

(c) a person or body prescribed for purposes of this section; and

in respect of which the employee concerned reasonably believes that-

(i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and

(ii) the information disclosed, and any allegation contained in it, are substantially true,

is a protected disclosure.

(2) A person or body referred to in, or prescribed in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or prescribed in terms of, that subsection, must render such assistance to the employee as is necessary to enable that employee to comply with this section.

147 *Stencell v The Crown* para 192

148 Calland *et al,* Bower

149 Calland *et al*

150 s 5 of PDA

employer[151], to a member of Cabinet[152], to the Public Protector and Auditor-General[153] and any other person or body[154]. Disclosure to the Public Protector and the Auditor-General and general disclosures also require an employee to "reasonably believe" (*sic*) that the information is "substantially true"[155] to be protected. Disclosures to the employer do not have to be "substantially true". The requirements in the definition of "disclosure" viz that the employee must have "reason to believe" that an impropriety is merely "likely" is significantly elevated in order for a disclosure to qualify for protection.[156]

197. The tests are graduated proportionately to the risks of making disclosure. Thus the lowest threshold is set for disclosures to a legal advisor. Higher standards have to be met once the disclosure goes beyond the employer. The most stringent requirements have to be met if the disclosure is made public or to bodies that are not prescribed, for example the media.

198. There should be reasonable steps to investigate the matter. The employer should be given a chance to explain or correct the situation. The motivation for this approach is not to cover up wrongdoing but because the internal remedy may be the most effective.[157] Genuine engagement on the issues minimizes the risks for both parties. An employee who refuses to engage runs

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151 s 6 of PDA
152 s 7 of PDA
153 s 8 of PDA
154 s 9 of PDA
155 s 8(i)(ii) and s 9(1)(a) of PDA
156 This staged process is emulated from PIDA. See also *Street para 5-8*
157 *Stencell v The Crown para 192*

the risks of not being able to show that his belief was reasonable. An employer who refuses to engage cannot later be heard to complain that it was embarrassed or that it was brought into disrepute.

199. The definition of "protected disclosure" does not require an employee to formally request the recipient of the disclosure to conduct an investigation. It is implicit in the act of reporting wrongdoing to such persons or bodies that an investigation must follow. Uppermost on the list of persons responsible for investigating improprieties is the employer.

General Protected Disclosures

200. Several hurdles must be overcome before disclosures can qualify as general protected disclosures.[158]

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158 s 9 of PDA "General protected disclosure

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

(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 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 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 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,

201. First, the disclosure must be in good faith. Good faith in the context of protected disclosures was discussed in *Street* (above).

202. Auld LJ summarized the definition thus : "

> Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus in the context of a claim or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it is made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose."

203. By setting good faith as a specific requirement, the Legislature must have intended that it should include something more than reasonable belief and the absence of personal gain. An

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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 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 complied with any procedure which was authorised by the employer; and

(g) the public interest.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (2) (c) where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure."

employee may reasonably believe in the truth of the disclosures and may gain nothing from making them, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong.

204. Good faith is a finding of fact. The court has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there are mixed motives, what the dominant motive is.[159]

205. A whistle-blower is unlikely to have "warm feelings" about the wrongdoing or person against whom disclosure is made.[160] At the other extreme a whistle-blower who is overwhelmed by an ulterior motive, that is, a motive other than to prevent or stop wrongdoing, may not claim the protection under the PDA. The requirement of good faith therefore invokes a proportionality test to determine the dominant motive.

206. In the context, good faith is required to test the quality of the information. A malicious motive cannot disqualify the disclosure if the information is solid. If it did, the unwelcome consequence would be that a disclosure would be unprotected even if it benefits society.[161] Such might be the case of an accountant who out of malice discloses to SARS that his employer is evading taxes. Or, an employee of a trade union who bears a grudge against its management might blow the whistle to the

159 *Lucas v Chichester Diocesan Housing Association Ltd 2005 WL 460717 (EAT) 7*
160 *Street para 72*
161 Bowers (above) 74

registrar of trade unions that the trade union is not complying with its constitution and the LRA. A malicious motive could affect the remedy awarded to the whistle-blower.

207. The second requirement viz that the employee must have a reasonable belief, has been discussed in the context of the definition of "disclosure". In the context of determining whether a disclosure is protected the test is more stringent. The reasonableness of the belief must relate to the information being substantially true.

208. The third requirement that the disclosure should not be for "personal gain"[162] should be construed to include any commercial or material benefit or advantage received by or promised to the employee as a *quid pro quo* for the disclosure and any expectation by the employee of a benefit or advantage that is not due in terms of any law. "Cheque book journalism" falls into this category. If the employee benefits incidentally from the disclosure it will be protected provided that was not the purpose of making the disclosure.

209. As a form of discrimination, whistle-blowing legislation deserves "a certain generosity in …. construction".[163] The word "any" in "any other person or body"[164] and "any disclosure"[165] should be construed widely[166], constrained only by the definition of

162 s 9(1)(b) of PDA
163 *Boulding* (above) *para 24*
164 s 1(e) definition of "protected disclosure"
165 s 9 (1) of the PDA
166 *Commissioner for Inland Revenue* (above)

"disclosure" and the requirements of s 9.[167]

210. Good faith, reasonable belief and personal gain overlap[168] and are mutually reinforcing. A weakness in one can be compensated for by the other(s). Thus a doubtful motive can be compensated for by a strong belief based on sound information.

211. Each of the three requirements in s 9(1) should be construed narrowly so as not to defeat the objectives of eliminating crime, promoting accountable governance and protecting employees against reprisals.

212. This view is fortified by the fact that the disclosure has to be filtered further through two more tests. Firstly, the disclosure must meet one or more of the four conditions in s 9(2). Secondly, it must be reasonable to make the disclosure. Reasonableness must be assessed against the seven criteria in s 9(3). These two tests shift the focus away from an assessment of the employee's good faith and the reasonableness of his beliefs to more tangible and objectively determinable facts.

213. A narrow approach to s 9(1) could therefore block the enquiry firstly into facts that are more easily ascertainable in ss 9(2) and (3) and secondly, into the alleged impropriety and the retaliation.

214. The defence that any one of the requirements in s 9 is lacking must be specifically pleaded and proved. Deciding whether all

167 *H and M* (above)
168 *Street para 26, 49-50*

the requirements are met is a question of fact. The more serious the allegation, the more cogent the proof. The threshold of proof required for each requirement must be assessed from all the facts, case by case. This is the approach adopted in *Street*[169] and endorsed in *Lucas.*[170] Contrary to Mr Hulley's submission, *Street* did not hold that the employee bears the onus of proving good faith. To saddle the employee with a burden of proof would set too high a standard which, if not met, could disqualify the disclosure and bar an enquiry into whether the employer breached the PDA by subjecting the employee to an occupational detriment. Unfair labour practices and unfair dismissal are occupational detriment.[171] Ultimately, the employer bears the burden of proving that it did not commit an unfair labour practice or dismiss the employee unfairly.

Did the applicant reasonably believe that the information disclosed, and the allegations contained in it, are substantially true"?[172]

215. The meaning of "substantially true" must lie closer to the total than to a trivial degree of truth.[173] Information of quality and quantity go to determining whether the disclosure is substantially true.

216. This case differs significantly from that of a public servant who makes adverse statements to the press about a government

169 Para 57
170 Para 39
171 S 1(b) definition of "occupational detriment"
172 s 9(1)(a) of the PDA
173 Bower (above) 35

decision without being involved in the decision-making or taking steps to get to know the grounds for it.[174]

217. The applicant believed that a crime was or was likely to be committed; that the Minister was failing to comply with his legal obligations; that the Minister committed unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000; and that these improprieties were likely to be deliberately concealed.[175]

218. His belief was based on the Vahed and Kinghorn reports and his personal encounters with the respondents and Motala.

219. His belief was reasonable because firstly, the Vahed and Kinghorn reports were prepared by responsible persons whose duty was to prepare them. They were official documents of the department. The *bona fides* and competence of the preparers of the reports were not questioned.

220. Secondly, he had personal knowledge of some of the information. He interacted with the respondents and Motala. He also knew that the panel within his unit was succeeding in transforming the liquidation industry to ensure a more equitable distribution of work to include PDI's. Consequently, the Minister's persistence in having Motala appointed could not have been because transformation was not being achieved.

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174 *Haydon v. Canada (Treasury Board)2004 CF 749, 2004 FC 749, 253 F.T.R. 230, [2005] 1 F.C.R. 511*

175 s 1(a), (b), (f) and (g) of the PDA –definition of "disclosure"

221. Thirdly, he knew that the Director-General was also concerned about the Minister's relationship with Motala.

222. Fourthly, no one was willing to investigate his allegations – not the Director- General, the Public Protector, the Auditor-General or Minister Pahad.

223. He also believed that the information he disclosed was substantially true because :

224. He had personal knowledge. He knew what the relationship between Motala and the Minister was because they told him that they were friends. He knew that the Minister preferred Motala over other liquidators.

225. The Kinghorn report[176] which stated that there was alleged corruption involving R950 000.00 noted that :

> "Information was received about the appointment of certain liquidators into the affairs of RAG N221/02. As the first appointment was made in total disregard of the set principals (*sic*) of the Insolvency Act of 1936 the appointment was set aside by the Supreme court in Durban. A senior member of the department then went as far as to appoint a master from another master's office as master in Pietermaritzburg to appoint the liquidator that was wrongly appointed. As RAG is the biggest liquidation in South Africa the benefits that can be begotten by a liquidator is far reaching. The happenings in this case seems to be linked to other similar cases at various Master's offices in RSA and must be

176 A 96

> investigated intensively. Because of the scale of this investigation it will still take some time before a clear result can be given."

226. That information was supplemented by his personal knowledge that the Minister had appointed Lategan, the "senior member of the department", who appointed Motala, whose initial appointment by the Minister had been set aside.

227. The Vahed report stated that[177]:

227.1. Two Assistant Masters from the Masters' Office in Pietermaritzburg appointed four provisional liquidators to RAG which was placed in provisional liquidation on 28 May 2002.

227.2. Motala was aggrieved about not being appointed.

227.3. SARS' requisition in support of Motala lacked "clarity and authenticity." Motala was given an extension of time to submit a proper requisition but he did not comply.

227.4. Motala's requisition reflected SARS' claims as R106 400,00 for VAT and R5 039 671,23 for PAYE.

227.5. Mr Lyn, the provisional liquidator, had reported that SARS owed RAG a refund.

227.6. On 7 June 2002 Motala's attorney called for the Master's reasons for refusing to appoint Motala.

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177 A215-226

227.7. Accompanied by SARS' Counsel they subsequently met Vahed and the two Assistant Masters to demand that Motala be appointed failing which SARS would obtain an order compelling his appointment.

227.8. Vahed found no cogent reason to appoint a fifth provisional liquidator and undertook that his office would give reasons for its refusal.

227.9. About 14 June 2002, SARS submitted an assessment for R249 832 016,58 against RAG.

227.10. The Assistant Master was instructed to send his reasons to the Minister which was done on 12 July 2002.

227.11. On the same day the Minister informed Vahed that he was setting aside his decision and directed him to appoint Motala.

227.12. On 15 July 2002 Motala telephoned Vahed to alert him to correspondence from the Minister to the Assistant Master instructing him (Vahed) to appoint Motala. Vahed was opposed to doing so.

227.13. Vahed learnt from the Assistant Master that the other provisional liquidators would be applying to interdict the appointment of Motala.

227.14. Nevertheless, he decided to appoint Motala. He invited him to

submit an affidavit of non-interest and bond of security to enable him to make the appointment.

227.15. At about 15h00 that day Lyn gave Vahed notice telephonically of his intention to interdict the appointment.

227.16. By the time Vahed left his office that day he had not received the interdict application.

227.17. At about 19h30 Motala telephoned to inform him that the Minister wanted to speak to him. The Minister was angry that Vahed had not appointed Motala despite his instruction and especially as Motala had received the application for the interdict.

227.18. The Minister insisted that Vahed appoint Motala despite Vahed informing him that Motala had not submitted a bond of security.

227.19. Vahed agreed to attend to the appointment the next morning, but the Minister insisted that he effect the appointment immediately.

227.20. He instructed Vahed to notify him by short message service (sms) once the appointment was made.

227.21. Vahed was unsuccessful in getting the Assistant Master to open the office to make the appointment. He used his wife's office to issue a temporary appointment.

227.22. The State Attorney who had been contacted by the Minister then

called Vahed who informed him that he had made the appointment.

227.23. He learnt at 22h40 that Galgut J had granted an interim order.

228. Mr Hulley's suggestion that competition amongst liquidators motivated the four appointed liquidators to resist the appointment of Motala in the RAG enquiry, was not born out by the evidence. The four liquidators succeeded in getting the High Court to set aside Motala's appointment and the Supreme Court of Appeal confirmed that order because it was made on the unlawful instructions of the Minister.

229. There were negative media reports to which the Minister did not respond publicly. *Financial Mail* of 28 February 2003 reported that the Minister denied knowing Motala[178]. If the report was false or inaccurate, it was not corrected. In the applicant's opinion the Minister would have been lying if he denied knowing Motala from "a bar soap" because firstly, he had referred to Motala as his friend when he had introduced him to the applicant in February 2002. Secondly, Motala had claimed to act on the authority of the Minister when he informed the applicant that he wanted to attend the meeting for the amalgamation of the two insolvency practioners' associations.

230. The applicant had also received many adverse reports from the public about Motala.

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178 A214

231. On 13 February 2003 Stegmann J had awarded costs *de bonis propriis* against Motala as a mark of that courts disapproval of his improper conduct as a liquidator.[179]

232. The adverse reports continued long after the applicant made disclosure. *Finance Week* published a report on 14 April 2004 tracking the developments since the visit by the Minister to the Master's office in February 2002 to about 26 July 2002 when Motala's appointment by the Kwazulu Natal Bench was set aside and the extraordinary lengths to which the Minister went to have Motala re-appointed.[180] There was no public reaction by the Minister.

233. In a judgment of the High Court[181] Leeu J found Motala's explanations were calculated to mislead the court in that case where he was cited as a liquidator.

234. The applicant's knowledge gleaned second hand from the reports and fortified by his own encounters with the Minister and Motala constitute reasonable grounds on which the applicant formed his belief that the information he disclosed and the allegations he made were substantially true.[182]

235. His suspicion was so strong that it was not dented by his knowledge that SARS, who was not party to the corruption, also

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179 A213
180 A340- 342
181 A345 *PG Bison Ltd v the Master Case No 655/03* issued on 24/6/04(*Bophuthatswane Provincial Division)*
182 *Minister of Law and Order v Hurley and Another* (above)

wanted Motala appointed and had been urging the Minister to support him.

Did the applicant make the disclosure for gain?[183]

236. The allegation that the applicant made the disclosure for gain was not specifically pleaded as it should have been as it was a statutory defence. Nor was any evidence led or cross-examination on this issue. In fact, this charge was withdrawn at the disciplinary enquiry.

237. If Mr Hulley's submission is correct that the applicant's purpose in making the disclosures was to secure a settlement, that is a reward to which the applicant became entitled as a result of the unlawful conduct of the respondents.

238. The applicant did not make the disclosures for personal gain.

Did the applicant have reason to believe that he would be subjected to an occupational detriment if he made his disclosure to the employer?[184]

239. This question must be answered affirmatively because the Minister was involved. Politically, he was the most powerful person in the department. And he was angry with the applicant.

240. He had demonstrated his wrath by removing the applicant as the head of his unit. The obligation to follow fair procedure did not

183 s 9(1)(b) of the PDA
184 s 9(2)(a) of the PDA

concern him. Retaliation against him as the messenger was more likely than an investigation of his message.

241. Furthermore, as the applicant believed that the information was substantially true, the retaliation was likely to be vicious.

Did he believe that the impropriety will be concealed or destroyed if he made disclosure to the employer?[185]

242. This question must also be answered affirmatively as the Director-General was reluctant to investigate the allegations.

243. The Vahed and Kinghorn reports were available to the Director-General. They were supplemented by the applicant's reports of his interactions with the Minister and Motala. The Director-General was aware of the allegations against the Minister. He knew that the Minister became "agitated" whenever Motala was discussed. It was not suggested to the applicant in cross-examination that the Director-General was not aware of the allegations or that he had acted upon them. He did nothing to investigate the allegations. He discouraged the applicant from provoking the Minister by asking him for reasons for removing him from his position as Managing-Director of the unit. Taken together, the applicant reasonably inferred that the Director-General would not act against the Minister to stop or prevent the improprieties. The probabilities were that the allegations would not have seen the light of day if the applicant did not make the disclosure.

185 S 9(2)(b) of the PDA

Did he make disclosures previously to his employer or persons or bodies referred to in s 8 of the PDA?[186]

244. As the Director-General was disinclined to act on the information contained in the Vahed and Kinghorn reports and from the applicant and Mokgalabone, it served no purpose to request that he investigate the complaints.

245. It is common cause that the applicant made disclosures of substantially the same information to the Public Protector and the Auditor-General.

Did a reasonable period lapse without any action being taken to investigate the complaint?[187]

246. Whether the period was reasonable must be assessed not only in terms of the passage of time. The nature of the complaint, its seriousness and the quantity and quality of the investigation it calls for must also be considered. Statutory and other procedures might apply to the investigators. Other statutes, practices and procedures could serve as benchmarks. Willingness and capacity to undertake the investigation could be decisive factors.

247. Seven months had passed from the end of February to October 2003. The applicant was guided by the Promotion of Administrative Justice Act No 3 of 2000 where an administrator

186 S 9(2)(c) of the PDA
187 S 9(2)(c) of the PDA

has 90 days in which to respond to a request for reasons for administrative action.[188] The applicant deduced that seven months was unreasonable.

248. All the indications were that none of the persons or bodies was willing to investigate the complaints. There was no evidence that any investigation had been undertaken by any of them by the time of the trial three years later. Seven months was in the circumstances a reasonable period to allow these persons and bodies to investigate the matter.

Was the impropriety exceptionally serious?[189]

249. It was common cause that the allegations were exceptionally serious. Allegations of corruption against a Minister is an exceptionally serious matter, irrespective of the amounts involved.

250. In the circumstances the applicant m*et al*l the conditions in s 9(2).

Was it reasonable for the applicant to make the disclosure to the media?[190]

251. It was reasonable for the applicant to make the disclosure because it was made to the media.[191] The media is one of the pillars that promote and uphold democracy. Corruption

188 s 5(2)
189 S 9(2)(d) of the PDA
190 S 9(1)ii read with (3) of the PDA
191 s 9(3)(a)

undermines democracy. The media's exposition of corruption is good for democracy. Whistle-blowers depend on the media and other organs of civil society to help level the playing fields as they are often lonely voices against powerful interests. As an employee the isolation and vulnerability are even more acute.[192] So symbiotic is the relationship between whistle-blowers and the media that Brewers Dictionary defines whistle-blowing to mean "exposing to the press a wrongdoing or a cover-up in a business or government office.[193]

252. Disclosures to the media of confidential material have been held to be justified in several cases in the United Kingdom.[194] A disclosure about price fixing was lawful because the public as being misled.[195] Disclosures to the press about faulty roadside breathalysers were justified so that people could challenge criminal charges against them.[196] Publishing allegations of corruption in the police force was also allowed.[197]

253. Disclosures to the media will not be justified if it is not in the public interest. That might be the case if confidentiality has to be maintained so that the complaints can be better investigated or the employer can be protected until the suspicions are confirmed. Such disclosures if made to the police, a professional body or prescribed regulator would better serve the public interest.[198]

192 Calland *et al* 19
193 Calland *et al* 2
194 Bowers 37-38
195 *Initial Services v Putterill (1968) 1 Q.B. 396*
196 *Lion Laboratories v Evans (1985) 1 Q.B. 526*
197 *Cork v Mc Vicar, The Times October 31 1985;* Bowers 37
198 Bower (above) 38

Disclosures to the media will also not be justified if the complaint has already been addressed internally or by a prescribed regulator.[199]

254. The impropriety was exceptionally serious.[200]

255. There was every indication that the impropriety was continuing once the panel was instructed to report to Lategan and it became clear that no action would be taken against the Minister following the Vahed and Kinghorn reports and the sidelining of the applicant.[201]

256. Disclosure of wrongdoing cannot be a breach of confidence. Thus a defence that the employee breached confidentiality has to be approached so cautiously that it does not strip the PDA of its content.[202] Hence the enquiry is confined to breach of confidence of third parties, which must also be assessed against the countervailing forces of openness and accountability.

257. There was no suggestion that the applicant breached a duty of confidentiality to a third party.[203] The charges for which he was disciplined was not breach of confidentially.

258. Neither the Director-General, the Public Protector nor Auditor-General said that they would act on his complaint.[204] The Public

199Bower (above) 38
200 S 9(3)(b) of the PDA
201 s 9(3)(c) of the PDA
202 Bower (above) 38
203 s 9(3)(d)
204 s 9(3)(e)

Protector seemed to be of the opinion that the disclosure was not a complaint.

259. No procedure was prescribed or authorized for making disclosures to the employer in the circumstances of this case.[205] Although the Public Service Code of Conduct required the applicant to use appropriate channels to air his grievances, there were none available to him internally. The Minister had not issued regulations in terms of s 10(4) of the PDA to guide whistle-blowers.

260. The normal grievance procedure was inadequate to ventilate an issue that fell under the PDA because it did not protect whistle-blowers. Furthermore, the grievance procedure did not apply in the applicant's situation where he was the second most senior official in the department and his complaint was against the most senior political and administrative heads of the department, the very people he reported to.

261. The PSC as an organ of state having regulatory functions over the public service[206] had recommended that "wider" disclosures could be made to the media.[207]

262. The disclosures were in the public interest as it involved the public service and public officials.[208]

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205 s 9(3)(f) read with s 6
206 The Preamble to the Public Service Commission Act No 46 of 1997
207 A 355
208 s 9(3)(g)

263. The applicant's disclosure to the media was in all the circumstances reasonable.

Was the disclosure made in good faith? [209]

264. Compliance or otherwise with all the other requirements of s 9 of the PDA feed cumulatively into the assessment of the applicant's motive for the disclosure and whether he acted in good faith.

265. The reason the applicant made the disclosures was simply that corruption had to be stopped. It distressed him that the PDA was being "killed" by the very department that gave birth to it. The court has no cause to doubt that. He and Mokgalabone presented as honest, dedicated and disciplined public servants. They were deeply and legitimately aggrieved by the castigation they endured from the Minister.

266. The applicant had no axe to grind with either of the respondents. The Director-General valued his expertise and contribution to the department. Tensions arose only after the applicant resisted the Minister's attempts to promote Motala as a liquidator.

267. Mokgalabone and the applicant had no reason to embarrass the respondents. If the respondents were embarrassed there is no evidence of that before this court. It was the Minister's own unlawful conduct which spurred the applicant to make the disclosures.

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209 S 9(1) of the PDA

268. The applicant had no choice but to make the disclosures. He had a statutory obligation to disclose criminal and any other irregular conduct[210] and to "report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest"[211]

269. As it was his assigned task to combat corruption, he would not have been able do his job effectively by turning a blind eye to what he reasonably believed were improprieties.

270. He turned to the media because that is where the guidelines issued by Professor Sangweni, the chairman of the PSC, directed him. The PSC promoted the PDA and had work-shopped it with the department to produce a manual.[212]

271. The way he made the disclosures tells on his motives. He could have leaked information anonymously. Instead, he took responsibility for the disclosures he made to the various persons and bodies. He proceeded cautiously from ensuring that the Director-General was aware of the allegations, to disclosing to prescribed state institutions responsible for such investigations and to the Minister in the Cabinet and Presidency before making his disclosures public.

272. Although the applicant had a strong suspicion that the Minister was involved in corruption and nepotism, he did not say that he

210 Preamble to the PDA
211 C.4.10 of the Public Service Regulations, 2001
212 A352 – A354

knew as a fact that the Minister was corrupt. That, he understood, fell within domain of the investigators to report on.

273. The applicant readily acknowledged that there were discrepancies in the Vahed and the Kinghorn reports and in his media releases. The discrepancies were of a technical nature, such as the citation of the incorrect statute and possibly a miscalculation of the value of estates in which Motala was appointed as liquidator. The central thrust of the reports was not vitiated by the discrepancies. Nor were the reports criticized by the respondents.

274. The applicant conceded that he did not draw the attention of the recipients of the reports and the media to them. He was either not aware of them at the time or considered them too insignificant to make an issue. Furthermore, in his opinion he had demonstrated a reasonable suspicion warranting further investigation. The journalists were to conduct that investigation. He was not qualified to conduct the sort of investigation that required the skills of a financial officer such as Mckensie. Nor was he as well placed as the media to get to the truth.

275. By not seeing the annexures to the Vahed and Kinghorn reports before they were disclosed did not mean that his belief was not in good faith. Nothing from the annexures was put to him to suggest otherwise. His stance was that it was up to the Public Protector and Auditor-General to obtain any further information they needed for their investigations.

276. A public expose was not the applicant's preferred option. He opted to make a disclosure to Minister Pahad even though that was not a precondition for making generally protected disclosures. He welcomed Minister Pahad's advice to resolve the matter internally. The respondents failed to meet him after agreeing to do so.

277. By making the disclosures the applicant had a lot to lose as a senior public servant with long service. It was not a risk that he took without careful consideration as can be seen from the planned process he pursued in making the disclosures.

278. The applicant made the disclosures in good faith.

Was the disclosure protected?

279. The court finds that the applicant's disclosure to the media was a general protected disclosure in terms of s 9 of the PDA.

Occupational detriment

280. The nature of the treatment of the applicant consequent upon the disclosure to the media is not disputed. It was common cause that he was suspended in October 2003 and later charged with misconduct.[213] He was forced to negotiate himself out of his job because the respondents found that the relationship had broken down and that affected his employment, profession and office

213 Definition of "occupational detriment" s 1(a) and (b) PDA

adversely.[214]

281. Nor was it disputed that the treatment was a consequence of the disclosures.[215]

282. The respondents' defence was that it was not an occupational detriment or an unfair labour practice because the disclosures were not protected. As the court has found that the disclosures were protected, the defence must fail.

283. The court finds that applicant was subjected to occupational detriment. Although he was paid during his suspension and the settlement assures him of his remuneration until he reaches the retirement age of 65, he has been denied the dignity of employment.

Remedy

284. The purpose of compensation is to redress for patrimonial and non-patrimonial losses. In assessing compensation that is reasonable, fair, just and equitable particular criteria come to the fore in PDA claims.

285. To reach the stage where a remedy is to be granted means that the applicant has successfully overcome the hurdles of proving that he made a disclosure, that it was protected and that he was subjected to occupational detriment. Compliance with each

214 Definition of "occupational detriment" s 1(h) of PDA
215 *Knight v Harrow LBC 2002 WL 31476435 (EAT) [2003] I.R.L.R. 140; 2002 WL 31476435*

hurdle as defined automatically justifies a remedy. All the developments up to and after the occupational detriment contribute cumulatively to the assessment of compensation. While it is not necessary to re-discuss every aspect, some general principles for assess compensation in PDA cases need to be emphasized.

286. An employee who is subjected to an occupational detriment is in a position similar to one who is victimized or discriminated.[216] Compensation awards for discrimination are guidelines for claims by whistle-blowers.[217]

287. Detriment suffered by whistleblowers generally and in the particular circumstances of this case is akin to a very serious form of discrimination which merits a very high award.[218]

288. An employer who subjects an employee to occupational detriment or fails to protect an employee who makes a protected disclosure cannot be allowed to limit compensation on the basis of its own conduct.[219] Thus if an employer fails to investigate the allegations but prefers to retaliate that should count against it.

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216 *Virgo Fidelis Senior School v Boyle 2004 WL 62152 (EAT); [2004] I.C.R. 1210; [2004] I.R.L.R. 268; Times, February 26, 2004 2004 WL 62152; Woodward v Abbey National Plc (No.1) [2006] EWCA Civ 822; [2006] I.R.L.R. 677; (2006); 103(27) L.S.G. 31; (2006) 150 S.J.L.B. 857; Times, July 11, 2006; Independent, June 27, 2006; 2006 WL 1666918 at para 59; Boulding* (above) *para 24*

217 *Vento v Chief Constable of West Yorkshire [2002] EWCA Civ 1871; [2003] I.C.R. 318; [2003] I.R.L.R. 102; (2003) 100(10) L.S.G. 28; (2003) 147 S.J.L.B. 181*; *Times, December 27, 2002; 2002 WL 31676435; Miklaszewicz v Stolt Offshore Ltd (EAT) [2001] I.R.L.R. 656; Independent, July 9, 2001 (C.S); 2001 WL 415617*

218 Virgo Fidelis Senior School v Boyle (EAT) [2004] I.C.R. 1210 ; [2004] I.R.L.R. 268; Times, February 26, 2004

219 *Mama East African Women's Group, Trustees of v Dobson* (above)

289. Whistle-blowing involves risks. The applicant took risks and must be acknowledged for that. Silence was not a "safer" option for him.[220] The seriousness of the improprieties and the status of the suspects increased the risks. It meant exposing a close colleague and breaching his trust. There was also the risk that the disclosures would not be protected. The disclosure might have been found to have been made in the reasonable belief that it was substantively true but that the applicant lacked good faith. In that case he could have found himself facing defamation claims.

290. How the disclosure was made also impacts on the remedy. He pursued a carefully constructed, cautious, staged process, proceeding from private to public disclosures.

291. The purpose of the disclosures was intended for the greater good of the department and society and not for personal gain. His disclosure was socially responsible. Employees who prefer silence over whistle-blowing leave consumers, shareholders, communities and the employer itself at risk.[221]

292. The more serious the nature of the occupational detriment to which the employee is subjected the greater the compensation. Hence dismissal attracts compensation of as much as twenty-four month's remuneration. Being suspended and charged for misconduct are a step away from being dismissed.

220 Calland *et al* at 3-4
221 Calland *et al* at 4

293. The longer the dispute endures, the greater the stress on the employee and the higher the compensation should be. This controversy has endured for almost four years. Furthermore, the applicant was driven to make the disclosure to the media. Disclosures to the media are more stressful as the risks are greater.

294. How the employer conducts itself in resolving the controversy is material. In this case the respondents agreed to be bound by the decision of the chairperson of the disciplinary committee as regards the applicant's alleged misconduct, but they refused to be bound by the finding that the disclosures were protected for purposes of this claim for compensation. It has been correctly held *in limine* that this court is not bound by the decision of the chairperson of the disciplinary enquiry.[222] But the respondents remained bound by the chairperson's decision.

295. Assuming that the *in limine* ruling gave the respondents a choice of retrying the issues or abiding by their obligation to be bound by the decision of the chairperson, that they opted for the former must count against them as they prolonged the applicant's anxiety and escalated costs. If they had adopted for the latter approach more issues could have been narrowed down.

296. Once the respondents were bound by the finding that the disclosures were protected it followed automatically that the

222 Judgment of Musi J issued on 16 February 2006 under this case No JR898/04 reported as *Tshishonga v Minister of Justice and Constitutional Development and Another (2006) 6 BLLR 601 (LC)*

suspension of the applicant and the disciplinary action against him fell within the definition of “occupational detriment”. The only focus of this trial therefore should have been the amount of the compensation. What the disclosures were, why and how they were made were questions that had been fully canvassed at the disciplinary hearing. Furthermore, the parties were agreed that the record of the disciplinary hearing was a true reflection of what transpired in those proceedings. Having called the Director-General to testify at the disciplinary hearing and lost, they could hardly have expected their case to get better when neither of the respondents testified at the trial. In these circumstances the question of compensation could have been simply argued on the record of the disciplinary enquiry and the common cause facts, with minimal evidence being led on those issues that still remained in dispute. The protraction of the matter unduly, is a continuation of the respondents’ retaliation against the applicant. This opinion is fortified, for instance, by the respondents persisting in alleging that the applicant was motivated by gain when it had withdrawn that charge at the disciplinary enquiry.

297. Whether the respondents account for their conduct as they should in a constitutional democracy is a consideration. They failed to do so by testifying in this trial and, in the case of the Minister, also at the disciplinary enquiry. Furthermore, the respondents’ defence is funded from public coffers. They, and the Minister in particular, owe the public an explanation. It is not as if they dismissed the allegations as ill-considered, unsubstantiated rantings of a disgruntled employee. They took the allegations against them seriously and were relentless in their

pursuit of the applicant. Their failure to offer any explanation in this case aggravates the claim against them.

298. After a struggle protracted over four years the applicant's objective in making the disclosures has not been met. The respondents have still not accounted for their conduct. Nor has the department, which is now under new management, called for an investigation into the allegations or a halt to the retaliation. In that sense, this application is a pyrrhic victory for the applicant.

299. The applicant's claim for compensation for unfair labour practice in the amount of twelve months remuneration is a statutory claim based on the respondents' breach of section of s 3 of the PDA. Remedies are prescribed by s 4 of the PDA read with s 186(2)(d), 191(5)(b) and (13) of the LRA. It is not a common law claim in delict for "insults and ill-treatment", an *iniuria* "not amounting to defamation" as submitted by Mr Hulley.[223] That the applicant was insulted, ill-treated and his dignity impaired are elements of the content of the occupational detriment he endured which the remedy must redress.

300. The amount of compensation awarded should be just and equitable[224] but limited to twelve months remuneration.

301. The applicant's claim is for twelve months pay. But he also claims the legal costs incurred in defending himself at the

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223 Para 50 -52 of Respondent's Heads.

224 S 194(4) of the LRA; *Melia v Magna Kansei Ltd (CA (Civ Div)) Court of Appeal (Civil Division) [2005] EWCA Civ 1547; [2006] I.C.R. 410; [2006] I.R.L.R. 117; 2005 WL 2893795*

disciplinary enquiry. Legal representation is a necessity in cases under the PDA not least because employees need to test their beliefs and the information they intend to disclose against the objective, independent and trained mind of a lawyer. Disciplinary action for making a protected disclosure is detrimental action. It is distinguishable from disciplinary action for misconduct. In the former, the employer has no right or prerogative to discipline the employee who has not committed any misconduct. Legal costs in opposing detrimental action is part and parcel of the damages imposed on the employee. It is a patrimonial loss that must be included in the compensation awarded without exceeding twelve month's remuneration.

302. Although compensation would usually be mitigated by the department paying the applicant's remuneration and benefits up to retirement, in this instance it does not relieve the respondents of paying the maximum allowed.

303. Taking into account all the criteria discussed above the applicant should be paid the maximum of twelve month's remuneration calculated at the rate payable to Deputy Director-Generals as at the date of this judgment.

304. Costs were reserved on a previous occasion when the matter was enrolled for trial. The applicant submitted that the respondents should pay the costs as the matter had to be adjourned at their instance as they gave notice at a late stage that they wished to compile their own bundle of documents.

305. The respondents contended that the applicant should pay the costs as it wanted to amend its pleadings.

306. The amendment was merely an elaboration of the applicant's case to include facts that were substantially common cause and which would not have warranted an adjournment.

307. On the other hand, although the respondents produced a bundle of 203 pages incorporating some documents from the applicant's bundle, Mr Hulley referred to only one document of fourteen pages in connection with the procedures for appointing liquidators. The document took that issue no further.

308. In the circumstances the adjournment was ill-conceived and probably another attempt at protracting the applicant's stress in the hope that he would back down.

Order

309. The respondents are directed to pay the applicant twelve month's remuneration at the current rate applicable to Director-Generals.

310. The respondents are to pay the applicant's costs including the costs of Senior Counsel, such costs to also include those reserved on 31 August 2006.

Pillay D, J

APPEARANCES

Date of hearing: 02 November 2006

Date of judgment: 26 December 2006

For the applicant: Adv H Van Woudstra SC

(Instructed by State Attorney)

For the respondent: Adv G I Hulley

(Instructed by Henning Viljoen Attorneys)