REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, KIMBERLEY

JUDGMENT

Not reportable

Case no: C373/2014

In the matter between:

MATHLOKO STEPHEN MOTINGOE Applicant

And

THE HEAD OF THE DEPARTMENT:
NORTHERN CAPE DEPARTMENT OF
INFRASTRUCTURE AND PUBLIC WORKS First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL:
NORTHERN CAPE DEPARTMENT OF
INFRASTRUCTURE AND PUBLIC WORKS Second Respondent

Date Heard: 27 October – 28 October 2014

Date delivered: 11 December 2014

As varied on 12 December 2014

JUDGMENT

VAN NIEKERK J

Introduction

[1] The Constitution commits us to effective, accountable and transparent governance. The role of individuals in securing this goal was recently emphasised by Van der Westhuizen J in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32, where he said:

> Corruption threatens the very existence of our constitutional democracy. Effective laws and institutions to combat corruption are therefore absolutely essential. It is the task of the courts – and this Court in particular – to ensure that legal mechanisms against corruption are as trustworthy and tight as possible, within the demands and parameters of the Constitution.
>
> But courts can only do so much. A corruption-free society can only develop in the hearts and minds of its people – particularly the ones occupying positions of political and economic power. We need dedication to the spirit and high aspirations of the Constitution. [1]

[2] One of the stated purposes of the Protected Disclosures Act, 26 of 2000, (the PDA) is to promote the eradication of criminal and other irregular conduct in organs of state and the private sector. The PDA does so by creating a culture that will facilitate the disclosure of information about irregular conduct by employees, in a responsible manner, and in which they will be protected against any reprisals consequent on any disclosures that they make.[2] The PDA is therefore an important element of the fight against corruption. It enables those employees who are dedicated to the 'spirit and high aspirations of the Constitution' to make disclosures without fear of reprisal by their employers.

[1] At paragraphs 221 of the judgment
[2] See the Preamble to the PDA.

[3] The applicant is employed as a legal adviser by the Department of Infrastructure and Public Works in the Northern Cape Province. In November 2013, the applicant was suspended and called to a disciplinary hearing. He contends that these are occupational detriments initiated consequent on disclosures that he made to his employer regarding the awarding of a contract to repair the Theekloof Pass. The applicant seeks an order declaring that he made a protected disclosure and that his suspension and the pending disciplinary hearing are occupational detriments. He also seeks compensation on account of the occupational detriments that he has suffered.

Material facts

[4] The applicant gave evidence on his own behalf. The respondents called two witnesses, a Ms Freda Tsimane, who at the relevant time was the chief financial officer, and a Mr Itumeleng Bulane, the chief engineer. The following factual background emerges from the evidence.

[5] On 1 September 2008, the applicant was employed by the Department of Infrastructure and Public Works of the Northern Cape Province as head of legal services. He currently occupies the same post. As head of legal services, the applicant is the legal adviser to the department and manages a unit known as legal services. In this capacity, the applicant is required, amongst other things, to ensure good governance in the department by ensuring that the department complies with relevant legislative and other regulatory measures.

[6] The department's mandate is vast and includes the establishment and maintenance of provincial infrastructure. In particular, the department is responsible for the construction and maintenance of provincial roads, the construction and maintenance of schools, clinics, hospitals, libraries and the construction and procurement of office accommodation for other provincial departments. Further, the department is the custodian of all provincial fixed assets.

[7] After the applicant assumed duty in 2008, it is not disputed that the applicant recognised weaknesses in the department's procurement system. In particular, the applicant observed that tender documents did not comply with the prescribed requirements, that there were weaknesses in the manner in which tenders were awarded, that contracts were being varied without sufficient legal justification and that there was very poor project and contract management. All of this had made the Department the target of litigation which it had little prospect of defending with any degree of success. In consequence, in 2010, the legal services unit initiated a review of the department supply chain management practices. This process was spearheaded by the applicant, with the primary aim of overhauling the department's infrastructure procurement to ensure that it complied with the recognized legal framework. Procurement processes were improved to achieve systemic efficiency, project and contract management practices were revised and stricter controls imposed on contract variations. These measures were adopted in 2010 by the then head of Department and accounting officer, a Mr van Heerden.

[8] In May 2011, the National Treasury issued an instruction to improve accountability and to provide supply chain directives to accounting officers of departments. The relevant part of the instruction reads as follows:

> 3.6 **Legal vetting of formal contracts or service level agreements**
>
> 3.6.1 Prior to signing a formal contract or service level agreement with a contractor, accounting officers and authorities must ensure that such contracts or agreements are legally sound to avoid potential litigation and to minimize possible fraud and corruption. This must include legal vetting by at least the Legal Services of the institution.

[9] The instruction specifically aimed, amongst other things, to improve transparency and to combat fraud. The instruction obliges accounting officers, prior to signing any formal contract or service level agreement with the contract, to ensure that the agreements are legally compliant and to minimise

possible fraud and corruption. In terms of instruction, this was specifically to include legal vetting by the legal services department of the institution concerned. This instruction was incorporated as part of the Department's control measures.

[10] In 2011, Van Heerden was transferred and replaced by the first respondent, a Mr. Nogwili.

[11] The applicant avers that after Nogwili's appointment, the controls introduced by Van Heerden were relaxed. In particular, legal vetting was not done, and major tenders were awarded without any regard to the National Treasury instruction. Vetting was reintroduced only after Nogwili had awarded a contract for the construction of the Kimberley Mental Health Hospital to a company that was not registered with the construction industry development board, as required. Legal vetting was re-introduced after the embarrassment caused to the department by this incident.

[12] During the course of May 2013, the supply chain management unit presented the applicant with tender documents for legal vetting. The documents included bids submitted, evaluation reports and the minutes of the bid evaluation and adjudication committees. The tender related to the procurement of professional engineering services for the repair of slip, down chutes and drainage at the Theekloof pass. The Theekloof pass is a mountain pass near Fraserburg, connecting the Northern Cape and Western Cape provinces.

[13] The applicant testified that when vetting the tender documents, he discovered a number of irregularities. The first of these is that only three companies had been invited to bid in what was referred to as a closed tender, without any justification or explanation as to how those companies had been selected. The applicant expressed the view that this was a contravention of the relevant regulatory requirements.

[14] The second concern raised by the applicant was that one of the companies, recommended by the bid adjudication committee for award, had been

allocated the highest score for experience despite the fact that in its tender submission, there was nothing to indicate that it had ever undertaken the specialised work in respect of which the tender had been issued.

[15] Third, the applicant noted that while the evaluation of the tenders had ostensibly been done in accordance with method for of the CIDB prescripts, the evaluation of price had been eliminated from the process. Further, there is no indication as to how the points allocated had been arrived at and the identity of the persons who had evaluated the tenders and their individual scores had not been disclosed.

[16] Fourthly, the recommended bidder, Bagale Consulting (Pty) Ltd, had not made an honest disclosure of its interests. This should have rendered the tender non-responsive.

[17] The applicant recorded his views in a memorandum dated 29 May 2013, which he addressed to the department's chief financial officer, Tsimane. The memorandum forms the basis of the protected disclosure for which the applicant contends. It reads as follows:

> 1. **NC 272/2013: PROFESSIONAL ENGINEERING SERVICES: THE REPAIR OF SLIP DOWNCHUTES AND DRAINAGE AT TEEKLOOF PASS NEAR FRASERBURG**
>
> According to the information obtained from the documents submitted, this was a close tender, where only specific companies were requested to submit proposals. I have not been advised of the reasons for this approach and what process was followed to identify the companies. According to the memo prepared by Mr Bulane requesting a deviation from the normal procurement process, which was supplied to me later, he requests a deviation "because of the speciality of the works and capacity needed to repair the slip, the request is to deviate from the normal procurement system of appointing through roster system and the contractor through advertising." This still does not explain how the three companies were arrived at. In any event, the recommended bidder, Bagale, is not on the roster, and has demonstrated no experience.

The documents submitted are accompanied by an anonymous document titled “Tender Evaluation Report” whose author is not identified. I will largely focus on this document as it appears to have determined the outcome of the evaluation and adjudication process.

In this document it is alleged that the evaluation of the bids was done “according to the procedures established in the CIDB Best Practice Guideline# A3 in respect of method 4. Whenever guideline# A3 is used it must be read with Guideline # A4, which describes the process for evaluating quality in tender submissions. CIDB guideline# A3 cautions that written reasons may have to be furnished to tenderers for administrative actions taken. This makes a detailed analysis of the document all the more crucial to ensure that there has been adherence to the legally recognized procedures.

The document correctly states that Method 4 envisages the evaluation of the financial offer, quality and preferences. It also proceeds to state that “quality shall be scored independently by not less than three evaluators in accordance with the following schedules….” However, the identity of the evaluators has not been disclosed, neither are the individual scores allocated. The scores that have been given to the bidders are not attributed to any ascertainable procedure, thus there is no explanation as to how the scores were arrived at. This compromises the objectivity and transparency that is mandated by the Guidelines and the legal framework.

The document starts by stating that the 90/10 preference points system will be used. Legally the 90 points represent the financial offer in every case, yet bizarrely, the document proceeds to eliminate price and replace it with quality in the entire evaluation exercise. In fact this approach is confirmed in a letter dated 10 April 2013 in which Mr Bulane advises the bidders that “price must be replaced with quality on page T2, 16” which the bidders then proceeded to do. This approach is not legally justifiable as quality must be evaluated separately in a two-envelope system and cannot be used as a substitute for price. The approach adopted here is in conflict with the CIDB Guidelines which recognize quality only as part of the preference package, and not as a possible substitute for price.

The evaluation used here implies the conflation of what would normally be a two-envelope approach into a one-envelope system, with one notable anomaly: the total elimination of price or financial offer from the equation. The evaluation of quality is nothing more than the evaluation of functionality that

should be done in a two-envelope system. This document makes bold to state that “the method of tendering used is one envelope method where it will be technically proposal and no financials needed for this tender as all fees are gazetted.” This cannot fly as the financial offer in situations such as this could involve the evaluation of the discounts given.

In a two envelope system quality is evaluated in the first envelope and only those bids that pass the determined threshold proceed to be evaluated on a 90/10 point system for price and preference in the second envelope.

In this case what should have happened is this: the bids should first have been evaluated on functionality (technical offer). Thereafter their discounts and preference claims would be evaluated as their financial offer and preference claims.

The CIDB Method 4 does not recognize a method that excludes financial offer from the evaluation process.

What is also not clear is how the points allocated for quality were arrived at. The members of the committee that did the evaluation and the scores they allocated to the bidders are not revealed in the document. CIDB Best Practice Guideline # A3 prescribes a process and format that must be followed. These do not appear to have been adhered to in this case.

What makes the point-allocation even more suspect is that while the recommended bidder, Bagale, has submitted no or very, very little evidence in relation to its experience relevant to the service required.

The BEC and BAC accepted without any interrogation the score for quality as stated in the document.

In short, the entire procurement process is irregular and cannot support any legitimate award.

In any event, the recommended bidder, Bagale, would have been non-responsive for failure to make an honesty disclosure in its declaration of interest. I have provided the profile of its directorship structure and also the interests attached to its directors.

[18] It is not necessary for me to canvass the content of the memorandum or whether it correctly identifies a breach of the relevant regulatory measures, nor is it necessary to traverse the evidence relating to the preparation of the technical report and the deliberations of the bid evaluation and bid adjudication committees. Tsimane, who testified for the respondents, stated

that she received the memorandum, read it, and advised Nogwili that in consequence of the irregularities identified by the applicant, the technical report should be redone. Under cross-examination, Tsimane conceded that the identification of the three companies that were selected to tender for the Theekloof project was irregular, that the evaluation done by the technical committee and contained in the technical report was irregular, that the company that had been awarded the tender, Bagale Consulting, did not qualify to be considered for appointment because it had misrepresented its interests, that the entire procurement process in respect of the project was irregular, that the contents of the applicant's memorandum dated 29 May 2013 were correct, and that Nogwili had acted irregularly in appointing Bagale Consulting. Tsimane also testified as to the applicant's competence as a legal adviser – she stated that the legal vetting reports prepared by the applicant and submitted to her had consistently been correct.

[19] The undisputed evidence before the court then is that by August 2013, Nogwili had before him a memorandum from his legal adviser recording at least four material irregularities in the tender process in relation to the recommendation that Bagale Consulting be awarded the contract in relation to the Theekloof project, and a recommendation from Tsimane, his chief financial officer, that the technical report be redone, on account of the irregularities identified by the applicant.

[20] The applicant testified that in or about August 2013 he became aware that despite his memorandum, Nogwili had awarded the Theekloof Pass contract to Bagale Consulting. He made several attempts to bring the matter to Nogwili's attention and when he could not secure an appointment with him, he informed a Mr Mohamed Sulliman, a senior official in his office, about the alleged irregularities and confirmed this in later correspondence addressed to Nogwili.

[21] The applicant then sought an appointment with the chairperson of the department's audit committee, Mr Chineme Ogu, who holds an office identified in the department's whistle-blowing policy as being one to which protected disclosures may be made. The meeting took place on 2 September 2013. At the meeting, the applicant reported to Ogu the irregularities that he

had discovered in the awarding of the tender to Bagale Consulting. He also provided Ogu with a copy of the memorandum dated 29 May 2013. Ogu advised the applicant that he should also brief the department's senior internal auditors, which he did.

[22] On the 1 November 2013, the applicant sent an email to the Nogwili to try and secure a meeting with him and he avers that: "*I made him aware of the existence of irregularities in which the first respondent was implicated. I also informed him that I had provided information in this regard to the audit committee and that I had discussed the irregularities with Mr Sulliman*."

[23] The applicant met with Nogwili on 21 November 2013. At the meeting, the applicant informed Nogwili that he had furnished information to Ogu regarding the appointment of Bagale Consulting. On 22 November 2013 the applicant was suspended in terms of Paragraph 2.7(2) (a) of the SMS Handbook for the Public Service. The applicant was suspended by the second respondent. Whether the second respondent had the authority to suspend the applicant is the subject of a dispute that need not be determined for present purposes. The reason given for the suspension was that he was "*suspected of serious misconduct in that you are disclosing confidential information from the department to third parties*". The suspension letter was signed by the second respondent. It is noteworthy that there is no affidavit filed on record by the second respondent.

[24] On 26 November 2013, applicant was served with a notice to appear before a disciplinary tribunal. The charges proffered did not relate to the disclosure of confidential information. They read as follows:

> **COUNT 1:**
>
> On or about the 22nd March 2011, The Member of Executive Council (MEC), the Honourable David Rooi, issued instruction under his hand that no instruction to attorneys shall be issued, without prior consultation of the Head of Department, subsequent to this instructions by the MEC. You issued various instructions to attorneys, without prior consultation with the Head of Department; consequently you made yourself guilty of gross insubordination.
>
> **COUNT 2:**

On or about the 21st November 2013, you were offensively contemptuous towards the Head of Department, in that you treated the HOD with disdain, and threatened the HOD, and as such made yourself of the misconduct of insolence.

COUNT 3:

On or about 20 May 2008, you declared in your Z83 application form the following:

"I declare that all the information provided (including any attachments) is complete and correct to the best of my knowledge. I understand that any false information supplied could lead to my application being disqualified or discharged if I am appointed."

You know that the information you supplied was not complete and correctly, as you failed to disclose in your Z83, or accompanying documentation that you have been struck of the Roll of attorneys, consequently you have committed the misconduct of fraudulent misrepresentation, by omitting to declare this crucial fact to your employer.

COUNT 4:

During your tenure as Head Legal Services, you treated your subordinates with disdain, and you victimized your subordinates, and made the employment intolerable for your subordinates, as such as you failed and/or neglected your duties to ensure employment justice at the workplace, resulting in inefficiency at your workplace."

[25] The applicant referred a dispute to the bargaining council in which he contended that his suspension and the disciplinary hearing constituted occupational detriments for the purposes of the PDA. On 4 March 2013, this court granted an interim order in terms of which the disciplinary enquiry was suspended pending the outcome of these proceedings.

[26] This factual background is not in dispute. During the course of the trial, a few factual disputes emerged, but none of them are material. I should add that the applicant made a good impression when he gave evidence. He gave his evidence confidently and stood up to cross-examination well. Nothing that he said was seriously called into question. Tsimane, who is no longer employed by the department, was initially reluctant to make concessions during cross

examination but when she did, as will appear from the above summary, these were devastating to the respondents' case. Tsimane was candid enough to admit that once the applicant had advised her of the irregularities relating to the Theekloof project, she thought it sufficient to advise Nogwili that the technical evaluation report should be redone. Unlike the applicant, who had the courage to take matters further, Tsimane considered that she had discharged her duties once she had provided Nogwili with her advice; what Nogwili did with that advice was of no concern to her. Bulane's evidence did not take matters much further. He testified that he did not regard himself as an expert in supply chain management and that Tsimane was far more knowledgeable in these matters. He was the chairperson of the technical committee that evaluated the tenders and testified that the committee had derived the score for experience awarded to Bagale Consulting on the basis of his personal knowledge and that entity's previous involvement in work conducted on the Theekloof Pass.

[27] Although the respondents indicated in the pre-trial minute that they intended to call Nogwili as a witness, he was not called to give evidence.

The issues

[28] As I have indicated, the applicant contends that his suspension and the institution of disciplinary proceedings against him constitute an occupational detriment for the purposes of the PDA. He seeks a declaratory order to this effect, and compensation in the form of a *solatium*. The respondents dispute that the applicant made a protected disclosure in terms of s 6 of the PDA. If it is found that the applicant made a disclosure for the purposes of the PDA, the respondents contend that the disclosure was not made in good faith and that it is therefore not protected.

[29] The crisp issues for decision then are whether the applicant made a disclosure in terms of s 6 of the PDA and if so, whether the disclosure was made in good faith.

Applicable legal principles and analysis

[30] The applicable legal principles are well-established. Section 1 of the PDA defines a disclosure as follows:

> 'disclosure' means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
>
> (c) That a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) That the health or safety of an individual has been, is being or is likely to be endangered;
>
> (e) That the environment has been, is being or is likely to be damaged;"
>
> (f) Unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
>
> (g) That any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;"

[31] The respondents contend that the memorandum addressed by the applicant to Tsimane on 29 May 2013, was nothing more than a document recording the applicant's observation on the review that he performed on the documents made available to him. The memorandum, as I understand the argument, was nothing more than a communication made by the applicant in his official capacity and in the discharge of his normal duties relating to the legal vetting of the tender documents

[32] The definition of a 'disclosure' requires only that information disclosed relates to the conduct of an employer or some other person employed by their employer, where the employee making the disclosure believes that the information shows or tends to show one of the matters listed in paragraphs (a) to (g) of the definition. They can be no question that the applicant's memorandum, even though it was prepared in the ordinary course of his duties, clearly showed a failure by the officials concerned to comply with the obligations imposed on them by the relevant regulatory measures. It is not disputed that the memorandum was addressed, again in the ordinary course, to Tsimane. But I do not understand the applicant's evidence to be that the preparation of the memorandum or the submission of that memorandum to Tsimane constituted the disclosure on which he relies. It is clear from the evidence that it was only when the applicant discovered in August 2013 that despite his advice that the awarding of the tender to Bagale Consulting was irregular, that he then sought in terms of the applicable policy to raise the issue with Sulliman and then Ogu, the chairperson of the audit committee.

[33] In my view, the applicant's memorandum and his later disclosure of its contents to Ogu constitutes a disclosure in terms of the PDA, at least in that it tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject. The fact that the memorandum had been prepared in the ordinary course of business is of no consequence; it was Nogwili's failure to heed the applicant's advice (which the respondents' own witness conceded was correct) and in particular his appointment of Bagale Consulting contrary to that advice that triggered the applicant's making of a disclosure on the basis of his previously prepared memorandum. Put another way, there was a failure by the respondents to comply with their legal obligations only once the decision was made to appoint Bagale Consulting in the face of the applicant's advice that any such appointment would contravene the relevant regulatory measures, and the applicant's later disclosure of the memorandum to Ogu triggered the protections afforded by the Act. Although the applicant may not have considered himself as a whistleblower when he wrote the memorandum, at the point of disclosure of the memorandum and the information contained in it

to Ogu, his evidence is clear – he regarded himself as a whistleblower. There is no other reason why the applicant, after learning that despite his advice Bagale Consulting had been awarded the tender, would initiate a meeting with Suliman and then Ogu. The applicant under cross-examination in a context where his evidence in relation to the memorandum he had written (and other previous memoranda) and its status as a protected disclosure was being probed. He is recorded as saying:

> Yes, I mean that is evidence before this court that in fact of the actions that were taken against me were taken precisely because I had made this information available contained in the memorandum and the memorandum itself available to the chairperson of the audit committee. And that is what triggered the occupational detriment. I made this information available to 3rd parties.

[34] In short, I am satisfied that the applicant made a disclosure for the purposes of the PDA.

[35] The next issue (and indeed, the only substantive issue raised by these proceedings), is whether the disclosure is protected. A protected disclosure is defined as follows:

> 'protected disclosure' means a disclosure made to-
>
> (a) a legal adviser in accordance with section 5;
>
> (b) an employer in accordance with section 6;
>
> (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
>
> (d) a person or body in accordance with section 8; or
>
> (e) 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;

[36] The applicant avers that he made a protected disclosure to his employer in terms of section 6 of the PDA. Section 6 provides:

> 6 Protected disclosure to employer
>
> (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.

[37] As I have indicated, the parties do not dispute that any disclosure made by the applicant was made in terms of the applicable procedure. The primary issue in dispute between the parties in this part of the enquiry is whether the disclosures were made in good faith. The applicant made the disclosure he did at considerable personal cost and not for personal gain. This in itself is evidence of his *bona fides*. The applicant's responsibility is to ensure that the department act within the ambit of the law and his actions are entirely consistent with the faithful discharge of his professional obligations. There is no evidence whatsoever that the applicant made the disclosure he did for an ulterior or malicious purpose, all with the intention to harass or discredit his employer. On the contrary, the evidence of the respondent's own witness Tsimane was that the applicant's memorandum was not only correct, but that his report said consistently been correct and that in her view, the applicant's findings were not motivated by malice.

[38] Finally, there is the issue of whether the actions taken by the respondent against the applicant constitute an occupational detriment. The PDA defines an occupational detriment as:

'occupational detriment', in relation to the working environment of an employee, means-

(a) being subjected to any disciplinary action;

(b) being dismissed, suspended, demoted, harassed or intimidated;

(c) being transferred against his or her will;

(d) being refused transfer or promotion;

(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;

(f) being refused a reference, or being provided with an adverse reference, from his or her employer;

(g) being denied appointment to any employment, profession or office;

(h) being threatened with any of the actions referred to paragraphs (a) to (g) above; or

(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;…

[39] It is not disputed that the applicant's suspension and his being subjected to disciplinary action constitute occupational detriments, were it to be found that the applicant made a protected disclosure in compliance with section 6 of the PDA.

[40] Insofar as the respondents contend that there is a genuine disciplinary process under way relating to serious charges of misconduct made against the applicant, this court is not called on to determine the merits of those charges. All that the court need determine is whether there is any nexus between the disciplinary charges brought against the applicant and the disclosure that he made. This is not an issue that the respondents have pertinently addressed, but it would seem obvious to me given the temporal coincidence between the applicant's disclosure and the filing of the charges against him that the charges constitute nothing more than a form of reprisal against the applicant. This conclusion is fortified by a moment's glance at the nature of the charges – they are vague (particularly insofar as they call into question the nature of relationships between the applicant and his superiors

and subordinates), and at least some of them relate to incidents that occurred years ago. None of the witnesses called by the respondent could give any evidence as to the genuineness of any of the charges. As I have indicated, the respondents' case was closed without their leading the evidence of those individuals, and in particular Nogwili, who were best placed to establish at least a degree of credibility in relation to the disciplinary process itself and the charges in particular. In the absence of that evidence, the court accepts the evidence tendered by the applicant that the charges brought against him were nothing less than a desperate reprisal for his having made a protected disclosure and more generally, an attempt to rid the Department of an employee who insisted on compliance with the relevant regulatory measures and who was intent on holding the Department to account in this regard.

[41] For the above reasons, in my view, the applicant has succeeded in establishing that he made a disclosure that is protected in terms of the PDA and that his suspension and the pending disciplinary proceedings brought against him constitute occupational detriments for the purposes of the Act.

Remedy

[42] In *Minister of Justice & Constitutional Development v Tshishonga* (2009) 30 *ILJ* 1799 (LAC), the Labour Appeal Court considered an appeal against an award of 12 months remuneration and compensation for an unfair labour practice and legal costs arising out of a disciplinary enquiry instituted by the Department. In the court *a quo*, the judge had taken into account a number of considerations; in particular, that compensation is redress for both patrimonial and non-patrimonial loss. The court also took into account all of the developments up to and after the occupational detriment and considered them to be relevant cumulatively toward the assessment of compensation. In that matter, the court further took into account the employer's failure to investigate the disclosure and the subsequent retaliation as factors which must necessarily count against employer. The conduct of the employer in failing to resolve the dispute and the attraction of the matter was also taken into account. The Labour Appeal Court noted that the acts which fall within the scope of the definition of occupational detriment in s1 of the PDA are deemed

to be an unfair labour practice. On that basis, it is necessary to have regard to s 194 (4) of the Labour Relations Act, the section governing compensation for unfair labour practices. This section provides that compensation must be just and equitable, but not more than the equivalent of 12 months' remuneration. the Labour Appeal Court took into account, for the purposes of calculating an amount of compensation that was just and equitable in the circumstances, the embarrassment and humiliation suffered by the respondent in that case, his being removed with immediate effect from the business unit in which he was engaged and there after being subjected to a suspension and subsequent disciplinary hearing. This embarrassment and humiliation was found also to have affected the family of the respondent, whose wife his children. The court considered that in calculating compensation for non-patrimonial loss, some assistance could be gained from jurisprudence relating to the award of a *solatium* in terms of the *actio injuriarum*. In these cases, the award is one that seeks to redress to a person who has suffered an attack on the dignity and reputation. Ordinarily, factors relevant to the assessment of damages include the nature and seriousness of the *injuria*, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and the attitude of the defendant after the *injuria* had taken place (see paragraph [18] of the judgment). In awarding the applicant an amount of R100 000 in compensation, the court took into account that the respondent had been the victim of unfortunate attacks on his dignity and integrity made by the Minister of Justice on national television, that this had been grossly unfair and irresponsible conduct on the part of the minister and compounded by the role played by the respondent in seeking to promote integrity in government and the indignity that he suffered in losing his employment.

[43] There are obvious parallels between the facts of *Tshishonga* and the present matter. The applicant holds a senior position in the department and has been its legal adviser for a long time. Before that, he was a legal adviser in the Department of Education, also for a long period. He is a skilled and experienced man whose reputation is an integral component of his job. The

applicant's evidence that he felt humiliated by being suspended and charged with misconduct went unchallenged, as was the evidence that in a relatively small province where news of this nature would quickly circulate, the mere fact of his being suspended and charged brought stress, humiliation and embarrassment to him and to members of his family. It must necessarily be borne in mind that the award in *Tshishonga's* case was motivated in part at least by the fact of derisory statements by a minister of state made on national television. However, I must also bear in mind that that decision was handed down some five years ago. In the present instance, the impact and repercussions of the respondent's conduct extended in all probability only to the province of the Northern Cape, but I must necessarily bear in mind that this is the province in which the applicant has worked for many years, and in which he will have built up a number of professional relationships with senior members of provincial government. I must also take into account that the applicant's professional reputation has necessarily been tarnished by the respondents' conduct. While in *Tshishonga's* case there was the added element of statements being made on national television, I am satisfied that having regard to the particular facts of the present case and the effects of inflation, an award in the same amount as that awarded by the LAC in *Tshishonga* is just and equitable.

Costs

[44] The court has a broad discretion in terms of s 162 of the Labour Relations Act to make orders for costs according to the requirements of the law and fairness. Costs are not ordinarily awarded to parties who, as the applicant did, represent themselves. In those instances, the court has made orders which would have the effect of entitling a party to recover all reasonable disbursements incurred in relation to the proceedings. There is no reason why the applicant should be denied those disbursements.

Direction

[45] Whistleblowers, when they comply with the PDA, are an integral element of the fight against corruption to which I referred in the introduction to this

judgment. People, like the applicant, who have the courage to stand by their convictions and speak out not only entitled to protection, they ought to be commended. I gained the sense during the course of the trial that the applicant was a stickler for detail, that he undertook his professional duties with diligence and that he demanded high standards from his staff. This is perhaps why the respondents formed the view, as it was put to the applicant during cross-examination, that he was obstructive and that his insistence on legal vetting 'contaminated' the bid adjudication process. The fight against corruption is almost entirely dependent on individuals such as the applicant, who choose to exercise their duties fearlessly and independently, and have the courage to call their employers to account when wrong-doing is identified.

[46] In the present instance, it would appear to me that those who are responsible for bringing charges against the applicant are those who should themselves be facing charges for the failure, by awarding the tender to Bagale Consulting for the Theekloof Pass project, to comply with the regulatory measures identified by the applicant. For that reason, I intend to direct the registrar to forward a copy of this judgment both to the Premier of the Northern Cape Province and the Office of the Auditor General.

For the above reasons, I make the following order:

1. The applicant's suspension constitutes an occupational detriment for the purposes of the Protected Disclosures Act.

2. The disciplinary hearing convened by the respondent into charges of misconduct against the applicant constitutes an occupational detriment for the purposes of the Protected Disclosures Act

3. The respondents are ordered immediately to uplift the applicant's suspension and are interdicted from conducting any disciplinary enquiry into the charges brought against the applicant in terms of the charge sheet served on the applicant on 26 November 2013.

4. The respondents are ordered to pay the applicant compensation in the sum of R 100 000.00, to be paid within 14 days of the date of this order.

5. The respondents, jointly and severally, the one paying the other to be absolved, are to pay all of the applicant's disbursements, including but not limited to his reasonable costs incurred in relation to travel, accommodation, and photocopying, in respect of the present proceedings.

6. The Registrar is directed to forward a copy of this judgment to the Premier of the Northern Cape Province and to the Office of the Auditor General.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances:

For the applicant: In person

For the respondents: Advocate TC Tshavhungwa instructed by Mjila and Partners, Kimberley.