THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

JUDGMENT

Case no: 532/08

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Appellant**

and

ENGINEERING COUNCIL OF SOUTH AFRICA **First Respondent**

ADRIANUS JACOBUS WEYERS **Second Respondent**

Neutral citation: *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and another* (532/08) [2009] ZASCA 151 (27 November 2009)

Coram: MPATI P, NAVSA, NUGENT and MLAMBO JJA AND WALLIS AJA

Heard: **16 November 2009**

Delivered: **27 November 2009**

Summary: **Whistleblower – employee writing a letter to Engineering Council and Department of Labour concerning appointments to posts – whether contents of the letter constituted a protected disclosure under the Protected Disclosures Act 26 of 2000.**

ORDER

On appeal from: High Court at Pretoria (Prinsloo J sitting as court of first instance).

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

WALLIS AJA (MPATI P, NAVSA, NUGENT AND MLAMBO JJA concurring)

[1] Mr Weyers, the second respondent, is an electrical engineer holding a Masters degree in engineering and registered as a professional engineer with the first respondent in terms of section 18(1)(a)(i) of the Engineering Profession Act, 46 of 2000 (the "EPA"). He has been employed by the appellant since 1996 and since 2003 has held the position of Managing Engineer: Power System Control (PSC). As such he is responsible for Tshwane's PSC centre the primary function of which is to ensure that correct systems of configuration and safety measures are applied in Tshwane's high, medium and low voltage networks so as to ensure continuity, quality and safety of electrical supply to all consumers within the metropolitan area.

[2] On 31 August 2005 Mr Weyers addressed a letter to Dr Lukhwareni, the Strategic Executive Officer (SEO) of the Electricity Department, in which he expressed concerns about the employment of new system operators in the PSC centre. He copied the letter to Mr Benny Mahlangu, the General Manager: Electricity Development and Energy Business and to the Municipal Manager. Whilst it is clear that the contents of the letter were not well received, at least by Mr Mahlangu, it is not suggested that there was anything untoward in his addressing the letter to them. However he also sent the letter to the Department of Labour and to the Engineering Council, which is constituted in terms of the EPA and discharges a range of statutory responsibilities, most importantly for present purposes dealing with improper conduct by professional engineers.

[3] On 9 November 2005 Mr Weyers was suspended and disciplinary proceedings were commenced against him. Initially he faced a number of charges, but at the hearing all charges were abandoned other than one 'that you copied a letter you had written to the SEO Electricity Department to … the Department of Labour and the Engineering Council of South Africa … without authorisation and/or prior approval and/or knowledge of the Head of the Electricity Department' When he was convicted on that charge, he approached the Pretoria High Court, with the support of the Engineering Council, for an order interdicting the appellant from imposing any disciplinary sanction upon him. That order was granted on the basis that sending the letter to these parties was a protected disclosure under various statutes and as such that it was impermissible for the municipality to impose a disciplinary sanction on Mr Weyers for doing so. This appeal lies against that order with the leave of the court below.

[4] In order to appreciate the circumstances leading up to the sending of the letter and the basis for the claim that its being copied to parties outside the municipality is a protected disclosure it is necessary to give some background based on the facts that are not in dispute between the parties. One of the major functions of the PSC centre is to ensure safe electrical operations on the network. Key employees in this regard are the system operators who are all qualified electricians, who have completed an 11kV switching course,[1] and who have the necessary technical knowledge and skill to undertake this work, which is more complex and potentially more dangerous than the work of an electrician working solely on low voltage systems. All qualified electricians are qualified to work on low voltage networks (400 volts and below) but work on medium and high voltage networks (11kV and 132kV respectively) requires specialist skill and knowledge because of the high levels of danger involved.

[5] The system operators work with the network when it is live at all voltage levels, whilst electricians in the municipality's Maintenance and Construction depots work on the low voltage and medium voltage sections of the network and then only when they have permission from the PSC centre. Generally (there may be exceptions) they only work on a network when the system is dead and certified to be such by a PSC system operator. The PSC section deals with complaints about electrical shocks; takes steps to prevent power failures in overload conditions and reconnects a network after a power failure. It is accepted that the higher the voltage level in a network the higher the fault level (the energy or 'spark' emitted if a fault occurs) and therefore the more potentially

[1] Electrical switching is a process whereby the voltage of current is altered, the position being that current is obtained by the local authority from Eskom at 132kV but this has to be transformed to lower levels for use by consumers. System operators also control when there is power in the network by switching.

dangerous the associated electrical work on such a network. Every time an electrical connection in a network is broken by a switch operation it also creates an electrical spark the size of which is dependent upon the voltage level in the system. The system operators work with high, medium and low voltages.

[6] The electrical work performed by the PSC system operators has considerably greater potential for negative consequences than the work done by electricians in the Maintenance and Construction depots. The latter's actions may result in the power supply to between one and twenty consumers being affected. Errors by system operators may cause a power failure in an entire suburb or even throughout the municipality.

[7] All of the above is common cause on the papers. There was some dispute whether the work performed by system operators is, as Mr Weyers contends, significantly more dangerous than the work done by electricians in the Maintenance and Construction depots. However, that was not persisted in before us and can be disregarded. On the basis of the matters that are common cause it is an obvious conclusion that the systems operators perform more dangerous work and consequently must be more skilled than ordinary electricians, even if the additional competence is something that can be acquired with training and experience.

[8] Turning then to the circumstances leading up to Mr Weyers writing the letter in question these emerge from the following facts that are either common cause or are no longer in dispute because the appellant no longer seeks to rely on the series of bald and unsupported denials in relation thereto contained in the answering affidavit. The starting point is that in

2005 there was a significant shortfall in the municipality's complement of system operators with only 13 of the 48 posts specified in the approved structure for the PSC section being filled. In the result those who were so employed were required to perform excessive and dangerous levels of overtime, well in excess of 60 hours a month and sometimes running to as much as 100 hours a month. The municipality accepts that staff was overworked and blamed exhaustion for accidents. In February 2005 Mr Weyers was given permission to recruit a foreman and eight additional system operators in order to address this problem.

[9] In late February Mr Weyers and three of his subordinates prepared a test when considering applications for a system operator foreman. This test was approved by Mr Booysen, who was Mr Weyers' immediate superior, and had been sent to Ms Zaayman, the Deputy Manager: Recruitment and Selection in the human resources department. She returned it with the comment that it asked the right type of question but was possibly a little long. She accordingly said that Mr Weyers should ensure that candidates had sufficient time to answer the test. The test was used to shortlist candidates for the post of foreman in April 2005 and, after interviews had been conducted, led to a Mr von Gordon being appointed. It is plain from the internal e-mails that passed between Mr Weyers, Mr Booysen and Mr Ratsiane, the Manager: Recruitment and Selection in the human resources section of the electricity department, that the last-mentioned was aware that the test had been used to select those who were short-listed and raised no objection to its use as a tool for that purposes.

[10] Applications for the system operators' posts were considered at the same time as the foreman's position. The posts were advertised internally

and attracted 13 applicants. Mr Weyers decided that the foreman's test should also be used for the operators because in his view the technical and safety requirements for the positions were the same and the test was directed to these. He discussed this with Mr Booysen, who agreed with him, although one of his subordinates thought the standard might be too high. This was a view he was prepared to accept and his later conduct bears that out. When the initial batch of applicants fared poorly, he suggested that all eight of those who achieved better than 31% should be interviewed, although he qualified that by saying that they 'may very well constitute a huge risk to Tshwane Electricity and to themselves' in view of their lack of knowledge. In due course only the four candidates who achieved better than 40% were short-listed by Mr Booysen. This happened on 8 April, but thereafter the forms changed and it was necessary for Mr Weyers to re-submit them, which he did on 24 April, recommending that two candidates be short-listed for the foreman's position and four for the system operator posts.

[11] The immediate response from Mr Ratsiane was that the shortlists were unacceptable and he asked for a meeting. The problem was that all the persons on the list were white and all the existing foremen and system operators were white. In the result the appointment of those on the lists would not satisfy transformation objectives within the municipality or assist in achieving its goals under the Employment Equity Act.[2] Mr Weyers was clearly aware of this as he dealt with this issue in an e-mail accompanying the list, saying that the employment equity candidates had lacked sufficient technical knowledge of the network to be appointed even when 10% had been added to their marks.

[2] Act 55 of 1998.

[12] The suggested meeting took place on 10 May in Dr Lukhwareni's office and was attended by Mr Booysen and Mr Ratsiane amongst others. On 19 May Mr Booysen circulated a summary of the agreement reached at the meeting and a memorandum on further appointments of system operators.[3] The agreement was that 60% of the vacancies would be filled by 'competent personnel based on training and test results' and the balance from 'qualified trainable personnel'. Accordingly four system operator posts were to be filled 'from the competent group based on test results'; four system operator posts were to be re-advertised and a foreman was to be appointed. The agreement appears to have struck a reasonable balance between the urgent needs of the PSC centre and the pursuit of transformation and employment equity. It had the endorsement of the SEO and Mr Ratsiane from human resources as well as Mr Weyers and his immediate superior. It led to Mr von Gordon being appointed. It also meant that the four white males, identified as the best candidates by the tests, would be appointed. Meanwhile an advertisement was placed in the Pretoria News on 18 May in respect of the posts to be re-advertised.

[13] Although it was submitted that the test became a bone of contention and its appropriateness had been challenged, this did not emerge at that time. Not only was the foreman position filled on the basis of the test,[4] but Mr Booysen's minute reflects that the test was to be used in the future. In addition had the test been controversial in itself, as opposed to in the results it produced, one would have expected there to be a clear instruction to Mr Weyers and Mr Booysen that it was not to be used in short-listing the candidates for the positions that were to be re-advertised.

[3] Whilst the answering affidavit denied that an agreement was reached and denied that the addressees of the two documents received them, the appellant does not persist in this stance in its heads of argument or in oral submissions.

[4] It was in respect of this position that the test had the most impact on employment equity candidates, because seven of the fourteen applicants for this position were equity candidates whilst only one of the applicants for a systems operator post came from this group

There is no such instruction. Instead, once the applications were received, the applicants were required to sit the test. It is inconceivable that this would have occurred if the test had been rejected as inappropriate in May 2005. The issue surrounding the test only arose later when Mr Mahlangu came on the scene.

[14] Fifteen employment equity candidates applied for the system operator positions but when they sat the test they performed dismally.[5] With one exception, who with the benefit of an adjustment for employment equity that added 10% to the mark scored 42.22%, they all scored less than 40% and only two managed, with the same adjustment, to score more than 30%. Mr Weyers forwarded the results to Mr Booysen on 29 July and asked for a meeting to discuss a shortlist.

[15] While this was going on an important change occurred in the Electricity Department. Mr Benny Mahlangu was appointed to the position of General Manager: Electricity Development and Energy Business. On 28 July Dr Lukhwareni informed his staff that he had delegated to Mr Mahlangu all transformation responsibilities with regard to human resources. From then on all applications for posts were to be forwarded to Mr Mahlangu who would appoint a committee for short-listing and a committee, chaired by himself, to conduct interviews. The decision of that committee in regard to appointments would be binding. Accordingly Mr Mahlangu would now play the central role in all new appointments.

[16] The impact of this change was immediate insofar as the appointment of system operators in the PSC section was concerned. On 1 August 2005

[5] This is the description in the appellant's heads of argument.

Mr Booysen sent him the list of applicants for the systems operator posts 'with test results for approved test' and the document embodying the agreement reached on 10 May 2005 in regard to these positions. According to Mr Weyers two of his existing operators had resigned by this stage and the need for new appointments had become even more urgent. However, Mr Mahlangu immediately made it clear that he was dissatisfied with what he saw (although there is no indication that either Mr Weyers or Mr Booysen had made any recommendations in regard to short-listing from these applicants) and a meeting was convened on 3 August 2005 attended by Messrs Mahlangu, Booysen, Weyers and some others.

[17] The meeting started with Mr Mahlangu stating that shortlists had to be approved by him, something that was not in dispute. Mr Weyers suggested that he shortlist the top six employment equity candidates. However as Mr Booysen suggested that managers internally had sought to discourage their best workers from applying, Mr Mahlangu directed that the posts should again be advertised internally. It is now accepted that Mr Mahlangu undertook personally to visit the depots and make sure that the best employment equity electricians applied. This was baldly denied in the answering affidavit, but as that denial is inconsistent with contemporary documents it carries no weight. On 4 August Mr Weyers sent an e-mail to Mr David Mahlangu (apparently in error) referring to the meeting the previous day; recording the decision to re-advertise internally and that Mr Benny Mahlangu would speak to the depots with a view to getting employment equity candidates to apply. It is inconceivable that he could have sent that e-mail had no such decision been made and even more inconceivable that, if they were untrue, he could, in response to the e-mails referred to in the next paragraph, have

repeated these statements. This he did on 5 August 2005 in an e-mail to Mr David Garegae, the manager: electricity support services responsible for human resources within the electricity department, who was himself a party to the agreement of 10 May 2005.

[18] What appears to have happened is that Mr Mahlangu changed his mind after the meeting. This emerges from two e-mails that he sent out on the afternoon of 4 August. The first addressed to Mr Booysen reads as follows:

'I am disappointed to see that a list containing only Whites was submitted to HR against what was agreed upon.[6] This act can be construed as fighting against transformation. To fast track transformation all tests are to be submitted to me and HR for review and it is HR that shall administer all the tests if there is a need for one.

The lack of skills and expertise is not the fault of the Black employees but of their managers who did not ensure that everyone irrespective of colour acquired experience and expertise. Given our numbers with regards to equity, candidates who do not comply with equity requirements will not be short-listed at all. This is the policy that has to be adopted and has the full support of council.'

The second, sent less than an hour later to Mr Weyers, reads as follows:

'It has been decided that only candidates that comply with the requirements of equity shall be considered. Your previous agreement with David Garegae and Ndhivo [Dr Lukhwareni] does not hold anymore. Tests shall be approved by me and HR and HR shall conduct the testing without your involvement.

The list that you had, shall be used for short listing for equity candidates.'

[19] The effect of these e-mails was considerable. No white males were to be considered for appointment notwithstanding the agreement on 10 May with Dr Lukhwareni, who was the head of the electricity department and Mr Mahlangu's superior. Accordingly the four candidates who had

[6] It is unclear to what list he was referring, as no shortlist had been prepared in regard to the employment equity candidates. If he was referring to the four recommended in May it had already been agreed that they should be employed.

been identified as suitable to commence work immediately would not be appointed. Mr Weyers would be removed from any process of assessing the competence of the candidates and the previous agreement in regard to the filling of these posts was set aside. Finally the blame for the absence of suitable black candidates was simply laid at the door of their managers without more. That left Mr Weyers in the position that he recorded in his e-mail to Mr David Garegae on 5 August namely that:

These positions I would like to fill are critical to the Service Delivery of Tshwane Electricity, and while they are not filled with competent personnel we are sacrificing Batho Pele."

[20] Mr Weyers' difficulties were compounded by the fact that on 25 July Dr Lukhwareni had circulated a letter dealing with staff working overtime beyond the conventional limit of 40 hours a month. This was directed at ensuring that staff did not exceed this level of overtime. With his current staff complement this was impossible for Mr Weyers to achieve. One of the suggestions in the letter was that breakdowns in the network would have to be left overnight to be dealt with when staff came on duty in the morning. That would clearly impact upon service delivery. In addition there had been at least some discussion (of which staff had become aware) that the municipality would program its computers dealing with salaries to prevent payment of more than 40 hours of overtime a month. This had led to talk of industrial action over the issue.

[21] Over and above the problems with overtime the system operator posts had been advertised twice, no new appointments had been made and virtually no employment equity candidates had come forward who possessed what Mr Weyers regarded as the basic level of skills to perform these jobs. Now all this was largely taken out of his hands and

only employment equity candidates were to be considered for the eight positions. He was no longer even able to employ the four candidates identified in the original process whose employment had been agreed to in May. The view he formed was that candidates would be employed irrespective of their level of skills or their ability to perform the tasks of a system operator and that the absence of skills would be disregarded in making appointments. That he held that view bona fide was accepted in argument before us, and it was an inference he could legitimately draw from what had happened.

[22] In those circumstances Mr Weyers sought guidance from his professional body the Engineering Council. He wanted to know what his professional responsibilities were if, as he feared, system operators were appointed in the PSC centre who in his judgment lacked the requisite skills to perform the work entrusted to such operators. He was advised that it would be unprofessional and misconduct on his part were he to be party to the appointment of persons to positions where, in his judgment, their lack of skills meant that they were not competent to fill those posts and that might give rise to safety risks. He was also advised that in the event that his employer forced him to make such appointments he would be obliged to report that to the Engineering Council. He informed a top management meeting of this on 10 August. Dr Lukhwareni convened the meeting and Mr Mahlangu was listed in the notice as one of the participants. The denial in the answering affidavit that such a meeting took place was demonstrated to be false and, even though a fourth set of affidavits was delivered on behalf of the municipality it did not deal with this meeting. Accordingly Mr Weyers' version of what transpired stands unchallenged. He says that Mr Mahlangu's response to being told that he would have to make a report to the Engineering Council was to say that

the Engineering Council could not dictate to the municipality who it should employ. His reply was that the council could not instruct him on how to conduct himself professionally.

[23] That the problems in the PSC centre remained critical is apparent from an e-mail addressed by Mr Booysen to Mr Garegae on 11 August in which he said that:

'We are not coping with the increasing number of resignations and not filling of vacancies resulting in people [having] to work overtime in excess of 40 hours and people working alone without assistants which could be seen as one of the reason for increasing incidents which could lead to incidents similar to the equipment blow-up at Morgan road in Mayville where members of the public were hurt.'

Mr Booysen finished by saying: 'We need internal electricians with experience on our network.'

[24] A further management meeting took place on 15 August at which Mr Weyers said that it appeared to be impossible to find internal employment equity candidates with the necessary competence and experience to fill the vacant system operator posts and requested that outside candidates should be head-hunted. He also proposed that in order to overcome the lack of skills internally 40 electricians in the municipality's employ be made available for training by him. In the meantime and in order to address the urgent existing problem he should be authorised to appoint people capable of fulfilling the immediate need for skilled system operators. It is accepted that this is what he said at the meeting and that Mr Mahlangu was opposed to these proposals.

[25] On 17 August Mr Mahlangu asked Mr Weyers to provide him with the 'job specs and job requirements' for *inter alia* the system operator

positions. This led him again to seek the advice of the Engineering Council, which on this occasion was furnished by its Manager: Legal Services, Mr Faul. The advice he received was to report his concerns to the mayor of Tshwane and that he was obliged also to report them to both the Engineering Council and the Department of Labour.

[26] On 24 August Mr Weyers sent to Mr Booysen and Mr Mahlangu a list of names of those employment equity candidates who had the minimum academic qualifications necessary for amongst others the system operator posts and said in the covering e-mail:

'Please note that academic qualifications are not enough as additional qualities are also needed. All of the positions to be filled are operational positions ie the people appointed need to take up the job immediately, failure to perform satisfactorily will endanger the lives of the candidates, their colleagues and the public.'

There was no response to this. On 25 August a further e-mail was sent to Mr Ratsiane and copied to Mr Mahlangu querying the decision to invalidate the tests (or more accurately the results of the tests) he had given to candidates and saying that he did not regard this as being in the best interests of the municipality as they had been devised to see if the candidates had the knowledge necessary to perform satisfactorily in the positions under consideration. Once again there was no response.

[27] The final act in the drama was a meeting on 29 August to prepare a short-list for the vacant positions. In the case of the system operators Mr Mahlangu proposed simply to short-list all the black applicants and none of the others. The range of unadjusted scores for these candidates on Mr Weyers' test ranged between 32,2% and 2,22%. Not surprisingly Mr Weyers said that he could not agree to and sign this shortlist as he regarded it as contrary to his professional obligations to do so. He told Mr

Mahlangu that if he continued with this process he would be compelled to write a letter to the Department of Labour reporting the issue to them. The response was: 'You can write a letter. I don't care.' As Mr Mahlangu says he cannot recall the meeting this stands unrebutted. Mr Weyers says that Mr Mahlangu then said he had heard that Mr Weyers was a racist, a charge that was strongly rejected. Mr Booysen also expressed concern about the competence of the candidates but Mr Mahlangu said that they would be sent for training at Eskom.[7] A check made by Mr Weyers the following day revealed that no arrangements had been made for any such training and this compounded his scepticism whether the training would eventuate.

[27] Against that background Mr Weyers wrote his letter of 31 August. It was addressed to the persons mentioned in paragraph [2] above and reads as follows:

'SHORT LISTING OF INCOMPETENT CANDIDATES

Dear Sir,

In my capacity as a Professional Electrical Engineer bound by the Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990) and as a Municipal Staff member bound by the Code of Conduct of the City of Tshwane Metropolitan Municipality ... I am compelled to inform the Council about possible irregularities in the process of the appointment of personnel in the Power System Control Section of which I am the Managing Engineer.

As the Section of Power System Control is primarily involved in ensuring the supply of electricity to the Tshwane Community and is required to work with dangerous live electrical equipment, the Managing Engineer sets high standards in appointing staff that have the best skills and competencies in the field. It is my professional opinion that academic qualifications alone, is not sufficient and therefore all applicants are

[7] Mr Booysen, who did not depose to an affidavit, clearly shared Mr Weyers' concerns. That much emerges from a memorandum he prepared on 12 September and from an e-mail he sent to Dr Lukhwareni on 5 October.

tested on their knowledge of the theory, work, electrical network and of safety procedures. These tests are approved by Human Resources before being used.

After obtaining the test results, the best candidates are invited for an interview. It was however found that the highest marks were mostly obtained by white candidates, and in order to adhere to the Employment Equity (EE) Act, 10% was added to each EE candidate's test result to give them a better chance of being invited to an interview.

This whole process was implemented in order to appoint System Operators and a shortlist was ready to be signed by HR on 8 April 2005. There was a great deal of unhappiness from HR as the shortlist only contained white candidates purely for the reason that they scored the highest marks and that it would be in the best interests of Council to interview such candidates for possible employment in the section. It was decided by HR and Top Management of Electricity to re-advertise the positions externally to draw a greater complement of possible EE candidates. With this done the candidates were tested again and very few EE candidates proved to be competent enough. No further actions as suggested by myself, such as 'Head Hunting' or the use of personnel agencies to find specific candidates, was taken by HR to find the right EE candidates for the positions.

On 29 April[8] 2005 I was involved in a meeting with HR and Members of Top Management where it was decided that my competency test marks will be totally disregarded and only black candidates, some of whom scored worst in the tests, be short listed this was done for the position of System Operator, System Controller and Dispatch agent, all positions that are critical for effective and safe service delivery.

The personnel structure of Power System Control currently consists of 54,5% EE candidates, 1,5% women and 44% white candidates. The Technical Service section under which Power System Control resides has 48% EE personnel, 4,3% Female personnel and 47,7% White personnel.

"The report to Council 23 June 2005: ELECTRICITY DEPARTMENT: SUPPORT SERVICES DIVISION UPDATE ON THE EMPLOYMENT EQUITY STATUS OF THE DEPARTMENT AND PLANS TO ACCELERATE THE PROCESS, where the equity target is set at 50% was disregarded by the short-list team, all white candidates applications were removed and only black candidates applications were accepted, no one cared about the levels of competency of persons being short-listed.

[8] Clearly this should be August.

I raised my concern about the fact that it should not be a question of white or black but of the most competent person in order for it to be in the best interest of the Council's Service Delivery and Electrical Safety. The General Manager responded to my concern by implicating me of being a racist.

The decision was however taken that all black candidates will be sent to training at ESKOM and will be certified competent by ESKOM before they are allowed to perform operational functions in the Power System Control Section. (Arrangements with ESKOM have yet to be made and money for the training must still be found).

I wish to confirm that I support the policy to train EE candidates to increase levels of competent service delivery to the public. This is in the best interest of our municipality. I have on different occasions proposed to different members of HR and Top Management to give me 30 EE candidates in special training positions created for this purpose, who will then be trained on the job, but as the Section is an operational section with immense staff shortages, the personnel needed NOW has to be competent to perform the work required of them without endangering their own lives, the lives of their colleagues or those of the public.

I believe that the short-listing of the candidates with the lowest competency levels, even though they will be sent for training (probably for a period of 2 months) is not in the best interest of the Council. With the current staff levels of Power System Control at a mere 58%, having no competent people appointed and with the possibility of training being done that may take a great deal of time, or even may not even materialise at all, it is my Professional opinion that the following Acts, collective agreements and codes could be contravened.

[A list of the provisions then follows.]

I wish therefore to distance myself from this process, and I wish to be exonerated of the negative impact this process might have on the performance of the Power System Control Section, the Electricity Department, the Council and the public of Tshwane in regards to safety as well as service delivery. I would also like to humbly request that my 2(7) appointment according to the OHS Act hereby be withdrawn and that someone else be appointed with that capacity.

Please be assured that despite this problematic situation, I remain committed to doing my job to the best of my ability and with the necessary diligence with the limited resources I have, whilst acting in the best interests of the City of Tshwane Metropolitan Municipality.

I eagerly await your response regarding the abovementioned issues and am looking forward to receiving guidance from your office in respect of the issues raised by me in this letter.'

[29] On receipt of the letter Dr Lukhwareni responded by e-mail saying:

'Should you colleagues not discuss matters personally with me before sending letters to the MM (municipal manager)?'

The reply from Mr Weyers was that he had been instructed by the lawyer at the Engineering Council to do this. The following day Mr Mahlangu addressed this e-mail to Dr Lukhwareni:

'To avoid such incidents where junior officials jump the SEO and run to the MM, calls for strong disciplinary measures. This is perturbing especially from an individual who has failed to demonstrate a commitment to transformation. If disciplinary measures are not taken, this scenario will be a recurring event where the SEO's directives are challenged by everyone and you can't run the department in this fashion.

Your mandate to transform this section is being challenged and failure to act will result in every decision that you make being challenged because someone does not like it.

That is my contribution to this matter and I personally will not change from the stance I have taken unless you give in to this threat."

[30] It is a curious feature of this case that the initial complaint was not that the letter had been copied to the Engineering Council and the Department of Labour, but that it had been sent to the Municipal Manager and Mr Weyers was perceived to have gone over Dr Lukhwareni's head thereby challenging his authority. What is clear is that the entire imbroglio arose when Mr Mahlangu intervened to prevent the implementation of the agreement of 10 May and it seems from this e-mail that he was also largely the driving force behind the disciplinary proceedings. Be that as it may, until his suspension on 9 November, Mr

Weyers continued in his post thereafter trying to resolve the impasse and participated in an interview process that resulted in six employment equity candidates being selected for system operator positions on the basis that they would undergo training. His conviction on the one disciplinary charge ultimately pursued against him precipitated the present proceedings. The only issue in the appeal is whether the court below was correct to hold that the distribution of the letter to the Engineering Council and the Department of Labour was protected under one or other of the statutes relied upon by Mr Weyers.

[31] It is perhaps as well at the outset to make it clear what this case is not about. It is not about the disciplinary proceedings and whether the sending of the letters in fact constituted misconduct or whether Mr Weyers received a fair hearing. Nor is the case about the application of the Employment Equity Act in the Tshwane Metropolitan Municipality. Nor does it require any view to be expressed on the wisdom of the approach adopted by either of the main protagonists, Mr Weyers and Mr Mahlangu, to the appointment of system operators and other staff in the PSC centre. Quite plainly they approached that issue from different perspectives and senses of priority. Whilst one might hope that these difficult issues in our society would always be resolved by mature discussion and mutual understanding, that did not occur in this instance and it is not for this court to determine the rights and wrongs of the situation that arose. Our only task is to determine whether the sending of the letter to the Engineering Council and the Department of Labour was protected by statute. It is to that question that I now turn.

[32] Mr Weyers relies on three statutory provisions to justify what he did. They are section 30 of the Engineering Profession Act, 46 of 2000;

section 26(1) of the Occupational Health and Safety Act 85 of 1993 (OHSA) and section 3 of the Protected Disclosures Act 26 of 2000 ('the PDA'). All the oral argument revolved around this latter provision and in view of the conclusion I have reached it is necessary for me to deal only with that aspect.

[33] According to its long title the purpose of the PDA is to make provision for procedures in terms of which employees in both the private and the public sectors may disclose unlawful or irregular conduct by their employers or by other employees and to provide for the protection of employees who make such disclosures. The preamble records that employees bear a responsibility to disclose criminal and any other irregular conduct in the workplace, and that employers have a responsibility to take all necessary steps to protect employees who make disclosures from reprisals as a result of making such disclosures. All of this is located within the constitutional imperative of good, effective, accountable and transparent government in organs of state. Section 3(1) of the PDA states as its objects the protection of an employee who makes a protected disclosure from any occupational detriment; the provision of remedies for those who suffer an occupational detriment in consequence of having made a protected disclosure and the provision of procedures to enable an employee, in a responsible manner, to disclose information concerning improprieties by his or her employer. Whilst it was submitted to us that the purpose was to have the subject of a disclosure investigated, and no doubt it is hoped that will flow from disclosures, that is not a stated purpose of the PDA. It recognises that disclosures are frequently not welcome to an employer and seeks to protect the employee who

makes a protected disclosure from retribution from their employer in consequence of having made a protected disclosure.[9]

[34] Before addressing the question whether Mr Weyers' letter contained a protected disclosure it is necessary to deal with a contention on behalf of the appellant that this is not a matter within the jurisdiction of the High Court, but one exclusively within the jurisdiction of the labour tribunals established under the LRA.[10] The basis for that contention is an interpretation of section 4 of the PDA in the light of certain recent decisions by the Constitutional Court and this Court. The starting point is section 4 itself, the relevant portions of which read as follows:

'(1) Any *employee* who has been subjected, is subject 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 151 of the Labour Relations Act, 1995 (Act No 66 of 1995), for appropriate relief; or

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

(2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court —

(*a*) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter VIII of that Act; and

(*b*) 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…'

[35] In my opinion the clear answer to this contention is that section 4(1) specifically states that an employee who may be subjected to an occupational detriment by his or her employer in consequence of having

[9] See in general *Tshishonga v Minister of Justice and Constitutional Development* 2007 (4) SA 135 (LC) paras 166 to 169 and 170 to 175.

[10] The Labour Relations Act 66 of 1995.

made a protected disclosure may approach 'any court having jurisdiction'. In principle that is the appropriate High Court bearing in mind the jurisdiction conferred on High Courts by section 169 of the Constitution, read with section 19 of the Supreme Court Act 59 of 1959, and that the reference to 'any court' is extremely broad. There is nothing in section 4 to exclude that jurisdiction. Instead the section says that the Labour Court will also be included as a court having jurisdiction. Bearing in mind that the Labour Court's jurisdiction is carefully circumscribed in sections 156 and 157 of the LRA that statement alone might have occasioned some difficulties in understanding the precise extent of the Labour Court's jurisdiction under the PDA. Accordingly the legislature went on in section 4(2) to place any dismissal in the category of automatically unfair dismissals and any other occupational detriment in the category of unfair labour practices, thereby locating the jurisdiction of the Labour Court under the PDA within the framework of its existing jurisdiction in respect of unfair dismissals and unfair labour practices. Subsequently it introduced sections 186(2)(d) and 187(1)(h) into the LRA to harmonise the two statutes. There is nothing in any of this to indicate that it was intended to deprive the High Court of jurisdiction in these matters.

[36] That straightforward reading of section 4 was challenged on the basis that because section 4(2) created what were referred to as LRA rights and remedies that meant that the Labour Court has exclusive jurisdiction. The explanation proffered for the reference to 'any court having jurisdiction' was that section 2 of the LRA excludes from its ambit members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and Comsec and accordingly it was necessary to

provide for another court to have jurisdiction in respect of these employees. The submission for the appellant is that the Labour Court is the court having primary jurisdiction in cases under the PDA with the jurisdiction of the High Court being incidental thereto and limited to the excluded employees who amount at most to a few percent of all employees in South Africa.

[37] The answer is that this inverts the language and structure of the section. The section starts by saying that all employees may have resort to any court having jurisdiction. It then says that the Labour Court is included in that broader category presumably because otherwise it would have had no jurisdiction at all in respect of cases arising under the PDA. Perhaps the effect is that for these purposes employees otherwise excluded from the scope of the LRA may have resort to its provisions and to the Labour Court or the CCMA, but it cannot mean that they are obliged to do so. Nor can it mean that employees otherwise subject to the LRA are deprived of the right to approach the ordinary courts for relief under the PDA. The language of the section is simply not apt for that purpose. There was a strong body of authority prior to the Constitution that held that the jurisdiction of the then Supreme Court was not lightly excluded.[11] That is now reinforced by the Constitution, which provides in section 169(b) that the High Court may decide any matter not assigned to another Court by an Act of Parliament. Where the statute in question gives the right to approach any court having jurisdiction and then adds by way of inclusion the Labour Court that is not an assignment of the matter to the Labour Court. Had the intention been as suggested the section would have started by referring all cases under the PDA to the Labour

[11] *Paper, Printing, Wood and Allied Workers' Union v Pienaar NO* 1993 (4) SA 621 (A) at 635A-C.

Court and then, if necessary, dealing separately with the few employees who fall outside the purview of the LRA. It does not do so.

[38] Mr Pauw SC, who appeared for the appellant, sought to support his argument by reference to the recent decision of this Court in *Makhanya v University of Zululand*[12] and that of the Constitutional Court in *Gcaba v Minister for Safety and Security and others*.[13] He submitted, with reference to paragraph 66 of the latter judgment, that this was 'a quintessential labour-related issue' and accordingly that the Labour Court has exclusive jurisdiction in regard to disputes arising under the PDA, with the exception of disputes in regard to those employees excluded from the scope of operation of the LRA. However that quotation is taken out of context. It must be seen in the light of paragraph 64 of the judgment where it was said that: 'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA.' and also in the light of the full passage where the phrase occurs, which reads:

'In *Chirwa* Ngcobo J found [at paras 142 and 150] that the decision to dismiss Ms Chirwa did not amount to administrative action. He held that whether an employer is regarded as "public" or "private" cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr Gcaba appears to be a quintessential labour-related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and has little or no direct consequence for any other citizens.'

The basis of the judgment in *Gcaba* is that the decision in regard to Mr Gcaba's promotion did not amount to administrative action.[14] Whilst pointing to the advantages of specialised courts and the undesirability of

[12] [2009] ZASCA 69.
[13] [2009] ZACC 26; [2009] 12 BLLR 1145 (CC).
[14] As has been held in two recent decisions by this Court. *Tshavhungwa v NDPP* [2009] ZASCA 136 and *Mkumatela v The Nelson Mandela Metropolitan Municipality* [2009] ZASCA 137.

forum shopping[15] it laid down no wider principle. The reference to a 'quintessential labour-related matter' is made in the context of the constitutional concept of an unfair labour practice that is given shape and form by the LRA.

[39] The issues in this case, whilst arising in the context of employment, relate to questions of public safety and the professional obligations of persons in the position of Mr Weyers in the context of the accountability of a municipality for proper service delivery of electricity within its municipal area. Those issues are by no means solely or at all labour-related matters. The questions that can arise in relation to a protected disclosure, such as whether the person concerned had reasonable grounds for believing that a criminal offence had been committed or that a miscarriage of justice had occurred or that the environment is likely to be damaged[16] are not labour-related issues and are more appropriately dealt with in the ordinary courts. The mere fact that it is an employee who is protected under the PDA from an occupational detriment in relation to that employee's working environment does not mean that every issue arising under the PDA is a 'quintessential labour-related issue' as contended by Mr Pauw. For those reasons I reject the challenge to the High Court's jurisdiction.[17]

[40] I turn then to consider the provisions of the PDA. Under section 3 of the PDA an employee who makes a protected disclosure may not be subjected to an occupational detriment by his or her employer on account, wholly or partly, of having made that disclosure. An occupational detriment is defined in section 1 as including being subjected to any

[15] Paragraphs 56 and 57.
[16] See the definition of 'disclosure ' in section 1 of the PDA.
[17] As did Kroon J in *Young v Coega Development Corporation (Pty) Ltd* 2009 (6) SA 118 (ECP).

disciplinary action. Accordingly the question is whether Mr Weyers' action in sending his letter to the Department of Labour and the Engineering Council constituted a protected disclosure. If it did then the appellant was not entitled to institute disciplinary proceedings against him and he was entitled to obtain the interdict that was granted by the Pretoria High Court.

[41] The material portion of the definition of a disclosure reads:

'...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) ...

(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) ...

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

The first argument advanced before us was that the contents of the letter did not constitute information because they contained only Mr Weyers' opinion that people who were not competent were about to be appointed as system operators and not a fact or similar form of information.[18] However a person's opinion is itself a fact, for as Bowen LJ pointed out:

'the state of a man's mind is as much a fact as the state of his digestion'.[19]

In addition an opinion often relates to a fact the existence of which can only be determined by considering the views of a suitably qualified expert. Whether a person has the requisite skills to undertake a dangerous and skilled task is a question of fact, but prior to their appointment, which

[18] Reliance was placed on *CWU and another v Mobile Telephone Networks (Pty) Ltd* [2003] 8 BLLR 741 (LC) at para 22. To the extent that it was held that a subjective opinion cannot be information the judgment is wrong.

[19] *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA) at 483.

was the relevant time in this instance, that fact can only be ascertained by way of tests and the assessment of people who know what the job requires of their level of skill. The letter dealt with that issue and as such contained information concerning the possible lack of competence of those who were likely to be appointed to the system operator posts. It also contained information to the reader about the state of mind of Mr Weyers as the person in charge of the PSC centre and the person responsible, both under his contract and by virtue of his appointment under the OHSA, for the safety of the machinery under his control and that of the PSC centre staff.

[42] A further difficulty with this approach to the nature of information under the PDA is that its narrow and parsimonious construction of the word is inconsistent with the broad purposes of the Act, which seeks to encourage whistleblowers in the interests of accountable and transparent governance in both the public and the private sector. That engages an important constitutional value and it is by now well-established in our jurisprudence that such values must be given full weight in interpreting legislation. A narrow construction is inconsistent with that approach. On the construction contended for by Mr Pauw the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite.

[43] For those reasons I am satisfied that the letter contained a disclosure of information regarding the conduct of those employees of the

appellant[20] who had taken responsibility for the selection of people to be appointed as system operators and a professional view on the suitability of the persons concerned to be appointed to those jobs. Both the letter itself and the background sketched earlier in this judgment demonstrate quite clearly that this information concerned the actual or prospective health and safety of individuals in the employ of the municipality and possibly outsiders as well and related to compliance with statutory obligations in regard to safety. Accordingly the letter constituted a disclosure in terms of the PDA. In terms of the definition of a protected disclosure in section 1, whether it was protected depends upon whether it was made to the Department of Labour and the Engineering Council in accordance with section 9 of the PDA.

[44] Section 9 reads in its material part as follows:

'**General protected disclosure**

(1). 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 purposes of personal gain, excluding any reward payable in terms of any law;

is a *protected disclosure* if –

(i) one or more of the conditions referred to in subsection (2) applies; and

(ii) in all the circumstances of the case, it is reasonable to make the *disclosure*."

The conditions in subsection (2) that are relevant for the purposes of this case are contained in paragraphs (c) and (d) which read:

"(c) that the *employee* making the *disclosure* has previously made a *disclosure* of substantially the same information to:

(i) his or her *employer*; or

(ii) a person or body referred to in section 8,

[20] Referred to in the letter as 'HR", an abbreviation for human resources, and 'Top Management" referring to senior management in the electricity undertaking.

in respect of which no action was taken within a reasonable period after disclosure; or (d) that the *impropriety* is of an exceptionally serious nature."

[45] The effect of these provisions is that the disclosure would be protected if Mr Weyers acted in good faith; reasonably believed that the information disclosed and the allegations made by him were substantially true; was not acting for personal gain and one or other of the conditions in section 9(2)(c) and (d) was satisfied. Mr Pauw rightly conceded that the first three requirements were satisfied. In the light of the evidence summarised earlier in this judgment he could do no less. It is plain that Mr Weyers was throughout painfully aware of his professional responsibilities and of the need to provide residents of Tshwane with a safe and reliable electricity supply. His concern about the dangers arising from appointing people who, after testing, he regarded as insufficiently skilled to undertake the onerous duties attaching to a system operator position shines through each document. His bona fides and his belief in the truth of what he was saying are apparent. As this case shows he made the disclosure at considerable personal cost and not for personal gain. He acted in the discharge of what he conceived, and had been advised, was his professional duty. The disclosure was made to parties that would manifestly be interested in such disclosure. It would be surprising in those circumstances to learn that the disclosure was not protected.

[46] Mr Pauw confined his contentions on this part of the case to the submission that Mr Weyers had not made a prior disclosure to his employer of substantially the same information in terms of paragraph (c), as the latter was at all times aware of his view, so that nothing was disclosed to it. He also contended that the disclosure did not relate to any

impropriety as required by paragraph (d). Accordingly, so he submitted, the last necessary element of a protected disclosure was missing.

[47] I cannot accept these contentions. In regard to the first it was put to him that the effect of his submission was that if the employer knew of a problem before the employee went and reported it there could be no prior disclosure to the employer and accordingly no protected disclosure could be made to anyone else. There was no answer to this point and the postulate cannot be correct. Its effect is that if an employee goes to the managing director and reports that bribes are being paid in order to secure contracts flowing from successful tenders that is not a disclosure if the managing director authorised the payments, and that knowledge would bar a protected disclosure to anyone else, such as the party issuing the tenders. Such a construction would undermine the whole purpose of the PDA because it has the result that the more culpable the employer in the conduct giving rise to the report and the greater its knowledge of wrongdoing, the less would be the protection enjoyed by the employee.

[48] The alternative submission was that the letter merely reflected a disagreement between Mr Weyers and his employer and therefore there had been (and could be) no previous disclosure to the employer because that disagreement did not amount to a disclosure. However that is merely the argument that the letter contained no information decked out in a different guise and the way in which it is couched further undermines that original submission. If the letter is so construed then the information it contains is that there is a disagreement between the manager of the PSC centre, a skilled and highly qualified electrical engineer, and the representatives of management and human resources concerning the abilities of persons to be appointed as system operators in the PSC centre.

That is a most important item of information that could cause the Department of Labour to intervene to conduct a safety inspection and engage with the relevant individuals to address the concerns being raised by Mr Weyers. Equally it could cause the Engineering Council to become involved in the interests of public safety and protecting the standing and reputation of its member. It also illustrates why these were the appropriate parties to whom to make the disclosure in question.

[49] In my view therefore the requirements of section 9(2)(c) were satisfied, it being common cause that the relevant officials in the municipality had disregarded Mr Weyers' concerns and intended to ride roughshod over them. Accordingly he had made the disclosure to his employer and no action had been taken consequent upon it, other than to disregard his bona fide concerns. It was not suggested that a reasonable period for acting upon his disclosure had not passed.

[50] That conclusion suffices to hold that the letter embodied a protected disclosure. The same result is reached by considering the requirements of sub-section (d). An 'impropriety' is defined in section 1 as being conduct in any of the categories in the definition of disclosure, which includes any conduct that shows or tends to show that the health or safety of an individual has been, is being or is likely to be endangered. Having regard to the nature of the enterprise and the nature of the work that system operators would be employed to perform it would be likely that the safety of an individual would be endangered by the appointment of a person who did not possess the skills necessary to do the job safely. That is an impropriety as defined and, against the background set out in paragraphs [3] to [6] above, it cannot be contended that it was not an impropriety of

an exceptionally serious nature. Clearly lives were at risk as the municipality's own advertisement for the position had stated.

[51] It follows that the respondents proved that the publication of the letters to the Department of Labour and the Engineering Council constituted a protected disclosure by Mr Weyers. It was accordingly impermissible for the municipality to discipline him for doing so and it would be impermissible for it to impose any sanction upon him for doing so. Lest it be taken that in referring to the municipality in this regard I am attributing conduct to the council of the municipality it is appropriate for me to record that it is unclear from the record, and counsel were not in a position to inform us, of the extent to which the council, as opposed to its officials acting in accordance with their delegated powers were responsible for both the disciplinary proceedings and the opposition to the present litigation, including this appeal. Accordingly my references to the municipality must be understood as referring to the conduct of those officials as representatives of the municipality. It is important to say this because it is not apparent that in the dispute that arose the broader interests of the residents of Tshwane and their need for service delivery, in the form of a safe and stable supply of electricity, were always kept in mind. In addition the manner in which these proceedings were conducted was deplorable with an answering affidavit being delivered by the manager: legal support services supported by purely formal confirmatory affidavits. The answering affidavit was replete with vague, evasive and in many cases demonstrably untruthful denials, as well as an attack on Mr Weyers' bona fides that could not be, and was not, supported by counsel in argument. This judgment would not be complete without recording that this was not justified and that it was not in the interests of the residents of Tshwane.

[52] The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
ACTING JUDGE OF APPEAL

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