IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 36/2018

In the matter between:

THE NATIONAL INSTITUTE FOR THE

HUMANITIES AND SOCIAL SCIENCES (NIHSS) **Appellant**

and

KIBITI LEPHOTO **First Respondent**

THE MINISTER FOR HIGHER EDUCATION

AND TRAINING **Second Respondent**

Heard: **15 August 2019**

Delivered: **12 September 2019**

Coram: Davis and Coppin JJA and Kathree-Setiloane AJA

JUDGMENT

DAVIS JA

Introduction

[1] This case involves the Protected Disclosures Act 26 of 2000 ('the PDA'). The preamble to the Act sets out its purpose to:

- create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the work-place 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.

[2] In a constitutional state committed to the principles of transparency and accountability, those exercising power, whether private or public, must be subject to adequate scrutiny. In this context, the PDA fulfils an important objective in the vindication of these commitments. There is, however, a danger that the Act will be abused in order to justify wrongful conduct or malperformance by a disgruntled employee, who seeks to fend off consequential disciplinary action taken against him or her by way of recourse to the Act. This is such a case.

The background

[3] The appellant was established in terms of Regulation 2 of the Regulations for the Establishment of a National Institute for the Humanities and Social Sciences. The relevant regulations were published in terms of s 69 read with ss 38 A, 38 B and 38 C of the Higher Education Act 101 of 1997 as amended. On 5 January 2015, the respondent was appointed as Chief Financial Officer ('CFO') of appellant. His written contract of employment made it clear that he was to report to the CEO and that his appointment was for a fixed period of five years and subject to a twelve-month probationary period. Appellant did not confirm respondent's employment contract at the end of the probationary period and consequently dismissed him after notice had been given to him.

[4] Respondent challenged the fairness of this dismissal before the court *a quo*. In essence, respondent alleged that his dismissal was triggered by a protected disclosure as contemplated in the PDA; that is the decision to terminate his

employment constituted an occupational detriment as defined in s 1 of the PDA and was consequently automatically unfair in terms of s 197 (1) (h) of the Labour Relations Act 66 of 1995 ('LRA'). Respondent claimed reinstatement to his position as CFO, alternatively compensation, being the equivalent of twenty-four months' remuneration.

[5] On 22 November 2017, sitting in the court *a quo,* Mamosebo AJ upheld respondent's claim and ordered as follows:

> '1. The dismissal of the applicant [Mr Lephoto] was both procedurally and substantially unfair.
>
> 2. The applicant [Mr Lephoto] is re-instated with effect from 4 January 2016 being the date of his dismissal.
>
> 3. The first respondent, the National Institute Humanities and Social Sciences, is order to pay the applicant 12 months' compensation, an equivalent of 12 months' salary subject to statutory deductions payable within 30 days from the date of this order.
>
> 4. The first respondent is ordered to pay the applicant's costs which costs shall include costs consequent upon the employment of senior counsel.'

[6] In justification of this order, the learned judge found that respondent made a protected disclosure and that there was a clear nexus between this disclosure and his dismissal which had resulted in an occupational detriment as defined in the PDA.

[7] The court *a quo* accepted respondent's argument that he made disclosures pertaining to what was referred to by him as 'the question or relationship' between the CEO and Mr Slingsby Mda of Deloitte Consulting, a firm of auditors which had been contracted by appellant to provide fund management services to it. The court a quo also accepted the second justification as a protected disclosure, namely that the CEO had undermined the rule of law by disregarding her legal obligations relating to the supply chain management of appellant. In

this regard it placed emphasis on an extract of a meeting between respondent, Mr Mda and two other members of Deloitte Consulting on 7 August 2015:

> 'I proceeded to ask him (Mda) about the email that he had sent to the CEO in which I was copied relating to the meeting that he had with the CEO. I wanted to know whether the meeting was an isolated incident or interaction or whether they did interact on a regular basis. Mr Mda agreed that the email was the tip of the iceberg [and] that he regularly communicated with CEO through email, telephone meetings that they were on a first name basis that he saw nothing wrong in the relationship.'

[8] Furthermore, the learned judge placed emphasis on respondent's case, namely that the manner in which the supply chain management had been conducted was in breach of the provisions of the Public Finance Management Act 1 of 1999 ('PFMA'). Significantly, in her order, the learned judge found that both reinstatement with retrospective effect and compensation could and should be granted, notwithstanding that this had not been the relief sought by the respondent.

[9] With the leave of this court, the appellant contends on appeal that the court *a quo* fundamentally misconceived the true reason for the dismissal, erred in finding that there was a protected disclosure made in terms of the PDA and was wrong in relation to a finding that the PFMA had any applicability to the conduct of the CEO and hence the disclosures which had been made by respondent. Appellant also contended that the court *a quo* had erred in finding that both reinstatement and compensation could be granted.

[10] In order to evaluate these arguments, it is necessary to briefly outline the operation of appellant and its structure.

The structure of appellant and its relationship to Deloitte Consulting

[11] The purpose of appellant is to "dynamise" the fields of study for the humanities of social sciences for South Africa's higher education system through enhancing

scholarship, research and the ethical practice in these areas. It is governed by a board, albeit that the day to day running of appellant is conducted under the supervision of the CEO, who is accountable to the board.

[12] On 27 September 2013 the Department of Higher Education and Training (DHET) issued a request for proposals regarding the management of appellant's funds. Deloitte Consulting ('Deloittes') was a successful bidder. Paragraph three of the request for proposals provides insight into what was required by the successful bidder, being Deloitte Consulting:

> '1 Under the general supervision of the Board of NIHSS and the direct supervision of the Director of NIHSS, the financial management service provider will be responsible for providing support in the various financial management functions. The scope of the work and expectations for the appointed agency will among others include:
>
> 1.1 managing the budget of approximately R52 457 170 to support the activities of the NIHSS;
>
> 1.2 maintaining an integrated accounting system for all approved NIHSS activities, utilising standard accounting procedures, which will ensure full documentation and recording of sources and uses of funds.
>
> 1.3 preparing the Financial Management Reports and Financial Statements for all the NIHSS activities;
>
> 1.4 Monitoring that financial management activities of NIHSS are performed in line with the PFMA, HE Act and Treasury Regulations.
>
> 1.5 Ensuring that funds for Programme implementation are disbursed in a timely manner.
>
> 1.6 Reviewing and consolidating procurement requests and payment applications to ensure correctness and that they are in line with

the established format of presentation and all the government procurement regulations.

1.7 Preparing quarterly financial reports (expenditure and revenue) for the NIHSS and quarterly Financial Management Reports for the DHET budgetary control and input into NIHSS quarterly reports.

1.8 Reviewing and certifying receipts and cash transfer sheets regarding Procurement of goods and services in line with PFMA and Treasury regulations.

1.9 Preparing interim unaudited reports for the NIHSS Board.

1.10 Verifying and ensuring the availability of funds before payment approval is written to NIHSS.

1.11 Managing NIHSS expenditure including personnel costs and ensuring full compliance with PFMA, HE Act and Treasury Regulations.

1.12 Reviewing receivables and payables and ensure prompt settlement of payable to the NIHSS's suppliers and contractors.

1.13 Working with and supporting the NIHSS Board to co-ordinate logistical requirements as and when the funds are required.

1.14 Developing a handover report to the NIHSS management at end of contract.'

[13] As Mr Kennedy, who appeared on behalf of appellant, correctly noted the contract for the management of appellant's funds was not between appellant and Deloittes but rather between DHET and Deloittes. The contract provided that Deloittes was 'under the general supervision of the Board of the NIHSS and the direct supervision of the director of the NIHSS', being the CEO. The initial contract was for a period of twelve months but this was extended for a further period between 1 October 2015 to 30 May 2016. The CFO was mandated to

develop and monitor the implementation of the financial administration and accounting policies, systems and processes of appellant. He was also responsible for managing appellant's budget in accordance with the relevant prescripts.

[14] On 11 and 18 August 2015, that is some eight months after respondent was appointed, the CEO consulted with Mr Anton Roskam, an attorney acting on behalf of appellant, regarding her concerns about appellant's performance and conduct. She informed Mr Roskam of a series of her concerns, which included the following:

a. his failure to attend meetings

b. his late submission of reports

c. his failure to provide feedback to the CEO and act upon instructions

d. his failure to bring important information to her attention such as the closing down of a bank account and the perilous state of the organisations National Skills Fund account;

e. his handling of the CEO's disbursement claims;

f. the manner in which he questioned his appointment as chair of the Bid Adjudication Committee for appellant's office space tender;

g. the nature of his participation in this process; and

h. his role in the implementation of appellant's payroll system.

[15] On 18 August 2015, following a second consultation conducted by the CEO with Mr Roskam, the chairperson of appellant's Board, Professor Ari Sitas, informed the CEO that he was in receipt of a letter from respondent in which the latter had alleged a series of improprieties. The document which was submitted to the Board was headed 'Disclosure of Impropriety in terms of the Provisions of the Public

Finance Management Act, Public Service Act, the Code of Conduct for Public Servants and other Prescripts'. In this document respondent made two fundamental allegations which, in his view, constituted the disclosure of impropriety:

> '1. The CEO has a questionable relationship with Mr Slingsby Mda of Deloitte Consulting, a firm of auditors contracted to provide fund management services to the NIHSS.
>
> 2. The CEO is undermining the rule of law by disregarding her legal obligations relating to Supply Chain Management of the NIHSS.'

[16] Upon receipt of this document, Professor Sitas sent an email to respondent in which he described respondent's communication as "baffling". As a result, he sought clarification and better particulars from respondent. This was followed few days later by an email generated by Professor Rosemary Moeketsi, the chairperson of the Board's Human Resources Committee, in which she requested that respondent: (a) substantiate and provide evidence to support his assertion that the CEO had a questionable relationship with Mr Mda, (b) explain what was meant by "questionable relationship", and (c) produce evidence in support of respondent's claim that the CEO was undermining the rule of law by disregarding her legal obligations relating to supply chain management.

[17] Respondent replied to this query by way of a document referred to as "the explanatory memorandum". In this document, he referred to an email which he had received a copy of, relating to a meeting between Mr Mda and the CEO. He noted that, as a result of his response, Mr Mda 'agreed that the email was the tip of an iceberg, that he regularly communicated with the CEO through email, telephone, meetings, that they were on a first name basis, that he saw nothing untoward in that relationship, it was part of his service offering to the client, that at one stage he was asked by the CEO to prepare a letter for the Board authorising the utilising of the operating budget for projects expenditure and that all that was in the spirit of helping the client.'

[18] Respondent also referred to a proposal that the payroll function be taken over from Deloittes and brought "in-house" with effect from 1 May 2015. He noted that on 4 May 2015 the CEO 'expressed her disapproval of the proposal for the reason that I did not first run it by her'. He went on to say that, 'she (the CEO) said that the Chairman of the Board was not happy about the decision to take over the payroll function from Deloitte Consulting … I was surprised why a decision which I considered to be operational would involve the chairman of the Board, why the Chairman would not want the CFO to carry out his normal duties…' He referred as well to a letter of 20 August 2015 sent by Professor Sitas to Mr Mda confirming that the Board had approved a temporary diversion of funds from operations to projects. In his view 'the letter raised concerns about governance and relationships'. In his document respondent also set out what he considered to be the irregular extension of the scope of the contract between DHET and Deloitte Consulting, as well as the irregular appointment of member of the finance staff. He concluded by referring to the PFMA and said; 'As part of my responsibility as the CFO, I have on numerous occasions made the CEO aware of her legal obligations as outline above. The CEO has steadfastly refused to allow the implementation of supply chain management in terms of the law', by which he clearly meant the provisions of the PFMA and National Treasury Regulations which related thereto.

[19] On 20 August 2015 appellant's attorneys advised that they appoint a person to investigate both the concerns that the CEO had expressed regarding respondent's performance and conduct together with the allegations of impropriety which respondent had levelled against the CEO pursuant to the PDA.

The appointment of Charles Nupen

[20] The Board acted pursuant to this advice and appointed Mr Charles Nupen to conduct an independent investigation of the matter. His brief was as follows:

> 'B. **Legal Opinion on the Way Forward to the HR Chair of the Institute**
>
> B1. An Assessment of the Situation i.e. the relevant Facts

Firstly, is there an irreconcilable breakdown of trust between Dr Sarah Mosoetsa (the CEO of the Institute) and Mr Kibiti Lephoto (the CFO of the Institute)

Secondly, the CFO sent a "disclosure of impropriety" letter to the Board, alleging serious misconduct by the CEO. The Board responded by requesting substantiation of allegation which elicited one such submission to the Board.

Thirdly, the CFO refused to authorise the payment of 127 service providers despite instructions by the CEO to do so after the Board authorised the interim release of funds from its operational budget in consultation with the DHET. This led the CEO (again after legal opinion) to move towards serving a suspension warning of the CEO.

We would like the investigator to listen to the respective allegations as well as eliciting any other information necessary by speaking to other parties and inspecting any documentation of the NIHSS as necessary. The investigator should then suggest a decisive way forward.

B2. Options that the Board must consider as necessary to the fulfilment of the Institute's mandate.'

[21] In conducting his investigation, Mr Nupen interviewed nine people, including the CEO. He also conducted one interview with respondent. A second interview did not take place because, on 8 October 2015, respondent objected to Mr Nupen, accusing him of not being independent or fair and claiming that the Nupen investigation focussed exclusively on respondent and would not deal with the alleged impropriety he had raised against the CEO. He further alleged that this had been made clear to him in the manner in which Mr Nupen had conducted the initial interview. There was also some dispute about the fact that Mr Nupen had been described as an advocate, when it was common cause that he was an attorney, a point which was clarified in a further email from appellant that this description had been a mistake. In this email which was written by appellant's Nthabiseng Motsemme on 12 October 2017, she summarised Mr Nupen's career as a well-known member of the labour legal community, a highly experienced attorney with many years of experience as a mediator, conciliator and arbitrator,

the founding Executive Director of the CCMA, and previously a commissioner of the Independent Electoral Commission in the 1994 elections. Nonetheless, respondent persisted with his contention that Mr Nupen was not properly qualified, was not independent and was biased.

[22] Mr Nupen's report, notwithstanding the claim by respondent that he was not interested in dealing with the alleged impropriety, dealt carefully with both questions, namely whether there was an irreconcilable breakdown of trust between the CEO and respondent and, further the evaluation of the disclosures made by respondent. Mr Nupen concluded that there was clearly an irreconcilable breakdown between the two parties. The relevant passage of his report reads thus:

> 'Although I did not have the opportunity of canvassing with the CFO his view on whether there was an irreconcilable breakdown in the trust relationship with the CEO, he would be hard pressed to contend otherwise having regard to the serious nature of the allegations levelled against her. The only reasonable conclusion that can be drawn from them is that as far as he is concerned the CEO has acted in breach of the law and is therefore not fit to hold public office.
>
> In my view interview with the CFO I put it to him that he was in effect alleging that the CEO was party to an agreed with conduct that was in breach of the law. He replied.
>
> Yes I am alleging that.'

[23] Regarding the respondent's disclosures, Mr Nupen used his interview with respondent to probe the meaning of respondent's phrase "questionable relationship". The relevant section of his report reads as follows:

> 'I was constrained to ask him whether he was suggesting an improper personal relationship between Mr Mda and the CEO and he answered that he was not suggesting that. He said that questionable stands for the fact that you would have something to measure it against such as rules standards and norms. If it cannot be measured against those it becomes questionable. He said the

> relationship was questionable in terms of the Public Finance Management Act (PFMA). He acknowledged that there was nothing in the contract between Deloittes and DHET which stipulated that the relationship should be managed through the office. He said that the CEO was finally accountable for financial management but she carries that responsibility through the office of the CFO. He referred to National Treasury Regulations which he said stipulates that. His view was that the treasury regulations direct that a service provider should report to the CFO and he reports to the CEO. I asked him if he would furnish me with a reference to the particular section in the treasury regulations that provided for this. He undertook to do so but this information was not forthcoming.
>
> He did however refer me to refer to s 38 and 45 of the PFMA in addition to the treasury regulations.'

[24] Mr Nupen then considered the provisions of the PFMA and concluded 'as the Institute at all material times was not a listed Public Entity the Treasury regulations do not apply to it and will not until such time as it is so listed. The standards by which the CFO assessed and determined that the relationship between the CFO and Mr Mda was questionable, are therefore not applicable.' He went on to say that, even if the PFMA was applicable 'I can find nothing in the law that suggests that the leader of a project team from a service provider should not have a direct working relationship with the CEO of a Public Entity.'

[25] Turning to the question of the supply chain management argument of respondent, Mr Nupen concluded:

> 'As early as February 2015 Board concluded that the SCM policy as presented by the CFO needed further work. The decision of the Board at that meeting was that the finance policies were accepted on condition that a legal person reviews the documents. External advice would be sort from the Durban University of Technology, at no costs to the Institute.'

[26] Regarding the further allegations of Deloittes' role in producing opening balances for the Annual Financial Statements, Mr Nupen noted that this related to a

'contractual issue between DHET and Deloittes and should be addressed by them… What is clear is that on this issue there is no evidence linking the CEO with impropriety. Her position on the matter was clearly set out in her email of 9 July 2015; an email which was copied to the CFO to the effect that Deloittes should proceed 'with the CFO's approval'.

[27] After assessing the suspension of the CFO, in particular the notice of intention to suspend the CFO generated by the CEO on 27 August 2015, Mr Nupen found that there was an irreconcilable breakdown in trust between the two parties and that 'the CFO had failed to substantiate his allegations of impropriety against the CEO. He has impugned her character and professional standing without due cause.' In his view, there was *prima facie* evidence of serious misconduct on the part of the CFO in failing to authorise payments on the basis of the unavailability of funds in circumstances 'where he knew that the Board had approved the temporary utilisation of DHET funds for project purposes'. Mr Nupen concluded that, the CFO had undermined the intentions of the Board and exposed the appellant to reputational and operational risk. He recommended that, before steps be taken to arraign the CFO before a disciplinary enquiry, the latter should be invited to comment on this report.

Respondent's reaction to the recommendations

[28] On 13 November 2015 the chairperson of the Board's HR committee, Professor Moeketsi informed respondent that the Board intended to take legal advice following this report and would appreciate respondent's comments before it did so. She requested that respondent indicate by 23 November 2015 whether he wished to comment upon the contents of the report. A copy of the report was attached to this email. Respondent replied on 23 November 2015 that he wished to have an opportunity to comment upon the report. On 24 November 2015 Professor Moeketsi requested respondent's comments by 27 November 2015. At 08h17 pm on that day, respondent replied with an email in which he stated 'please forward me a copy of the full report with the cited exhibits and payment

submissions for the period 5 January 2015 to 27 August 2015.' Although he did not stipulate what documents were missing, it appeared under cross examination that he could only refer to one exhibit (exhibit 1) which was missing, namely the letter from Professor Sitas to Mr Nupen which set out the investigation's terms of reference. These however had been quoted at the beginning of Mr Nupen's report which respondent confirmed he had received.

[29] On 4 December 2015 appellant emailed respondent and informed him 'that (a) the full investigation report including the exhibits' had been emailed to him, that it was again attached with the exhibits to the email; (b) the full investigation report had been couriered to him; and (c) he was now required to provide his comments by 09 December 2015. On 9 December 2015 at 03h14 pm, respondent generated an email in which he stated 'please forward me the information I requested below in order to allow me to make meaningful comments upon the report.' On the same day, Ms Motsemme replied to the effect that she had already emailed the attachments on 04 December 2019. She however resent this email together with the attachments. Respondent did not comply with this deadline for submitting his comments but on 10 December 2015 lodged a complaint with the Auditor general. On 11 December 2015 he replied to Ms Motsemme's email in which he stated that he still awaited the information requested in his emails of 27 November and 09 December 2015.

[30] Under cross-examination, respondent was exquisitely vague as to what documents were missing stating only that appellant would clearly know what was missing. On 14 December 2015 Ms Motsemme sent respondent a further email confirming a telephone conversation which she had with him on 11 December 2015 and recorded that, in response to her query about whether he would be submitting comments, respondent advised that he was experiencing technical difficulties and had not accessed the exhibits. She confirmed that the exhibits had been couriered to him on 11 December 2015 but that the courier had been unable to deliver the documents to him for the reason that he had relocated his home and not informed appellant of his new address. Again she attached the

report and annexures in an email. On 16 December 2015 a request was sent to respondent to attend a meeting with Professor Moeketsi. On 17 December 2015, by way of an email, he indicated that he refused to attend. On 17 December 2015. Ms Ayanda Zwane of appellant informed respondent that he must now submit his comments by 18 December 2015 (the third deadline) and informed respondent that, if he did not have any exhibits, he could collect them at appellant's offices during the day. Respondent did not comply with this deadline and never submitted comments on the report. As a result, on 21 December 2015, Professor Sitas wrote to respondent in which he confirmed the various attempts to obtain respondent's comments and concluded by requesting respondent's written representations by 27 December 2015 in order to respond to the Board's preliminary review that his probationary period should be terminated. On 27 December 2015 at 11h09 pm respondent requested an extension of this deadline because 'he was still awaiting certain resources including information that (he) requested from the NIHSS to prepare (his) response.' He thus requested an extension until 10 January 2016. By now the Board had taken the view that these delays were unreasonable and, on 30 December 2015, Professor Sitas sent respondent a letter of termination of his probationary period.

[31] Significantly, on 28 April 2016 the Auditor General responded to respondent's complaint stating that he had assessed the request for an investigation and had found no irregularities in the 2015 – 2016 audit. He concluded:

> 'Due to the fact that the institute is not a registered public entity the PFMA and treasury regulations do not apply thus compliance relating to procurement and contract management has not been assess.
>
> Procurement and contract management was evaluated based on the Supply chain Management Policy. No deficiencies have been identified.' (emphasis added)

Evaluation

[32] As Mr Woudstra, who appeared on behalf of respondent, correctly observed the first question that has to be answered in the affirmative in order for respondent's case to be justified is whether there was a protected disclosure as defined in the PDA. Before its amendment by the Protected Disclosures Amendment Act 5 of 2017, which amendment does not apply to this case, s 1 of the PDA defined a disclosure as follows:

> '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 paragraph (a) to (f) has been, is being or is likely to be deliberately concealed.'

[33] Given the disclosures by respondent, as I have set them out, it is clear that only sub paragraphs (a), (b) and (c) could possibly be considered to be applicable in this case. In *Radebe and another v Premier Free State Province and others* [2012] 33 ILJ 2353 (LAC) Mlambo JP, on behalf of this Court, noted that s 1, that

is the definition of disclosure, contains the following essential requirements: that the employee making the disclosure must have "reason to believe' that the information disclosure "shows" or "tends to show" that an impropriety as defined has been committed or has continued to be perpetrated.

[34] The key question in the present case is whether respondent had a reason to believe that the so called questionable relationship between the CEO and Mr Mda could or tended to show that a criminal offence had been committed, or that there had been a failure or a likelihood of failure to comply with any legal obligations or that there was or was a likelihood of a miscarriage of justice.

[35] To return to the court *a quo*, its essential finding was based on the applicability of PFMA and the regulations to appellant and consequently there was a reasonable belief of the respondent that these had been breached by the CEO. It is clear from s 3 of the PFMA that this legislation is only applicable to a public entity, if that entity appears in Schedule 2 or Schedule 3 to the PFMA. Appellant is not listed in either of these schedules. Therefore as a matter of law, if appellant as a public entity, is not listed in either Schedule 2 or Schedule 3 of the PFMA, the Act is inapplicable. Contrary to the legally unsubstantiated submission of Mr Woudstra which, regrettably appeared to have persuaded the court *a quo,* whatever a public entity might believe about the scope of legislation does not confer upon it a right nor an obligation to decide whether the legislation is applicable to it. The legislation itself determines its own scope, particularly when, in a case such as the present, it is clear that appellant was not listed in either of the relevant schedules which were necessary for the provisions of the PFMA to be applicable to it. Even ignoring the PFMA, it is clear that the CEO was aware of the legal position because she notified National Treasury that appellant was not listed in Schedule 2 or 3 of the PFMA at the time that appellant was first established. This notification was pursuant to an engagement with National Treasury as to whether appellant should be listed in either Schedule 2 or 3. Appellant and indeed National Treasury knew it was not applicable and therefore

it is hardly surprising that the Auditor General audited the appellant on the basis that the PFMA was inapplicable to appellant.

[36] Again, even assuming that there was a reason to believe that the PFMA was applicable on the part of the CFO, of which there is no evidence to justify such an inference, as Mr Nupen correctly noted, there was nothing in this legislation which suggested that the leader of a project team from a service provider such as Mr Mda should not have a direct working relationship with the CEO of a public entity to which the service provider was providing services. Indeed the contract between the DHET and Deloittes provided expressly that the service provider would operate under the general supervision of the Board and the direct supervision of the director, that is the CEO.

[37] The evidence indicates compellingly that the complaint of the respondent was, at core, that he was being marginalised by the CEO. This might, at best for him, constitute a problem to be dealt with by the human resources department of appellant or possibly the Board, but certainly could not fall under any of the key components of the definition of disclosure, being a criminal offence, failing to comply with any legal obligation or a miscarriage of justice. The fact that the CEO increasingly was concerned about the CFO and his performance, is evident from the various difficulties with his performance which she had expressed to Mr Roskam when she sought his legal advice on 11 August 2015.

[38] This conclusion is supported by the extremely vague content given by respondent to the notion of questionable relationship. One would have been entitled to expect that some allegation of an inappropriate personal relationship between the two parties which somehow would have cast the judgment of the CEO into doubt. But that was never the basis of any allegation made by respondent.

[39] Mr Kennedy was correct to describe the CFO's averments with regard to the CEO undermining the rule of law as nothing more than 'anaemic allegations'. An examination of respondent's explanatory document reveals a series of further

unjustified allegations on his part. One illustration concerns the question of the handover by the Centre of Education Policy Development ('CEPD') to Deloittes of a series of its responsibilities. It had been agreed that the CEPD would provide the final opening balances of appellant's account by 23 February 2015, which included a breakdown and detailed understanding of each of these balances. Despite a request that a meeting on 17 June 2015, which was attended by representatives of Deloittes and of appellant, including respondent, it was reported that CEPD had not provided the final opening balances. Deloittes suggested that it could assist in the gathering of all the supporting documents for the opening balances and would put together a proposal which would be presented to the CEO and the CFO for the additional work. Significantly respondent later removed any reference to the CFO and hence his own position from Deloittes draft minutes of this meeting. On 25 June 2015 Mr Mda sent the CEO an email stating that Deloittes would like to assist in the reconciliation of these amounts and finalise the opening balances taken over of CEPD. He said that this would be done subject to obtaining the CFO's approval. On 9 July 2015 the CEO replied to Mr Mda copying respondent in this email in which she stated that Mr Mda should proceed with "Kinitis' (respondent's) approval". Ironically, it was by being copied in on this email that not only did respondent come to know about Mr Mda's email to the CEO of 5 June 2015, but then arrived at the view that this email was a justification for the so called questionable relationship between the parties.

[40] On 13 July 2015, four days after the CEO's email to Mr Mda, Mr Katende of Deloittes sent an email to respondent stating that the CEO had endorsed the commencement of the opening balance work, but his email was clearly not a correct reflection of the contents of the CEO's email of 09 July 2015. The CEO had not been sent a copy of Mr Katende's email and knew nothing about it. It is difficult to see how, on the basis of these emails, respondent could reasonably conclude that the CEO had marginalised him from what was clearly an important issue for appellant.

[41] A further significant aspect of the role of CEPD was that, in his explanatory document, respondent referred to the payment of monies owing to CEPD. On 25 March 2015 CEPD sent an invoice to the DHET for the payment of an amount of R5 616 000.00 for the management of appellant's finances from 4 June 2012 to November 2014. On 7 April 2015 respondent provided the CEO with documents relating to this claim, in which he concluded that the CEPD was owed R 4 440 323.37. The CEO then sent documents to Ms Whittle at the DHET. Following her questioning these calculations, it was Deloittes which investigated the matter and concluded that the CEPD was only owed R 909 8 33.73. On 27 July 2015 the CEO sent a letter to CEPD informing them of the Deloitte calculations and the explanation therefor which CEPD accepted. It was then paid R 909 883. 73 as opposed to the R 4 440 323. 73 that it would have paid, had the CEO relied on the CFO's calculations.

[42] One final illustration shows how there could be no basis by which to believe that the information provided by respondent fell within the definition of disclosure as I have analysed it. During the appellant's board meeting of 5 June 2015, at which respondent was present, the first quarter report was discussed. The CEO reported that there was a significant challenge posed by the late allocation of funds which affected the implementation of various projects, and therefor undermined the success of appellant's enterprise. On 6 August 2015, on the advice of the DHET, the CEO wrote a memorandum to the Board, requesting approval to move funds temporarily from operations to projects and scholarships. On 11 August 2015 she generated an email to Mr Mda, which was copied to respondent, an email which even he accepted he had received. In this email she informed Mr Mda:

> 'As from tomorrow, you will be receiving a total of about R 10 million of invoices to be processed. Please note that these are indeed not operations costs but projects and scholarship costs. I have received board approval to temporarily shift operations funds to projects and scholarships. This is part of the solution as advised by the DHET, as we await our NSF funds.'

[43] On 17 August 2015 Deloittes sent an email to respondent requesting authorisation of payments pursuant to the Board decision. This letter which followed upon an earlier one of 12 August 2015, in which the chairperson of the Board, Professor Sitas, had written to Mr Mda confirming the Board's approval to temporarily move funds from operations to projects and scholarships. However, on 20 August 2015 Deloittes was constrained to inform the CEO that some 127 invoices in this regard had not been paid because respondent had refused to authorise these payments. Under cross examination, all that respondent could say was that Professor Sitas' letter did not constitute a proper resolution. The evidence clearly justifies the following conclusion by Mr Nupen:

> 'On 20 August he (respondent) received a copy of the board's letter to Mr Mda. In spite of all these advices and reminders he continued to refuse to authorise payment on the basis that funds were not available. I can only conclude that his email of 26 August to the CEO saying that he was not aware of the board resolution and offering assistance was disingenuous.'

Was the termination of the probation period justified?

[44] It is abundantly apparent from the evidence that respondent's conduct, prior to his suspension, revealed significant problems with his conduct which had jeopardised the long term sustainability and legitimacy of the operations of appellant. This is shown in his refusal to endorse the urgent payment of 127 invoices (as opposed to 39 as found by the court *a quo*) to universities, notwithstanding that he was aware that the Board had approved the transfer of these funds for scholarships and, notwithstanding that he must have known of the crucial importance of these payments to the core objectives of the appellant. Respondent made critical mistakes regarding the payment of monies owing to CEPD, mistakes which, but for the intervention of Deloittes, would have cost the appellant more than R 3 million. He failed to cooperate with Deloittes in trying to find a solution to finalise the correct opening balances which resulted in the delay of appellant's financial statements. There was a consistent failure to attend interviews, telephone conferences and meetings including meetings with

Deloittes, and a clear lack of cooperation with Deloittes which had signed a contract, not with the appellant but with the DHET.

[45] These examples of respondent's inability to perform his job as required, justified the decision of the CEO to contemplate suspension by appellant on 11 August 2015, a week before respondent's purported disclosure, when the CEO consulted Mr Roskam.

[46] The available evidence suggests that there had been an irretrievable breakdown in the relationship between respondent and CEO, that he had failed to substantiate allegations of impropriety against her, had impugned her character and professional standing and authority as CEO, had made unfounded allegations which, on any reasonable inference, appear to be in retaliation for the difficulties in which he found himself as a result of his own incompetence or lack of performance, and had undermined the decisions of the Board and the CEO in authorising payments to universities, which were central to the functions of appellant, thereby exposing it to potential reputational and organisational risk.

[47] In short, the available evidence compellingly supports the conclusions contained in the report generated by Mr Nupen. Two further aspects require comment. In the first place, respondent sought to attack the integrity, competence and good faith of Mr Nupen. A careful reading of the transcript of the one interview that Mr Nupen was able to conduct with respondent reveals, contrary to the allegations made by respondent, that Mr Nupen carefully and patiently sought to probe the meaning of allegations such as "questionable relationship" and the justifications for respondent making these very serious allegations. In addition, the report reveals, contrary to respondent's contentions, that Mr Nupen dealt both with the allegations made by the CEO relating to the competence of respondent as well as the disclosures he had made, and evaluated them on a basis of a careful examination of the available evidence.

[48] The reaction of the respondent to the Nupen report is equally instructive. As I have documented in this judgment, the Board acted upon Mr Nupen's

recommendations and invited the respondent to provide a detailed response to Mr Nupen's report and his recommendations. As the evidence shows, the respondent consistently refused to do so, raising a veritable range of tendentious excuses for non-compliance with this request, and which inevitably culminated in the Board having to make a decision in the absence of any reasonable cooperation from respondent.

Conclusion

[49] The PDA is an important piece of legislation and is part of the overall framework which ensures that the exercise of both public and private power should be conducted in a transparent and accountable way. It seeks to create a climate in which employees, whether in the private and the public sector, are able to disclose information regarding unlawful and irregular conduct by employers or other employees in the employ of the employer in a manner which will not result in any occupational detriment to a person who commendably considers that the organisation, in which he or she works, should operate legally and in a meticulously regular fashion. However, the PDA was not enacted to encourage employees, whose own conduct renders them liable to dismissal, to exploit this legislation in a desperate attempt to fend of the inevitable consequences of their own actions or performance. That the PDA should be interpreted generously in order to vindicate its purpose is one thing, but in a case such as the present, where the facts are overwhelmingly in support of the conclusion that its provisions were abused, the court should have no truck with an attempt to invoke its protection.

[50] For all of these reasons the following order is made:

1. The appeal is upheld with costs.

2. The order of the Labour Court is substituted as follows.

'The application is dismissed with costs.'

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Davis JA

COPPIN and KATHREE-SETILOANE JJA concurred

Appearances:

FOR THE APPELLANT:	Adv p Kennedy SC
	Instructed by Roksam Savage Attorneys
FOR THE RESPONDENTS	Adv HVR Woudstra SC
	Instructed by Maphalla Mokate Conradie Attorneys