REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 61/09

In the matter between:

NTOMBI GLADYS RADEBE **First Appellant**

VERONICA LEAH DHLAMINI **Second Appellant**

and

PREMIER, FREE STATE PROVINCE **First Respondent**

MEMBER OF EXECUTIVE COUNCIL FOR EDUCATION

FREE STATE PROVINCE **Second Respondent**

SUPERINTENDENT GENERAL OF EDUCATION,

FREE STATE PROVINCE **Third Respondent**

Heard: 22 September 2010

Delivered: 01 June 2012

Summary: Labour Law – Protected Disclosures act – definition of employer in the act clear and unambiguous – approach to interpretation of statutory provisions restated – Provincial MEC for Education employer of employees in the provincial Education department – disclosure made to MEC is compliant with the act.

Meaning of "good faith", "reason to believe" and "information" in the act discussed – narrow interpretation of the provisions of the act is inimical to the purposes of the act – honesty plays a central role in determining whether a disclosure was made in good faith and whether the employee had reason to believe that improprieties were committed.

Meaning of information - could be factual, opinion or hearsay etc but must be based on some facts – not a requirement to prove the truth or accuracy of information disclosed.

Relief – full retrospective reinstatement awarded

JUDGEMENT

MLAMBO JP

[1] This is an appeal directed at the judgment and order of the Labour Court (Moshoana AJ) handed down on 17 February 2009. In that judgment, the Labour Court dismissed an unfair labour practice claim by the appellants that they had suffered an occupational detriment after making what they alleged to have been a protected disclosure in the context of the Protected Disclosures Act[1] (the PDA). Leave to appeal was granted by the Labour Court.

[2] At all material times, the first appellant (Radebe) was a School Management and Governance Developer and second appellant (Dhlamini), the Principal of Thabong Primary school. Both were based at the Lejweleputswa Education District in Welkom under the auspices of the Free State provincial sphere of government, more specifically in the education department. On 9 December 2005, the appellants signed an affidavit in which they stated under oath:

> 'That we are the complainants against corruption, nepotism and fraud that is ongoing in the Department of Education in the Free State, generally and at Lejweleputswa Education District in particular.'

[1] Act 26 of 2000.

They attached an eight page document to that affidavit and disseminated it to the President of the Republic of South Africa, National Minister of Education, Premier of the Free State Province, Member of the Executive Council (MEC) in charge of Education in the Free State Province, the Superintendent General for Education in the Free State Province, Deputy Director General for Education in the Free State Province Education Department as well as the District Director of Lejweleputswa District.

[3] In that document (the disclosure), the appellants chronicled what they viewed as conduct amounting to corruption, nepotism as well as fraud, fruitless and wasteful expenditure and requested that these be investigated. I set out its contents in full:

> 'We the undersigned as iinterested parties in the Education Department in the Free State would like to request deeper & serious investigation in the following:
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> 1. REDEPLOYMENT
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> 1.1 Principals and Deputy Principals
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> Principals were redeployed by the MEC without consultation with the School Management Developers (SMDs) who are the immediate Supervisors. Some principals were redeployed to the District Office where they were later on absorbed as SMDs and SYRAC officials.
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> They received letters which supported their absorption. Schools and the District Staff were notified of their converted posts. These Officials were with all relevant equipment to aid them in executing their (e.g Stamps, offices, cars etc).
>
> Thereafter, in the SMD Conference held in Golden Gate in September 2005, the MEC
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> announced that 2 SMD's should relinquish their posts with immediate effect and these instructions have implemented. Therefore our concerns are the following:

i. Legal & financial implications of such redeployment. This was challenged by NAPTOSA and certain individuals through the High Court ruling.
ii. Payment of acting Principals.
iii. Legal & financial implications of “demotions”.

Therefore we request that reasons behind the redeployment process be investigated, because speculations are that the MEC was perhaps trying to pave ways for her favourites to occupy these posts.

For example; the JC Motumi Secondary School Principal was to be redeployed to Icoseng Primary School. Amid that L. A Wesi has SMT members, the Deputy Principal from JC Motumi Secondary School was to be redeployed to LA Wesi as acting Principal.

At Concordia Secondary School in Theunissen, the Deputy Principal has been the acting Principal since January 2005, abruptl removal, a Deputy Principal from Bodiba Primary School also in Theunissen was appointed as the new acting Principal.

This post had been advertised in the vacancy list no. 1 of 2005, and the new acting Principal is the candidate – proving that nepotism has been applied and will still apply in filling the post.

Speculations are that the new Concordia acting Principal paved the way for the wife of Bodiba Primary School Principal, who is an HOD also at Bodiba, to occupy either a Deputy Principal or a Principal post whilst the current Principal - her husband will be promoted to one of the SMD posts that are being relinquished by demoting two(2) current SMDs.

1.2 District Director

Allegedly,the Lejweleputswa District Director is to be redeployed to Bloemfontein by early January 2006. This is really surprising, because the MEC had initially ignored Educational Department protocol and joined the entourage which announced the District Directors appointment. The MEC indicated in that meeting that whoever does not support the District Director, shall meet her wrath.

This move and utterances have raised speculations of nepotism in the District Director's appointment. The District Director's husband - a CES (Chief Education Specialist) at Lejweleputswa acted as a District Director, implying that the husband paved way for his wife.

In practice, the wife was a District Director and the husband a CES. It is thought that when the MEC realized the abnormality of a family manipulating the district she then immediately redeployed the husband to the Special Programmes/Projects Directorate dealing in tenders, in Bloemfontein. A strategic move!

It is against thid background that an investigation should be done on:

- CES husband. Redeployment reasons are unknown.
- District Director wife. Redeployment reasons are unknown.
- Are the Director's skills causal to the deployment to Bloemfontein.
- Is it lack of skill that resulted in her redeployment?
- Which post will she occupy in Bloemfontein?
- Is the Director paving the way for another of the MEC's favourites from Whole School Evaluation?
- Is this not a comfort zone creation for the family?
- Is it a strategy for her to join her family whilst many educators and other Departmental Officials are separated from their families?

The MECs vested interest and relation to this particular family should honestly, seriously and thoroughly be investigated.

1.3 The Ex- District Director of Lejweleputswa

The redeployment of the ex-District Director of Lejweleputswa to the Finance Section in Bloemfontein is questionable. He was redeployed from one section to another within a very short space of time. It seems he was being prepared for the senior post he is currently occupying - Chief Financial Officer (CFO).

- Why was he redeployed from Lejweleputswa?
- Was it because a space was being created for the husband-wife comfort zone?

- What about the investigations that were done by the Lejweputswa Provincial Department which alleged his role as an Acting Officer?
- Was he also strategically removed to pursue someone's interest?

2. RESKILLING OF PRINCIPALS

Some of the Principals underwent a re-skilling programme which was equally unclear what informed it. The criteria used by the MEC to select those who went for reskilling was not and is still not known. The SMDs as immediate supervisors to the Principals were not consulted and involved in the selection process

All the Principals from outside Welkom who were in the reskilling programme were accommodated at Stanville Inn, Welkom and were catered for, for a month by a private caterer. Therefore the following concerns should be addressed:

What informed the MEC, as the Lejweleputswa District had no knowledge thereof?

Which budget was used for accommodation & catering?

Who were the caterers?

Were tender procedures followed?

How many catering services were used and why?

3. NEW OFFICE MOVEMENTS

The Odendaalsrus offices which were occupied by the Department of Education were closed and their Officials were transferred to Welkom. During first quarter in 2005, the SMD Section including part of the Administration Section was informed that by 1 April 2005 there was to be exodus to the Western Holdings Mine Offices. This was done whilst the Learning Facilitation, SYRAC and BET Sections occupied Amercosa.

There were a lot of frustrations faced by the affected Sections in the Mine Offices as they were isolated from the entire community, insufficient and no

transport to and from the Mine Offices, communications broke down as there was no technological means such as telephones, faxes, computers etc.

During August 2005, a second instruction was given by the MEC for another exodus back to the Amercosa Building which is being rented by the Department of Education. This too, was done whilst the Learning Facilitation and SYRAC Sections had to occupy the Mine Offices.

It has to be noted that immediate occupancy of the Amercosa Building was due to the pressure by Unions (SADTU, COSATU, NEHAWU, COSAS).

Allegedly, there is a three (3)-year contract between the Department of Education and the Western Holdings Mine which was signed during the Ex-District Directors term of office. The contract is set to expire in 2006.

- Who signed it?
- Who paid for it?
- Who occupied these Offices prior to the first Exodus?

It is assumed that fruitless expenditure was incurred during all such movements. *Therefore an investigation needs to be done on the basis on which the Ex-District Director was promoted to CFO position whilst he left an alleged legacy of fruitless expenditure in the Lejweleputswa District.*

We request an investigation be conducted on:

- The contract in itself
- The budget used for renovations, transport and installation in the Mine Offices
- The role which the present District Director should have taken in adhering the contract implementation
- The role which the MEC played in initiating the exodus and seeing through to the implementation of the contract.

4. <u>THE MEC's APOINTEES</u>

During MEC Kganare's term of Office, two (2) Officials who allegedly were on three (3) year contracts as VALUES IN EDUCATION Officials were appointed at Lejweleputswa District. Their roles were not clear such that presently they are in Learner Section.

- How is it that they were transferred to Learner Section?
- Is it transfer or absorption?
- What is the future of the two (2) officials in our District after the three (3) year contract?

As if all wasn't enough, one of the seconded Official in Learner Section had been action as CES (Deputy Chief Education Specialist), there is high speculation that the post will be given to one of the ex-District Director's favourites who comes from Kroonstad. Therefore it is evident that the present District Director as she continues to pursue his interests characterized by nepotism instead of pursuing the goals of the Department.

5. APPPOINTMENTS IN THE FREE STATE DEPARTMENT OF EDUCATION

It is with concern that after the placement of the new MEC, the Head Office appointments become a theatre wherein the Head of Education was said to be transferred/absorbed or seconded in the Premiers Office. There was an actor in the Head's Office. It was not clear why such an effective and efficient person was removed from the Education Department. Due to the HOD's removal, a series of actors were witnessed at the Head Office in Bloemfontein. This resulted in instability and lack of continuity and consistency.

As we witnessed the drama unfold at Head Office, the Chief Director was caught by the Scorpions and coverage was lively broadcasted by the SABC. The Chief Director was released on a R 50 000 bail pending the investigation. He was subsequently suspended by the MEC yet ironically after his re-instatement, he was elevated to the Deputy Director General (DDG) post.

- Why was the Head of Education removed from the Department of Education?
- Why was the Chief Director elevated after placing the Department under great and public disrepute?
- What is the Departmental role in such a situation?
- How is the Department image portrayed?
- What is the MEC's vested interest in not only this case but in the DDG himself?

- If this is a paid senior position, is this designed and destined for him only?

At Lejweleputswa District, there are some of the appointments which are a total disappointment, and the concern was raised in various meetings and submissions were made but all were ignored. The appointments (especially in the Administration Section) highlight a lot of nepotism and favouritism whilst effective and committed subordinates are side-lined. The result is inefficiency and ineffectiveness in most of the section. Some of these Administration Officers are moved from pillar to post because they are not favourites.

One Official in particular (Mr Xaba, who is a very dedicated, committed, effective and efficient workerholic) happened to be a whistle blower against corruption and fraud especially in the Provision Section. A submission was made and an investigation was done at the Lejweleputswa District whilst the present CFO was a District Director, yet to date there is no outcome of the investigation. Instead he was and still is continually moved from one section to another.

Presently he is the Workers Section and was once confronted by the District Director because he had blown a whistle. Unlilke other Officials, he is also ostracized in merit awards as no one can claim him due to him being tossed from one section to another. This is considered as harassment and violation of his appraisal rights because he cannot tow the line of corruption and fraud.

The deeper investigation should be conducted on the disposal system as there are strong allegations that there was corruption involved as he (Mr Xaba) refused to sign the disposal documents. It is also requested that Mr Xaba's submission and supportive documents that were sent to Provincial Department of Education to be revisited in order to gain more understanding of the corruption and fraud that occurred during the present CFO's term of office as a District Director.

Corruption, theft and fraud concerns were also raised by an SMD (Dr. Radebe) and the very same investigation team sent to the Lejweleputswa District had once again failed to present the results of their investigation. For these reasons:

- A neutral and independent investigation team should be sent to thoroughly investigate concerns raised by Mr Xaba, Dr Radebe and Mrs Maruping (an ex-LF who was also one of the aggrieved).
- Credentials or profiles of all investigating team members must be checked as one member (Mr Mokoena) had relations which he consented to and as a result, he was recused from the presentation.
- Did he have an influence on the outcome of the investigation? One can only wonder!
- Why were those suspected and found with Departmental stock by the Scorpions not suspended pending the investigation?
- Nepotism is a tight web of corruption in which favourites are placed in strategic positions. This should be thoroughly investigated and uprooted for the successful running of the District.
- All schools that had been closed should be investigated as to where the Departmental stock is, Farm Schools in particular.
- Books that schools had not ordered yet were delivered to such schools should be investigated.

There were SMD's (School Management Developers) interviews at the Lejweleputswa District and it was indicated that all those women were not suitable for the post. A calculated move!

The present appointee was a Principal at Dr Cingo Secondary School, Kroonstad - a post which was vacated by the present CFO.

It is for this reason that we request deeper investigations on the relationship of the present SMD and present CFO because there are high speculations of nepotism practiced in expense of the Department of Education.

6. <u>SCHOOL MANAGEMENT TEAMS (SMT) TRAINING IN THE FREE STATE</u>

It is requested that a thorough investigation be conducted on the SMT Training in 2003 during the term of office of the present CFO.

- Who were given the tenders? (because there is speculation that one person in particular was given more tenders because of nepotism and his association with the higher echelons of the Department.)

> ➢ Neutral investigators especially for this investigation should be sought, otherwise the syndicate will build a fortress.
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> 7. ALLOCATION OF TENDERS
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> Honest and deeper investigation should be conducted as tenders are given to favourites and family members e.g Learner Transport in Theunisson, Parys and Brandfort. Investigation should also go for the 31 million Project extra funding on the renovations of schools. The role of the MEC on both should be thoroughly investigated.
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> We hope this will receive the necessary attention and immediate action as people are enriching themselves through the Department of Education. Be aware that the syndicate of corruption is so strong and occupies most strategic positions. The untouchable MEC of Educations' quasi – roles should be investigated.'

[4] Upon receipt of the disclosure, the Free State Department of Education (the Department) responded through the State Attorney, Bloemfontein, *per* letter dated 15 December 2005, to the effect, *inter alia,* that it noted the contents of the disclosure with concern, that the MEC and other officials mentioned in the disclosure, viewed the appellants conduct as a deliberate attack on their dignity and called on them to desist from such conduct as well as demanding that they discontinue such conduct or face the consequences. The National Minister of Education[2] responded *per* letter dated 13 December 2005 to the effect that the matter fell outside her jurisdiction and that she would refer the matter to the Free State Department of Education for investigation. The MEC's secretary also acknowledged receipt of the disclosure as well as the letter from the Minister of Education with an undertaking to refer the matter to the MEC. There is no indication on record that the MEC sent any response to the appellants.

[5] The appellants wrote to the Minister in response to her letter stating, *inter alia*, that:

[2] Ms Naledi Pandor.

> '5.1 Among the people we requested an investigation for, is the MEC for Education. With due respect how can she investigate herself?
>
> *5.2* As we waited for the MEC's response as indicated in your letter, we received the attached we received the accompanying intimidatory and unsigned letter from the Office of the State Attorney, Blooemfontein dated 15 December 2005.
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> ...
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> 5.4 We therefore request your urgent intervention in this matter as we do not intend to discontinue with the matter as it is the demand conveyed by the Office of the State Attorney. We still request and independent investigation into the matter of enquiry.'

[6] The Minister responded *per* letter dated 17 March 2006 simply reiterating her stance as conveyed in her initial letter. She however further stated, *inter alia*, that: 'Take note that should you intend to continue with the matter despite the instructions of the State Attorney not to continue, you stand the risk of an appropriate action being taken against you as indicated in his letter.*'* Thereafter the Department, *per* letter dated 21 December 2005, appointed a Mr P M Tladi and Mr L Gildenhuys to investigate the appellants' allegations. The letter of appointment stated that the Tladi and Gildenhuys were appointed in terms of the Disciplinary code and procedure for Educators and specified the powers of the investigators regarding the investigation. Appellants refused, upon being invited, to take part in the investigation that ensued, alleging *inter alia*, that the letter from the state attorney barred them from making allegations of the sort they had made in their document.

[7] It should be mentioned that the appellants did at some stage after their initial disclosure refer same to the Public Protector for attention. It is not necessary to consider this referral as it has no bearing on the appeal and the conclusion we have arrived at.

[8] Upon conclusion of the investigation, Tladi and Gildenhuys, *inter alia*, found that: 'It is the opinion of the investigating team that the allegations that had been made are baseless and unfounded and malicious and cannot be found or established after making the proper investigations. Due to the fact that Dr.

Radebe and Ms. Dhlamini did not co-operate with the investigating team it was not possible to investigate all the allegations.'

They further recommended that:

'1. The Superintendent General Education should not establish a commission of enquiry to investigate or call any agency of the State to investigate these allegations as they are made out of malice and speculation.

2. Disciplinary measures be taken against Dr. Radebe and Ms. Dhlamini.'

[9] The Department accepted the recommendation and instituted disciplinary action against the appellants. The crux of the charges levelled at them was that in making the allegations they had contravened section 18 of the Employment of Educators Act[3] (EEA) and that in so doing they had committed the common law/statutory offence of *crimen iniuria* i.e by publishing and/or communicating defamatory statements in respect of the MEC for Education, the CFO and the District Director of the Lejweleputswa district, to the effect that either and or all of them were guilty of nepotism, fraud and that they had caused fruitless and wasteful expenditure. With respect to Radebe, she faced additional charges regarding allegedly dishonest conduct pertaining to an insurance claim and unauthorised trips in respect of a subsidised motor vehicle. As is apparent from the crux of the charges[4] brought against the

[3] Act 76 of 1998 as amended.

[4] 'Charge 1**:**You have contravened Section 18 (1) (dd) of the Employment Educators Act 76 of 1998 in that on the 9th December 2005 and at Welkom, you committed a common law or statutory offence namely *crimen iniuria* by publishing and/or communicating defamatory statements in respect of the MEC for Education (Free State), the Chief Financial Officer and the Lejweleputswa District Director (Department of Education), to the effect *inter alia* that either and/or all of the mentioned were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure**.** First alternative, Charge 1: you have contravened Section 18(1) (q) of the Employment of Educators Act 76 of 1998 in that on the 9th December 2005 and at Welkom, you conducted yourself in an improper, disgraceful or unacceptable manner when you published and/or communicating defamatory statements in respect of the MEC for Education (Free State), the Chief Financial Officer and the Lejweleputswa District Director (Department of Education), to the effect *inter alia* that either and/or all of the mentioned were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure.

Second alternative to Charge 1, you have contravened Section 18(1)(f) of the Employment of Educators Act 76 of 1998 in that on the 9th December 2005 and at Welkom, you unjustifiably prejudiced the administration, discipline or efficiency of the Lejweleputswa District Director or the

appellants the disciplinary action was initiated against them on account of them having made the disclosure.

[10] Upon being served with the charge sheet, the appellants unsuccessfully tried to interdict the Department, in the Free State High Court, from pursuing with the disciplinary action. Their basis was that they considered themselves to be whistleblowers in terms of the PDA and that the disciplinary inquiry amounted to an occupational detriment. That court (per Musi J) found that the purported disclosure was made to persons not contemplated in sections 5,6,7,8 and 9 of the PDA, and concluded that the appellants had not made a protected disclosure within the contemplation of section 9 of the PDA and dismissed their application with costs. It is not necessary to traverse the reasoning of that court as that judgment is not on appeal before us nor does it have any bearing on the issues in the appeal.

[11] The disciplinary process thereafter unfolded with the appellants' participation and upon conclusion the appellants were found guilty on the alternative to charge 3 being: 'Alternative to Charge 3, you have contravened Section 18(1)(f) of the Employment of Educators Act 76 of 1998 in that on the 10th February 2006 and at or near Welkom, you unjustifiably prejudiced the administration, discipline or efficiency of the Lejweleputswa District Office or the Department of Education when you communicated the unavailability of the Accounting Officer to the insurers Glenrand MIB as reason for the incomplete claim form whilst being aware that the damage to your subsidised vehicle registration number 245 DOC FS resulted from an unauthorised trip.'

[12] A sanction of demotion was imposed against both but Dhlamini succeeded in having her sanction altered to a three month suspension, on appeal. Radebe's appeal was unsuccessful. They contested the fairness of the disciplinary action as well as the sanctions imposed against them and invoked the dispute resolution mechanisms contained in the Labour Relations Act

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Department of Education when you published and/or communicating defamatory statements in respect of the MEC for Education (Free State), the Chief Financial Officer and the Lejweleputswa District Director (Department of Education), to the effect *inter alia* that either and/or all of the mentioned were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure.'

(LRA)[5] by referring an unfair labour practice dispute to the Education Labour Relations Council for resolution through conciliation. The dispute could not be resolved and the matter was referred to the Labour Court for adjudication.

[13] In their papers, the appellants claimed that they had made a protected disclosure within the contemplation of the PDA and as such the action taken against them was an occupational detriment as defined in the PDA and amounted to an unfair labour practice in terms of section 186(2) (d). This section provides that an unfair labour practice is any unfair act or omission that arises between an employer and employee involving an occupational detriment other than dismissal, in contravention of the PDA, on account of the employee having made a protected disclosure as defined in the PDA. The Labour Court ruled as stated earlier that the appellants had not made a protected disclosure and dismissed their unfair labour practice claim with costs.

[14] The Labour Court's conclusion that the appellants had not made a protected disclosure within the contemplation of the PDA rests essentially on two pillars. In the first place, the Labour Court found that the disclosure they made was not to their employer and also that it was not about the conduct of their employer. The other pillar on which the Labour Court's ruling is premised is that the appellants had not acted in good faith when making their disclosure and that they did not have reason to believe that the improprieties they alleged in their disclosure were committed or were ongoing.

[15] The essential issue in the appeal therefore is whether the appellants had made a protected disclosure within the contemplation of the PDA. In this regard, we are required to determine whether the disclosure was made by the appellants to their employer and whether they lacked the requisite good faith and reason to believe that improprieties were committed, when making the disclosure. On both scores, the Labour Court, as indicated, found against the appellants.

[5] Act 66 of 1995, as amended.

[16] Perhaps it is prudent at this juncture to set out certain key provisions of the PDA which have a bearing on the appeal. We must remind ourselves at the outset that the PDA's primary sphere of focus is the employment/working environment regarding the disclosure of information about unlawful and/or irregular conduct by the employer and/or its employees. The PDA further provides primarily for the protection of employees from being subjected to what is referred to as an occupational detriment in the PDA for having made such a disclosure[6] as well as suitable remedies to employees who have suffered such an occupational detriment on account of having made a disclosure that enjoys the protection of the PDA. Provision is made in keeping with the objects of the PDA for procedures in terms of which employees may disclose information regarding such conduct.

[17] Section 1 of the PDA contains definitions of the key terms used in the act. In the first place, the term 'disclosure' is defined as '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 that *(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; or *(g)* that any matter referred to in paragraphs *(a)* to *(f)* has been, is being or is likely to be deliberately concealed'.

[18] An occupational detriment is defined in section 1 by reference to a number of instances that could occur in the employment environment arising from the making of a disclosure by an employee. For purposes of this judgment, the following instances are relevant: subjecting an employee to any disciplinary action; dismissing, suspending, demoting, harassing or

[6] Section 2.

intimidating an employee. Furthermore, the wrongdoing targeted by the PDA is referred to as an "impropriety". This is defined as any conduct falling within any of the seven instances of wrongdoing referred to in paragraph 11 above i.e. the so called seven types of improprieties.

Protected disclosure

[19] However not all disclosures are protected in the sense of immunising the employee making the disclosure from being subjected to an occupational detriment, by the employer implicated in the disclosure. A disclosure is protected if it is made in terms of one or more of five scenarios provided in the PDA. These are if the disclosure is made in terms of sections 5, 6, 7, 8 or 9. For purposes of this judgment, I propose to consider only those provisions considered by the Labour Court to arrive at its decision being essentially section 6 and to a certain extent section 9.

[20] Broadly, section 1 contains two qualifying requirements for a disclosure that will be regarded as protected in terms of the PDA. These are that the employee making the disclosure must have "reason to believe" that the information disclosed "shows" or "tends to show" that an impropriety has been committed or continues to be perpetrated. These are the general requirements found in section 1 in terms of which all disclosures have to comply with in addition to the specific requirements found in the particular section within which a disclosure is sought to be located.

Disclosure by an employee to an employer

[21] Section 6 provides that any disclosure made in good faith to the employer of the employee is a protected disclosure. *Ex facie,* the provisions of section 6, a disclosure made in terms thereof has to comply with two essential requirements. These are that the disclosure must be made *to the employer of the employee making the disclosure* and that *it must be made in good faith*. (My emphasis). The Labour Court found that the disclosure at issue in this matter was not in compliance with section 6 in that it was not made to the appellants' employers and that it was not made in good faith.

[22] In arriving at this conclusion, the Labour Court briefly considered the definition of an employer contained in the PDA and then proceeded to consider the provisions of the EEA regarding employment relationships in the context of that Act. This led the Labour Court to conclude that the persons to whom the appellants made the disclosure were not their employers. The court found on this score, and based entirely on the provisions of the EEA, that Radebe's employer is the Superintendent General for education in the Free State Department of Education. In respect of Dhlamini, the court concluded that her employer is the Thabong Primary School where she was the principal. The Labour Court further reasoned that any disclosure 'not made to the employer of the employee disclosing the impropriety does not receive any protection under section 6', that 'section 6 does not contemplate disclosure to employees of the employer' and further that the PDA is clear that, 'that person must be acting on behalf of or on the authority of such an employer.' The Labour Court further dismissed the suggestion that the MEC was the employer of the appellants.

[23] This reasoning led the court to conclude that as the appellants had complained, in general terms, about the conduct of the MEC for education in the Free State province, the complaint was not a disclosure in terms of the PDA as the MEC was not their employer. The Labour Court's resort to the EEA appears to have been influenced by the agreement between the parties that the appellants were employees of the Free State Province Department of Education. The court then recounted the provisions dealing with employment relationships in the EEA and made its conclusions as already mentioned.[7]

[24] The PDA defines an employer[8] as 'any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or 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.' This definition is, to me, clear and unambiguous. I can

[7] It is unclear why the Labour Court did not find that Radebe had correctly referred the disclosure as in terms of its reason based on the EEA it found that the Superintentendent General was her employer.
[8] Section 1 of the PDA.

find no basis to suggest otherwise and am therefore not persuaded that it was necessary for the Labour Court to have resorted to the EEA to determine the employer of the appellants. Clearly, the court erred, in my view, by ignoring the definition of employer as we have in the PDA.

[25] The correct approach, in my view, when interpreting a statutory provision is that one must focus on the language found in the relevant provision and not resort to extraneous sources unless the provision is unclear and/ or ambiguous. Furthermore, when interpreting a legislative provision, one has to determine the meaning of the words used in the relevant provision according to their natural, ordinary or primary meaning and also in light of their context, including the subject matter of the statute and its apparent scope and purpose.[9]

[26] As the SCA remarked in *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse:*[10]

> 'Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.'

See also *Ebrahim v Minister of the Interior,*[11] where it was stated*:*

> 'Once the meaning of a statutory provision is found to be clear and unambiguous it is the function of a Court of law to give effect thereto. It is not then permissible to have recourse to pre-existing legislation for the purpose of construing the statutory provision.'

[27] The court further erred in concluding that the conduct complained of should be that of the employer and not that of its employees unless they were acting with the authority of the employer. In the first place, the definition found in the PDA is clear and wide enough to cover the conduct of employees of the employer in the course and scope of their employment with the employer.

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[9] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2507 (CC) at para 34; *Republican Press (Pty) Ltd v CEPPWAWU and Others* at para 19; See also *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662.

[10] 1997(4) SA 613 (SCA) at 632G -H.

[11] 1977 (1) SA 665 (A) at 680.

Furthermore, the approach of the Labour Court is seriously limiting and would exclude the conduct of a wide range of officials and functionaries in state departments. It is instructive to note from the document authored by the appellants that the information disclosed by them not only deals with the conduct of the MEC, but also details the conduct of other officials in the Free State Education Department. On the basis of the Labour Court's approach, all their actions fell outside the ambit of the PDA.

[28] It is axiomatic that the Labour Court's springboard in its gravitation towards the EEA was its finding that the Free State Department of Education was where the appellants were employed. This was correct and for this reason their employer is the head of the education portfolio in the Free State province in the person of the MEC. It is the MEC who exercises overall operational control and oversight regarding all matters educational in the provincial sphere of government in that province. The Superintendent General is an employee appointed by or at the behest of the MEC and cannot replace the MEC as the appellants' employer. The disclosure was therefore in accordance with section 6 and the Labour Court erred in concluding otherwise. After all it is the Free State Department of Education that instituted disciplinary action against the appellants. It did so in terms of its prerogative as their employer. The MEC is the accounting authority and that makes the incumbent the employer of employees in that department. This is squarely within the ambit of section 1 in the PDA.

[29] This conclusion on my part disposes of one of the bases on which the Labour Court dismissed the claim. Perhaps not strictly necessary but I also mention that the disclosure also complied with section 7. This section provides:

> 'Any disclosure made in good faith to a member of Cabinet or of the Executive Council of a province is a protected disclosure if the employee's employer is—
>
> a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;

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

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

It is common cause that the disclosure was also made to the Premier of the Free State Province, who is a member of the Executive Council of the Free State Province. It is the Premier of a Province who appoints MECs. Furthermore, the appellants are employees in the Free State Department of Education which is an organ of state within the provincial sphere of government under the control of an MEC. These findings render it unnecessary to venture into the question regarding the applicability of section 9 of the PDA which the Labour Court also dealt with. That is an issue for another matter.

[30] It remains for me to consider if indeed the disclosure was not made in good faith by the appellants and whether they did not have the requisite reason to believe that the information they disclosed showed or tended to show that improprieties had been committed or were continuing, as found by the Labour Court. In this regard, the Labour Court's view was that on examining the evidence tendered by the appellants it was not possible to find that the applicants could have acted in good faith when there was no basis for their allegations. The lack of good faith was to the Labour Court, also demonstrated by the fact that the disclosure was "replete" with speculation and that the appellants had "spurned" an opportunity to take part in the investigation instituted to investigate the allegations made by them in their disclosure. Furthermore, the Labour Court reasoned that the appellants could not have had reason to believe that the information they disclosed was substantially true as they had made no attempt to verify same, which was by its nature very serious. The Labour Court then stated:

> 'In my view the word reason means basis, in a form of facts and not baseless speculations or opinion.'

And further:

> 'So even if one is to follow lavishly the test applied by the EAT, there must still be facts upon which a believe (sic) is based. However my interpretation of the PDA suggests a slightly different test. The test being, there must be a factual basis upon which a believe (sic) must rest.'

[31] The decision that the Labour Court had in mind is not that of the Employment Appeals Tribunal but actually that of the Supreme Court of Judicature Court of Appeal (Civil Division) in *Babula v Waltham Forest College*,[12] where it was stated:

> 'If the employee makes a disclosure in good faith to his employer of relevant qualifying information, then provided he is not committing a criminal offence in making the disclosure he is protected from dismissal and detrimental action short of dismissal. The information may in fact be inaccurate or wrong that does not move the protection provided the employee has a reasonable belief that the information tends to show one or more of the matters set out in section 43(1) (b).'

[32] The Labour Court then went on to conclude that there was no factual ground or proof to substantiate the allegations made by the appellants in the disclosure. This finding by the Labour Court is not surprising bearing in mind that in the proceedings before it, its pre occupation was to find corroboration for and verification of the allegations made by the appellants in the disclosure. Counsel for the appellants argued that the test for determining whether the appellants had reason to believe or had lacked good faith was not as high as the Labour Court had pitched it. Counsel referred, *inter alia*, to the decision of the Employment Appeal Tribunal in Darnton v The University of Surrey,[13] where the Tribunal stated:

> 'While the determination of the accuracy of the factual allegations might be a useful tool to determine whether the worker's belief was

[12] [2007] ICR 1026, [2007] IRLR 346, [2007] EWCA Civ 174.
[13] *Darnton v University of Surrey* [2003] IRLR 133 (EAT) at 1780E-F.

> reasonable the reasonable belief had to be based on the facts understood by the worker and not as actually found to be in the case.'

[33] In my view, the nature of the information and meaning of that term as propounded by the Labour Court is rather too narrow and introduces an element of truth and verification. It presupposes factual accuracy of the allegations made in a disclosure. The PDA does not contain such an element. The phrase "tends to show' in section 1 cannot be equated to "show". Had the legislature intended the approach propounded by the Labour Court, it would have used only the term "show". The phrase "tends to show" properly interpreted means that the information in the disclosure "conveyed a suggestion of" an impropriety or conduct that may have taken place or might be continuing. I do not understand the provision itself to include a requirement that what is conveyed must be factually accurate or be the truth.[14] If the employee believes that the information is true it would fortify the reasonableness of his belief from which, in turn, his bona fides can be inferred.

[34] The approach of the Labour Court is too narrow and would, simply put, seriously gut the PDA of its essence and purpose. The PDA seeks to address important constitutional injunctions regarding clean government and effective public service delivery. See in this regard the statement by the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another*,[15] where it was held that a narrow definition of the term "information" under the PDA is inconsistent with the broad purposes of the PDA, namely the encouragement of whistleblowers in the interests of accountable and transparent governance. The SCA stated in this regard:

> 'A further difficulty with this approach to the nature of information under the PDA is that its narrow and parsimonious construction of the word is inconsistent with the broad purposes of the Act, which seeks to encourage whistleblowers in the interests of accountable and

[14] *Communication Workers Union v Mobile Telephone Network (Pty) Ltd* (2003) 24 ILJ 1670 (LC) at para 21.
[15] (2010) 31 ILJ 322 (SCA) at para 42.

> transparent governance in both the public and the private sector. That engages an important constitutional value and it is by now well-established in our jurisprudence that such values must be given full weight in interpreting legislation. A narrow construction is inconsistent with that approach. On the construction contended for by Mr Pauw the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite.'

[35] There is further, in my view, an overlap when determining whether the employee making the disclosure was acting in good faith and further whether he had the requisite reason to believe when making a disclosure that improprieties had been committed or were continuing. Honesty plays a pivotal role in both situations. Whilst good faith and honesty may conceivably amount to the same thing, I am of the view that a case by case approach is the proper one for a court considering these issues. Factors such as reckless abandon, malice or the presence of an ulterior motive aimed at self advancement or revenge, for instance, would lead to a conclusion of lack of good faith. A clear indicator of lack of good faith is also where disingenuity is demonstrated by reliance on fabricated information or information known by the employee to be false. The absence of these elements on the other hand is a strong indicator that the employee honestly made the disclosure wishing for action to be taken to investigate it.

[36] Simply stated if an employee discloses information in good faith and reasonably believes that the information disclosed shows or tends to show that improprieties were committed or continue to be committed then the disclosure is one that is protected. The requirement of 'reason to believe' cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. Disclosure of hearsay and opinion would, depending on its reliability, be reasonable. A mistaken belief or one that is factually inaccurate can nevertheless be reasonable, unless the information is so inaccurate that no

one can have any interest in its disclosure. (See also the statement in *Babula* (*supra*) at para 41 where it was held that: '*Darnton*[16] seems to me clear authority for the proposition that whilst an employee claiming the protection of ERA 1996, section 43(1) must have a reasonable belief that the information he is disclosing tends to show one of more of the matters listed in section 43B(1)(a) to (f), there is no requirement upon him to demonstrate that his belief is factually correct; or, to put the matter slightly differently, his belief may still be reasonable even though it turns out to be wrong.) If the primary or exclusive purpose of reporting is to embarrass or harass the employer the reasonableness of the employee's belief is also questionable.

[37] With regard to good faith, I have found the approach of the UK Appeal Court (Civil Division) apt and worthy of consideration by our courts. This was in the *Street v Derbyshire Unemployed Workers' Centre*,[17] matter where the Court stated:

> '[41] Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus in the context of a claim or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it is made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose. The term is to be found in many statutory and common law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another."

[38] Viewed this way, the information in the disclosure at issue does indeed tend to show that certain conduct by the MEC and other officials in the Department of Education tended to show that something was amiss. It is true that some of the allegations may have amounted to speculation but this does not render the disclosure unprotected. The appellants were not directly involved in what was taking place but observed conduct suggestive of foul play. Consideration of their disclosure set out at the beginning of this judgment details a number

[16] *Darnton v The University of Surrey* above n14.
[17] [2004] EWCA Civ 964; [2005] ICR 97; [2004] 4 ALL ER 839 at 41.

of incidents and occurrences at the instance of the MEC and other officials that at face value appeared irregular. Their disclosure, in my view, sufficiently raised the red flag regarding that conduct and the appellants, objectively considered, were honestly calling for an investigation of those matters. The investigation that was conducted in this matter was a non starter. It was superficial to say the least and blaming the appellants for its failure to uncover anything is taking matters rather too far. The investigators were appointed with wide ranging powers but they elected to rush through the process to enable them to recommend that disciplinary action be instituted against the appellants.

[39] Furthermore, from the evidence on record, it cannot be inferred that the disclosure was motivated by spite or malice on the part of the appellants or that they sought to embarrass the MEC thereby. It cannot also be said that they were motivated by self interest or were aware that the information they alleged was false or fabricated. I also do not agree that their refusal to participate in the investigation showed their lack of good faith. They were justified to adopt that stance after they were threatened with legal action by the employer on receipt of their disclosure at a stage when no investigation had been initiated.

[40] I have no hesitation therefore to find that that the Labour Court erred in interpreting the PDA provisions in a narrow fashion and in finding that the appellants had not had the requisite reason to believe in making their disclosure and that they had also lacked good faith in doing so. In my judgement, I find that the appellants made a disclosure that is protected in terms of the PDA. It is also common cause that they have been subjected to an occupational detriment by being disciplined and sanctioned on account of having made the disclosure. The disciplinary action instituted against the appellants and the sanction imposed upon them was unjustified and amounts to an occupational detriment. It therefore amounts to an unfair labour practice as contemplated in section 186 of the LRA. The appellants have shown that they made a protected disclosure, that their employer took action against them as a result thereof and that a causal link exists between the disclosure

and the retaliating action by the employer. Put differently, the detriment suffered by the appellants is clearly on account of, them having made the protected disclosure. This must be redressed.

[41] By way of relief, it appears justified to award the appellants full relief that restores the *status quo ante* between them and their employer which will go a long way towards addressing the humiliation they suffered arising from the occupational detriment they suffered. Such relief is justified in view of the fact that they blew the whistle on what was at face value irregular conduct by their employer and fellow employees. The action taken against them was precipitate and totally unjustified. The full redress proposed is enough to express our displeasure at how the appellants were treated. It should also send a clear message to other employers that this court will not hesitate to come to the aid of employees who blow the whistle on unlawful and irregular conduct. It is also justifiable under the circumstances to award the appellants costs.

[42] In the circumstances, the appeal succeeds and the following order is granted:

1. The order of the Labour Court dated 17 February 2009 is set aside and in its stead the following order is granted:

    1.1 "The applicants are reinstated to the positions they held before their demotion and suspension respectively.

    1.2 Such reinstatement shall be retrospective from the date of this order to the date of their demotion and suspension respectively including such remuneration and all benefits they would have been entitled to but for their demotions and/or suspension respectively.

    1.3 The respondents are ordered to pay the applicants costs including the costs occasioned by the employment of senior counsel."

2. The respondents are ordered to pay the appellants' costs including the costs occasioned by the employment of senior counsel.

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Mlambo JP

Jappie JA and Van Zyl AJA concur in the judgment of Mlambo JP.

APPEARANCES:

FOR THE APPELLANTS: Advocate Woudstra SC

Instructed by Henning Viljoen Attorneys

FOR THE RESPONDENTS: Advocate Tim Bruinders SC

Instructed by State Attorneys