**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**
**(HELD AT JOHANNESBURG)**

**Case No.: JA 6/2007**

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| **THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT** | **First Appellant** |
| **THE DIRECTOR-GENERAL FOR THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** | **Second Appellant** |
| **and** | |
| **MICHAEL MALISA TSHISHONGA** | **Respondent** |

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**JUDGMENT:**

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**DAVIS JA:**

**Introduction**

[1] This is an appeal against the judgment of Pillay J of 26 December 2006 in which the following order was made:

> "*The respondents are directed to pay the applicant twelve month's remuneration at the current rate applicable to Director-Generals.*
>
> *The respondents are to pay the applicant's costs including the costs of Senior Counsel, such costs to also include those reserved on 31 August 2006."*

[2] Initially, the appellants noted some forty six grounds of appeal. However all were abandoned, save for the ground that the learned Judge erred in fact and in law in ordering the appellants to pay the respondent twelve (12) month's remuneration.

**Factual background**

[3] The respondent sued for compensation for an "unfair labour practice" and legal costs arising out of a disciplinary enquiry instituted by the Department of Justice and Constitutional Development ("the Department"). Respondent contended that, by suspending him and subsequently instituting disciplinary proceedings against him, the Department subjected him to "occupational detriment" as defined in the Protected Disclosure Act, 26 of 2000 ("the PDA"). Accordingly, he was entitled to the remedies prescribed in the PDA including compensation.

[4] It was common cause on the pleadings that the dispute between the parties arose after the respondent made a number of disclosures to the media on 7 and 8 October 2003; including:

4.1 The erstwhile Minister ("the Minister") had a "questionable relationship" with a Mr E Motala, one of the persons appointed to act as provisional liquidator in the liquidation of Retail Apparel Group Ltd ("RAG").

4.2 The minister undermined the rule of law by acting outside the scope of his powers and contrary to the discretionary powers of the Master of the Court.

4.3 The Minister was guilty of nepotism.

4.4 The Minister was guilty of abuse of the infrastructure and staff of the Department of Justice for the purpose of advancing his personal interests.

4.5 The Minister was guilty of endangering the South African criminal justice system.

[5] Following their disclosures, on 8 October 2003 the respondent was suspended by the Department. On 5 December 2003 he was charged with misconduct and required to appear before a disciplinary enquiry. The following charges were preferred against the respondent.

(i) Charge 1: That the respondent, during October 2003, made allegations against Mr Penuel Maduna (who was at the time the Minister of Justice and Constitutional Development), to the effect that Mr Maduna had a “questionable relationship” with Mr Enver Motala, a liquidator appointed to handle the RAG liquidation. In this regard Mr Tshishonga contravened:

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

Clause C4.10 of the Code, which state that an employee must "report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes and offence, or which is prejudicial to the public interest." (My own emphasis)

(ii) Charge 2: That the respondent accused Mr Maduna of:

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

Nepotism;

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

Endangering South Africa's criminal justice system;

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

(iii) Charge 3: That the respondent refused without just or reasonable cause to return all documents relating to the RAG case after having been instructed to do so by a person having authority, namely Mr V Pikoli, the Director-General of the Department ('the DG'). This amounts to gross insubordination.

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

(v) Charge 4 was withdrawn by the Department at the close of the second appellant's case at the disciplinary enquiry.

[6] A chairperson was appointed in terms of the *Senior Management Services Handbook: Procedure for Disciplinary Action against Senior Managers* to conduct the disciplinary enquiry.

[7] The disciplinary enquiry commenced on 12 December 2003 and concluded on 2 June 2004. On 20 July 2004 the chairperson submitted his findings. He found that the respondent's disclosure were protected disclosures as contemplated in the PDA.

[8] The respondent then instituted the present action. Several pre-trial conferences were held. At the first, the parties agreed that the following issues had to be determined by the Court:

8.1 Whether the respondent's disclosures to the news media on 7 and 8 October 2003 qualified as a protected disclosure in terms of the PDA.

8.2 Whether the respondent's suspension from duty and disciplinary proceedings constituted "occupational detriments" as contemplated in the PDA.

8.3 Whether the respondent's suspension from duty and disciplinary enquiry constituted "unfair labour practices" as contemplated in section 186 of the Labour Relations Act, 66 of 1995 ("the LRA").

8.4 Whether the respondent was entitled to compensation in terms of section 193(4) of the LRA.

8.5 Whether the disciplinary action against the respondent constituted unlawful action by the first respondent.

8.6 Whether the respondent was entitled to claim the legal costs incurred in the disciplinary hearing.

[9] In a comprehensive and careful judgment, Pillay J found for respondent and ordered appellants to pay twelve (12) months remuneration to respondent at the rate presently applicable to a Director-General. In

justification of this award, the learned judge set out a number of considerations of which she took account.

9.1 Compensation is a redress for both patrimonial and non-patrimonial loss.

9.2 All ‘developments’ up to and after the occupational detriment contribute ‘cumulatively’ towards the assessment of compensation.

9.3 Subjection to an occupational detriment for whistle-blowing is generally and on the facts of the present case in particular ‘a very serious form of discrimination’ and such ‘merits a very high award’.

9.4 A failure by the employer to investigate a disclosure and subsequent retaliation are factors which ‘count against’ the employer.

9.5 The fact that a whistle-blower takes risks when making disclosures is a factor that ‘must be acknowledged’.

9.6 The manner in which a disclosure is made is also a relevant factor.

9.7 The more serious the nature of the occupational detriment the greater the compensation; hence a dismissal for making a protected disclosure attracts as much as 24 months remuneration. In her view, suspension and being charged with misconduct ‘are a step away from being dismissed’.

9.8 The longer the dispute endures, the greater the stress on an employee and the greater should be the compensation.

9.9 The conduct of the employer in resolving/not resolving the dispute.

9.10 The protraction of the matter 'unduly' was a 'continuation of the appellants' retaliation against the respondent.

9.11 The appellants account within the context of a constitutional democracy is 'a consideration'. Their failure to testify or offer any explanation 'aggravates' the claim against them.

9.12 The insults to and the ill-treatment and impairment of the respondent's dignity are 'elements of the content' occupational detriment that the respondent endured and which the remedy must redress.

**Appellant's case**

[10] Mr Bezuidenhout, who appeared on behalf of the appellant, submitted that Pillay J had erred in making the award of compensation in that:

10.1 She failed to apply her discretion in a judicial manner and thereby failed to weigh a number of material factors. He submitted that, upon a proper interpretation of the applicable legislation (the PDA read with the LRA), the award of compensation was a discretionary matter in the hands of the judicial officer.

10.2 The maximum award permitted by the legislation should be awarded only in exceptional circumstances. In this case the award was excessive.

10.3 The judgment over emphasized the effect of the occupational detriment on the respondent and failed to take into account material mitigating factors that ought to have been weighed in favor of the appellants, being:

10.3.1 At no time did the respondent suffer dismissal. It was common cause that the respondent was remunerated in full during the period of his transfer and subsequent suspension.

10.3.2 The respondent was in fact reinstated to his position by the Labour Court on 28 January 2004. A disciplinary hearing was conducted on 20 July 2004 he was found not guilty. Although the Director-General refused to reinstate him a settlement was then reached, the terms of which were made known to the court *a quo*.

10.3.3 In terms of the agreement respondent's employment contract, until age of retirement was paid to him (taking into account projected salary increases and

> inflation). This "settlement/severance package" was separate from the pension benefits (also calculated until age of retirement) of the respondent, which was also paid to him. According to Mr Bezuidenhout, the respondent was, at the end of the process, the recipient of more than adequate compensation.

In order to evaluate there submissions, it is necessary to consider first the relevant legislative framework.

**The statutory scheme of compensation**

[11] Section 3 of the PDA provides:

> "*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*."

[12] As it was common cause on appeal that the respondent's disclosures were protected, it can be said that there was a breach of section 3.

Occupational detriment is defined as follows:

> "(*a) being subjected to any disciplinary action;*
>
> *(b) being dismissed, suspended, demoted, harassed or intimidated;*
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> *(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 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;"*

[13] Once it has been established that there has been occupational detriment, save in the case of a dismissal (which is not relevant to this present appeal), section 4(2) (b) provides the applicable remedy, being:

"*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*."

[14] As acts which fall within the scope of the definition of occupational detriment are deemed to be an unfair labour practice, it is necessary to have recourse to section 194(4) of the LRA which is the provision governing the award of compensation. It provides that the compensation awarded to an employee in respect of an unfair labour practice must be just and equitable but cannot be more than the equivalent of 12 months remuneration.

[15] In summary, once it has been found that an employee has been subjected to occupational detriment on account of having made a protected disclosure, a court must determine what compensation is just and equitable in the circumstances, which amount is capped at 12 months remuneration. In the present case the judge in the court a quo appeared to conflate the award of compensation with an amount of remuneration. As already noted section 194(4) of the LRA employs remuneration purely as a means of capping the amount of the award so ordered. By contrast, the court a quo employed remuneration as the basis for the quantification of the award. Accordingly the Court *a quo* erred in its interpretation of s194(4) of the LRA and this court is thus at large to determine the appropriate amount of compensation.

[16] In argument before this court, Mr Bezuidenhout conceded that the following factors could legitimately be taken into account by this court in making such an award:

16.1 The embarrassment and humiliation suffered by the respondent, a Deputy Director-General in the Department of Justice and Constitutional Development, for first of all being removed with immediate effect from the Master's business unit, without any reason being given and thereafter being subjected to a suspension and subsequent disciplinary hearing. This embarrassment and humiliation also affected the family of the respondent, his wife and his school going children.

16.2 The respondent suffered further denigration by being referred to as a "dunderhead" by the then Minster of Justice on national television during October 2003. The Minister went on to belittle the respondent by saying that he is "the most timid public servant and at worst he is the sort of person who would not be able to box himself out of a wet paper bag". The Minister went further to state that this statement could be printed.

16.3 In the same television broadcast in which the respondent was called a "dunderhead", the Minister said that the respondent was

rapped over the knuckles for poor work performance. There was absolutely no truth in this allegation.

16.4 The respondent further suffered gross humiliation by being moved to a position which was non-existent at the time, and thereafter for long periods he was kept in that position without any work or instructions coming his way.

16.5 The respondent suffered victimisation and harassment by being subpoenaed to an interrogation in terms of s417 and s418 of the Companies Act in the RAG-liquidation by the lead liquidator, Mr E Motala, who was implicated in the respondent's disclosures. The undisputed evidence revealed that the respondent's evidence in the inquiry was completely irrelevant. It was obvious that the only reason why he was subpoenaed was to embarrass him.

16.6 The respondent had to employ an attorney and counsel to protect his rights and interests at the inquiry and he had to incur substantial costs of over R100 000.00 which the appellants failed to repay him.

16.7 The respondent furthermore was required to pay an attorney R77000. 00 for defending him in the disciplinary inquiry where he was eventually found not guilty.

16.8 The undisputed evidence of the respondent was that, because of all the humiliation, victimisation and harassment by the appellant, he

had to receive trauma counseling as a result of the way in which he was treated after the disclosures had been made to the media.

16.9 The appellant insisted during the trial that the respondent proceed with the leading of evidence on all the issues despite the fact that the matter had comprehensively been dealt with during the disciplinary inquiry. As the judge *a quo* noted, the appellants were relentless throughout the entire saga in their pursuit of the respondent. Nevertheless, the appellants failed to produce any evidence to substantiate claims made in the pleadings against the respondent.

[17] It was not disputed by appellant that all of these factors fall within paras (a) – (e) of the definition of occupational detriment. All of these factors are thus relevant to the determination of the quantification of the amount of compensation to be awarded.

[18] The question thus is what is just and equitable in circumstances where the compensation is for non patrimonial loss. In this connection, some assistance can be gained from the jurisprudence relating to the award of a solatium in terms of the *actio injuriarum.* In these cases the award is, subject to one exception of a non-patrimonial nature, and is in satisfaction of the person who has suffered an attack on their dignity and reputation or

an onslaught on their humanity. The exception is for the amount relating to the costs of R177000 which were incurred by respondent in having to defend himself, and which are patrimonial by nature. Factors regarded by the court as relevant to the assessment of damages generally included the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behavior of the defendant (especially whether the motive was honorable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and the attitude of the defendant after the iniuria had taken place. It should be noted that this list is not exhaustive in that specific forms of infringement have their own peculiar factors to consider.

**See Bruwer v Joubert 1966 (3) SA 334 (A) at 338; Jansen van Vuuren v Kruger 1993 (4) SA 842 (A) at 857 – 858.**

In the context of the present dispute the following factors set out by Harms JA(as he then was) in **Mogale v Seima 2008 (5) SA 637 (SCA) at 642** are of particular relevance:

"The main factor determining quantum in damages is the seriousness of the defamation…The second factor is the nature and extent of the publication…The third factor is the reputation…Lastly, the motives and conduct of the defendants are relevant".

[19] In the present case, a starting point must be that respondent be compensated for the R177 000 incurred to defend himself against the wholly unwarranted onslaught launched against him. In addition, this court must take account of the facts set out in paragraph 16 of this judgment. Sections of these facts must be given significant weight. In particular, the respondent suffered the indignity of unfortunate, intemperate attacks of an *ad hominem* nature made by the Minister of Justice on national television. The gravity of this grossly unfair and irresponsible conduct on the part of the minister was compounded by the role played by the respondent in seeking to promote integrity in government. Respondent further suffered the indignity of losing his employment. All of this occurred because he acted as a 'whistle blower' in terms of the very legislation introduced by first appellant's department, which was designed to protect such people. The Department of Justice is obligated to show the greatest respect for the PDA for, as the promoter of the legislation it should know the cardinal importance of this Act in promoting the constitutional values of accountability and transparency in the public administration of this country.

[20] For all the reasons set out in this judgment, a significant award is justified. While the principles developed in the cases dealing with a solatium are important, the actual amount to be awarded is a discretionary act of the court ; there is no tariff to which recourse can be made.

[21] To the extent that precedent is of assistance, in **Mogale and Others v Seima 2008(5) SA 637(SCA)** at para 18, it was noted that courts have not been generous in their awards of solatia. In Mogale, a newspaper, with a readership of possibly more than 900000, carried a report that plaintiff gave his girlfriend a 'hot klap' for having taken notice of other men. The newspaper tendered an apology which was not accepted. The Supreme Court of Appeal reduced the award from R70000 to R12000.

[22] In this case, a far more significant sum, should be awarded as compensation for the indignity suffered, the extent of the publication of the attack on respondent ( publication being on national television ) and the persistent, egregious nature of the attacks upon respondent which has been triggered because he had acted in the national interest. In my view, an amount of R100000 is thus justified, that is apart from the R 177 000 in respect of costs incurred in respondent's defence.

[23] Although the amount to be awarded has been reduced to R277 000, the nature of this litigation and the outcome justify an award of costs in favour of the respondent.

[24] In the result the following order is made.

1. The order of Pillay J is set aside and replaced with the following order:

   (a) The respondents are directed to pay the applicant R277 000 in compensation;

   (b) The respondents are to pay the applicant's costs, including the costs of senior counsel, such costs also to include those reserved on 31 August 2006.

2. Appellants are to pay the respondent's costs of appeal, including the costs of senior counsel.

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**DAVIS JA**

**I agree**

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**ZONDO JP**

**I agree**

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**JAPPIE JA**

**Appearances**

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| For the appellant | :Mr P Bezuidenhout |
| Instructed by | :The State Attorney |
| For the respondents | :Advocate H.R Woudstra SC |
| Instructed by | :Henning Viljoen Attorneys |
| Date of hearing | :3 March 2009 |
| Date of judgment | :2 June 2009 |