REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA52/12

In the matter between

PALACE GROUP INVESTMENTS (PTY) LIMITED **First Appellant**

GRINPAL ENERGY MANAGMENT

SERVICES (PTY) LIMITED **Second Appellant**

and

MACKIE ALEXANDER MICHAEL **Respondent**

Heard: 28 May 2013

Summary: Respondent facing disciplinary hearing- respondent seeking interim interdict to halt disciplinary proceeding against him pending the adjudication of an alleged unfair labour practice dispute lodged by the respondent- respondent alleging to have been subjected to occupational detriment for launching liquidation procedure against the appellant. Labour Court granting interim interdict.

Requirements of interim interdict. Principle that an applicant must set his/her case in the founding affidavit restated. Respondent's *prima facie* right arising out of the alleged protected disclosure for lodging the liquidation application- respondent failing to state the facts on which he relied for asserting that he was subjected to an occupational detriment- respondent failing to attach to founding affidavit annexures referred to-

prima facie **right not established. Appeal upheld and interim application dismissed with costs**

Coram: Waglay JP, Davis JA and Molemela AJA

JUDGMENT (REASONS FOR ORDER)

MOLEMELA AJA

Introduction

[1] This is an appeal against the judgment and order of the Labour Court (Rabkin-Naicker, J) in terms of which the Labour Court in an urgent application granted an interim interdict ordering that disciplinary proceedings against the respondent be stayed pending the outcome of an unfair labour practice dispute. The appeal is brought with special leave of this Court.

The factual matrix

[2] The respondent is employed by the first appellant and holds the position of Group Risk and Internal Manager. There was a dispute as to whether the first or second appellant is the respondent's employer but nothing turned on this aspect.

[3] On or about 10th February 2012, the second appellant received a copy of a notice of motion by facsimile. The notice of motion appeared to have been issued at the North Gauteng High Court on 9th February 2012. The applicant in that application was the respondent in these proceedings. The relief sought in that notice of motion was provisional liquidation of the second appellant, alternatively that the second appellant be placed under business rescue. The notice of motion in question ("liquidation

application") was not served on either of the appellants in terms of the Rules of the High Court and had merely been faxed to the second appellant. The faxed notice of motion was not accompanied by any affidavit. It is common cause that on 9th February 2012, the respondent provided the appellants' landlord with a copy of the notice of motion in question and that pursuant thereto, the appellants' landlord indicated to the appellants that he intended to deny them any further access to their business premises.

[4] An unsigned draft affidavit to the liquidation application was subsequently sent to the appellants' attorney of record on 21st February 2012. No annexures were attached to that affidavit, the respondent having indicated that such annexures were too voluminous to be submitted electronically. The respondent never set the liquidation application down for a hearing.

[5] On 19thJuly 2012, the appellants issued a notice of contemplated suspension against the respondent, in terms of which they also indicated that the respondent would at a later stage be invited to make representations regarding his contemplated suspension. The respondent was subsequently suspended on full pay and issued with a notice to attend a disciplinary enquiry in which six complaints of misconduct were levelled against him.

[6] The respondent raised several preliminary points concerning the impending disciplinary hearing, *inter alia*, alleging that the subject matter of the complaints levelled against him emanated from protected disclosures he had made. The chairperson of the disciplinary enquiry dismissed these preliminary points and ruled that the disciplinary hearing proceed on 7th August 2012. On 7th August 2012, the disciplinary hearing was postponed to 15th August 2012 so as to enable the respondent to obtain legal representation.

[7] On 10th August 2012, the respondent lodged an unfair labour practice dispute with the CCMA, alleging that the disciplinary proceedings against

him constituted an occupational detriment as contemplated in the Protected Disclosure Act 26 of 2006 ("PDA") and as such constituted an unfair labour practice. At the commencement of the disciplinary enquiry on 15th August 2012, the respondent launched an urgent application against the appellants, seeking to interdict the disciplinary proceedings pending the outcome of the unfair labour practice dispute. It was agreed between the parties that the disciplinary proceedings would be postponed pending the adjudication of the urgent application. The urgent application was heard on 17th August 2012 and judgment was handed down on 28th August 2012. The court *a quo* granted an interim interdict ordering that the disciplinary proceedings against the respondent be stayed pending the outcome of the unfair labour practice dispute referred by the respondent to the CCMA on 10th August 2012. The court *a quo* also ordered the appellants to pay the costs of the application. It is against this decision that an appeal has been lodged in this Court.

<u>Proceedings at the court *a quo*</u>

[8] The respondent's case in the urgent application was that he made a protected disclosure in the liquidation application that he filed and that the disciplinary proceedings against him were instituted as a result of these disclosures. It is to be noted that a copy of the liquidation application was attached to the urgent application launched in the court *a quo*, but no annexures were attached thereto.

[9] The court *a quo* remarked that the respondent had not substantiated his claims by providing it with the annexures to the liquidation application and went on to state that it could only presume that "he intends to 'pull [the annexures] out of the hat' at a later stage in the dispute". This was after the court *a quo* had concluded that "some of the allegations he [the respondent] has made, as reflected in the charges against him, fall full-square within the definition of a "protected disclosure' in the PDA." It would seem that the court *a quo*'s conclusion that the respondent made a protected disclosure was made on the basis of the text of the charges/complaints quoted in the respondent's founding affidavit. What

the court *a quo* did not consider was that in the same text of the charges the appellants asserted that the misconduct committed by the respondent related to the fact that the allegations he had made in the liquidation application were fraudulent, dishonest and without any reasonable basis.

[10] The court *a quo, inter alia*, stated as follows: "It may well be that Mackie has a personal axe to grind against his employers. Indeed certain of the averments in the 'winding-up application' suggest that he is concerned with monies owed to him by the respondents. However, given the charges facing Mackie and taking into account the approach to the interpretation of the PDA exemplified in the Radebe case (supra), I consider that he has established a prima facie right to the relief he seeks".

<u>The appeal</u>

[11] At the conclusion of the hearing of the appeal on 28th May 2013, this Court granted an order upholding the appeal and replacing the court *a quo*'s order with one dismissing the application. The reasons for the order are set out hereunder.

[12] The crisp question for consideration in this appeal is whether the court *a quo* was justified in granting the respondent an interim interdict halting the disciplinary hearing. The appellants' contention is that the order of the court *a quo* was not justified as the respondent failed to furnish the court *a quo* with sufficient information that served to establish the requisites for an interim interdict. The respondent contended *in limine* that given the fact that the order made by the court *a quo* was of an interim nature, it was not appealable. He argued that even though some allegations made in his liquidation application are not comprehensible when read without consideration of the annexures, as correctly argued by the appellants, there are other allegations that are perfectly understandable on their own and, as such, clearly spelling out the protected disclosures he made.

[13] It is trite that the granting of an interim interdict pending the outcome of further proceedings is an extra-ordinary remedy within the discretion of a court, exercised upon a consideration of all the facts. In motion proceedings, the facts are set out in the affidavits. The affidavits as such constitute pleadings and evidence. It is trite that an applicant's case is made in its founding affidavit and the respondent's case in its answering affidavit. It is settled law that the facts must be set out in the affidavits with sufficient particularity to enable the opposing party to respond thereto.

[14] The respondent's case was that he was entitled to protection under the PDA due to the fact that the disciplinary hearing he was facing amounted to an occupational detriment, having been instituted as a result of the protected disclosures he made in the liquidation application. In order to determine whether the respondent has *prima facie* established his entitlement to such protection, it is necessary to consider a few sections of that Act that are relevant to this appeal.

[15] An occupational detriment is defined in section 1 (the definitions section) of the PDA as including *inter alia* subjecting an employee to a disciplinary inquiry. In terms of section 3, an employee who makes a protected disclosure may not be subjected to an occupational detriment by his/her employer on account, wholly or partly, of having made a protected disclosure. However, not all disclosures are protected in the sense of protecting the employee making the disclosure from being subjected to an occupational detriment by the employer implicated in the disclosure. A protected disclosure is defined as a disclosure made to the persons/bodies mentioned in sections 5, 6, 7, 8 and 9 and made in accordance with the provisions of each of such sections. In terms of section 6, for a disclosure to fall within the ambit of a protected disclosure, it must have been made in good faith. It is clear that before other provisions of the PDA can come into play, the disclosure allegedly made must answer to the definition of that term as set out in the definitions section.

[16] Section 1 of the PDA defines the term 'disclosure' 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 one or more of the following:

(a) That a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged;

(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or

(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed".

[17] Section 9(1) of the PDA reads as follows:

"9. General protected disclosure

(i) Any disclosure made in good faith by an employee-
(a) Who reasonably believes that the information disclosed and any allegation contained in it are substantially true and
(b) Who does not make the disclosure for personal gain, excluding any reward payable in terms of any law,

is a protected disclosure if-

(ii) one or more of the conditions referred to in subsection (2) apply and

in all the circumstances of the case it is reasonable to make the disclosure".

[18] It is trite that for an applicant to be successful in an application for an interim interdict he/she must establish the following:

(i) A *prima facie* right, even though open to some doubt;

(ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted;

(iii) absence of an alternative remedy;

(iv) a balance of convenience in favour of granting the interim relief.

[19] With regards to the first pre-requisite, it is necessary to assess whether an applicant has, *prima facie*, established a right capable of protection. In the context of this particular matter, this calls for a determination of whether the information disclosed by the respondent in the liquidation application *prima facie* falls within the definition of a protected disclosure; put differently, whether such information *prima facie* qualifies as a protected disclosure.

[20] The question is whether the respondent had put sufficient information at the disposal of the court *a quo* to enable it to determine whether he had shown a *prima facie* right to entitlement to the protection afforded by the PDA. This inevitably calls for an assessment and analysis of the information disclosed by the respondent in the founding affidavit to the liquidation application to determine whether it amounts to a disclosure. If it constitutes a disclosure, the next question would be whether such disclosure is protected. If the disclosure amounts to a protected disclosure, the next consideration would be whether the respondent was subjected to an occupational detriment.

[21] In order for the respondent to satisfy the first requirement for an interim interdict, i.e. that he has a *prima facie* right even though open to some doubt, he would have to establish facts which clearly show that the disclosure he made is one contemplated in section 9(1) above. A perusal of the respondent's founding affidavit filed in the liquidation application, without a consideration of the annexures unfortunately does not establish such facts, in my view.

[22] In a paragraph headed "Material Facts" in the founding affidavit filed in the proceedings instituted in the court *a quo*, the respondent simply stated as follows:-

> "47. On or about 09 February 2012 I was forced in the circumstances prevailing to initiate legal proceedings for the business rescue and or provisional liquidation of the second respondent [second appellant], as is contained and or dealt with in annexures AMM 15 hereto. The annexures referred to in "AMM 15" hereto number in excess of some 119 items and these have been omitted herefrom on account of prolixity and uncertain relevance etc in the determination of these proceedings. Where annexures to AMM 15 are deemed necessary to the determination of the relief sought in the proceedings, these shall be adduced herein. I understand that the attested affidavit and what follows hereafter would suffice to establish the requirements to succeed on the basis of the relief sought in this matter. The application for business rescue and or provisional liquidation has never been served due to a belief that a non-litigious resolution could be obtained, see annexure "AMM 16".

[23] In the paragraphs following the one quoted above, the respondent merely quotes from a document submitted by the appellants at the disciplinary hearing and then goes on to aver that the disciplinary inquiry is an occupational detriment as contemplated in the PDA. It is thus clear from that founding affidavit that instead of narrating the facts on which he relied for asserting that he was subjected to an occupational detriment, the respondent chose to simply incorporate the contents of the founding affidavit filed in the liquidation application. Unfortunately for him the latter

affidavit, without annexures, failed to clearly identify the alleged protected disclosures.

[24] In the founding affidavit filed in the liquidation application the importance of the annexures was couched by the respondent as follows:

> "17. The annexures hereto are what they purport to be, are believed to be relevant to the entire conspectus of facts and should be read in their entirety, as if incorporated [in] the body of the affidavit as such, unless otherwise specifically stated or is implied etc by the context thereof."

[25] I find it ironic that whereas the respondent had indicated that the affidavit filed in the liquidation application was to be read in conjunction with the annexures, he repeatedly refrained from serving these annexures on the appellants, both in the liquidation application and in the application under consideration, simply because they rendered the application too "prolix". He still did not deem it necessary to file these annexures even after the appellants had, in their answering affidavit, complained about his failure to do so, having pointed out that it was "impossible for it [the appellants] to deal with the allegations without having had sight of the annexures which form part of the application". The upshot of the respondent's approach was that when the court *a quo* adjudicated over the matter, it had the benefit of only the affidavits and nothing more, hence its remarks that the respondent had apparently intended to pull the annexures out of a hat at a later stage in the dispute.

[26] I must point out that in almost every other sentence in the affidavit filed in the liquidation application, the reader is referred to an "annexed" report or e-mail, but then no such documents were attached to that affidavit. It is thus difficult to obtain the full grasp of the averments because the respondent merely makes allegations and then refers the reader to the unattached annexures for substantiation, with the result that the averments in question constitute bald and/or incomprehensible allegations.

[27] Furthermore, the respondent in his affidavit made some averments pertaining to alleged impropriety concerning an invoice allegedly submitted by the second appellant to Maluti-a-Phofung municipality. Unfortunately these averments are confusing due to the fact that the respondent at some point stated that the invoice in question was issued by another entity known as PPS. The respondent further sought to substantiate the allegations of impropriety by referring to a contract entered into with the municipality in question, which contract was not attached to his affidavit. Due to the respondent's failure to attach the relevant annexures, it is not clear whether any alleged impropriety pertaining to that invoice was committed by the appellants or by the other entity known as PPS.

[28] Moreover, the respondent averred that he arranged to have a meeting with the managing director of the second appellant to discuss the matter pertaining to suspicious or fraudulent activities but then cancelled that meeting in order to make further investigations. The respondent then refers to an e-mail that he subsequently sent to the managing director, where he, in the main, alluded to the second appellant's financial woes and how its business could possibly be salvaged. As a result, one is left unsure as to whether the respondent's investigation concerning the invoice did in fact confirm the managing director's impropriety.

[29] Furthermore, the chronology of events pertaining to this invoice is unfortunately not clear from the affidavit, not only because there seems to be a mistake with regards to the dates (in one paragraph the respondent refers to a date in January 2011 and in another paragraph to a date in January 2012), but also due to how the incidents are narrated.

[30] Mr van der Riet SC contended on behalf of the appellants that the respondent's liquidation application was motivated only by malice because the respondent failed to serve a copy of the liquidation application on the appellants, believing, on his own version that "a non-litigious resolution could be obtained" but then provided the appellants' landlord with a copy thereof. The respondent subsequently sent an e-

mail to the second appellant suggesting that a possible solution for the appellants' financial problems was for the appellants to sell the business. In the same e-mail, the respondent mentioned that he had already had confidential discussions with potential buyers pertaining to the sale of the appellants' business. In the end, the respondent never set the liquidation application down for a hearing.

[31] Whereas the PDA seeks to encourage employees to expose wrongdoing in the workplace without fear of reprisal, the requirement of 'good faith' is clearly one of the mechanisms incorporated into the Act so as to safeguard the interests of employers. The respondent's e-mail in which the afore-mentioned proposition was made was attached to the appellants' answering affidavit. The contents thereof were not disputed by the respondent in his replying affidavit. Neither did he make any attempt of refuting the appellants' allegations about his motive for launching the liquidation application. The relevance and importance of such a refutal relates to the fact that for a disclosure to constitute a protected disclosure as contemplated in the PDA, it must have been made by the employee in good faith. Given that an unfair labour practice dispute pertaining to this matter is already pending in the Labour Court, I consciously desist from making any further remarks pertaining to this aspect. Suffice it to mention that the respondent did not, in his replying affidavit, make any averments to refute the appellants' allegations of malice.

[32] Mr van der Riet SC also contended on behalf of the appellants that the respondent made no averments whatsoever pertaining to the three remaining pre-requisites of an interim interdict and that was another reason why the appeal ought to succeed. I do not share that view. Although the respondent did not in his affidavit direct himself to the remaining requirements in so many words, it is clear from the court *a quo*'s judgment that it was alive to those aspects and it cannot be said that it completely failed to consider them. It must be borne in mind that an affidavit is considered as a whole. In the seminal judgment in the case

of *Eriksen Motors Limited v Protea Motors and Another*,[1] Holmes JA aptly stated as follows: "The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities…"

[33] In my view, a perusal of the respondent's affidavit as a whole, without the benefit of the annexures, reveals numerous allegations so lacking in particularity that one cannot reasonably conclude that the respondent made a protected disclosure as contemplated in the PDA.

[34] It is a trite principle that affidavits, constituting both evidence and pleadings as they are, are expected to be clear and to accurately identify issues so that both the court and the litigants can be properly appraised of relevant facts. The respondent's affidavit in support of his urgent application does not fit this description. The vague manner in which the respondent's averments were set out in his affidavit resulted in him not satisfying the requirements for the granting of an interim interdict. In so far as the court *a quo* found that he did, it erred.

Appealability of the court *a quo*'s order

[35] An interim order is ordinarily not appealable. However, in the case of *National Treasury and Others v Opposition to Urban Tolling Alliance,*[2] the Constitutional Court re-affirmed that it is not an inflexible rule that an appeal cannot succeed against an interim interdict. The court stated that an Appeal Court must have regard to and weigh carefully all germane circumstances, including whether an interim order has an immediate and substantial effect. Moseneke DCJ stated as follows at par 24: "It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule. In

[1] 1973 (3) SA 685 (AD) at 691.
[2] 2012 (6) SA 223 (CC).

each case, what best serves the interests of justice dictates whether an appeal against an interim order should be entertained. That accords well with developments in case law dealing with when an appeal against an interim order may be permitted."

[36] The interim order granted by the court *a quo* bars the appellants from proceeding with the disciplinary hearing pending the outcome of the unfair labour practice. In terms of section 191(13)(a) of the Labour Relations Act, Act 66 of 1995 once an unfair labour practice dispute pertaining to an alleged occupational detriment has not been successfully conciliated, the matter then proceeds to the Labour Court for adjudication.

[37] In a case such as the present, the result is that no disciplinary hearing pertaining to the current charges can proceed against the respondent, who is currently on suspension with full pay, until the whole litigation pertaining to the unfair labour practice dispute is exhausted in the courts. During this entire period the appellants would have to continue paying the respondent's remuneration without him rendering any service to them, due to his suspension. Considering the substantial effect of the interim order on the appellants, coupled with the adverse order of costs made against them without justification, the interests of justice dictated that this appeal be entertained even though the court *a quo's* judgment was of an interim nature.

Order

[38] The above findings and conclusions constitute the reasons for the order made, which is re-iterated as follows:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following:

"The application is dismissed".

____

Molemela, AJA

I agree.

____

WAGLAY JP

I agree.

____

DAVIS JA

<u>APPEARANCES:</u>

FOR THE APPELLANTS: Van der Riet SC

Instructed by Webber Wentzel Attorneys

FOR THE RESPONDENT: In Person