REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 16/2012

In the matter between:

Johannes Izak BEAURAIN	**Applicant**
and	
LESLIE MARTIN N.O.	**First Respondent**
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL	**Second Respondent**
DEPARTMENT OF HEALTH, WESTERN CAPE	**Third Respondent**
MEC FOR THE DEPT OF HEALTH, WESTERN CAPE	**Fourth Respondent**

Heard: **10-14 March 2014**

Delivered: **16 April 2014**

Summary: Protected Disclosures Act 26 of 2000 – whether publication on Facebook is a protected disclosure – claim for automatically unfair dismissal in terms of s 187(1)(h) of LRA.

JUDGMENT

STEENKAMP J

Introduction

> "Fair is foul and foul is fair
>
> Hover through the fog and filthy air."[1]

[1] This is a case about allegations of filthy air emanating from the foul toilets and circulating through the air conditioning of Groote Schuur Hospital. It is also a case about whether the applicant's dismissal was fair or foul.

[2] The applicant, Mr Johan Beaurain, worked at Groote Schuur Hospital.[2] He published photographs and complaints on Facebook about the state of the toilets at the hospital, as well as allegations that the health of patients and staff was being compromised, because dirty air was being sucked up and distributed through the hospital via the air conditioning system. He was told to stop. He did not. He was dismissed. He says that his disclosures were protected in terms of the Protected Disclosures Act[3] and that his resultant dismissal was automatically unfair in terms of s 187(1)(f) of the Labour Relations Act.[4] In other words, he claims to be a whistleblower. The Department of Health and its MEC[5] say that the publications did not constitute a protected disclosure, and in publishing them the applicant was in breach of his duty to the employer, as well as of a number of express workplace rules. As the applicant's refusal to heed the instruction was persistent and deliberate, he was guilty of gross insubordination. This warranted his dismissal.

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[1] William Shakespeare, *Macbeth* Act 1 Scene 1.

[2] I may refer to it as "GSH" or "the hospital" in the course of the judgment.

[3] Act 26 of 2000 (the PDA).

[4] Act 66 of 1995 (the LRA).

[5] The Department of Health, Western Cape is cited as the third respondent and the Member of the Executive Council is cited as the fourth respondent. The hospital falls under the administration of the Department and the MEC is the executive authority. The dispute was initially referred to the Bargaining Council (the second respondent) and then to this Court.

Background facts

[3] The applicant was employed at GSH by the Department as an electrician in 2006. He worked in the Engineers Department. In 2007 he wrote to the doctor in charge of staff health, Dr Helga Antonissen, raising a concern about the inter-floor area (a mezzanine level not used for theatres or the public) above level C16 of the hospital. He described it as follows:

> "I had to inhale extremely filthy air that in my opinion consisted of the dust that was never cleaned or vacuumed for months as well as the fumes emanating from the dried-out remnants of a sewerage spillage in the area".

He claimed that, as a result, he suffered from a number of systems during the next week, including a severe headache, congested and painful lungs, swollen glands, fever, indigestion and diarrhoea. He also went to see her and further complained about weight loss.

[4] Dr Antonissen held a different medical opinion. She inspected the area in question together with the occupational health nurse and the safety officer. They did not notice excessive dust or any sewerage spillage. Her opinion was that the most likely condition for the applicant's condition was a viral respiratory infection. She advised sending away two sputum specimens to exclude TB, in view of the weight loss. She was of the opinion that the interfloor area did not pose a health hazard.

[5] In April 2009 the applicant wrote to Dr Antonissen again. Amongst other things, he raised the following complaint:

> "In the interfloors are toilets that do not seem to be part of a cleaning schedule similar to the other toilets in the hospital. These toilets are also dysfunctional and do not flush properly. Despite that, some contractors and staff members working in the interfloors seem to use these toilets from time to time. This then results in a situation where toilets are blocked up with dried out human excreta.
>
> The air conditioning system then sucks the rotten air that hangs around this toilet up into the air conditioning system and feeds it into the 'fresh' air to be supplied in the wards and other areas where sick people are lying or waiting to be attended to. The staff working in the hospital also get their fair share of this precious "fresh air".

> In certain areas of the hospital staff are working with dangerous chemicals. I'm thinking for example about cleaning chemicals, those used in the development of photographs, those used in laboratories etc. The toxic air (gases) that escape from these processes are often recycled through the rest of the hospital before it escapes into the sky to contaminate the rest of Cape Town."

[6] The applicant also complained about a number of other issues, including a claim that cellular phone equipment installed on the hospital premises and cellphones carried by staff and visitors "are also radiating harmful frequencies that reduces the strength of patients and staff. These should be neutralised and staff should be developed to identify, rectify and constantly monitor to ensure safe conditions around the beds of our patients."

[7] In the period from April to June 2009 the applicant posted a number of documents and photographs on Facebook. Apart from copies of his internal correspondence with hospital staff, including Dr Antonissen, he included photographs of the toilets in the inter-floor areas under the heading, "Vrotspul in Groote Schuur Hospitaal".

[8] On 5 June 2009 Dr Antonissen wrote to the applicant again. She said:

> "The GSH Occupational Health and Safety Committee held a workshop on 22 May 2009, at which the concerns raised in your letter were discussed.
>
> Some, but not all, of these concerns are valid, and have been addressed previously.
>
> A few points to note are:
>
> 1. The unsanitary conditions in some hospital bathrooms/toilets. This is an EHS[6] function and should be addressed with that department again.
> 2. Poor condition of the engineering workshops. Many visits have been done to this area, and recommendations made, but little progress has been made. This is a managerial issue with financial implications.
> 3. Poisonous pesticides in kitchens. Pyrethroids are used in gel form, not powder. This does not pose a danger to staff working in the areas.

[6] Environmental Health and Safety.

4. Drinking water has been tested on several occasions, and is safe to drink.

5. Regular annual or two yearly medical examinations performed on staff who work in identified risk areas. These examinations include appropriate blood tests and x-rays.

6. Maintenance checklists should be obtained from your HOD[7], Mr Scott. If maintenance is not carried out, raise the matter with him.

   If you have any other health and safety concerns it would be a good idea to put them in writing and address them to the Occupational Health & Safety Exco, c/o Ms Beth Adams, G45, OMB. We have regular meetings with problems are discussed."

[9] On 12 June 2009 Mr Harold Scott, the head of the engineering department, sent the applicant a letter in the following terms:

"**Bringing the name of Groote Schuur Hospital into disrepute**

I have received information in the format of emails, photos and Facebook literature pertaining to health risks that you have accumulated and exposed trying to bring Groote Schuur Hospital into disrepute.

Please stop these actions immediately.

You are hereby also informed that an investigation will be launched regarding your acts of misconduct of a serious nature with respect to these negative and derogative [*sic*] comments you have published on Facebook."

[10] The applicant continued to post comments on Facebook. On 7 August 2009 Mr Scott addressed a further letter to him in the following terms:

"**FAILURE TO ADHERE TO A LAWFUL INSTRUCTION GIVEN BY YOUR SUPERVISOR**

This matter has reference to a letter dated 12 June 2009.

You have previously been warned to refrain from publishing information on email, photos and Facebook literature pertaining to a letter to health risks. The said allegations are currently being investigated.

You have ignored the previous written instructions, when you continued to publish literature pertaining to allegations of health risks at Groote Schuur

[7] Head of Department.

> Hospital on Facebook and also having made arrangements to speak to a journalist while such allegations is [*sic*] being investigated.
>
> You are therefore given a final instruction to stop with immediate effect all kind of communication, which include all forms of electronic publications of information with regard to your allegations, and if you continue with these publications your actions will be viewed as gross insubordination."

[11] The applicant continued with his Facebook posts. For example, on 10 October 2009, he posted:

> "The management of Groote Schuur Hospital are currently in the process of locking the doors of the filthy toilets in the service areas of the hospital. The locked toilets will then be inaccessible to most people. But the majority of these toilets are still very filthy. Most of these toilets are still in such a terrible state of disrepair that it is impossible to flush the waste away. These filthy toilets are causing foul air to enter the air conditioning system and be pumped into the hospital wards. I took the pictures of the toilets in this album on Friday, 9 October 2009.
>
> The management of Groote Schuur Hospital do not succeed in seeing to it that the engineering department at the hospital fix these 15 toilets that are locked up and hidden away in the services areas of the hospital. I suspect that most of the managers at GSH just do not care."

[12] On 16 February 2010 the applicant was notified of a disciplinary hearing to be held on 25 February 2010.. The charge was described as:

> "Gross insubordination in that you failed to adhere to a lawful instruction issued to you in letters dated 12 June 2009 and 6 August 2009 that you stop with immediate effect all kinds of communication with regards to the allegations you made and refrain from publishing such information."

[13] The chairperson of the disciplinary hearing found that the applicant had committed the misconduct complained of and dismissed him with immediate effect on 12 May 2010 in terms of clause 7.4(vii) of the disciplinary code and procedure for the Public Service. The applicant appealed unsuccessfully. He referred a dispute about the fairness of his dismissal to the Public Health and Social Development Sectoral Bargaining Council where conciliation was unsuccessful. He then referred the current claim to this court.

[14] In the interim, but unbeknownst to the applicant, the hospital had implemented a comprehensive programme with the unfortunate acronym of SEAT[8]. The objective of the programme was "to evaluate the process of repair, maintenance, as well as management of the ablution facilities in the New Main Building, Groote Schuur Hospital."

[15] The first SEAT meeting was held on 16 July 2009. A representative of the engineering department explained problems relating to the cost of maintaining toilets and ongoing vandalism and theft in toilets. Systems were put in place to ensure that toilets were cleaned regularly and to prevent vandalism. Unfortunately, none of this was conveyed to the applicant.

Evaluation / Analysis

[16] The applicant claims that his dismissal was automatically unfair in terms of section 187(1)(h) of the LRA because the reason for the dismissal was –

> "a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act."

[17] This court has to decide, therefore, whether the employee did make a protected disclosure as defined in the PDA.

The applicable legal principles

[18] The PDA defines a "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 information concerned shows or tends to show, into alia, that the health or safety of an individual has been, is being or is likely to be endangered.[9] The objects of the Act[10] are –

[8] "Satisfactory Environment and Toilets".

[9] PDA s 1(i)(d).

[10] Section 2.

> "(a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
>
> (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
>
> (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer."
>
> And an "impropriety" means any conduct which falls within any of the categories referred to in the definition of "disclosure".[11]

Not a case for the Protected Disclosures Act?

[19] Ms *Harvey*, for the Department, argued that this is not a case that falls under the Protected Disclosures Act. The purpose of the Act is to facilitate disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of information and protection against any reprisals as a result of disclosures.[12]

[20] Ms *Harvey* argued that this is not a case falling under the Act because:

20.1 The allegations were not of an 'impropriety': the applicant's belief about health risks was unreasonable, and his complaint about quality management does not amount to an impropriety;

20.2 The publications did not amount to a 'disclosure' as the information was notorious;

20.3 The applicant did not follow the statutory procedures, and was not in good faith;

20.4 The disclosure did not meet the conditions prescribed in section 9(2); and

20.5 It was not reasonable in all the circumstances to publish the information on the internet.

[11] PDA s 1(iv).

[12] Preamble to the Act.

Was there a disclosure of an impropriety?

[21] To qualify as a disclosure, the applicant must have *reasonably believed* that the information disclosed showed an *impropriety* – in this case, that health or safety was being endangered.[13]

[22] The applicant had two broad concerns. Firstly, he had a concern about *health*: he believed that the unsanitary conditions in the toilets endangered health, and that filthy air and toxic fumes from chemicals used to deep clean toilets were blown over patients in the hospital. Secondly, he had a concern about *quality management*: he wanted the toilets unlocked, fixed, cleaned, and thereafter properly maintained.

The health concern

[23] There is no doubt in my mind that the applicant's belief that the unsanitary conditions in the toilets endangered health was *bona fide.* He struck me as an honest witness who believed passionately that his concerns were valid. He sincerely believed that the health of patients and staff at the hospital was being endangered. But was that a reasonable belief? On both occasions when he raised his concern Dr Antonissen took him seriously, investigated, and gave him a comprehensive reply. What is difficult to understand, is why Dr Antonissen or another representative of the hospital did not make the applicant aware of the comprehensive SEAT programme that had been undertaking to address some of the very concerns that he had raised. Nevertheless, his persistent refusal to accept her replies cannot be said to have been rational or reasonable.

[24] In *Tshishonga v Minister of Justice and Constitutional Development and another*[14] it was held that 'whether a belief is reasonable is a finding of fact based on what is believed. Thus, if the employer clearly has no obligation, the employee's belief that he does cannot be reasonable'.[15] See also *Xakaza v Ekurhuleni Metro Municipality and Others*,[16] where an employee

[13] Section 1(i)(d) and (iv).

[14] *Tshishonga v Minister of Justice and Constitutional Development and another* (2007) 28 *ILJ* 195 (LC).

[15] *Tshishonga* (above) at para 185.

[16] *Xakaza v Ekurhuleni Metro Municipality and Others* [2013] 7 *BLLR* 731 (LC) at para 70.

was repeatedly advised that he was factually and legally wrong but persisted in his allegations.

[25] In the evidence before me, Dr Antonissen made it clear that the problems with the toilets on the inter-floor areas – that were not being used by patients or visitors – did not pose any health risk. It could not lead to the spread of bacteria through the air-conditioning system. Dirty toilets could pose a health risk if users physically touched them and then touched other surfaces, but this was not a concern that arose in this case. The applicant's belief, on the evidence before me, was not reasonable.

The quality concern

[26] Information that toilets are in an unsanitary state does not come within the ambit of the Act, as Ms *Harvey* pointed out: in *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd*[17] this Court held that the legislature could not have intended that complaints about the under- performance of a quality systems department should be afforded the protection of the Act.[18]

Notorious information cannot be subject of 'disclosure'

[27] The information, in any event, was notorious: the unpleasant situation in the interfloor toilets was experienced by everyone on a daily basis, and could not be 'disclosed'. This quality management issue was the subject of a comprehensive SEAT program, which over the period 2006 – 2010 showed good results. In *Xakaza*,[19] a case in which a town planner was disciplined for refusing to register a land deal because he erroneously believed that irregularities were involved, the court held that the information referred to by the employee was already known to the employer and could not constitute a 'disclosure'.[20]

[17] *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (2013) 34 *ILJ* 3314 (LC).

[18] *Van Alphen* (above) at paras 36 and 39.

[19] *Xakaza* (above).

[20] Ibid at para 56.

The applicant did not follow the statutory procedure

[28] An objective of the Act is to provide for procedures in terms of which an employee can, *in a responsible manner*, disclose information regarding improprieties by his or her employer.[21]

[29] That information should be disclosed in a 'responsible manner' balances the employer's interest in protecting its reputation against the public interest in disclosure of irregularities. It links with the repeated requirements of good faith on the part of the disclosing employee.[22] Information ought preferably to be disclosed to the employer (under s6 of the Act), to the Minister or MEC for Health (s7 of the Act), or to a body which, in the ordinary course, deals with the irregularity in question (s8 of the Act) – in this case the Department of Labour which administers the Occupational Health and Safety Act 85 of 1993 (OHSA).

[30] In this case the applicant did first raise his concerns with his employer and he did so, I believe, in good faith. But despite the assurances from Dr Antonissen that those concerns that were valid, were being addressed, he continued to publicise his allegations to the world, on the internet. For protection he relies on section 9 of the Act, the 'general protected disclosure'.

[31] Section 9(1) provides that the disclosure must be made in good faith by an employee who reasonably believes that the information disclosed, and any allegation contained in it, a substantially true. From his evidence in this court, it is clear to me that the applicant did believe that his allegations were substantially true and that the made them in good faith. But apart from my finding that his belief was not reasonable, section 9(2)(c) further provides that the disclosure is only protected if the employee had previously made a disclosure of substantially the same information to his employer, and the employer took no action within a reasonable period after the disclosure.

[21] Section 2(1)(c) of the Act.

[22] Sections 6(1), 7(1), 8(1) and 9(1) of the Act.

[32] In this case, the applicant had no reason to believe that evidence would be concealed: the state of the toilets was open for all to see and to experience. The SEAT committee was attending to the problems that did exist. To the extent that he believed toilets were being locked in order to deny him access, this belief was irrational. In fact, Sister Tracey Douglas, the quality assurance manager, testified that toilets were temporarily locked in order to enable control, or when they were receiving chemical treatment; others were permanently decommissioned. The applicant had not previously made a disclosure in respect of which 'no action' was taken: on both occasions that he reported his concerns to Dr Antonissen she investigated and reported back to him, and the quality/maintenance issues were being addressed throughout 2009.

Was it reasonable in all the circumstances to make the disclosure ?

[33] Publishing the allegations on the internet was unlikely to solve the perceived problems: the health problem lay ultimately within the competence of the Department of Labour, and the quality/management problems fell to be dealt with by the Department of Health (from Hospital management up to the MEC). It was unnecessary to publish to the international community, who could do little to help.

[34] The internet is, unlike the press, not subject to editorial policy: there was no prospect of a moderator contacting the Hospital for its side of the story so that the public be given a balanced perspective. The publication was therefore unfair as well as unreasonable. And, as I have set out above, the employer had investigated and adequately responded to the health concerns; the quality concerns were in hand and receiving attention.

[35] In all the circumstances, the disclosure cannot be said to have been reasonable. Nor was it made in a responsible manner. It does not meet the requirements set out in sections 2 and 9 of the Protected Disclosures Act.

Was the dismissal for misconduct nevertheless fair?

[36] Given my findings with regard to the Protected Disclosures Act, the applicant's dismissal cannot be said to have been automatically unfair in terms of section 187(1)(h) of the LRA. It remains to consider whether his dismissal was nevertheless unfair.

[37] It is not disputed that the applicant was a civil servant whose employment was subject to express rules prohibiting publishing information detrimental to the employer's interests.[23]

[38] The applicant contravened these rules when he:

38.1 published allegations on the internet which brought the Hospital into disrepute - including that:

38.1.1 toilets are a health hazard;

38.1.2 Hospital management is 'unable or unwilling to manage things properly';

38.1.3 various health and safety risks exist (lack of fresh air, unsafe water, use of poisonous pesticides, unsafe electricity, unsafe building design);

38.1.4 HIV tests are invalid, and the Hospital is giving AIDS patients toxic drugs;

38.2 and when he

38.2.1 gave his contact details to a journalist who expressed interest in his allegations that HIV tests; and

38.2.2 published internal Hospital correspondence and Hospital meeting minutes online.

[23] This was covered with him in cross-examination, and also appears from his contract of employment at clause 3.4; Public Service Regulations (Part I) H.5, providing that an employee may not "irresponsibly criticise" government policy in publication;: Public Service Regulations (Part II) E, providing that an employee may not release information to the public without the necessary authority; and the Hospital's Media Policy clause 3, providing that employees may not provide information or comments about the Hospital to the media without the permission of the CEO or his deputy.

[39] The applicant was formally instructed twice, in writing, to cease such publications, but he deliberately and persistently refused to obey. His conduct amounted to gross insubordination. Having failed to show that he was dismissed because of having made a protected disclosure as defined in the PDA, it is clear that is dismissal on 12 May 2010 was for a fair reason.

Conclusion

[40] Whistleblowing should be encouraged. Employees who risk occupational detriments by making *bona fide* and reasonable disclosures about irregularities at the workplace if their attempts to have the employer address such irregularities, fall on deaf ears, must be protected. The scourge of corruption and the misspending of public money can be curtailed if a culture of whistleblowing is encouraged and if employers, both public and private, are encouraged to take steps at an early stage to address such irregularities. That would obviate the need for more public money to be spent later on through investigations by Chapter 9 institutions such as the Public Protector and further litigation. But on the facts of this case, sympathetic as the Court is to the applicant's concerns, I cannot find that he did make a protected disclosure. It follows that his dismissal was not automatically unfair; and on the facts of this case and in the face of the clear instructions that he willingly and deliberately defied, he was guilty of gross insubordination. His dismissal was fair.

[41] With regard to costs, I take into account that the applicant acted out of a sense of duty, albeit misplaced, and that he genuinely believed in his cause. He was initially represented *pro bono* at the Court's request, but he chose to represent himself at trial. In law and fairness, he should not be held accountable for the costs of the Department.

Order

The applicant's claim is dismissed.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	In person.
THIRD and FOURTH RESPONDENTS:	Suzanna Harvey Instructed by the State Attorney, Cape Town.