

WHISTLEBLOWING MANUAL

A guide for shopstewards to the
Protected Disclosures Act

(“Whistleblowing Act”)



Introduction

The material in this manual was developed by the Open Democracy Advice Centre (ODAC), a registered Law Centre which focuses on the Right to Know in South Africa.

This manual was made possible through the generosity of the Foreign and Commonwealth Office of the British High Commission in South Africa.

ODAC intends this manual to be used and reproduced by all who want a better understanding of the Protected Disclosures Act (PDA). Please acknowledge ODAC when reproducing the manual.

Purpose of a Manual

Whistleblowing matters to all of us. In every business or government organization there is a possibility that something it does can go seriously wrong. For instance food might become contaminated or money could be misused. And yet, employees often feel pressure not to raise their concerns.

Employees are the people who usually are the first to notice these wrongdoings and so are in the best position to raise these concerns.

The Protected Disclosures Act (PDA) explains how concerns should be raised and how employees are protected from dismissal and victimization for raising these concerns.

This manual assists shop-stewards to understand the PDA and so be able to assist employees to blow the whistle safely. It also shows unions how to assist their members if the members are victimized or dismissed for making protected disclosures.



Open Democracy Advice Centre (ODAC)

The Open Democracy Advice Centre is a legal advice Centre whose mission is to promote democracy and encourage corporate and governmental accountability. Established in 2001, ODAC's founding institutions are IDASA, the Black Sash Trust and the Public Law Department of the University of Cape Town. The centre is a non-profit section 21 company based in Cape Town.

Questions and Answers

What is Whistleblowing?

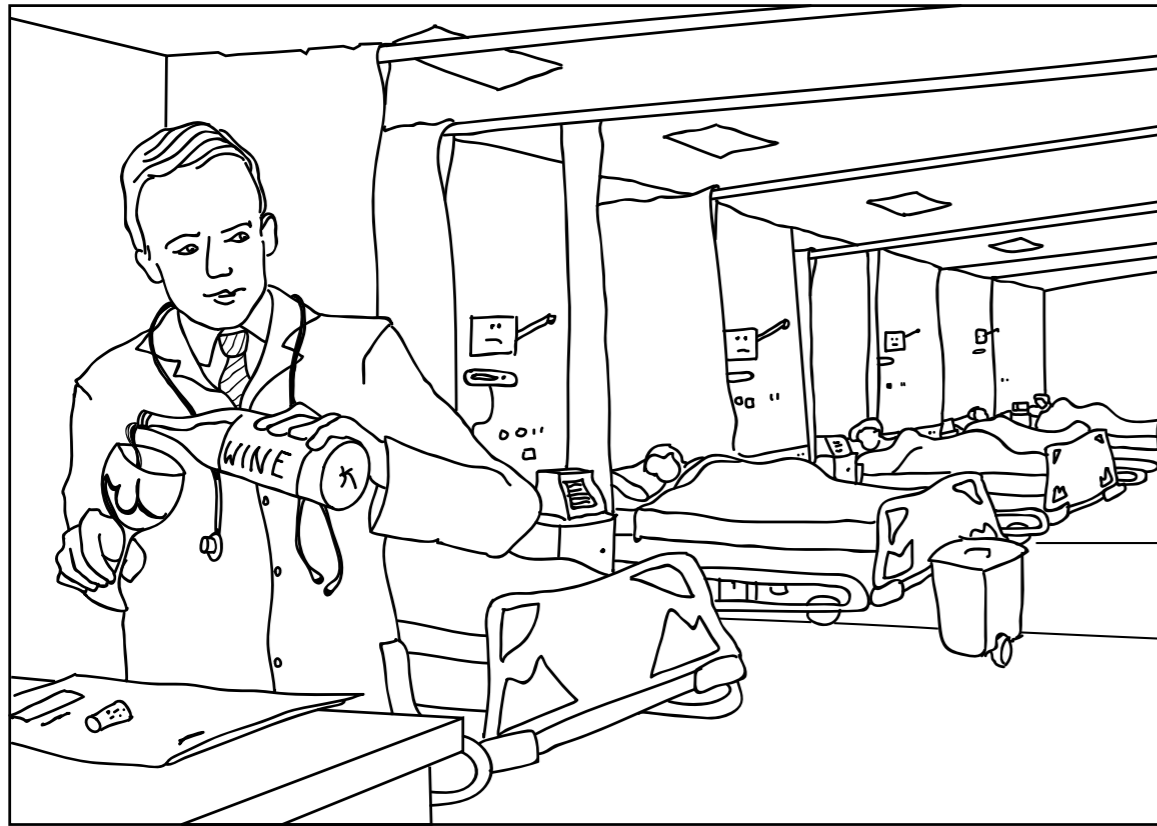
Sipho, mixes mortar on a site that is building community houses. He is told by Sakhele, the foreman that he must put more sand and less cement into the mix. He knows this is not right and already Hanief, the bricklayer has complained that the mortar is not holding the bricks together properly. Sipho has also seen Sakhele loading cement into his car one night and suspects that Sakhele is stealing the cement that should be going into the mortar. He thinks carefully about this and discusses this with his wife and uncle who both agree with him that he should tell a manager about this. They tell him that it could lead to the houses cracking and even walls falling down and is bad for the community. His wife tells him that if the Department of Housing knows that Sipho's company is using bad mortar they will not use this company and then Sipho and everybody else will lose their jobs. He speaks to his cousin who tells him that the company may do nothing about the problem and see him as a trouble maker and dismiss him. Sipho has a sleepless night as he tries to come up with a solution. He decides that he cannot live with this wrongdoing and the next morning he tells Mr. Dlamini, the top manager, about what Sakhele is doing.

Sipho is raising his concern about wrongdoing and this is called whistleblowing. It is necessary as such wrongdoing can damage the organization or community and even lead to an organization failing. This could mean that an important service that the organization provided can no longer be provided. In the case above Sipho and his colleagues could lose their jobs if the tender is lost and the community will get badly built houses.

However blowing the whistle can be a difficult process. A whistleblower will think carefully about whether it is right to raise concerns and when the whistleblower raises the concerns he or she is often victimized, isolated, criticized and in the workplace even dismissed for their actions.

Whistleblowers act in good faith and are motivated not by self interest, nor to get at anybody nor to further themselves in some way. They tend to have a strong sense of right and wrong and a clear sense of their own ethical boundaries. Most importantly though, whistleblowers are not denouncers or accusers but witnesses who let the facts speak for themselves. When Sipho raised his concerns with Mr. Dlamini he did not accuse Sakhele but told Mr. Dlamini what Sakhele told him to do (put less cement in the mortar and more sand) and how he had seen Sakhele put bags of cement into his car. It is now up to Mr. Dlamini to investigate further.

This manual recognizes that every employee has the right to raise genuine concerns about unlawful or irregular conduct in the workplace without fear of reprisals (without being victimized or dismissed) in both public and private sector. Employees have an active role to play in disclosing unlawful and any other irregular activity and they require protection from any reprisal as a result of making such a disclosure.



Why is whistleblowing important?

Whistleblowing can act as a risk management tool. Wrongdoing can cause businesses to lose contracts (as in the above example) or to lose customers. This can cause employees to lose their jobs and so communities will suffer. An effective whistleblowing policy – where employees know what to blow the whistle on and who to report to – encourages employees and employers to take steps to correct problems before they become out of control. It can save money, jobs and lives.

It is in the organization's and the employees' interests to stop wrongdoing. Promoting better risk management can also help prevent the need for more rules and laws.

To have a successful risk management system the organization must have a positive whistleblowing culture. A positive whistleblowing culture is one where employees are assured that the organization takes whistleblowing seriously i.e. by having a whistleblowing policy and training on it. Management must also keep whistleblowers' concerns confidential and investigate their concerns and take appropriate action against wrongdoers. No fuss should be made about the whistleblower either negatively or positively. The emphasis should be on getting rid of the wrongdoing not on the whistleblower.

For crooked competitors, fly-by-night operators and downright fraudsters, whistleblowing poses a real threat. For responsible businesses having a positive whistleblowing culture means that the organization can focus on the core business, secure that any wrongdoing will be raised and dealt with.

“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.”

M. Tshishonga and the Minister of Justice and Constitutional Development; Director General of the Department of Justice and Constitutional Development (2006)(LC) @ para 106



Why don't people blow the whistle?

While employees are usually the first to know of any wrongdoing, many will feel they stand to lose the most by speaking up. Employees who genuinely suspect that something may be going seriously wrong in the workplace usually have a difficulty making a choice. They can stay silent and look the other way, they can raise the matter with the employer, or they can take their concerns outside the organization.

The fear of being labeled an impimpi or a troublemaker, or of breaking ranks and appearing disloyal to colleagues, and the fear of being required to provide undeniable evidence, are powerful reasons not to speak up. Since we were children we were told not to tell on one another. Very often people do not separate between people betraying trust and those who act, often against their own immediate interests, to protect others and the interests of their employers. In the above example some people may say that Sipho is being disloyal to Sakhele. Actually Sipho is concerned about the business losing the contract and everybody losing their jobs. He is also concerned that the community will be getting bad houses. A good policy encourages and protects responsible whistleblowing.

In such circumstances, it is not surprising that most employees who find themselves in this position speak only to friends or family – rather than to the employer, the person best able to investigate the wrongdoing.

The result of this communication breakdown is that the employer loses a valuable opportunity to prevent what might become a damaging crisis or to reassure employees that their concerns are mistaken, and also loses access to a valuable pool of information.

Why are grievance procedures not enough?

Often employers do have procedures for reporting workplace grievances but employees wanting to raise concerns about wrongdoing will not be reassured that following line-management reporting of grievances will be a safe way to do this. Often, the issue a whistleblower wants to raise is not actually a grievance – it is not a complaint about the way they have been treated but is actually reporting wrongdoing, which may have nothing to do with their position at all. Also, grievance procedures often assume that you need to talk to your manager about your grievance – and your manager might be the problem!



UNPACKING THE PROTECTED DISCLOSURES ACT (PDA)

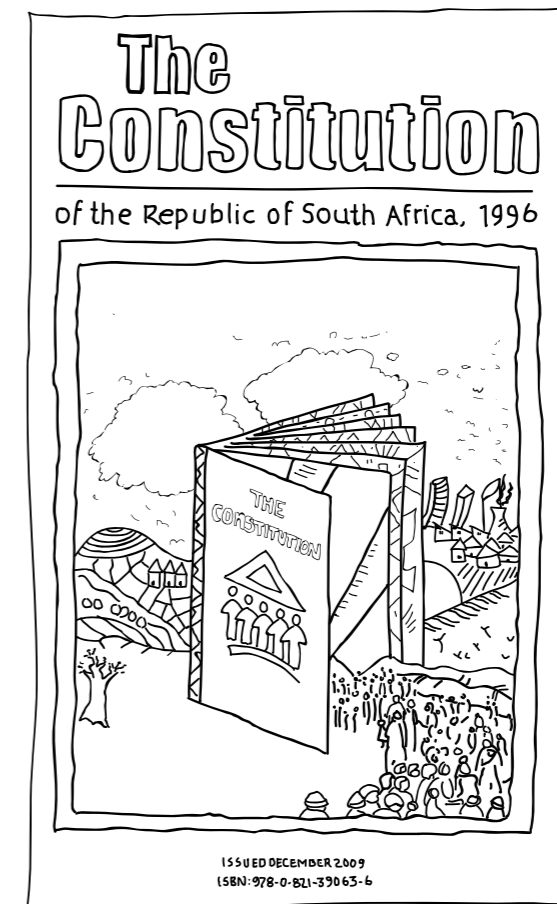
What is the Protected Disclosures Act (PDA)?

In February 2001, South Africa passed the Protected Disclosures Act (PDA) also known as the “Whistleblowing Law”. In terms of the PDA employees can expose wrongdoing in the workplace without being disciplined or punished for it.

Whistleblowers must be properly informed about their rights and how best to raise their concerns about wrongdoing at work: who to speak to; how to speak and what to speak about. Concerned citizens or employees who bring up issues regarding their communities or places of work should not be disturbed in their work or lives in any way and should be able to continue without fear of any punishment whether physical, social or emotional.

What does the Act promote?

The PDA promotes the creation of a culture in which those wishing to speak out against crime and other wrongdoing at work can do so in a responsible manner and are **provided with comprehensive guidelines for the disclosure of such information and protection against any reprisals(victimization and/or dismissal) as a result of such disclosures.**



What is the Spirit of the Law?

- It upholds the democratic values of human dignity, equality and freedom of expression found in the Bill of Rights
- It recognizes that criminal and irregular conduct stops organizations both in the private and public sectors from being run in a good and healthy way.
- Every employer must make sure that employees who raise wrongdoing responsibly are protected from victimisation as a result of the whistleblowing
- It tries to make sure that employees can speak out about wrongdoing in a responsible manner by giving rules for blowing the whistle, and by giving protection to employees who are victimized or dismissed for speaking out responsibly.

What are the benefits of the Act?

It protects all employees from victimization or dismissal in both public and private sectors who challenge unlawful and irregular conduct in the workplace.

It sets out what you can disclose, who you can disclose to and how to disclose.

It creates a culture which helps employees to speak out about unlawful and other irregular conduct in the workplace.

It sets out how to get protection against any subsequent victimization or dismissal.

It encourages stopping criminal and other irregular conduct in the public and private sectors.

When is a disclosure protected?

When information about wrongdoing is disclosed using the correct procedure.

Disclosure + Proper Procedure = Protected Disclosure

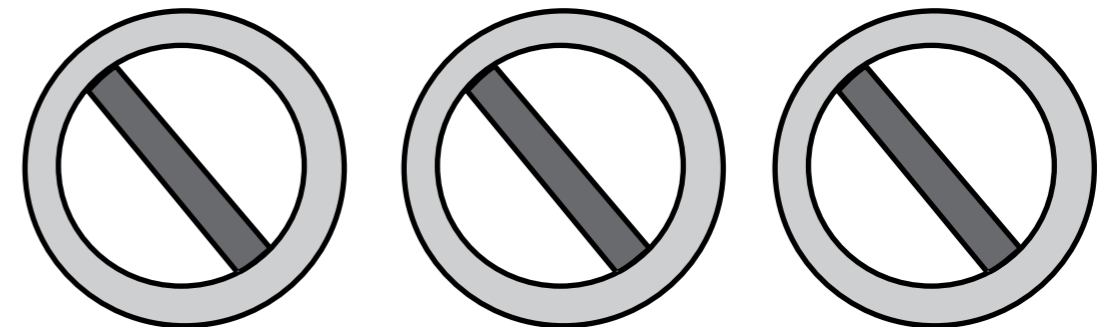


What can you blow the whistle on? (Disclosure)

Section 1 of the PDA lists the wrongdoing that you can blow the whistle on under the definition of disclosure:

- Criminal offence e.g. fraud, theft, assault,
- Failure to comply with a legal obligation e.g. not doing what you are legally compelled to do at work
- Miscarriage of justice e.g. where proper justice is purposely prevented e.g. destroying court documents
- Endangering health and safety e.g. abusing patients in hospitals or institutions,
- Damage to the environment e.g. illegal disposal of waste
- Unfair Discrimination e.g. discrimination on the basis of race, gender, disability.

In Siphos example above Siphos blew the whistle on the theft of the cement and also on not doing what one is legally compelled to do at work i.e. using the correct amount of cement when making mortar.



NO ENTRY

TO
FRAUD

NO ENTRY

TO
DISAPPEARING
COURT DOCKETS

NO ENTRY

TO
DUMPING
OF WASTE

What can't you blow the whistle on?

Managers being incompetent, or not understanding how to run the business. So in our example, if Sakhele buys the wrong amount of cement by mistake, and then leaves the bags of cement out in the rain, and they are spoiled, he is clearly being incompetent, but that is not the sort of wrongdoing you can disclose about in terms of the Act.

What is the correct procedure?

- a) A whistleblower could disclosure wrongdoing to a legal advisor (Section 5 of the PDA). This could be to an attorney, or to the trade union or to a whistleblowing helpline
- b) The PDA gives protection to an employee who in good faith discloses information to an employer (Section 6 of the PDA). This could be to the employee's direct manager or to someone more senior than that. The information must be disclosed to someone more senior than the whistleblower and to someone who can do something about the wrongdoing. If the employer has a whistleblowing policy then the procedure set out in that policy must be followed.



- c) If an employee works for a government department he or she could disclose the wrongdoing to a Member of the Cabinet e.g. a Minister or Executive Council member e.g. an MEC (Section 7 of the PDA)
- d) If an employee works for a government department he or she could disclose the wrongdoing to the Public Protector or Auditor-General (Section 8 of the PDA)
- e) A whistleblower can go to the media, or an NGO or anyone else they think would be helpful, in a general disclosure, where the whistleblower has followed the procedures set out in the Act, and had no response from management. This could be to a journalist or anyone outside the organization but the whistleblower must be able to motivate why the disclosure was made to that person(s), and not to their organization. A general disclosure is the hardest one to justify, so you have to follow procedures strictly to claim protection based on the Act (Section 9 of the PDA).

Sipho went in good faith (in all honesty) to raise his concerns with his employer (Mr. Dlamini). (Section 6 of the PDA). Sipho does not have to raise it with Sakhele's immediate superior. He can go up to the next level of reporting. But he must report his concerns with someone senior enough who can rectify the wrong.

Note for sections 6 to 9 the whistleblowing must be done in good faith.

What does the Act protect you from?

The PDA protects you from victimization or dismissal which it calls an occupational detriment. It could be any of the following:

any disciplinary action e.g. dismissal, suspension, demotion, harassment, intimidation, refusal of a transfer or promotion, altering the terms or conditions of employment or retirement to an employee's disadvantage, being denied appointment to any employment, profession or office, being threatened with any of the above or being adversely affected in respect of employment. (Section 1 of the PDA under occupational detriment and Section 3)

So, the PDA is trying to be careful to protect the employee from many different ways that could be used to try and silence a whistleblower.



How the PDA fits into the Labour Relations Act (LRA)

Unfair Labour Practice

Under Section 186 (2) (d) of the LRA any occupational detriment other than dismissal is unlawful.

“S186 Meaning of dismissal and unfair labour practice

(2) **Unfair labour practice** means any unfair act or omission that arises between an employer and an employee involving –

.....

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”

Automatically Unfair dismissal

Under section 187(1)(h) of the LRA a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to the PDA.

“S187 Automatically unfair dismissals

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 (section 5 confers protections relating to the right to freedom of association and on members of workplace forums) or, if the reason for the dismissal is –

.....

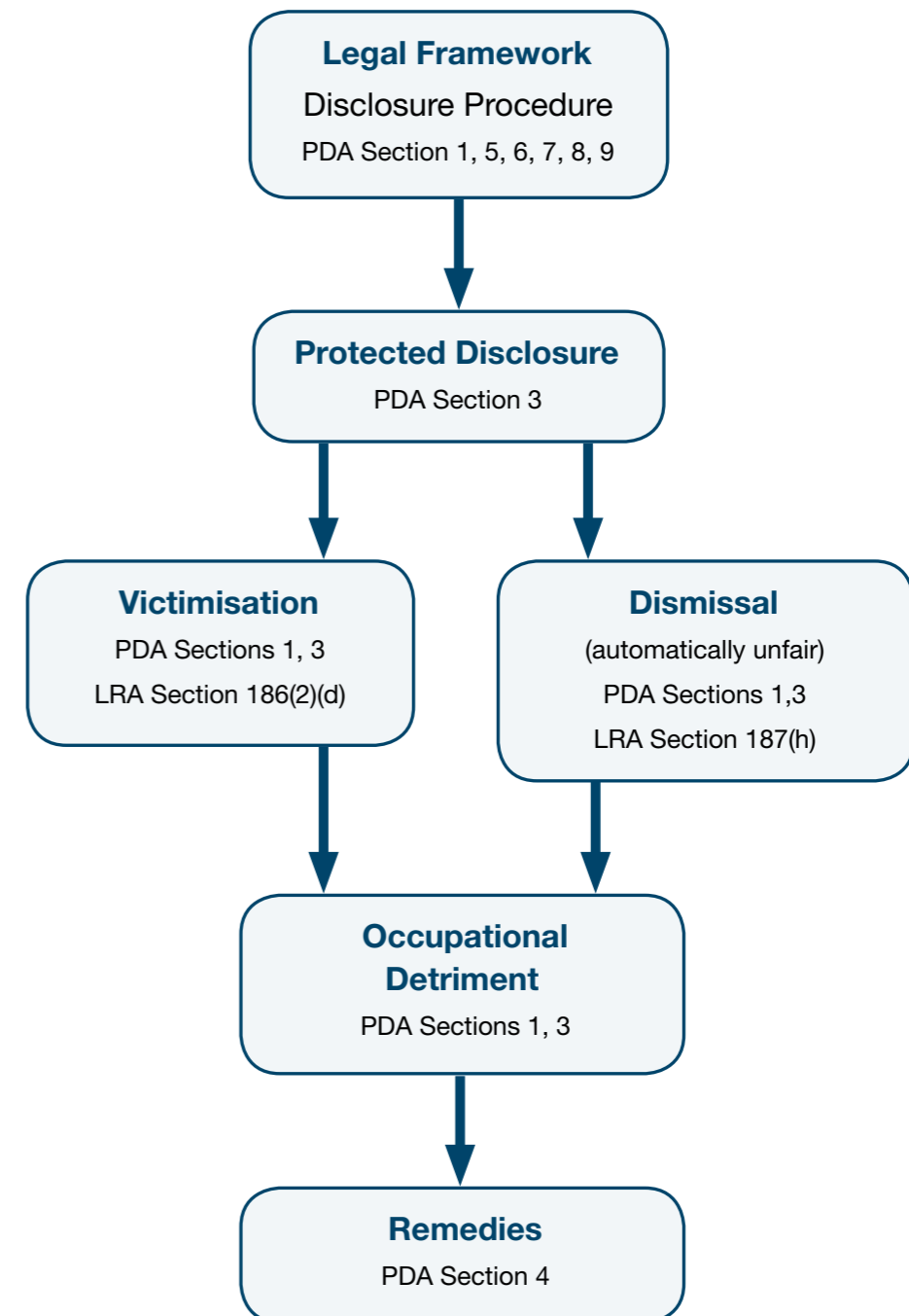
(h) a contravention of the Protected Disclosures Act 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.”

Remedies (Section 4)

Any employee who suffers an occupational detriment may refer a dispute to the CCMA, bargaining councils or any other appropriate court.

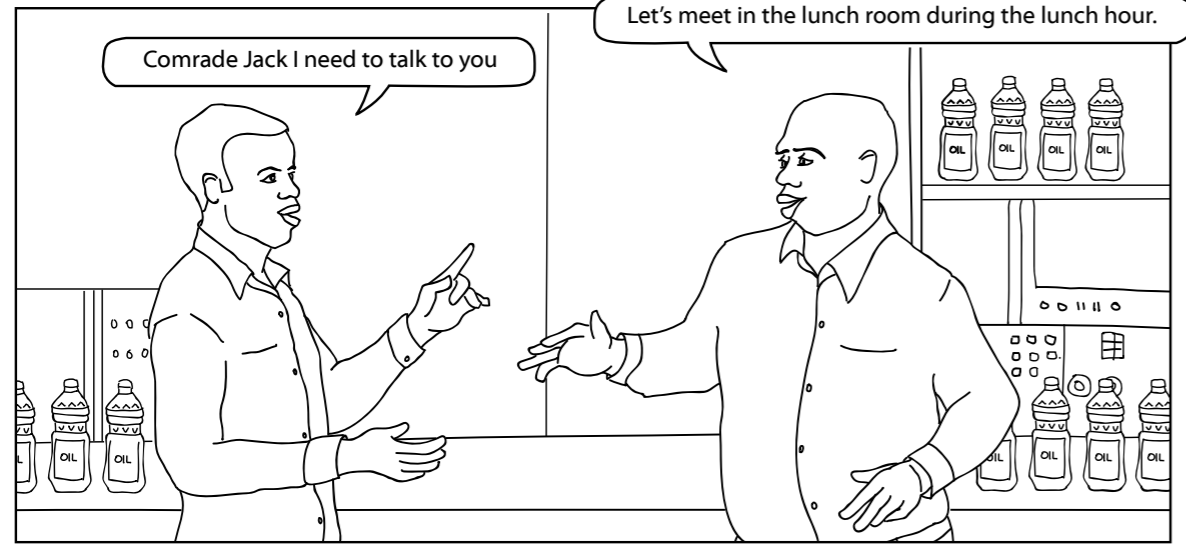
Under Section 191(13)(a) of the LRA “an employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has been subjected to an occupational detriment by the employer in contravention of Section 3 of the PDA for having made a protected disclosure as defined in that Act.

The employee’s anonymity can be maintained. However this may make the wrongdoing harder to investigate and remedy. Union organizers and shop stewards may wish to take up the complaint on an employee’s behalf and raise the issues through their own structures.



How shopstewards can assist their members

Friday :



Comrade Jack I need to talk to you

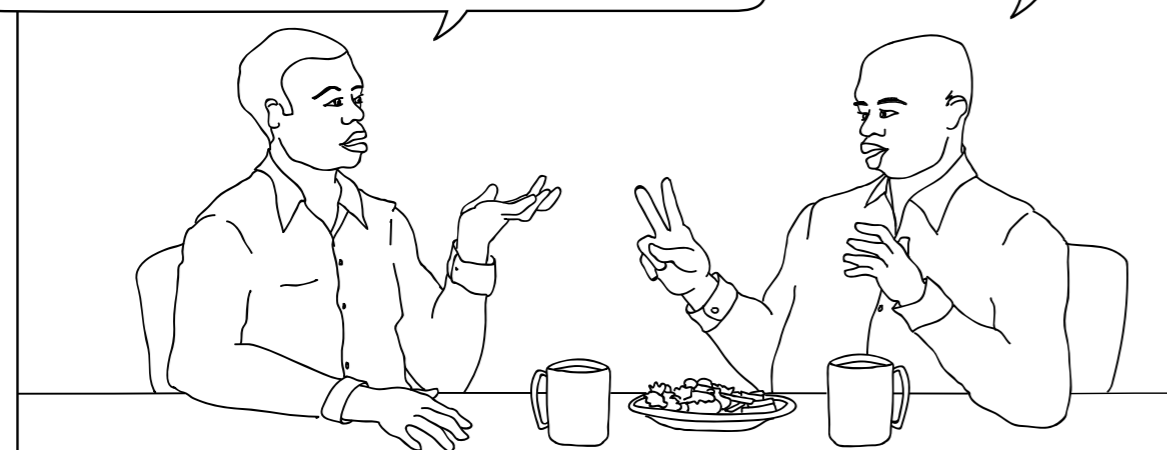
Let's meet in the lunch room during the lunch hour.

Later in the lunch room...

Comrade Jack, Mr. Brown (the manager) has asked me to deliver large quantities of cooking oil to his house. There is no delivery note and no paperwork involved. When I asked him about the paperwork that I am supposed to give to Mercia he says that he will sort it out with Mercia. I spoke to Mercia and she says that Mr Brown has said nothing to her and she does not want to be involved and I must not come to talk to her again. I know Mr. Brown's wife runs a spaza shop. Mr. Brown is my manager, Comrade Jack. What must I do?

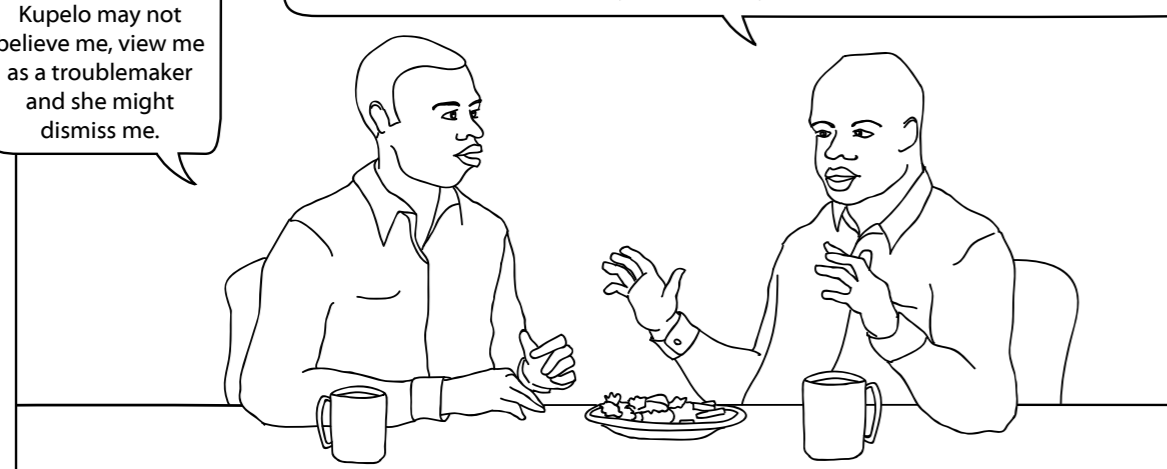
Well, Comrade Vusi you have a few options and you will have to decide what to do:

1. You can keep quiet and just do what Mr. Brown asks you to do
2. You can go and tell Mrs. Kupelo, Mr. Brown's manager.



But Mrs. Kupelo and Mr. Brown are very close. Mrs. Kupelo may not believe me, view me as a troublemaker and she might dismiss me.

If Mrs. Kupelo dismisses you it will be an unfair dismissal because you are protected by the Protected Disclosures Act. But if you don't feel comfortable blowing the whistle to Mrs. Kupelo you can raise your concerns with Mr. Allie, the CEO.



But what if Mr. Allie speaks to Mr. Brown. Mr. Brown will know that I told Mr. Allie. What if I still get dismissed?

We will refer your dismissal as an unfair dismissal to the CCMA because Section 3 of the Protected Disclosures Act (PDA) says that "No employee may be subjected to any occupational detriment by his or her employer on account of having made a protected disclosure" Dismissal or any victimisation will be an occupational detriment. You are blowing the whistle on wrongdoing as defined in Section 1 of the PDA (definition of a disclosure) and you will have raised your concerns with your employer (in terms of section 6 of the PDA), so you will be protected.



I am still uncertain Comrade Jack. I spoke to my wife last night and she says that if I lose my job we will lose our house and car and Talita, my daughter won't be able to go to college next year. This is difficult, Comrade Jack. I don't like what Mr. Brown is doing but I must think about my family.

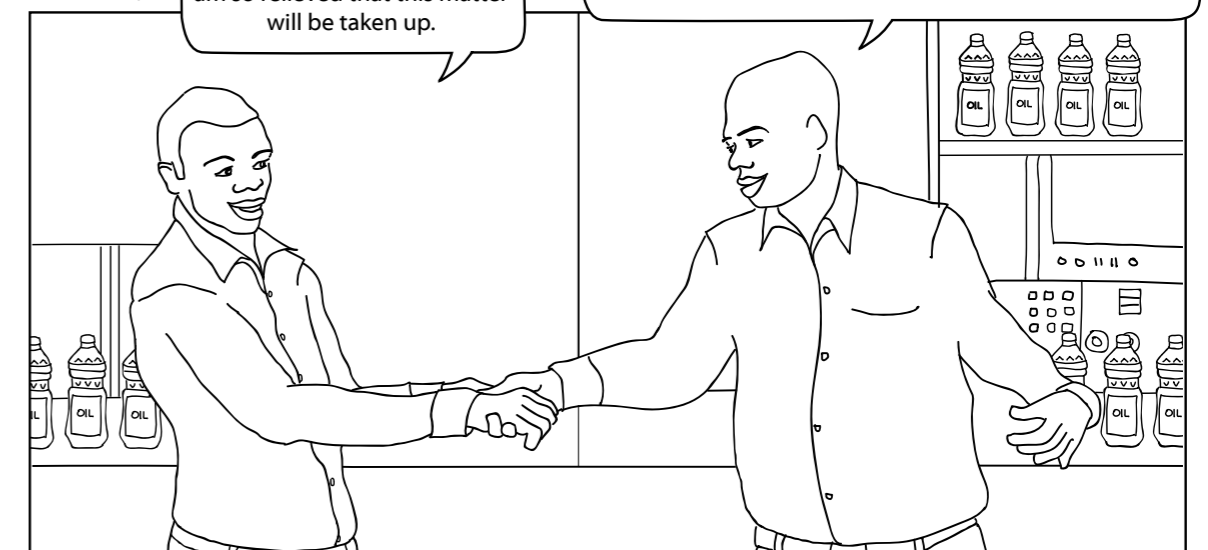
I will talk to the legal department of the union and see if they can assist you. We have a shop-steward's meeting on Wednesday and I will report back to you on Thursday.



Thursday :

Thank you Comrade Jack. I am so relieved that this matter will be taken up.

The legal department of the union has informed me that they will take up the issue with the employer.



Note: The PDA gives the highest protection to a whistleblower who has made a disclosure to a legal advisor (section 5). An employee who raises the issue with the legal department of the union allows the union to raise the issue on the employee's behalf and protects the member through the proper legal channels. It is also good to have the assurance and experience of a qualified legal professional when an employee feels so vulnerable.

STEPS TO FOLLOW

1. Who can make a protected disclosure?

All employees (as defined in the LRA) in the public and private sectors). IF you are an independent contractor, you are not covered by the PDA.

However, the definition is far broader under the new Companies Act section 159(4).

In sub-section 4 of s159, the Companies Act extends the protections of the PDA to

- a registered trade union that represents employees of the company or another representative of the employees of that company
- a supplier of goods or services to a company

2. What can you make a disclosure about? (Section 1)

- A criminal offence
- A failure to comply with a legal obligation
- A miscarriage of justice
- Endangering health or safety
- Environmental damage
- Unfair discrimination
- A deliberate cover up of the above

3. What about confidentiality clauses?

Any provision in a contract of employment or severance agreement is void if it has the effect of discouraging the employee from making a protected disclosure (Section 2)

4. How to make a protected disclosure

The disclosure must be made to one of the following:

- a) A legal advisor (Section 5)
A legal advisor includes the employee's shop steward, union organizer or an attorney
- b) The employer (Section 6)
Concerns raised internally are encouraged but not always possible. They must be done in good faith and to someone more senior than the employee. This person should be someone who can address the wrongdoing.
- c) The Cabinet or Executive Council (Section 7)
A disclosure can be made to these officials if the employer is appointed by the Cabinet or Executive Council of a province
- d) Certain Persons or Regulatory Bodies (Section 8)
Disclosures can be made to the Public Protector or the Auditor General.
The concern does not have to begin with the employer

5. General Protected Disclosures (Section 9)

This refers to wider disclosures e.g. the media, the police, a regulator

This protection applies where the employee honestly and reasonably believes that the information and any allegation contained in it are substantially true and not made for personal gain. (This section must be studied carefully before an employee makes a wider disclosure i.e. made to persons other than mentioned in sections 5, 6 7 and 8)

When can you make a general protected disclosure?

- The concern was not raised internally or with a prescribed regulator because the employee reasonably expected to be victimized or dismissed
- The concern was not raised internally because the employee reasonably believed a cover-up was likely and there was no prescribed regulator
- The concern was raised but no action was taken within a reasonable time
- The concern is exceptionally serious

How do you establish that a general protected disclosure was reasonable? (S9(3))

In determining whether it was reasonable for the employee to make a general protected disclosure the following need to be considered

- To whom it was made
- The seriousness of the concern
- Whether the risk or danger remains
- Whether the disclosure breached a duty of confidence the employer owed a third party
- The public interest

PROTECTION MAY BE LOST IF THE EMPLOYEE FAILED TO COMPLY WITH A WHISTLEBLOWING POLICY THAT THE ORGANISATION HAS AVAILABLE

**The Protected Disclosures Act
Cape Town 2000**



REPUBLIC OF SOUTH AFRICA

GOVERNMENT GAZETTE

STAATSKOERANT

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THE PRESIDENCY

DIE PRESIDENSIE

No. 785.

7 August 2000

No. 785.

7 Augustus 2000

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 26 of 2000: Protected Disclosures Act, 2000.

Hierby word bekend gemaak dat die President sy goedkeuring gegee het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 26 van 2000: Wet op Beskermdede Bekendmakings, 2000.

2 No. 21453

GOVERNMENT GAZETTE, 7 AUGUST 2000

Act No. 26,2000

PROTECTED DISCLOSURES ACT, 2000

*(English text signed by the president.)
(Assented to 1 August 2000.)*

ACT

To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.

PREAMBLE

Recognising that—

- the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
- section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;
- criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage;

And bearing in mind that—

- neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;
- every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;
- every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure;

And in order to—

- create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures;
- promote the eradication of criminal and other irregular conduct in organs of state and private bodies,

BE IT THEREFORE EN-ACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In *this Act*, unless the context otherwise indicates—

- (i) “*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 No. 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;
- (ii) “*employee*” means—
- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
 - (b) any other person who in any manner assists in carrying on or conducting the business of an employer;
- (iii) “*employer*” means any person—
- (a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or
 - (b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer;
- (iv) “*impropriety*” means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of “*disclosure*”, irrespective of whether or not—
- (a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere; or
 - (b) the law applying to the impropriety is that of the Republic of South Africa or of another country;
- (v) “*Minister*” means the Cabinet member responsible for the administration of Justice;
- (vi) “*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;
- (vii) “*organ of state*” means—
- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

- (b) any other functionary or institution when—
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;
- (viii) “*prescribed*” means prescribed by regulation in terms of section 10;
- (ix) “*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;
- (x) “*this Act*” includes any regulation made in terms of section 10.

Objects and application of Act

2. (1) The objects of this Act are—

- (a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
 - (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
 - (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.
- (2) This Act applies to any protected disclosure made after the date on which this section comes into operation, irrespective of whether or not the impropriety concerned has occurred before or after the said date.
- (3) Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it—
- (a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
 - (b) (i) purports to preclude the employee; or
 - (ii) has the effect of discouraging the employee, from making a protected disclosure.

Employee making protected disclosure not to be subjected to occupational detriment

3. No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

Remedies

4. (1) Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may—
- (a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act No. 66 of 1995), for appropriate relief; or
 - (b) pursue any other process allowed or prescribed by any law.
- (2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court—
- (a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter VIII of that Act; and

(b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication. 5

(3) Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state. 10

(4) The terms and conditions of employment of a person transferred in terms of subsection (2) may not, without his or her written consent, be less favorable than the terms and conditions applicable to him or her immediately before his or her transfer.

Protected disclosure to legal adviser 15

5. Any disclosure made—

- (a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and
(b) with the object of and in the course of obtaining legal advice, is a protected disclosure. 20

Protected disclosure to employer

6. (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 25
(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. 30

Protected disclosure to member of Cabinet or Executive Council

7. 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; 35
(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
(c) an organ of state falling within the area of responsibility of the member concerned. 40

Protected disclosure to certain persons or bodies

8. (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 45
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. 5

General protected disclosure

9. (1) Any disclosure made in good faith by an employee— 10

(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— 15

(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; 20

(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; 25

(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, 30

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— 35

(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; 40

(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 45

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 50 taken by any person as a result of the previous disclosure.

Regulations

10. (1) The *Minister* may, after consultation with the Minister for the Public Service and Administration, by notice in the Gazette make regulations regarding—

(a) for the purposes of section 8(1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-General, as the case may be;

(b) any administrative or procedural matter necessary to give effect to the provisions of *this Act*; and

(c) any other matter which is required or permitted by *this Act* to be prescribed.

(2) Any regulation made for the purposes of section 8(1)(c) must specify persons or bodies and the descriptions of matters in respect of which each person or body is prescribed.

(3) Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the *Gazette*.

(4) (a) The *Minister* must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of *this Act* and all procedures which are available in terms of any law to *employees* who wish to report or otherwise remedy an *impropriety*.

(b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the *Gazette*.

(c) All organs of state must give to every *employee* a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every *employee*.

Short title and commencement

11. This Act is called the Protected Disclosures Act, 2000, and commences on a date 25 determined by the President by proclamation in the *Gazette*.

COMPANIES ACT 71 OF 2008**SECTION 159****Protection for whistle-blowers**

159. (1) To the extent that this section creates any right of, or establishes any protection for, an employee, as defined in the Protected Disclosures Act, 2000 (Act No. 26 of 2000)—
- (a) that right or protection is in addition to, and not in substitution for, any right or protection established by that Act; and
 - (b) that Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective whether that Act would otherwise apply to that disclosure.
- (2) Any provision of a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of this section.
- (3) This section applies to any disclosure of information by a person contemplated in subsection (4) if—
- (a) it is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned; and
 - (b) the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, has—
 - (i) contravened this Act, or a law mentioned in Schedule 4;
 - (ii) failed or is failing to comply with any statutory obligation to which the company is subject;
 - (iii) engaged in conduct that has endangered or is likely to endanger the health or safety of any individual, or damage the environment;
 - (iv) unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or
 - (v) contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.
- (4) A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section—
- (a) has qualified privilege in respect of the disclosure; and
 - (b) is immune from any civil, criminal or administrative liability for that disclosure.
- (5) A person contemplated in subsection (4) is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section and, because of that possible or actual disclosure, the second person—
- (a) engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or
 - (b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and—
 - (i) intends the first person to fear that the threat will be carried out; or
 - (ii) is reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually feared that the threat would be carried out.
- (6) Any conduct or threat contemplated in subsection (5) is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.
- (7) A public company and state-owned company must directly or indirectly—
- (a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and
 - (b) routinely publicise the availability of that system to the categories of persons contemplated in subsection (4).

KEY CONTACTS

Corruption Watch

Corruption Watch provides a platform for reporting corruption. Anyone can safely share what they experience and observe and can speak out against corruption. They investigate selected reports of alleged acts of corruption, choosing cases that have the most serious impact on our society. They hand over their findings to the authorities to take further action and they monitor the progress of each case.

Tel: (011) 447-1472

Email: info@corruptionwatch.org.za

www.corruptionwatch.org.za

Public Protector

The Public Protector's office investigates improper conduct in the public administration e.g. abuse of power, dishonesty, unfair conduct, improper enrichment using public money.

Tel: (012) 322-2916

Fax: (012) 322-5093

Public Service Commission Hotline

The Public Service Commission has an anti-corruption hotline which deals with wrongdoing in the public service.

Tel: (012) 328-7690

Hotline: 0800 701 701

Auditor General

Tel: (012) 426-8000

Fax: (012) 426-8257

CCMA (Commission for Conciliation Mediation and Arbitration)

National Office

Tel: (011) 377-6650

Fax: (011) 834-7351

Eastern Cape

(East London):

Tel: (043) 743-0826

Fax: (043) 743-0810

(Port Elizabeth):

Tel: (041) 505-4300

Fax: (041) 586-4585

Free State (Bloemfontein)

Tel: (051) 505-4400

Fax: (051) 448-4468

Gauteng (Johannesburg)

Tel: (011) 220-5000

Fax: (011) 220-5101/02/03

Gauteng (Pretoria)

Tel: (012) 392-9700

Fax: (012) 392-9701

Kwazulu Natal (Durban)

Tel: (031) 362-2300

Fax: (031) 368-7387

Kwazulu Natal (Pietermaritzburg)

Tel: (033) 345-9249

Fax: (033) 345-9790

Kwazulu Natal (Richards Bay)

Tel: (035) 789-0357

Fax: (035) 789-7148

Limpopo (Polokwane)

Tel: (015) 297-5010

Fax: (015) 297-1549

Mpumalanga (Witbank)

Tel: (013) 656-2800

Fax: (013) 656-2885

Northern Cape (Kimberly)

Tel: (053) 831-6780

Fax: (053) 831-5947

North West (Klerksdorp)

Tel: (018) 464-0700

Fax: (018) 462-4126

North West (Rustenburg)

Tel: (014) 597-0890

Fax: (014) 592-5236

Western Cape (Cape Town)

Tel: (021) 469-0111

Fax: (021) 465-7193

Western Cape (George)

Tel: (044) 873-2895

Fax: (044) 873-2906

Labour Courts

Johannesburg

Tel: (011) 359-5700

Fax: (011) 403-9325

Port Elizabeth

Tel: (041) 586-4923

Fax: (041) 585-9860

Cape Town

Tel: (021) 424-9035

Fax: (021) 424-9059

Durban

Tel: (031) 301-0104

Fax: (031) 301-0145

COSATU Today | COSATU Press Statements

SAMWU reveals documented proof of corruption in Limpopo

SAMWU PRESS STATEMENT

25 January 2011

The largest Local Government Union SAMWU is willing to reveal documented proof of grave corruption in Thabazimbi local Municipality in Limpopo. In the Unions ongoing investigations into corrupt activities in the Municipality, we have uncovered grave corruption in the form of fraudulent qualifications and the squandering of rate payers monies, amounting to millions of Rands.

Attached we have included a copy of a fraudulent qualification that was revealed during the Unions investigations of Thabazimbi. The attached is only one example of the evidence the Union has in its possession. Please take note, for legal reasons; we have blacked out the actual name and ID number of the person involved.

SAMWU is willing to make available the evidence of the fraudulent qualifications from the investigation to all interested parties, we urge the media to take these leads and investigate the corruption in the Limpopo based Municipality. We are also calling upon the South African Police Services to launch a full investigation into the fraudulent dealings of the Municipality.

In demonstrating our commitment to root out corrupt activities in Municipalities, we have been investigating Thabazimbi as of last year and found that some employees Matric certificates have been fraudulent and many other qualifications have been fraudulently altered.

As of today, every week we will release new evidence of fraudulent tenders in Thabazimbi, that were awarded to friends and family. This documented proof is already in the Unions possession.

The nature of the corrupt activities is so serious that the Unions Local Secretary has received death threats yesterday, for whistle blowing in terms of COSATU's resolution to fight corruption.

The Union has been calling for qualification audits throughout the Limpopo based Municipality for more than a year now, we want the politicians in Limpopo who are involved in appointing personnel who are not qualified and are not competent, to immediately cease flouting procedures for their own personal gain.

The Unions repeated calls to the management of Thabazimbi to root out corrupt activities has been falling on deaf ears. We are quickly running out of options in dealing with this Municipality.

For further comment contact SAMWU's Provincial Chairperson in Limpopo Manthata Mamaile on 0739413595.

Issued by:

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Corruption Watch queries R13m tender

June 21 2012 at 01:54pm

By SAPA

A Corruption Watch probe has found irregularities in a R13 million tender awarded by the department of transport (DOT), the civil society organisation said on Thursday.

The department had awarded a tender to a company which had not fulfilled all the necessary requirements, and overpaid for services by R10 million, it said in a statement.

Global Interface Consultancy won a tender to manage conference and communication services for the department of transport's international investor conference in June last year.

It had submitted a bid for R13.5 million.

Losing bidder Indigo Design and Event Marketing bid R3.837 million – about one-quarter of the winning bid.

Indigo Design, a BEE-accredited company, lodged complaints with the department, the Public Protector, and Corruption Watch (CW).

"CW's further investigation into the DOT tender award revealed gross irregularities in the tender process," Corruption Watch said.

Corruption Watch had handed over its findings, as well as two cases involving irregular public tenders, to the Public Protector for further investigation.

It was in the process of formalising a working relationship with the Protector.

"We will closely monitor the cases that we hand over to the Public Protector and we will assist her office with further evidence and information gathered from the public," said executive director David Lewis.

"It should be stressed that this case and each of the serious acts of corruption that we are investigating were reported by alert members of the public."

Comment from the department could not be immediately obtained. – Sapa

CASE STUDIES

BAGARETTE & OTHERS v PERFORMING ARTS CENTRE OF THE FREE STATE & OTHERS (2008) 29 ILJ 2907 (LC)

Facts

The three applicants, who were the CEO, the chief financial officer (CFO) and the HR officer of the Performing Arts Council of the OFS (“PACOFs”) were suspended and called to a disciplinary enquiry. The charges against them related to alleged financial improprieties which had been revealed by an audit conducted by a forensic investigation firm known as JGL. The applicants referred three disputes to the CCMA: unfair suspension, discrimination or victimization, and occupational detriment arising from a protected disclosure. These disputes were unresolved at conciliation, and the CCMA issued certificates of non-resolution. The discrimination and protected disclosure disputes had been referred to the Labour Court.

The present application was an urgent application for an interdict. The applicants asked the Labour Court to uplift their suspension and to restrain PACOFs from proceeding with disciplinary action against them. They also asked the court to set aside the appointment of JGL, and to find that the chairperson had made racist remarks which constituted an occupational detriment.

The background to the matter was that, during 2005, various allegations of mismanagement, financial impropriety and nepotism were made by members of the public and others against PACOFs. The three applicants were implicated in these allegations. Ernst and Young were appointed to do an internal audit, but their report was considered inadequate by the chairperson of PACOFs’ Board, who accordingly appointed JGL to perform a forensic investigation. As the chairperson did not follow procedure when taking this decision, the CFO disclosed to the Auditor General that the decision to appoint JGL was irregular and contravened the Public Finance Management Act (PFMA). This disclosure was made in September 2006. The Board subsequently ratified the decision to appoint JGL.

In April 2007, after receiving JGL’s first report, the chairperson suspended the three applicants and charged them with disciplinary offences.

Findings

the application to set aside the appointment of JGL

The court held that it lacked jurisdiction to set aside the appointment of JGL, because this was not a decision taken by the state in its capacity as employer. Even if JGL’s appointment had indeed contravened the Public Finance Management Act, this was not a matter falling within the jurisdiction of the Labour Court.

the allegation of discrimination

The court held further that the allegations of racism and discrimination could not be resolved on the papers. In any event, these allegations had already been referred to the Labour Court. Likewise, the disputed suspensions were now ripe for a hearing before the CCMA. In respect of these two matters, therefore, the applicants had an adequate alternative remedy.

the application to interdict PACOFs from proceeding with the disciplinary enquiry

The court then turned to the application for an interdict restraining PACOFs from proceeding with the disciplinary enquiry. The court considered whether the disciplinary charges against the applicants were as a result of them having made a protected disclosure. The court held that the

alleged protected disclosure (that the appointment of JGL was irregular) was made some seven months before applicants were suspended and charged.

Moreover, the suspension and charges were as a direct result of JGL’s forensic report.

The applicants had failed to show a link between the disclosure and the occupational detriment, and had therefore failed to show a *prima facie* right to the relief sought.

The court remarked that there is seldom good reason to interfere with disciplinary proceedings. It held that the applicants had an adequate alternative remedy, in that they could raise their defence at the disciplinary hearing. Applicants would not suffer irreparable harm, because the hearing would be chaired by an independent advocate and because applicants were permitted to have legal representation.

Outcome

The application for an interdict was dismissed.

WHAT THIS CASE TEACHES:

THERE MUST BE A LINK BETWEEN THE DISCLOSURE AND THE OCCUPATIONAL DETRIMENT IF ONE WANTS TO USE THE PDA AS A DEFENCE IN AN UNFAIR LABOUR PRACTICE OR UNFAIR DISMISSAL CASE.

CITY OF TSHWANE METROPOLITAN MUNICIPALITY v ENGINEERING COUNCIL OF SOUTH AFRICAN AND ANOTHER (532/08) [2009] ZACSA 151 (27 November 2009)

Facts

Mr Weyers, a professional electrical engineer, was employed by the Tshwane Municipality as managing engineer: Power System Control. His responsibility was to ensure that systems were correctly configured, so as to provide continuous and safe electrical supply to consumers in the municipality.

The municipality was chronically understaffed and new appointments had to be made. The work is difficult and dangerous, and mistakes pose a serious risk both to employees and to the public. Weyers devised a written test for candidates for the positions, but most applicants scored below 40%. In the end Weyers proposed appointing those who scored highest; these were white males. The municipality’s employment equity plan, however, required the employment of black people.

There followed a lengthy process around the appointments. Weyers was eventually removed from the recruitment process and was informed that no whites would be considered for positions. Weyers was genuinely concerned that safety standards and service delivery would be compromised if unqualified applicants were appointed, and he told the municipality that ‘these positions I would like to fill are critical to the Service Delivery of Tshwane Electricity, and while they are not filled with competent personnel we are sacrificing Batho Pele.’”

Weyers consulted his professional body, the Engineering Council, which told him that he was obliged to report to the Council any attempt to force him to make such appointments.

Weyers then wrote a letter to the Municipal Manager, copied to the Department of Labour and to the Engineering Council, expressing his concern over the imminent appointment of unqualified personnel, distancing himself from such appointments, and asking to be relieved of his section 2(7) appointment in terms of the Occupational Health and Safety Act (OHSA).

Weyers was suspended and disciplined for copying his letter to outside bodies without authorization. The Pretoria High Court interdicted the employer from imposing any disciplinary sanction, and the Tshwane Municipality appealed to the SCA against that order.

The issues before the SCA were:

- Whether the High Courts had jurisdiction over the matter, as Tshwane Municipality contended that it was a matter for the Labour Courts.
- Whether the court below was correct to hold that the distribution of Weyers' letter to the Engineering Council and the Department of Labour was protected under either the PDA, the OHSA or the Engineering Profession Act.

Jurisdictional challenge

The City of Tshwane argued that only the Labour courts had jurisdiction over the matter, but the SCA rejected this argument because section 4 of the PDA clearly provides that an employee may approach 'any court having jurisdiction'.¹ Accordingly, the High Court had jurisdiction. The SCA also rejected an argument that the matter was a "quintessential labour-related issue":² although the matter arose in the context of employment, it concerned questions of public safety, the obligations of professionals, and the accountability of the municipality for proper service delivery. The court also said that many of the issues which arise in relation to protected disclosures (such as whether an employee has 'reasonable grounds' to believe that an offence has been committed) are better dealt with in the ordinary courts than in the labour courts.

Whether Weyers' actions were protected

The court considered only the PDA in its findings. After stating that the purpose of the PDA is to protect employee who disclose unlawful or irregular conduct by their employers or other employees, the court turned to consider whether Weyers' letter was a 'disclosure' and if so whether it was 'protected'.

Did the letter constitute a 'disclosure'?

This question was considered with reference to section 2 of the PDA.

The City argued that the letter did not contain 'information', but only Weyers' *opinion* that unsuitable candidates were about to be appointed. The SCA held however that a person's opinion is a fact, and also that a narrow interpretation of 'information' would engender a culture of silence, in contrast to the constitutional values of transparent and accountable governance. An honestly held opinion qualifies as information.

Was the disclosure protected?

This question was answered with reference to section 9 of the PDA.

It was common cause that Weyers acted in good faith and that he reasonably believed the information disclosed to be true. It was manifest that Weyers acted not from self interest, but from a genuine concern about safety standards and service delivery.

¹ ECSA had argued that section 4(2) specifically refers to LRA rights and remedies; accordingly the intention was for the Labour courts to have exclusive jurisdiction except in respect of those employees who are excluded from the application of the LRA. The SCA held that the structure of the section makes it clear that employees may approach any court, and that the Labour Court is then included.

² A phrase taken from *Gcaba v Minister for Safety and Security and others* [2009] 12 BLLR 1145 (CC) at para 66.

The City however argued that Weyers did not previously disclose the information to his employer as required by section 9(2)(c), because the City was at all times aware of his view in any event. The SCA rejected this argument: it would undermine the purpose of the PDA if employees were denied protection when the employer already knew about the wrongdoing. The City's argument that a 'disagreement' did not amount to a 'disclosure' was also rejected. In any event, it was an impropriety of a serious nature to appoint people who lacked the skill to do the job safely.

Finding

The court found that Weyers had communicated his concerns to the City but that it had disregarded them. Weyers' disclosure to the Engineering Council and the Department of Labour was therefore protected and the decision of the High Court to interdict the employer from imposing any disciplinary sanction on Weyers was upheld.

WHAT THIS CASE TEACHES:

NOT ONLY THE LABOUR COURT BUT ALSO THE HIGH COURT HAS JURISDICTION IN PDA MATTERS

AN HONESTLY HELD OPINION QUALIFIES AS INFORMATION

IF THE EMPLOYER KNOWS ABOUT THE WRONGDOING IT SERVES NO PURPOSE TO DISCLOSE TO THE EMPLOYER – YOU CAN MAKE A WIDER DISCLOSURE (section 9 of the PDA)

GLOBAL TECHNOLOGY BUSINESS INTELLIGENCE (PTY) LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2005) 26 ILJ 472 (LC)

This was a review application against a CCMA jurisdictional ruling.

Facts

At the CCMA, applicant alleged that he had been dismissed in part for seeking legal advice after being counselled by his employer for poor performance. The employer had then argued that the CCMA lacked jurisdiction, since this was an allegation of an automatically unfair dismissal because of a protected disclosure.

The CCMA held that it was an ordinary dismissal for misconduct or poor work performance, and that the CCMA had jurisdiction. The Commissioner noted that the objective of the Protected Disclosures Act was to protect a E aa aawhistle-blower from retaliatory action by an employer. The employer's argument that the employee's referral amounted to an allegation of an automatically unfair dismissal based on a protected disclosure simply represented the employer's view of the dispute.

The issue before the court

The court had to decide whether to overturn the CCMA Commissioner's jurisdictional ruling.

Finding

The court held that it is the employee who determines the nature of the dispute referred to the CCMA. There was accordingly no reason to overturn the Commissioner's ruling. The application was dismissed.

WHAT THIS CASE TEACHES:

THE EMPLOYEE DECIDES WHAT THE NATURE OF THE DISPUTE IS (I.E. HOW TO REFER A DISPUTE).

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT & ANOTHER v TSHISHONGA (LAC) Case number 6/2007

In this case the Department of Justice appealed against the amount of compensation awarded to Tshishonga by the Labour Court.

The Department said that the award of the maximum permissible amount of 12 months remuneration was excessive.

Findings

Davis JA found that the court *a quo* erred in its interpretation of section 194 of the LRA. The award should not have been made with reference to Tshishonga's remuneration: his remuneration was merely a reference point for calculating the amount at which the award could be capped. The amount of compensation had rather to be determined with reference to the legal principles applicable to cases of defamation.

Tshishonga was entitled to compensation for his patrimonial (financial) loss of R177 000 in legal fees incurred to defend him at the disciplinary enquiry. He was also entitled to compensation for his non-patrimonial losses for defamation. Citing the SCA decision in *Mogale v Seima*,³ the court found that the factors to be considered in determining damages include:

- The seriousness of the defamation
- The nature and extent of the publication
- Reputation
- Motives and conduct of the defendants.

Davis JA found that Tshishonga had been humiliated on national television by the Minister of Justice, and that this unfair conduct was compounded by the fact that the Department of Justice had a heightened responsibility to be seen to be upholding the spirit of the PDA, being to 'promote the constitutional values of accountability and transparency in the public administration of this country'.

³ 2008 (5) SA 637 (SCA)

Davis JA also noted however that the courts have not been generous in their awards for non patrimonial loss. Nevertheless a 'significant' award was justified. The actual amount to be awarded is discretionary; there is no tariff. The amount should be more than the R12 000 awarded in the Mogale case.

In the court's opinion, an award of R100 000 for non patrimonial loss was justified.

Outcome

The court therefore awarded Tshishonga a total amount of 277 000, being 177 000 for costs incurred in his defence and 100 000 for the defamation.

WHAT THIS CASE TEACHES:

COURTS CAN AWARD BOTH FINANCIAL AND NON FINANCIAL LOSS

NGOBENI v REDDING NO & ANOTHER (2009) 30 ILJ 365 (LC)

In this case, the Labour Court refused to review a decision taken by a private arbitrator refusing to extend the terms of reference in the arbitration agreement to include a claim under the PDA.

Facts

Ngobeni, a medical manager, was dismissed after he was found guilty of circulating an allegedly offensive email to employees of the company worldwide. Ngobeni and his employer entered into a private arbitration agreement. The dismissal was at this stage characterized as an ordinary misconduct dismissal. Ngobeni sought reinstatement, two months backpay, and R1 million *solatium for contumelia*.⁴

After the private arbitration had commenced, but before the cross examination of the employer's first witness, Ngobeni for the first time raised the argument that his dismissal had been in consequence of a protected disclosure.

The arbitrator, however, ruled that his terms of reference did not include the determination of an automatically unfair dismissal arising out of a breach of the PDA.

Ngobeni asked the Labour Court to review and set aside this finding. He sought an order declaring that the arbitrator's ruling did not preclude him from referring an automatically unfair dismissal dispute to the CCMA. Alternatively, he sought an order permitting him to resile from the private arbitration agreement, so that he could pursue an automatically unfair dismissal claim at the CCMA.

Ngobeni's application to the Labour Court was filed out of time and he applied for condonation.

Findings

The court held, firstly, that it could not grant condonation of late filing of Ngobeni's application. No good reason for lateness had been advanced, and the applicant had no prospects of success.

⁴ Compensation for injured feelings

Secondly, the court held that there were no reviewable defects in the conduct of the private arbitration. Even if an arbitrator makes mistakes of fact or law, these do not render a decision reviewable unless the arbitrator was actually dishonest.

Thirdly, the court held that it was not open to Ngobeni to seek to enlarge the grounds of substantive unfairness to rely on the PDA, after the private arbitration hearing had already commenced.

Finally, the court held that it was open to Ngobeni to launch proceedings under the PDA in an 'appropriate forum' and that a declarator to this effect was unnecessary.

Outcome

The application was dismissed with costs.

WHAT THIS CASE TEACHES:

THE TERMS OF REFERENCE CANNOT BE CHANGED ONCE PROCEEDINGS START.

RADEBE AND ANOTHER v MEC, FREE STATE PROVINCE DEPARTMENT OF EDUCATION [2007] JOL 19112 (O) (High Court)

Facts

The applicants were employed by the Free State Department of Education (FSDOE). At the end of 2005 they produced a document containing allegations of fraud, corruption and nepotism on the part of the Free State MEC for Education ("the MEC"). They sent this document to national figures (the President and the National Minister of Education) and provincial figures (including the Premier, the MEC and the Superintendent General of Education) with the intention that their allegations should be investigated.

The MEC warned the applicants that she regarded their allegations as baseless, defamatory and designed to disrupt the functioning of her department and that she would take legal action if they didn't stop. Applicants replied that they intended to continue. They were then called to a disciplinary enquiry to answer a variety of charges including a main charge of *crimen injuria*.

The applicants then applied to the High Court for an interdict restraining FSDOE from proceeding with the disciplinary enquiry, pending referral of an unfair labour practice dispute to the Education Labour Relations Council.

The issues before the court

Who is the employer?

The national Minister of Education was joined in the proceedings because there was some dispute as to who was the employer. Section 1 of the PDA only covers disclosures made against the employer. Applicants argued that the MEC and the National Minister of Education were co-employers. The court assumed in favour of this contention without making a finding on it.

Does the information constitute a disclosure?

The court held in favour of the applicants, without deciding the issue, that they may have reasonably believed that the information showed some impropriety on the part of the MEC and some of her employees.

Does the information disclosed meet the criteria for protection?

The information was disclosed to parties who were not the employer. Therefore the criteria to be satisfied are those in Section 9 of the PDA. The purpose of these more stringent criteria is to strike a balance between encouraging employees to expose wrongdoing in the workplace, whilst protecting the reputations of others in the event that the allegations are false.⁵

In this case, the respondents did not produce alternative facts to those produced by the applicants. They simply contended that the allegations were baseless and false and did not disclose any wrongdoing on their part.

In order to be protected under Section 9, the disclosures must first be made:

- in good faith, and
- in the reasonable belief that its contents were substantially true.

The court found that the disclosures contained:

- speculation, in that facts are cited which are susceptible to entirely innocent motives and improper motives are attributed without any evidence of those motives;
- suspicion, rumour and conjecture, in that facts are cited and investigations requested without any evidence of wrongdoing
- only one single instance in which, *prima facie*, the requirements of s 9 of the Act may have been met.

The court found that the presence of a single possible such instance amongst a large number of instances which did not qualify for protection, tilted the balance of convenience against the granting of interim relief, especially as the applicants:

- were able to raise the instance in the pending disciplinary hearing;
- were only then, 3 months after the dispute arose, proposing to refer it to the Education Labour Relations Council.

The court therefore found that the applicants 'cannot be supposed to have acted in good faith when no basis existed for the allegations therein, nor could they reasonably have believed the information to be substantially true'.⁶ It was also not reasonable for the applicants to make such serious allegations without making any attempt to verify the information.

Finding

As there had been no protected disclosure, there was no basis on which to interdict the employer from proceeding with the disciplinary proceedings.

Outcome

The application was dismissed with costs.

⁵ Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 ILJ 1670 (LC) at 16781-J

⁶ At para 30.

WHAT THIS CASE TEACHES:

THE HIGHEST PROTECTION IS WHEN AN EMPLOYEE MAKES A DISCLOSURE TO AN EMPLOYER. MAKE SURE THAT YOU KNOW WHO YOUR EMPLOYER IS (ESPECIALLY IF YOU ARE EMPLOYED BY A STATE INSTITUTION).

SPECULATION, SUSPICION AND RUMOUR WILL NOT CONSTITUTE A DISCLOSURE FOR A SECTION 9 DISCLOSURE. THE DISCLOSURE NEEDS TO BE SUBSTANTIALLY TRUE.

RADEBE & ANOTHER v MASHOFF, PREMIER OF THE FREE STATE PROVINCE & OTHERS (2009) 18 LC 10.10.1

Facts

The applicants were employed by the Free State Department of Education (FSDOE). At the end of 2005 they produced a document containing allegations of fraud, corruption and nepotism on the part of the Free State MEC for Education ('the MEC'). They sent this document to national figures (the President and the National Minister of Education) and provincial figures (including the Premier, the MEC and the Superintendent General of Education) with the intention that their allegations should be investigated.

On the instruction of the national Minister of Education, the FSDOE investigated the allegations. The applicants refused to cooperate with the investigating team on the basis that the State Attorney had already issued a letter dismissing the allegations and that they sought an independent investigation, not one conducted by the FSDOE.

In the absence of cooperation from the applicants, the team issued a report which described the applicants' allegations as 'baseless and unfounded and malicious'. The report recommended disciplinary measures against the applicants.

The applicants were charged with *crimen injuria*, alternatively that in publishing or communicating defamatory statements they contravened the Employment Educators Act 76 of 1998.

Applicants launched an application in the High Court seeking to interdict the disciplinary enquiry on the basis that they were protected by the PDA. That application was dismissed.

The applicants refused to participate in the disciplinary hearing, because they regarded themselves as whistle blowers. The enquiry proceeded without them. Both applicants were found guilty of contravening the Employment Educators Act, and they were demoted to the next lower rank.

Applicants appealed unsuccessfully, and then referred an unfair labour practice dispute to the Education Labour Relations Council. When this dispute could not be resolved it was referred to the Labour Court.

The issues before the court

The court considered whether the applicants had made a disclosure as defined in s1 of the PDA and, if so, whether or not it was protected. Even though the court ultimately found that the applicants had not made protected disclosures, the court commented on the interpretation and application of many of the provisions in the PDA.

The court first remarked that for a disclosure to be a disclosure in terms of the PDA it must have all of the following elements:

- 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 improprieties listed in s1(a) – (g)

disclosure of information

The court held that 'information' consists of facts; it does not include 'questioning certain decisions and/or processes of an employer'.

In *Tshishonga v Minister of Justice and Constitutional Development*⁷ the court stated that 'information includes, but is not limited to, facts' and that information would 'include such inferences and opinions based on facts which show that suspicion is reasonable and sufficient to warrant an investigation.'

disclosure about an employer

Section 3 of the Employment of Educators Act 76 of 1998 (EEA) clarifies that first applicant's employer is the head of the FSDOE who is the Superintendent-General, and the second applicant's employer is Thabong Primary School; therefore the MEC and the Minister are not employers for the purposes of the PDA.

In this case, the court held that because the complaint was about the MEC, who was not the employer, complaints about her conduct could not amount to disclosure in terms of the PDA.

Where s1(b) of the PDA says '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 word 'person' should be given a limited meaning, referring only to the employer of the discloser, or to another employee of that employer.

'reason to believe'

The following definition of 'reason to believe' should be followed:

'the reason to believe must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice'⁸

information that 'shows or tends to show'

Information must be 'carefully documented and supported'.⁹ Opinions, speculations, uninformed questions and baseless and unsupported allegations do not constitute information 'upon which a reason to believe can be formed' and are therefore not disclosures in terms of the PDA.

The information concerned has to show or tend to show an impropriety. 'Show or tend to show' has been found to mean 'something less than a probability'.¹⁰

'bona fide'

The court further considered whether the disclosure was bona fide and held that applicants' refusal to co-operate with the investigation, as well as their failure to attach supporting documents to their 'disclosure document', indicated that it was not.

⁷ 2007 (4) SA 135 (LC)

⁸ *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W)

⁹ *Greve v Denel (Pty) Ltd* 2003 (4) BLLR 366 (LC); *CWU and Another v Mobile Telephone Networks (Pty) Ltd* 2003 (8) BLLR 741 (LC).

¹⁰ In *Tshishonga*, supra n 1

the employer's investigation of the allegations

The court held that it was not open to the applicants to refuse to participate in the investigation, rendering it not a proper investigation, and then complain that the employer did not properly investigate their allegations.

application of sections 6, 7 and 9

Any disclosure not made to the employer of the employee disclosing the impropriety does not receive protection under Section 6. In this case many of the recipients, including the President, the National Minister, the Premier of the Free State, the MEC of the Free State, the DDG of Education and the DD of the Lejweleputswa Education District, were not the employers of the applicants.

Section 7, in this case, would include the President of the Republic, the Minister of Education, the Premier and the MEC, subject to whether the disclosures were made in good faith.

Section 9 applies, in this case, to the DDG and DD since they are not the employer nor do they act on behalf of the employer. Again this is subject to any disclosure having been made in good faith.

Finding

The Court held that the applicants' disclosures were not protected disclosures for the purposes of the Act. They were not made bona fide, nor were they shown to be substantially true.

Moreover, the conduct complained of was that of the MEC, who is not employer; there was no complaint about the Superintendent-General (who is the employer of the first applicant) or Thabong Primary School (who is the employer of the second applicant).

Outcome

The application was dismissed, each party to pay its own costs.

WHAT THIS CASE TEACHES:

THAT INFORMATION CONSISTS OF FACTS. IT DOES NOT INCLUDE QUESTIONING CERTAIN DECISIONS AND/OR PROCESSES OF AN EMPLOYER.

IF YOU ARE EMPLOYED BY A GOVERNMENT DEPARTMENT YOU MUST MAKE SURE WHO YOUR EMPLOYER IS WHEN CONSIDERING WHO TO MAKE THE DISCLOSURE TO AND ABOUT WHOM YOU ARE DISCLOSING INFORMATION ABOUT.

WHEN THE PDA IN SECTION 9 TALKS ABOUT EMPLOYEE REASONABLY BELIEVING ...THIS BELIEF MUST BE BACKED BY FACTS GIVING RISE TO SUCH A BELIEF. A BELIEF BASED ON HEARSAY EVIDENCE OR NOT BACKED BY FACTS WON'T BE PROTECTED.

OPINIONS, SPECULATIONS, UNINFORMED QUESTIONS AND UNSUPPORTED ALLEGATIONS DO NOT CONSTITUTE INFORMATION AND ARE NOT DISCLOSURES UNDER THE PDA.