REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 08/14

WISANI EVIDENCE NGOBENI **Applicant**

and

MINISTER OF COMMUNICATIONS **First Respondent**

DIRECTOR-GENERAL - DEPARTMENT

OF COMMUNICATIONS **Second Respondent**

Heard: **20 March 2014**

Delivered: **3 April 2014**

Summary: Protected Disclosure Act: - Principles re-stated. Even in circumstances where a protected disclosure has been made in good faith, a whistle-blower may still not be granted final relief if requirements of such an order are not met. A finding that intended disciplinary action constitutes an occupational detriment cannot be made where allegations of impropriety have been levelled against the whistle-blower.

JUDGMENT

TLHOTLHALEMAJE, AJ

INTRODUCTION:

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[1] In his article, Evan Pickworth proclaimed that;

> "South Africa's whistle-blowing framework has received the highest possible rating of three stars in a report by global law firm DLA Piper for providing express protection to those making legitimate disclosures. It means South Africa trumps Germany, France, Hong Kong and Australia and is on a par with the laws in the US, UK and China."[1]

[2] In the light of such "feel-good" news, as South Africans, we should ordinarily be in self-congratulatory mood and patting ourselves at the back for having trumped such illustrious nations known generally for clean governance, and also being on par with such good company in the field of whistle-blowing. The irony however is that our whistle-blowing framework does not always and immediately provide the protection whistle-blowers expect and deserve. Given the various powerful political forces and interests at stake in the scramble to lay hands on the public purse, that valiant act of exposing malfeasant within the public service might be a career limiting move if not the beginning of a long nightmare. The well-known matter of *Charlton v Parliament of the Republic of South Africa*[2] is a case in point. Just to recap, honest Mr. Charlton exposed all of those "Honourable" Members of Parliament involved in the "Travelgate" scandal in April 2003. Some of those "Honourable" Members who had committed fraud on a grand scale owned up, and re-paid the ill-gotten gains. Some were 'disciplined', whilst others went about audaciously with their lives and regarded the whole episode and scandal as a non-event if not a big joke. As for honest Mr. Harry Matthew Charlton though, he came out second best for causing trouble, and was subsequently involved in a protracted battle to set aside his unfair dismissal.

[3] It needs to be emphasised however that all is not doom and gloom. In the face of the powerful, greedy and politically connected officials within the public service, whose past time is looting public funds, there will always be honest and brave South Africans in the form of whistle-blowers. They will take upon themselves to continue to expose the rot and those public officials with itchy

[1] "SA whistle-blowing system gets top score". Business Day, 27 January 2014
[2] [2011] 12 BLLR 1143 (SCA)

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fingers. These are our unsung heroes and heroines, the faithful servants of the people of our beloved country. They should be commended, encouraged and supported in their quest for making public officials accountable, with the acknowledgement that they continue do so at great risks to themselves and their careers.

[4] Following the dismantling of the evil system of apartheid, sadly in its stead, we have an even more evil and sustained system and culture of fraud, theft, corruption, nepotism, and other forms of malfeasant committed by the very same people entrusted with the protection of the public funds. The whistle-blowers are patriotic individuals, who are now the face of our new struggle against such evil and wanton looting. These are public servants who are taking the meaning of "public service" to new levels, and who are prepared to practice and uphold the principle of *"Batho Pele"* rather than merely paying lip service to it. As Pillay J observed in *Tshishonga v Minister of Justice & Constitutional Development & another*[3];

> "Whistle-blowers are not *impipis*, a derogatory term reserved for apartheid era police spies. Whistle-blowing is neither self-serving nor socially reprehensible. In recent times its pejorative connotation is increasingly replaced by openness and accountability. Employees who seek to correct wrongdoing, to report practices and products that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer. Still, of 230 whistleblowers in the United Kingdom and the USA, a 1999 survey found that 84 percent lost their jobs after informing their employer of fraud, even though they were not party to it" (references omitted)

[5] The applicant in this case is one of those brave South Africans. He took upon himself, at great cost, to expose malfeasant in his department. As a direct consequence of the disclosures he made, the Minister of the Department of Communications ("The Department"), Mr. Yunus Carrim took appropriate action, and the President has, on 20 February 2014, since signed a Proclamation initiating the Special Investigation Unit's investigations into the allegations.

[3] (2007) 28 ILJ 195 LC at para 168)

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[6] Brave and patriotic the applicant may have been, the matter however did not end with that simple protected disclosure. He now finds himself caught in the "Charlton syndrome". He has approached the court for a declaratory order, seeking that the disclosures he made during the execution of his duties be deemed to qualify for protection in terms of the provisions of the Protected Disclosure Act[4] ("The PDA"). Most importantly, he further seeks an order prohibiting the Minister and the Director-General from subjecting him to occupational detriment in contravention of section 3 of the PDA. In this regard, it is is common cause that the respondents have levelled allegations of misconduct against the applicant, and he has already made representations as to the reason he should not be suspended.

[7] At the end of the hearing of this application, the court made a request to the respondents that any disciplinary measures intended against the applicant be held in abeyance pending delivery of this judgment. The court is grateful to both the respondents' counsel for conveying the court's request to the respondents.

[8] The respondents opposed the application and argued that firstly, the disclosures were not made in good faith; and secondly, the applicant has not been subjected to any occupational detriment as contemplated in the PDA. The respondents further argue that there is no causal relationship between such disclosures as have been made by the applicant and the pending disciplinary enquiry against him for alleged misconduct. It is further the respondents' contention that the allegations raised by the applicant are presently the subject of investigation by the Special Investigative Unit, and that similarly the alleged misconduct by the applicant was investigated and is the subject of a pending disciplinary enquiry.

The relevant provisions of the Protected Disclosure Act ("The PDA"):

[9] In *Radebe and Another v Premier, Free State and Others*[5] Mlambo JP stated the following;

[4] 26 of 2000
[5] (2012) 33 ILJ 2353 (LAC) at para 16

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> 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 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.

[10] In its preamble, the PDA recognized that criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies, and can endanger the economic stability of the Republic and have the potential to cause social damage. In the mind of its drafters, it was emphasized that every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace and that every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure[6].

[11] Section 1 of the PDA provides that;

> **'disclosure'** means 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;

[6] Preamble to the PDA

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(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;

'impropriety' means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of 'disclosure', irrespective of whether or not-

(a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere;
(b) the law applying to the impropriety is that of the Republic of South Africa or of another country;

'protected disclosure' means a disclosure made to-

(a) a legal advisor in accordance with section 5
(b) an employer in accordance with section 6
(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7.
(d) a person or body in accordance with section 8
(e) any other person or body in accordance with section 9

BACKGROUND:

[12] At the onset, it needs to be stated that there can be no doubt in this case that the applicant has indeed made a disclosure regarding allegations of impropriety on the part of senior officials in the department. It can further not be doubted that the information disclosed falls within the realm of subsections (a); (b) of the definition and further that the disclosure was made in respect of “improprieties” as defined. The disclosures revealed possible breaches of legal obligations and criminal conduct. This conclusion is based on the background facts to follow and the fact that following this disclosure, the Minister had acted on the allegations.

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[13] The respondents' contention however is that the veracity of the allegations of impropriety was not relevant to these proceedings. The focus was instead shifted to the allegations of misconduct against the applicant. It is in that light that the respondents either denied knowledge of some of the allegations or alternatively failed to deal with them. It is however my view that the allegations and disclosures made by the applicant cannot simply be brushed aside for the purposes of a proper determination of this application. This is so in view of the applicant's contention that he was subjected to relentless occupational detriment, and further since it is within the context of the timing of these disclosures that a determination has to be made as to whether the applicant is entitled to the relief he seeks or not.

[14] South Africa has over time, been preparing to move its terrestrial broadcasting from analogue to a digital platform. The department being responsible for the implementation of the Broadcasting Digital Migration (BDM) Process entered into a Memorandum of Understanding with Media Corner (Pty) Ltd, on 29 October 2012. The agreement was to be in force for three years, and Media Corner was tasked with the public awareness campaign surrounding the BDM. In this regard, it was to develop and implement a comprehensive public relations strategy for BDM over a three year period until 2015.

[15] The applicant was employed with effect from February 2010 as a Chief Director Communications in the Premier's Office in the Free State provincial government. In April 2013, he was seconded to the Department of Communications for a period of 12 months in terms of section 15 of the Public Service Act, 1994. On 24 June 2013, the then Minister of Communications, Ms. Dina Pule, had submitted a request to the Premier of the Free State Province to transfer the applicant permanently to the position of Chief Director Marketing and Communications in the department. Premier Magashule of the Free State had approved the transfer on 8 July 2013.

[16] In his position as Chief Director Marketing and Communications, the applicant was *inter alia*, responsible for the monitoring and control of the finances of the Chief Directorate; authorization of payments to service providers for services rendered within the limit of R1 million; the prevention of unauthorized,

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irregular and fruitless and wasteful expenditure and losses, and overspending. The applicant reported to the Deputy Director-General, Dr. Sam Vilakazi ("Vilakazi"), who in turn reported to Ms. Rosey Sekese ("Sekese"), the Director-General. Sekese had signed the contract with Media Corner on behalf of the Department.

[17] The applicant's concerns surrounding financial impropriety within the department came about in July 2013 when he first received a copy of an expenditure statement dated 4 July 2013 pertaining to the financial status of his directorate. His previous requests for such statement since he joined the department had been unsuccessful. This statement covered the period 1 April 2013 to 30 June 2013, and showed that during that period, the Chief Directorate incurred an expenditure totalling in excess of R34 million for what is known as "DTT Awareness Campaign". The statement further showed that an order totalling in excess of R2.9 million had been made towards the awareness campaign, and that a further financial commitment in excess of R4 million was also recorded. This implied that a further amount of R6.9 million was still to be made during the 2013/2014 financial year. Having analysed the expenditure statement, it concerned the applicant that the Chief Directorate did not even have a budget allocated to it, yet it was already more than R50 million in the red. Furthermore, its total expenses were already totalling in excess of R39 million with further outstanding commitments amounting to R10.6 million.

[18] Of particular concern to the applicant was the fact that an amount of R34 million had already been spent on the awareness campaign, and as the money was coming from the cost centre under his responsibility but without his knowledge and approval, he had made enquiries with the department's finance unit. The finance unit had then confirmed that the whole amount of R34 million was paid to Media Corner. Officials of the unit could however not produce records or reports motivating for the payment for work done by Media Corner.

[19] The applicant then had a discussion with Ms. Lindiwe Nkwe ("Nkwe"), the department's Director, responsible for Supply Chain Unit and Contract

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Management. Nkwe informed the applicant that the department was obliged to pay to Media Corner an annual retainer in excess of R11.8 million for a period of three years. The payments were to be made monthly notwithstanding the fact that Media Corner was not rendering any service to the department. Furthermore, Nkwe had informed the applicant that all the payments made to Media Corner were authorised by Vilakazi.

[20] Having been provided with a copy of the contract between the department and Media Corner, the applicant analysed it and discovered that in its bid document, Media Corner had proposed an advertising expenditure of R756 million over a period of three years. The proposed expenditure was accepted and approved by Sekese despite the fact that the department did not have the budget to meet the proposed expenditure.

[21] The applicant held the view that Sekese had committed gross financial misconduct in contravention of the Public Finance Management Act in approving the proposed expenditure of R756 million. From the contract itself, it became apparent to the applicant that Media Corner was not doing any work for the department but was presenting invoices for payment which Vilakazi was authorising for payment and which the department had duly paid. The contract however did not allow for payment to be made without services being rendered, and thus invoices submitted should not have been authorised for payment by Vilakazi.

[22] The applicant also discovered that Media Corner was billing the department a monthly retainer of R983 335.67 without any billable activities. This amount emanated from the contractual provision in terms of which Media Corner was to be paid an annual retainer fee of R11.8 million inclusive of VAT. The applicant had also discovered that Media Corner's invoices were addressed directly to Vilakazi even though he was not involved in the day to day functions of the Chief Directorate.

[23] Having further regard to the expenditure statement of 4 July 2013, the applicant had discovered that of the R34 million already paid to Media Corner, about R6.8 was paid specifically for the retainer, and he had come to the

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conclusion that there existed misconduct and irregular dealings between Vilakazi and Sekese, and Media Corner on the other hand. The applicant had again approached Nkwe and informed her of his findings that irregular payments had been made. Nkwe had not provided him with documents supporting payments to Media Corner, and had told him to discuss the matter with Vilakazi as he was the one who had approved the payments. Having approached Vilakazi, the latter had informed him that he (Vilakazi) had dealt directly with Media Corner as the applicant's predecessor was incompetent. Vilakazi had also undertaken to provide the applicant with the relevant documentation, but to date, none had been forthcoming.

[24] Ms. Dina Pule was replaced by Minister Carrim on 10 July 2013. The applicant's contention was that the crusade to drive him out of the department started at that point. On 18 July 2013 he was invited to the Minister's office for a meeting and was informed that Sekese and Vilakazi had furnished the Minister with a memorandum in which they had recommended that;

a. The Minister should revoke the decision of the former Minister to transfer him to the department due to non-compliances within the Chief Directorate.
b. The department should not pay a service provider who had provided event management services for an event held by the former Minister in Limpopo on 21 June 2013 due to alleged discrepancies in the invoice submitted by the service provider.

[25] The applicant informed Minister Carrim that the memorandum appeared to be an attempt to divert attention away from impropriety involving Sekese and Vilakazi, and was clearly designed to turn the Minister against him. He further informed the Minister of the irregular payments to Media Corner, and informed him that he was targeted because of the disclosures he had made and his persistent questioning of the payments to Media Corner. Minister Carrim informed him that he had referred the memorandum to Deputy Minister Stella Ndabeni-Abrahams who was delegated with dealing with internal labour related issues.

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[26] On 22 July 2013, Vilakazi caused a letter to be written to the applicant, and informed him that in view of non-compliance issues emanating from his Chief Directorate in relation to events, Sekese had taken the decision to with immediate effect, temporarily withdraw his appointment as Responsibility Manager for the Communications and Marketing Chief Directorate until further notice. Sekese appointed Ms Busiswa Mlandu in the applicant's position. At the time, the applicant was still staying at a hotel pending his final re-settlement from Free State. On 30 July 2013 he arrived at his hotel and was informed that Vilakazi's personal assistant had called and requested to be provided with his (applicant's) personal private details. The applicant complained to the Minister and his Deputy about the invasion of his privacy. However nothing came out of this complaint.

[27] In August 2013 the applicant had met with the Deputy Minister who had informed him that Sekese had raised various issues in a memorandum addressed to her pertaining to alleged violations of the departmental Supply Chain Policy during the preparation of a departmental event held in Limpopo Province on 21 June 2013. The applicant was informed that he had allegedly insisted on providing names and contact details of prospective suppliers for the event in violation of the policy. The applicant was also asked to submit a report pertaining to the irregularities in respect of Media Corner. The applicant had immediately submitted a detailed report in respect of the Media Corner arrangements. He simultaneously submitted a report in respect of an event held in Witbank. In his detailed Media Corner report, he also recommended that a forensic investigation should be commissioned.

[28] On 6 August 2013, the applicant wrote a letter to Sekese, demanding the reversal of the decision to temporarily withdraw his appointment as the Responsibility Manager for the directorate. This letter was copied to the Deputy Minister. On 13 August 2013, the applicant had met with Mr. Sthembiso Nkatha, the Chief Director Legal Services in the department, and was provided with a report by Vilakazi dated 5 August 2013, which contained the same allegations levelled against him. The applicant had provided Nkatha with documents surrounding that event, and e-mails showing that it was

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supply chain management that had in fact requested him to submit names and contact details of service providers. He had also provided Nkatha with an updated detailed Media Corner report, which showed that payments to Media Corner had continued in July 2013 and that the total amount paid had since increased to R36. 8 million. He had also asked Nkatha to forward the report to the Minister and his Deputy.

[29] On 14 August 2014, Sekese had informed the applicant in writing that a decision was taken to reinstate his delegated powers as the Responsibility Manager of the Chief Directorate even though he still needed to account for his non-compliance. On 27 August 2013, the applicant had submitted a request to the Director, Human Resource Service and Administration (Rathata) in respect of assistance to remove his furniture from Free State to Gauteng. Rathata had responded and informed him that he had received instructions not to do anything about the request.

[30] On 6 September 2013, Minister Carrim called the applicant to a meeting and informed him that "some powerful people within the department" did not want him and were putting pressure on the Minister to re-deploy him. The Minister further told him that he was seen as being "too soft on him", and that he (applicant) was not wanted due to his close association with former Minister Pule. The Minister also informed the applicant that he had initiated a process to re-deploy him to the Department of Public Service and Administration, and that if he did not want to go to that department, he would engage with the Premier of the Free State so that he could be transferred back to that province. The applicant had informed the Minister that he would prefer to stay in Gauteng where his family was. The Minister had also informed him that he would be assisted with his resettlement costs. When no such assistance was forthcoming, the applicant transported his furniture at his own cost from Bloemfontein to Pretoria.

[31] On 24 September 2013 the applicant was directed to attend a meeting at Sekese's office where he was informed of a decision by Minister Carrim to revoke the decision of former Minister Pule to transfer him to the department. The Minister also intended to transfer him back to the Free State provincial

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government with effect from 1 October 2013. The applicant was further informed that he had six days to report for duty in Bloemfontein and to vacate his position in the department by 30 September 2013. Sekese had declined to discuss the reasons in this regard or the applicant's personal circumstances. She further told the applicant that the transfer was a foregone conclusion as Minister Carrim had already approved it.

[32] On 25 September 2013, Sekese had confirmed what was discussed the previous day in writing, and had also addressed a letter to the Director General ("Ralikontsane") in the Department of the Premier the Free State informing him that the applicant would be returning to his office with effect from 1 October 2013. Ralikontsane had responded on 26 September 2013 and informed Sekese that it was not possible for the applicant to return back to his office in the Free State as he was permanently transferred as per the request of former Minister Pule. Notwithstanding the response, Sekese insisted in a letter to Ralinkontsane on 27 September 2013 that the applicant should return to the Free State as certain processes relating to his transfer had not been completed.

[33] Notwithstanding the fact that Ralinkontsane had not agreed to the applicant's return to Free State, Sekese had addressed an email to all staff members informing them that the applicant's secondment to the department had been terminated ending 30 September 2013, and that he had returned to the Free State. Mlandu was appointed as Acting Chief Director Communications.

[34] On 1 October 2013, the applicant addressed a letter to Sekese, to challenge the fairness of the decision to transfer him to the Free State. He was also denied access to his office. On 9 October 2013 the applicant filed a dispute with the GPSSBC. He also filed an urgent application in this court for interim relief under case number J2277/13. The matter was scheduled for a hearing on 15 October 2013 and was postponed by agreement between the parties pending settlement negotiations. On 16 October 2013, Sekese through the office of the state attorney, submitted a settlement proposal to the applicant's legal representative, offering him a post in the DPSA. The applicant had rejected the offer. On 8 November 2013 despite the matter still pending before

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the court, Sekese had placed an advertisement in the Mail and Guardian newspaper, inviting applications for the applicant's position.

[35] The matter before the court was again enrolled for a hearing on 19 November 2013 and both parties agreed to pursue settlement negotiations. This had resulted in an agreement in terms of which Sekese undertook not to fill the position pending the final determination of the matter. The Minister and Sekese further undertook to offer the applicant a vacant position in the Government Communication and Information Systems (GCIS) in writing on or before 20 November 2013. However the offer was not made and the matter ended up in court again on 22 November 2013. The court, per Shaik AJ had ordered the Minister and Sekese not to fill the position of Chief Director and to allow the applicant to return to work and to give him access to his office and the necessary equipment to perform his duties in the capacity of Chief Director Marketing and Communications.

[36] The applicant had returned to work on 22 of November 2013 and was given access to his office. Sekese had however not withdrawn the appointment of Mlandu, and the applicant was unable to perform his functions. The dispute referred to the GPSSBC was heard on 8 November 2013 but remained unresolved. A certificate of outcome was then issued. On 2 December 2013, a Mr. Mhambi of the state attorney's office had on behalf of the Minister and Sekese, addressed a letter to the applicant offering him a position of Head of Department: Business Development and Marketing and Communications at the National Electronic Media Institute of South Africa (NEMISA). This offer however was unsuitable to applicant. He had also established that the offer had not been approved by the board of NEMISA.

[37] On 2 December 2013, the applicant was advised that an investigation initiated by Sekese was to be conducted into grievances lodged by his subordinates, who had accused him of being rude and autocratic. The investigation, in accordance with the instructions of Sekese was to be conducted and finalised before the applicant could resume his duties. On 6 December 2013, the applicant met with the Minister and the latter had informed him that investigations into allegations of impropriety relating to Media Corner had

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been instituted. Despite such investigations the applicant was during the course of December 2013 provided with information from the finance unit of the Department showing that irregular payments to Media Corner had in fact continued. In this regard, between 8 July 2013 and 29 November 2013 the department had paid to Media Corner an additional amount in excess of R6.3 million. This was despite the fact that there was no evidence that work was commissioned to Media Corner to justify the payment of that amount.

[38] On 12 December 2013 the applicant was informed to attend a meeting in Sekese's boardroom. Upon his arrival he had met with Andre Bouwer from a company called Nexus Forensic Services ("Nexus"). Bouwer had informed him that his company was appointed by Sekese to conduct an investigation into allegations that he had violated the supply chain policy of the Department during the preparation of an event which was held in June 2013. The applicant met with Bouwer again on 18 December 2013 and cooperated in the investigations despite expressing his reservations about its legitimacy.

[39] On 9 January 2014, the applicant had again approached the Court with this application. On 15 January 2014, Sekese had withdrawn Mlandu's acting appointment. On 5 February 2014, Nexus had presented its findings, and on 13 February 2014, the applicant was issued with a notice of precautionary suspension. He was asked to make representations as to the reason he should not be suspended. On the same date, the applicant had made such representations despite his complaint that the nature of the allegations against him were vague for meaningful representations to be made.

[40] On 18 February 2014, the court per LaGrange J had directed that in view of the matter now being opposed, it was to be postponed to enable the applicant to supplement his application by way of a supplementary affidavit relating to his pending suspension. The respondents were also directed to file any replying affidavit.

[41] In his supplementary affidavit, the applicant had lamented the fact that Sekese had allowed an unreasonable and unnecessary time delay between the discovery of the alleged infraction and the institution of disciplinary action

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against him. In this regard he pointed out that on 22 July 2013 he was informed of Sekese's decision to temporarily withdraw his powers as the responsibility manager for the Chief directorate on the basis of allegations of non-compliance. The allegations against him were reported by Vilakazi on 5 August 2013. However on 14 August 2013 after it was shown that the allegations against him were unfounded and his powers were reinstated and he was allowed to continue performing his normal duties.

[42] The applicant further submitted that his pending suspension was baseless as Sekese still needed to investigate the matter further as indicated in the notice of precautionary suspension, and he had not as yet received the findings of the Nexus investigation. That investigation according to the applicant was an abuse of power, a fishing expedition and a crusade against him as there was no evidence that he had done anything wrong. The applicant further contended that he had made a protected disclosure to members of the Special Investigating Unit ("SIU") in regard to Sekese's dealings with Media Corner on 16 January 2014, following upon his initial disclosure of July 2013 to the Minister. The disclosures he had made to the SIU included;

i. Between October 2012 and November 2013, Media Corner had submitted a total of 15 invoices with an amount totalling in excess of R60.9 million. These invoices, which were not exhaustive, were irregularly authorised for payment by Vilakazi and paid by the Department.

ii. Expenditure control statement showed that for the current financial year starting from 1 April 2013 to 22 January 2014, a total amount of R40.7 million was paid to Media Corner in respect of the Digital Migration awareness campaign.

iii. There is an over-expenditure of more than R6 million in the Chief Directorate even before the financial year ended in March 2014.

iv. R60 million was belatedly allocated as total budget to the Chief Directorate for the awareness campaign, and only R17 million

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was remaining for that campaign, which has since been ring-fenced for that campaign.

v. Vilakazi and his personal assistant have facilitated the irregular payment by authorizing the issuing of a series of purchase orders.

vi. Sekese had signed a number of contracts with Media Corner and its sister company, Bagport South Africa, including the "Digital Migration Awareness contract", which contract did not go through a proper bidding process;

vii. The "Talk Show" contract with Media Corner on 28 March 2012 for an amount of R9.5 million without following tender procedures.

viii. "Airport Advertising" contract signed by Sekese on 15 March 2012 worth over R1 million with Bagport SA without following tender process.

[43] The office of the Auditor General had according to the applicant, conducted or is conducting an audit of the department's finances, and an interim audit has vindicated the disclosures made to the SIU as well as his disclosures made to the Minister in July 2013. Amongst findings made are those in respect of several instances of irregularities and violation of the PFMA in relation to the Media Corner contract for digital migration public awareness, and that the auditors could not locate the supporting approval from National Treasury indicating that the award was within budgetary provision.

[44] In regards to the above, the applicant submitted that the conduct of Sekese constituted improprieties as contemplated by the meaning of impropriety in section 1 of the PDA; that the disclosure made showed one or more of the categories referred to in paragraph (a) to (g) of the definition of disclosure in section 1 of the PDA; that such disclosures constituted "disclosure of information" in accordance with section 6 of the PDA, and further that disciplinary action instituted against him constituted an "occupation detriment" as provided in the PDA. He further submitted that there was a demonstrable

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nexus between his disclosures and the disciplinary action currently being instituted against him.

RELEVANT CASE LAW:

[45] The respondents opposed the relief sought by the applicant on the basis of the following three grounds;

i. The disclosures were not made in good faith,
ii. The applicant has not been subjected to any occupational detriment as contemplated in the PDA.
iii. There is no causal relationship between the disclosure as made by the applicant and the pending disciplinary enquiry against him for misconduct on account of procurement irregularities and insubordination.

[46] The applicant's claim and what he seeks is in the form of a final interdict. Effectively, if it is found that he had indeed made a protected disclosure and that the intended disciplinary proceedings constitutes an occupational detriment, the respondents would have no further recourse insofar as the intended disciplinary action is concerned. The requirements for a final interdict are well known.[7] These are;

i. A clear right;
ii. An injury actually committed or reasonably apprehended; and
iii. The absence of another suitable remedy.

[47] In applications of this nature and in the light of the disputes of facts that may arise, it is trite that such disputes should be resolved in accordance with the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[8]. Accordingly, where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been

[7] See Setlogelo v Setlogelo 1914 AD 221 at 227
[8] 1984 (3) SA 623 (A) 634G – 635C (See also Harms, LAWSA, Volume 11, 2nd Ed p414ff).

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admitted by the respondent, together with the facts alleged by the respondent, justify such an order. In *New Balance Athletic Shoe Inc v Dajee NO and Others*[9], a decision referred to by the applicant in his written heads of argument, Nugent JA in reference to the *Plascon-Evans* rules had stated the following;

> '….Those rules manifest the principle that application proceedings are intended for the resolution of legal issues. For that reason final relief will be granted only where the relief is justified by undisputed facts (facts alleged by the applicant that are not disputed, together with facts alleged by the respondent), though there are exceptions, which applies as much where the respondent bears the onus of proof.'[10]
>
> And
>
> 'But the rule in Plascon-Evans is not blind to the potential for abuse. As this court said in Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) "in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials"…'[11]

[48] The onus is on the applicant to prove that he is entitled to the remedy he seeks[12]. Conclusions have already been made that the applicant had indeed made a disclosure as defined in the PDA. The respondents have conceded there is no reason to submit that the applicant did not have a reasonable belief in the substantial truth of his allegations.

A clear right:

[49] In the light of it being common cause that a disclosure of improprieties was made, the only issue that the applicant needs to establish is whether the intended disciplinary hearing will be an occupational detriment on account that the disclosure was protected. This implies a consideration of the facts to determine whether he has established a clear right in terms of the PDA.

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[9] (251/11) [2012] ZASCA 3 (2 March 2012)
[10] at para 16
[11] at para 17
[12] Randles v Chemical Specialist Ltd (2010) 31 ILJ 2150 (LC)

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[50] Section 3 of the PDA provides that;

> **Employee making protected disclosure not to be subjected to occupational detriment**.
>
> No *employee* may be subject to any *occupational detriment* by his or her *employer* on account, or partly on account, of having made a *protected disclosure.*

[51] Section 1 of the PDA defines **'occupational detriment'**, in relation to the working environment of an employee, as-

> (a) being subjected to any disciplinary action;

[52] Section 6 (1) of the PDA in respect of a protected disclosure to an employer refers to "Any disclosure made in good faith". The same requirement is found in section 7 in respect of disclosures made to members of Cabinet or the Executive Council, in section 8 (1) (a) in respect of the Public Protector, 8 (1) (b) in respect of the Auditor General or 8 (1) (c) in relation to a person or body prescribed for the purposes of the section 8.

[53] From the above provisions, it follows that the applicant must establish that the intended disciplinary constitutes an occupational detriment on the grounds that such action is taken "on account, or partly on account, of having made a disclosure", which in addition, was made in "good faith". In *Tshishonga*[13] the meaning of "good faith" was considered in the following terms;

> 'By setting good faith as a specific requirement, the Legislature must have intended that it should include something more than reasonable belief and the absence of personal gain. An employee may reasonably believe in the truth of the disclosures and may gain nothing from making them, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong'
>
> Good faith is a finding of fact. The court has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there are mixed motives, what the dominant motive is.

[13] at para 197

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> A whistleblower is unlikely to have 'warm feelings' about the wrongdoing or person against whom disclosure is made. At the other extreme a whistleblower who is overwhelmed by an ulterior motive, that is, a motive other than to prevent or stop wrongdoing, may not claim the protection under the PDA. The requirement of good faith therefore invokes a proportionality test to determine the dominant motive.'

[54] It follows that factors such as lack of honest intention, malice, ulterior motive, a quest for revenge, reckless abandon, a quest for self or others advancement, and attempts to divert attention from one's or others' wrong doing and involvement in criminal or acts of misconduct will negate the requirement of good faith[14]. In this regard, the onus will be on the employer to establish the lack of good faith. The absence of good faith however does not detract from the fact that a disclosure was made. Even if the disclosure was made in pursuance of ulterior motives, it is still incumbent upon the employer to investigate the veracity of the allegations and to take appropriate steps where required[15]. Where however it is found that a protected disclosure was made in good faith, and it is still nevertheless established that the whistle-blower himself or herself is or might be involved in acts of impropriety, the question is whether he/she should be immune from answering to those allegations.

WAS THE DISCLOSURE MADE IN GOOD FAITH?

[56] This question is to be addressed within the context and time-line as elaborated in the background material and the allegations against the applicant. The applicant's contention was that the allegations of impropriety against him are a direct result of his protected disclosure in regards to the Media Corner contract, whilst the respondents contend that the real issue is that the applicant was himself investigated, and that the subject of the disciplinary action is unrelated to and quite independent from the disclosures. The respondents' contention was that the investigations against the applicant originated before the disclosures were made.

[14] Arbuthnot v SA Municipal Workers Union Provident Fund (2012) 33 ILJ 584 at para 23. See also Radebe & another v Premier, Free State & others (2012 (5) SA 100 (LAC)
[15] See Tshishonga at para 197

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[57] The facts relied upon by the respondents are as follows;

To recap, the applicant was seconded to the department in April 2013. An event was planned to take place in Nkowankowa on 21 June 2013 hosted by the then Minister Pule. The respondents submit that the intended disciplinary action emanate from alleged irregularities surrounding the procurement of the services for that event. The respondents contend that on 24 June 2013, the department's finance unit had received an invoice from a company called Blue Rain Drops Advertising ("Blue Rain Drops"). On 26 June 2013, the department's finance had queried the invoice submitted by Blue Rain Drops, and in particular, what appeared to be inflated amounts charged on the invoice. It is alleged that the applicant had nevertheless insisted that the invoice be paid, and this had caused Vilakazi to initiate an internal investigation into the matter. Vilakazi had then on 17 July 2013, submitted an internal investigation report on the concerns raised by the finance unit surrounding the Nkowankowa event. It was submitted further that the applicant had only met the Minister and his Deputy thereafter. On 5 December 2013, the State Law advisor had provided an opinion on the Nkowankowa event. The Nexus investigation into the Nkowankowa event and the alleged improprieties on the part of the applicant had commenced in December 2013. Findings were made in that regard on 5 February 2014, followed by a full report which was submitted on 14 February 2014.

[58] In the light of the above, it was the respondents' contention that the applicant made the disclosures for an ulterior motive, thus negating the requirement of good faith. It was submitted that the applicant had an ulterior motive in that he had raised the Media Corner allegations to divert attention away from his involvement in the irregular procurement of services for the Nkowankowa event; and that his disclosure was made after, and in response to allegations of impropriety. To this end, it was further submitted that employees who use the provisions of the PDA to attempt to conceal or divert attention away from their own involvement in criminal or misconduct activities should not receive protection in terms of the PDA.

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[59] The applicant's response was that on the papers, the respondents failed to provide evidence to demonstrate that he was made aware of the concerns surrounding the Nkowankowa event, or that he was requested to submit an explanation in regard to Vilakazi's report submitted on 17 July 2013. He had pointed out that the respondents had conceded that he had met with the Minister on 18 July 2013. Although the Minister allegedly did not have recollection of what had transpired in that meeting, the applicant's contention was that the respondents had not rebutted the fact that he had made a disclosure to the Minister on that day. The applicant had confirmed that he was informed by the Minister on 18 July 2013 of the memorandum received from Vilakazi. He however contended that the allegations in that report were baseless, and that this is borne out by the fact that no disciplinary proceedings were pursued against him at that point, and that it took 20 days from when the alleged infractions against him were raised, and when Vilakazi submitted his report on 17 July 2013. At that time, he had already submitted a detailed report on 8 July 2013 in respect of the Media Corner contract. His further contention was that it was Vilakazi, who sought to use the allegations against him as a means of silencing him and having him removed from the department.

[60] The applicant had further submitted that the respondents had only provided a bald denial to his contention that his disclosure was first made to the Head of Supply Chain, Nkwe, and then to Vilakazi early in July 2013 prior to escalating the matter to the Minister.

EVALUATION:

[61] The respondents seem to attach to much weight on the timing of the disclosure as against the revelations of impropriety against the applicant in seeking a conclusion that firstly the disclosure was not made in good faith, and secondly, in seeking to demonstrate that the intended disciplinary proceedings do not constitute an occupational detriment. There is thus emphasis on form rather than substance.

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[62] The applicant had submitted that the disclosure was first made to Nkwe, and then to Vilakazi. The respondents' contention was that there were merely queries made by the applicant, and besides, one cannot make a disclosure to the purported wrongdoers themselves. Sekese in her answering affidavit had merely indicated that she had no personal knowledge of the applicant's averments in this regard, and yet denied same. The applicant had averred that he had again approached Nkwe about irregularities, and the latter was not forthcoming or refused to provide the applicant with documents supporting the payments to Media Corner[16]. The applicant had the same discussions with Vilakazi, who had again failed to provide the applicant with the relevant documents. Sekese's response was again to deny knowledge of these contentions. Sekese's contention was that if these two individuals had refused to cooperate by giving the applicant the documents he required, the applicant should have escalated the matter to her.

[63] Nkwe did not file an answering or confirmatory affidavit to rebut allegations against her. Vilakazi had filed a confirmatory affidavit in respect of the answering affidavit deposed to by Sekese. The above events pertaining to encounters with Nkwe and Vilakazi relate to the period before 10 July 2013 when Ms. Dina Pule was removed. This is borne out by the applicant's averments[17] that in early July 2013, he had also raised other concerns regarding weaknesses and apparent malpractices within the department's supply chain unit in respect of procurement of services for departmental events. On 8 July 2013, he had submitted a report to Vilakazi relating to a departmental event held in Witbank but that had to be cancelled due to malpractices in the supply chain unit. Vilakazi had not given him feedback in that regard. He had contended that instead, Vilakazi, working with officials within the supply chain unit, embarked on a crusade to drive him out of the department. The crusade started within days after the former Minister was recalled on 10 July 2013.

[64] Sekese had in her answering affidavit conceded that she was aware of the Witbank report but denied that any other concerns were raised by the

[16] At paragraph 18 of the founding affidavit
[17] At paragraph 21 of the founding affidavit

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applicant. Not much of the applicant's allegations in regards to irregularities were challenged. Sekese in her answering affidavit had either denied knowledge of the allegations or baldly denied same. She had also denied that there was a crusade to drive out the applicant after the former Minister was removed from office. Only Vilakazi had filed a confirmatory affidavit in respect of Sekese's averments. In applying the *Plascon-Evans* rule, and bearing in mind the caution alluded to in *Fakie NO v CCII Systems (Pty) Ltd* as referred to in *New Balance Athletic Shoe Inc v Dajee NO and Others* the respondents cannot be permitted to shelter behind patently implausible versions or bald denials. To this end, even if emphasis is to be placed on form rather than substance as sought by the respondents, it is found that its contentions that the disclosures in respect of the Media Corner were made after concerns were raised in respect of the Nkowankowa event are not plausible. As at 17 July 2013 when Vilakazi submitted his report into allegations surrounding the Nkowankowa event, the applicant had already made the disclosure to Nkwe and Vilakazi.

[65] The respondents had delegated the disclosures to Nkwe and Vilakazi as mere queries. I have difficulties with this submission in that neither Nkwe nor Vilakazi had made such an averment in earnest. In the face of such a decisive factor to their case, more than a mere denial was required from Vilakazi or Nkwe. The applicant had confronted Nkwe and Vilakazi on two occasions with the revelations and concerns about Media Corner. Both had on the uncontested version of the applicant, refused to cooperate. The only inference to be drawn is that both knew that there was merit in the disclosures, and had elected not to act on them. These two individuals were at that stage, not merely confronted with queries or mere suspicions as alleged. They were presented with factual information which touched nerves, and which they had clearly failed to act upon. The applicant had during argument conceded that the actual disclosure was made to the Minister on 18 July 2013. Even if so, in the absence of a formalised procedure in the department for making disclosures, there is no reason to conclude that the Vilakazi as the applicant's immediate supervisor was not aware of the irregularities before 18 July 2013, more especially after the applicant had confronted him twice. Even if it is still

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believed that the applicant had merely made queries, the substance of those queries and the implications thereof could not simply have been ignored as Vilakazi had done.

[66] A further contention on behalf of the respondents was that a disclosure cannot be made to a wrongdoer. As already indicated, Vilakazi is the applicant's immediate superior, and even if the applicant had reason to believe that Vilakazi might be a wrongdoer, in the absence of a procedure in such matters in the department, it cannot be said that the disclosure made to him cannot qualify as such. There is no provision in the PDA that a disclosure made to a wrongdoer does not qualify as a disclosure. All that is required is that the disclosure must meet the requirements stipulated in section 1 of the PDA. In the end, I am satisfied that the applicant has established that the protected disclosure was made in good faith, and there is nothing placed before the court to negate that finding.

[67] The applicant had met the Minister on 18 July 2013. It is strange, if not curious, that the Minister would recall discussions surrounding the successful hosting of the Nelson Mandela Day event in Soshanguve, and not recall any discussions surrounding irregularities pertaining to Media Corner, more especially in view of the stupendous amounts involved. The Deputy Minister had confirmed in her confirmatory affidavit that on or about 25 July 2013, she had met the applicant where she was informed of the irregularities. It was however not the first time that the disclosures had been made as they were already made to Nkwe and Vilakazi and investigations in regard to the Nkowankowa event had already taken place. The respondents' contention that the disclosure was only made on 25 July 2013 to Minister for the purposes of protection under section 7 (a) of the PDA is therefore not sustainable.

IS THERE A CAUSAL CONNECTION BETWEEN THE DISCLOSURE AND THE DISCIPLINARY ACTION AGAINST THE APPLICANT?

[68] In essence, the question posed above is whether the disciplinary action intended against the applicant constitutes an occupational detriment. The

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answer to the above question pertains to whether the disciplinary action is to be instituted on account, or partly on account of having made a protected disclosure.

[69] The applicant had submitted that the events prior to 22 November 2013 that resulted had with a court order should not be viewed in isolation more especially in view of the intended disciplinary action. I have no doubt in my mind that from the moment that the applicant had made a disclosure to Nkwe and Vilakazi, attempts to push him out of the department were relentless, and at times, bordered on the desperate. Sekese in particular appeared to be more desperate to remove the applicant from the department. This can be gleaned from a variety of facts including, but not limited to the efforts to re-deploy him back to the Free State despite Ralinkotsane's clear message that the applicant could not be accommodated back, the stripping of the applicant's powers, denying him access to his office, the prevarication in respect of the removal of Mlandu in the acting position, the desperate attempts to redeploy the applicant in other departments, the haste with which his position was advertised despite an application before the court, the clear message from the Minister himself on 6 September 2013, that "some powerful people within the department did not want him" and were putting pressure on the Minister to re-deploy him; and the perception that the Minister was "too soft" on him. In my view, these desperate measures could not have ended with a simple reinstatement of the applicant into his position after the court order of 22 November 2013.

[70] In view of the desperation on the part of Sekese as outlined above, the intended disciplinary action against the applicant can be said to have been brought *partly* on account of the protected disclosures the applicant had made. It is said *partly* in that the other part to the instituting of the disciplinary action pertains to the actual allegations of impropriety on the part of the applicant. Notwithstanding the fact that the applicant had made a protected disclosure and in good faith, the allegations against him remain untested. It could not have been envisaged by the drafters of the PDA to exonerate whistle-blowers regardless of other prevailing circumstances including the fact

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that they themselves may be involved in acts of misconduct. Inasmuch as the PDA is intended to protect whistle-blowers, there is no provision for sacred cows.

[71] It has been concluded that the disclosures were made in good faith. In my view the mere fact that the disclosures were made before the investigations in respect of the Nkowankowa event does not absolve the applicant from having to answer to equally serious allegations against him. The applicant's brave action of exposing malfeasant in the department is commendable. However, he must also answer to the allegations against him, no matter how spurious and unsustainable they may appear. This should not have come as a surprise to the applicant in that when his powers were reinstated by Sekese on 14 August 2014, he was reminded that he still needed to account for the Nkowankowa event. In the end, given the nature of the relief that the applicant seeks, it cannot be said in the light of what has already been stated that the intended disciplinary action would constitute an occupational detriment. The respondents are entitled in these circumstances to invoke their internal disciplinary processes, and it would be iniquitous and contrary to the spirit and letter of the PDA to interfere with that internal process.

[72] The disciplinary enquiry had not as yet taken place, and in view of the nature of the application before the court and the relief that the applicant seeks, it is not known what irreparable harm he would suffer. The applicant has an alternative remedy in that he will have an opportunity to rebut the allegations against him in the impending disciplinary enquiry. Furthermore, his remedies are to be found in section 4 of the PDA which contemplates an alternative remedy for cases where an employee has not been dismissed. In this regard,

> Section 4 (1) provides that;
>
> "Any *employee* who has been subjected, is subjected or may be subjected, to an *occupational detriment* in breach of section 3, may-
>
> (a) Approach any court having jurisdiction, including the Labour Court established by section 51 of the Labour relations Act, 1995 (Act 66 of 1995), for appropriate relief; or

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(b) Pursue any other process allowed or prescribed by any law.

Section 4 (2) (b) provides that;

"For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court-

(c) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication."

[73] It is common knowledge that Part B of Schedule 7 has since been replaced by section 186(2)(d) of the LRA by the 2002 Labour Relations Amendment Act 12 of 2002[18]. Section 186 (2) (d) provides that;

"Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—

"(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act."

[74] In summary, the applicant has demonstrated that he has made a protected disclosure, which disclosure was made in good faith. The applicant is however not entitled to the relief he seeks in view of the failure to establish the requirements of the relief that he seeks to the extent that it was found that the intended disciplinary action will not constitute an occupational detriment, that he has not established what irreparable harm he would suffer, and further that he has alternative remedies.

COSTS:

[75] The court may make an order of costs having taken into account considerations of law and fairness. In my view, having had regard to the

[18] See Van Alphen v Rheinmetall Denel Munition (Pty) Ltd (C 418/2013) [2013] ZALCCT 21; [2013] 10 BLLR 1043 (LC) (21 June 2013)

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circumstances of this application, and in particular the role played by the applicant in making the disclosures, and the fact that the Minister had acted upon them, any cost order would be wholly inappropriate.

ORDER:

The application is dismissed.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	In Person
For the 1st and 2nd Respondents:	Paul Pretorius SC with Tanya Venter
Instructed by:	State Attorney

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