

SOUTH AFRICA / JUDGMENT

Lephoto v National Institute for Humanities and Social Sciences and Another (JS274/16) [2017] ZALCJHB 442 (22 November 2017) [2017] ZALCJHB 442

COURT

Labour Court Johannesburg

BEFORE

M C Mamosebo

CASE / FILE NUMBER

JS 274/16

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JS 274/16

In

the matter between:

KIBITI
LEPHOTO
Applicant
and
THE
NATIONAL INSTITUTE
FOR
First
Respondent
HUMANITIES
AND SOCIAL SCIENCES
THE
MINISTER OF HIGHER EDUCATION
Second Respondent
AND
TRAINING

Argued:

30 October 2017

Delivered:

22 November 2017

JUDGMENT

MAMOSEBO, AJ

[1] The applicant, Mr Kibiti Lephoto, approached this Court claiming that he was subjected to an occupational detriment after he made a protected disclosure in terms of the Protected Disclosures Act [1] (the PDA). His grievance is that his dismissal was automatically unfair, as provided for in section 187(1)(h) of the Labour Relations

Act[2] (the LRA). He seeks re-instatement into his former position, alternatively, compensation equivalent to 24 months' remuneration and costs of the action.

[2] The first respondent, The National Institute for Humanities and Social Sciences (NIHSS), is a public entity established in terms of section 38A of the Higher Education Act[3] (the HE Act) and the regulations[4]. Its scope of application is to advance and co-ordinate scholarships, research and ethical practice in the field of Humanities and Social Sciences within and through public Universities. The second respondent is the Minister of Higher Education and Training (the Minister) joined to the proceedings because of a possible interest in the matter and against whom no relief is sought. NIHSS denies that the applicant's alleged disclosures constituted protected disclosures as defined in section 1 of the PDA and that his dismissal had anything to do with the said disclosures. NIHSS further denies that the dismissal was automatically unfair or that the applicant is entitled to the relief sought.

[3] NIHSS has submitted that the Public Finance Management Act[5] (the PFMA) and the Treasury Regulations published in terms of the PFMA are not applicable to this case. In its written submissions,

NIHSS explained that at its establishment it was understood that it was a public entity as contemplated in Chapter 6 of the PFMA. The Chief Executive Officer, Professor Sara Mosoetsa (CEO), notified the National Treasury as contemplated in section 46(2) of the PFMA that the public entity was not listed in Schedules 2 and 3 of the PFMA. This submission was made in response to what was pleaded by the applicant in his Statement of Case pleading to the effect that Deloitte Consulting (Pty) Ltd (Deloitte) a subsidiary of Deloitte & Touche, having been appointed as a financial service provider to the NIHSS, will observe and comply with, among others, the PFMA and its regulations.

[4] In terms of section 1 of the Regulations for the Establishment of a National Institute for the Humanities and Social Sciences[6] NIHSS means: 'The National Institute for Humanities and Social Science established in terms of section 38A of this Act[7], [Higher Education Act] and Regulation 2'.

[5] The submission by Mr Roskam, appearing for the NIHSS, that the NIHSS has not been listed in Schedule 2 and 3 of the PFMA and therefore does not fall under the PFMA and its Regulations, requires closer scrutiny. The NIHSS Board approved the Supply Chain Management Policy (SCM) in its minutes of 09 November 2015 for deviation in respect of

values for approval by the CFO, CEO and the Board. Interestingly, the minutes read that the SCM policy and the Delegation of Authority are based on principles and aspects encompassed and adopted in the report derived from the PFMA and PPPFMA, BEE Act and the Higher Education Act (HE Act)[8].

[6] The adopted NIHSS SCM policy recognises the need, when contracting for goods and services, to adopt a system which is fair, equitable, transparent and competitive as enjoined by section 217 of the Constitution[9]. Reference is also made to section 51 (1)(a)(iii) of the PFMA.[10] The NIHSS seems to be approbating and reprobating in the same breath. This is inadmissible. The mere adoption of a policy which recognises and is founded on, among others, the Constitution and the PFMA, gives credence to the application of the said legislation. In any event, the Constitution and its supremacy override any other legislation or policy and practice that is inconsistent with it. I therefore find that the SCM Policy, the PFMA and the regulations are applicable to NIHSS.

[7] The issues that fall for determination are the following:

7.1 Whether the documents disclosed by the applicant constitutes a disclosure and a protected disclosure in terms of the PDA;

7.2 Whether the actions taken by the NIHSS against the applicant (including NIHSS's failure to formally charge the applicant and to hold a formal disciplinary enquiry) constituted an occupational detriment as defined in section 1 of the PDA;

7.3 Whether the dismissal of the applicant was automatically unfair in terms of section 187(1)(h) of the LRA; and

7.4 If the applicant's dismissal was automatically unfair, whether and to what extent the applicant should be reinstated and/or compensated.

Background

and evidence adduced

[8] During 2014 the Minister entered into a 12 month's contract with Deloitte, as financial service provider to provide support in financial functions to NIHSS. This period was however extended by the Minister to 30 May 2016. Deloitte's responsibilities included:

8.1 Managing a budget of about R52 457 170.00 meant for the NIHSS activities;

8.2 Maintaining an integrated accounting system for all approved NIHSS activities, utilising standard accounting procedures, which will ensure full documentation and recording of sources and uses of funds;

8.3 Preparing the financial management reports for all NIHSS activities;

8.4 Monitoring and ensuring that the financial management activities of NIHSS are performed in accordance with the PFMA, HE Act and Treasury Regulations;

8.5 Reviewing and certifying receipts and cash transfer sheets regarding procurement of goods and services in line with the PFMA and Treasury Regulations; and

8.6 Managing the NIHSS expenditures, including personnel costs and ensuring full compliance with PFMA, HE Act and Treasury Regulations.

[9] The applicant, a qualified Chartered Accountant, was employed by NIHSS, as its Chief Financial Officer (CFO) on 19 November

2014. His duties as outlined in a document entitled “NIHSS Executive Appointments” were to: Assist the Accounting Officer to discharge the duties prescribed in the PFMA. Develop and monitor the implementation of the financial administration and accounting policies, systems and processes. Manage the Institute’s budget in accordance with the relevant prescripts. Ensure effective management of the Financial Management

Services, Supply Chain and Facilities Management Services and Risk Management Services; to provide timely and accurate financial and operational information; and ensure strict adherence to the Preferential Procurement Policy Framework Act[11] His employment contract was for a fixed period of five years with effect from 05 January 2015, subject to a 12-month probation period.

[10] On 18 August 2015 the applicant maintains that he made a disclosure in terms of the PDA to the Board of Directors of NIHSS under the head: “Disclosure of impropriety in terms of the Provisions of the Public Finance Management Act, Public Service Act, and The Code of Conduct for Public Service and other prescripts.” The applicant alleged that there was a ‘questionable relationship’ between the NIHSS’s CEO, and Mr Slingsby Mda of Deloitte, which undermined the Rule of Law pertaining to her obligations in respect of the Supply Chain Management at the NIHSS. On 24 August 2015 he furnished further details pertaining to the alleged impropriety to the Chairperson of the Human Resources (HR) Committee of the Board. The said disclosure was also made to the Auditor-General. The applicant maintains that he was automatically dismissed as a result of the disclosure that he made.

[11] The case for the NIHSS is that the CEO was dissatisfied with the applicant’s performance and conduct which were identified as:

(a) failure to attend meetings; (b) late submission of reports; (c) failure to provide feedback to the CEO and to act on her

instructions; (d) failure to bring important information to the CEO’s attention; for example, the closing down of the NIHSS bank account and the state of the NSFAS account; his handling of the CEO’s disbursement claims; questioning his appointment to the Bid Adjudication Committee (BAC) for the office space tender and his participation in the BAC process and reports emanating therefrom as well as his role in the implementation of the payroll for NIHSS. The CEO, following

an enquiry by the Chairperson of the Board, consulted with an attorney on 18 August 2015 regarding the applicant's performance and conduct.

[12] On 26 August 2015 the chairperson of the Board wrote an email to the CEO directing her to obtain a legal opinion on whether he can suspend the applicant on full pay pending an investigation and for the fund holders, (Deloitte Consulting]) to act as applicant. The attorneys advised NIHSS on 20 August 2015 to appoint an investigator to investigate the concerns in respect of the CEO's allegations against the applicant and the applicant's allegations against the CEO. It is common cause that two separate investigations were conducted. First, by Mr Charles Nupen (Nupen) and, secondly, by Professor Rosemary Moeketsi, the Chairperson of the HR Committee. The applicant received a notice of intention to suspend him on 27 August

2015. A resolution was taken by the HR Committee of the Board to suspend the applicant on 31 August 2015. The CEO addressed a letter of suspension to the applicant dated 01 September 2015.

[13] The applicant took issue with the fact that Mr Nupen was addressed as "advocate" whereas he is an admitted attorney. The applicant expressed a concern that Mr Nupen may not be independent and fair. He also feared that the investigation will focus on him and not on the alleged improprieties. The NIHSS explained that referring to Mr Nupen as an advocate was an administrative error. The Chairperson of the Board wrote Mr Nupen a letter dated 03 September 2015 headed: "NIHSS INVESTIGATION PROCESS": which reads as follows:

"On behalf of the Board of the National Institute for Humanities and Social Sciences, I would like to thank you in availing yourself to help us find a dignified way out of a very disturbing situation.

Please take this as a first attempt to clarify the task at hand:

We would appreciate a thorough investigation but also decisive advice on the options available to our Board. Below are the initial parameters in the two parts that may define your investigation and your recommendations.

Dr Nthabiseng Motsemme will be your resident host in the institute. She will endeavour to make your work as trouble-free as possible....

PART A: Investigation.

A1. Documents to be studied:

- The founding documents of the Institute [NIHSS];
- The Minutes of its Board Meetings;
- The legal Advice Dr Mosoetsa has been given re- her relationship with the CFO;
- The legal advice Dr Mosoetsa was given, re move of suspension;

- The original allegation of Impropriety;
- The response of the Chairman of the Board instituting the investigation;
- The response of the Chair of the HR Committee to Mr Lephoto [the applicant];
- The response of Mr Lephoto to the Chair of the HR Committee; and
- The suspension correspondence and legal opinion.

A2. Interviews.

Primary Interview Respondents:

Dr Sara Mosoetsa (CEO) and Mr Kibiti Lephoto (CFO)

Secondary Interview Respondents:

Prof. Ari Sitas (Chair of the Board); Prof Rosemary Moeketsi (Chair of the HR Committee); Mr Slingsby Mda (Deloitte and Touche – NIHSS fund-holder) and anyone that may be necessary, arising from the documents and the primary interview respondents.

B. Legal Opinion on the Way Forward to the HR Chair of the Institute

B1. An Assessment of the Situation i.e the relevant Facts

Firstly, is there an irreconcilable breakdown of trust between Dr Sarah Mosoetsa (the CEO of the Institute) and Mr Kibiti Lephoto (the CFO of the Institute);

Secondly, the CFO sent a “disclosure of impropriety” letter to the Board, alleging serious misconduct by the CEO. The Board responded by requesting substantiation of the allegations which elicited one such submission to the Board.

Thirdly, the CFO refused to authorise the payment of 127 service providers despite instructions by the CEO to do so after the Board authorised the interim release of funds from its operational budget in consultation with the DHET. This led the CEO (again after legal opinion) to move towards serving a suspension warning of the [CFO].

We would like the investigator to listen to the respective allegations as well as eliciting any other information necessary by speaking to other parties and inspecting any documentation of the NIHSS as necessary. The investigator should then suggest a decisive way forward.

B2. Options that the Board must consider as necessary to the fulfilment of the Institute’s mandate.

We look forward to receiving your response.

Yours in anticipation

Professor Ari Sitas.”

[14] The advice by Mr Nupen was that since the applicant was on probation, there is a prima facie basis for the institute not to confirm his appointment. There is also a basis to arraign the applicant for a disciplinary enquiry. He also advised the institute to make the copy of his report available to the applicant and to invite him to make representations.

The disclosure by the applicant

[15] In *Tshishonga v Minister of Justice and Constitutional Development and Another* [12] Pillay J stated:

“[176] The PDA is conceived as a four-staged process that begins with an analysis of the information to determine whether it is a disclosure. If it is, the next question is whether it is protected. The third stage is to determine whether the employee was subjected to any occupational detriment and lastly, what the remedy should be award for such treatment. It is not an enquiry into wrongdoing about whether the employee deserves protection. Structured in this way the inclination to shift the emphasis from the conduct and credibility of the wrongdoer to that of the whistle-blower is real.”

[16] Section 1 of the PDA defines disclosure as:

“(i) “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;
- (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 No.4 of 2000); or
- (g) That any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.”

[17] The applicant’s claim is that he made disclosures pertaining to the questionable relationship between the CEO and Mr Mda and the supply chain management. Deloitte was a service provider that ought to have reported to the applicant as the CFO in respect of financial issues. Instead, the communication went directly to the CEO. Several meetings were held between the CEO and Mr Mda where he as the CFO was absent. It is not surprising that the applicant was concerned that various meetings involving finances took place in his absence.

[18] The following extract of the meeting between the applicant and Mr Mda and two other officials from Deloitte Consulting on 07 August 2015 illustrates the applicant's concern:

"I proceeded to ask him (Mda) about the e-mail that he had sent to the CEO in which I was copied relating to the meeting that he had with the CEO. I wanted to know whether the meeting was an isolated incident of their interaction or whether they did interact on a regular basis. Mr Mda agreed that the e-mail was the tip of the iceberg [and], that he regularly communicated with the CEO through e-mail, telephone, meetings, that they were on a first name basis, that he saw nothing wrong in the relationship..."

[19] Of further relevance to ostensibly lend support for the allegation by the applicant that the relationship was questionable related to the shifting of funds, R10 Million, from operation funds to projects and scholarships. Mr Mda was asked by the CEO to prepare a letter to the Board seeking authority to shift those funds. The letter was signed by the Chairperson of the Board on 12 August 2015. The applicant only saw a copy of the letter, not given to him by the Board or the CEO, but by Ms Anita Rama, an employee of Deloitte, on 20 August 2015.

[20] What remains inexplicable is that while the applicant's terms of employment (see para 5 (above)) requires that he comply with the specified prescripts the memo dated 03 September 2015 is telling. The CEO communicated with Deloitte and copied the entire NIHSS team, without addressing this aspect which squarely falls under the applicant's domain, to jointly seek a solution. It reads:

"Attached is a list of payments that have not been paid due to the following

reasons:

- The Payment Authorisation Sheets have the comment 'NSF Funds not yet received' and signed by the CFO. The payments are not authorised for payment.
- Payments held back and not authorised by the CFO
- Payments received during the CFO suspension period and not paid

The Board has authorised the temporary use of operational funds to pay for NSF projects until the NSF funds are received.

I hereby authorise Deloitte to pay the attached list of payments using our operational funds."

[21] The applicant stated that although Deloitte Consulting's contract was meant to be for 12 months, ending September 2015, a whistle-blower informed him that they (Deloitte team) were planning to retain the contract for a further three years. They will succeed by getting rid of the applicant. This allegation by the whistle blower, contended the applicant, was supported by the fact that they had extended their areas of work and added 6 new areas. These were also discussed in his absence. He made reference to this in the disclosure. Some of the functions performed by Deloitte fell under his responsibilities and he was concerned that his position would become redundant. Of even greater concern to the applicant was an

email by Moses Katende, an employee of Deloitte, addressed to the applicant on 13 July 2015 mentioning that the CEO had endorsed the commencement of the opening balance work with CEPD. This allegation was not rebutted. Despite the fact that the applicant was also promised to be furnished with proof of authorisation of the extension of the Deloitte contract, it was not forthcoming, which rendered it an irregularity.

[22] It is clear that the CEO and Mr Mda had more than one meeting during which financial matters were addressed in the absence of the applicant. This is sinister, particularly in that the applicant has the responsibility in terms of his job description to advise the CEO on financial matters. This also had the potential to cause animosity in relationships.

[23] In as far as the determination whether or not the disclosure is protected or not, section 9 of the PDA sets out the criteria that must be met: Section 9 stipulates:

“9 (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 protected disclosure if –

- (i) one or more of the conditions referred to in subsection (2) apply; and
 - (ii) in all circumstances of the case, it is reasonable to make the disclosure.
- (2) The conditions referred to in subsection (1)(i) are –
- (a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;
 - (b) that in a case where no person or body is prescribed for purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;
 - (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,

In respect of which no action was taken within a reasonable period after the disclosure; or

- (d) that the impropriety is of an exceptional nature”.

[24] The Labour Appeal Court has summarised these requirements in the case of *Malan v Johannesburg Philharmonic Orchestra*[13] as follows:

“There must be a disclosure; the disclosure must be made in good faith; the disclosure must concern an impropriety, either a criminal offence or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; it must be reasonable for the employee to make the disclosure; and, that one or more of the conditions referred to in subsection 9(2) must be satisfied – for present purposes, any one of them is sufficient. Where the disclosure is made to the employer subsection

(c) which is relevant for the present purposes provides that the employee making the disclosure must have previously made a disclosure of substantially the same nature to his or her employer”.

[25] In *CWU v Mobile Telephone Networks (Pty) Ltd*[14] Van Niekerk AJ (as he then was) pronounced:

“It does not necessarily follow though that good faith requires proof of the validity of any concerns or suspicions that an employee may have, or even a belief that any wrongdoing has actually occurred. The purpose of the PDA would be undermined if genuine concerns or suspicions were not protected in an employment context, even if they later prove to be unfounded.” See also H & M Limited[15];*Randles v Chemicals Specialities Ltd*[16].

[26] In dealing with the reasonableness of the employee’s belief, Mlambo JP said the following in the State Information Technology case[17]

“for a disclosure to qualify for protection it must show that the employee reasonably believed that the information disclosed and any allegation contained in it was substantially true.”

[27] The applicant raised concerns pertaining to a lack of compliance with SCM Systems. The irregularity also related to employing personnel responsible for supply chain management. On 11 August 2015 this letter was addressed to the CEO by the applicant:

“Dear CEO

It is common knowledge that procurement in the public sector is regulated by statute. The design, location and roll out of Supply Chain Management System is prescribed in public sector prescripts. As I pointed out on numerous occasions, the prescripts are applicable to the NIHSS as well. Your refusal to allow and implement Supply Chain Management in a manner required by the PFMA (as per my recommendation) has serious financial and legal implications. It also places a severe limitation on my scope of work and makes it impossible for me to perform my responsibilities as they relate to Supply Chain Management. I hope that you will reconsider your decision and fulfil the legal obligation in this regard.”

While the CEO's response to the applicant was to claim ignorance of what was referred to, one cannot fully comprehend this response because the CEO's earlier communication is indicative of the fact that the NIHSS policy processes resonated with her.

[28] The applicant testified that he was under a duty in terms of the PFMA, as a senior manager, to report irregularities of which he encountered several. This duty transcends to him as a professional Chartered Accountant as well. This duty applies equally to senior managers in government.

[29] As stated earlier, the applicant's case is that he disclosed the impropriety on these grounds: First, the questionable relationship between the CEO and Mr Mda as well the CEO's undermining of the rule of law by disregarding her legal obligations relating to Supply Chain Management at the NIHSS. In my view, the applicant had a reasonable

suspicion which warranted an investigation. The law is clear that he does not need to prove the truth thereof. I am therefore satisfied

that the applicant has made a disclosure as contemplated in section 1(i)(b) of the PDA.

Is the disclosure protected?

[30] Section 1(ix) of the PDA defines a protected disclosure as a disclosure made to:

- (a) a legal adviser 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; or
- (e) any other person or body in accordance with section 9;

but does not include a disclosure –

- (i) in respect of which the employee concerned commits an offence by making that disclosure; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.

[31] In *Radebe and Another v Premier, Free State Province and Others*[18] Mlambo JP remarked:

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

[32] An employee who makes a protected disclosure contemplated in section 4 (2) of PDA is protected from dismissal. In *State Information Technology Agency (Pty) Ltd v Sekgobela*[19] Mlambo JA (as he then was) pronounced:

“[28] What has to be determined is whether the disclosure was made in good faith by the respondent, that he reasonably believed that the wrongdoing he disclosed fell within matters which, in the ordinary course, are dealt with by the appellant and that the information he disclosed is substantially true. An affirmative answer to these questions means that disclosure was protected.”

[33] The applicant reported the impropriety to the NIHSS Board. There was no evidence proving that the disclosure was not made in good faith and that the applicant reasonably believed that there was wrongdoing. The applicant did not make the disclosure for his personal gain. I am therefore of the view that the disclosure accords with sections 1 (ix) and 6 of the PDA. It follows that this was a protected disclosure as contemplated in the PDA.

Was the applicant subjected to any occupational detriment?

[34] Mlambo JP in the Radebe judgment[20] explains occupational detriment as follows:

“[18] An occupational detriment is defined in section 1 by reference to a number of instances that could occur in the employment environment arising from the making of a disclosure by an employee. For purposes of this judgment, the following instances are relevant: subjecting an employee to any disciplinary action; dismissing, suspending, demoting, harassing or intimidating an employee. Furthermore, the wrongdoing targeted by the PDA is referred to as an ‘impropriety’. This is defined as any conduct falling within any of the seven instances of wrongdoing the so-called seven types of improprieties.”

[35] Strikingly, the date of the disclosure is 18 August 2015 and nine days later, on 27 August 2015, the applicant was served with a notice of his suspension and subsequently suspended on 01 September 2015.

[36] Finally, there was the alleged failure by the applicant to make payment in respect of 127 invoices. However, the chronological

consideration of the invoices shows that he endorsed on each of them that payment cannot be made because of insufficient funds. Why the CEO did not engage him directly on this aspect to jointly seek a solution including shifting funds that was subsequently resorted to, is incomprehensible. It is evident that the CEO communicated on 11 August 2015 with an employee of Deloitte informing her that the Board has approved shifting the funds. The applicant was merely copied in that communication. On 12 August 2015, the Chairperson of the Board wrote to Mr Mda confirming such approval. The applicant is once more overlooked in this process. However, on 17 August 2015 an employee of Deloitte writes to the applicant asking him to authorise payment. He responds that the last date he was involved in the payments was 16 July 2015. He only received the approval letter by the Board on 20 August 2015 from an employee of Deloitte. Although mention is made by the CEO of the 127 unpaid invoices, there were in actual fact only 39 which she (the CEO) subsequently authorised payment of on 25 August 2015. This

aspect of unpaid invoices was actually moot. The Chairperson of the Board wrote to the CEO on 28 August 2015 asking her to seek a legal opinion on whether he can suspend the applicant with full pay pending an investigation and request Deloitte to act as CFO. It was argued by Mr Roskam that the applicant contradicted himself in evidence when he said he only became aware of the letter on 20 August 2015 whereas he had written an email to the CEO on 26 August 2015 alleging that he was not aware of the approval for the shifting of funds. In my view, this does not change the fact that he was made aware of the letter not by the CEO or the board but by Ms Rama of Deloitte.

[37] If the NIHSS deemed it necessary to have the conduct of the applicant investigated as a precursor to a disciplinary process it is incomprehensible why the process was not embarked on earlier. It is inexplicable why the NIHSS waited for the disclosure before they pursued the investigation route. In my view, the terms of reference furnished to Mr Nupen were convoluted. The investigation of the disclosure should have been confined to the allegations of impropriety. There is a clear nexus between the disclosure and the applicant's dismissal. In any event, a mere suspicion or perception of bias or partiality on the part of Mr Nupen was

sufficient to demand of the NIHSS to replace him, as investigator, with someone who was independent and impartial. In any event, the applicant had never been the subject of a disciplinary enquiry.

[38] The preamble to the PDA places a responsibility on every employer to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure.

[39] It must be borne in mind that the appointment of the applicant and his responsibilities, among others, were to ensure effective

management of the Financial Management Services, Supply Chain and Facilities Management Services and Risk Management Services; to provide timely and accurate financial and operational information; to ensure strict adherence to the Preferential Procurement Policy Framework Act[21] Undoubtedly, as evinced from the communication between the CEO and the Department of Higher Education and Training both the CEO and the applicant accepted that the PFMA and the Treasury Regulations applied to the NIHSS. That being the case, the concerns by the applicant were legitimate. Mlambo JP's remarks in the Radebe judgment[22] are helpful in this regard.

[40] I am satisfied that on the balance of probabilities the applicant's suspension and later dismissal was a consequence of his protected disclosure and therefore that he endured an occupational detriment.

Was the dismissal automatically unfair?

[41] Section 187(1)(h) of the LRA stipulates:

“(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

.....

- (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.”

[42] The Labour Appeal Court in Sekgobela[23] said the following:

“[15] In cases where it is alleged that the dismissal is automatically unfair, the situation is not much different save that ‘the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the applicant [employee]. If the applicant succeeds in discharging his evidentiary burden then the burden to show that the reason for the dismissal did not fall within the circumstances envisaged by s 187(1) of the LRA rests with the {employer}. It is evident therefore that a mere allegation that there is a dismissal is not sufficient but the employee must produce evidence that is sufficient to raise a credible possibility that there was an automatically unfair dismissal.”

[43] It is the applicant’s case that his dismissal was as a result of the disclosure he made. To the contrary, the NHISS alleged

misconduct on the applicant’s part pertaining to his failure to authorise payment of invoices and the irreparable trust relationship

between the CEO and the applicant) as NHISS’s reason for his dismissal. Even if it could be assumed or accepted for a moment that the dismissal was as alleged by the NHISS, it must still prove that the dismissal was for a fair reason and was preceded by a fair procedure, which is not the case.[24]. To determine the true nature of the dismissal, the Labour Appeal Court provided guidelines on the enquiry to be followed in SACWU and Others v Afrox Limited.[25]It is essential to show both the factual and the legal causation. While the NHISS alleged misconduct against the applicant, no disciplinary

enquiry was conducted. I am inclined to even think that the alleged misconduct was brought up to obfuscate the investigations and to derail the process. There was no basis to suspend or dismiss the applicant. I therefore find that the dismissal was automatically

unfair as contemplated in section 187(1)(h) of the LRA.

[44] The applicant has, in my view, established a prima facie case for the relief sought. I must point out that the NHISS had the option to call Mr Mda, Katende, the Chairperson of the Board, the Chairperson of the HR Committee of the Board and Mr Nupen as witnesses but chose not to. I am therefore of the view that an

adverse inference under these circumstances can be drawn that the NIHSS feared that their evidence will expose facts that are unfavourable to it.[26] On the evidence testified to by the applicant where the NIHSS witnesses failed to rebut same I accept such evidence as true and reliable.

[45] The applicant is seeking to be re-instated to his previous position with retrospective effect to the date of dismissal. I am of the view that the CEO did not afford the applicant an opportunity to function effectively as the CFO supporting the CEO in carrying out her responsibilities and serving the NIHSS. Their working relationship was clouded and obstructed by the role that Mr Mda played whilst he may have been on a frolic of his own. I do not believe the trust relationship has been broken. The following are instructive

remarks by Mlambo JP in Radebe[27].

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

[46] In *Chemical Energy Paper Printing Wood & Allied Workers Union & Another v Glass & Aluminium* 2000 CC[28] the Labour Appeal Court stated the following:

“[44] In considering these issues, it is necessary to bear in mind the provisions of s 194(3). They read thus:

‘The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances but not more than the equivalent of 24 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal.’

I therefore find that the applicant should be compensated for 12 months.

Costs

[47] Counsel for the applicant motivated for costs including costs of a senior counsel. I agree that this application was of a sufficiently

complex nature and importance to justify such an order.

[48] In the circumstances, the following order is made:

Order

1. The dismissal of the applicant was both procedurally and substantively unfair.

2. The applicant is reinstated with effect from 4 January 2016 being the date of his dismissal.
3. The first respondent, the National Institute for Humanities and Social Sciences, is ordered to pay the applicant 12 months'

compensation, an equivalent of 12 months' salary subject to statutory deductions payable within 30 days from the date of this order.

4. The first respondent is ordered to pay the applicant's costs which costs shall include costs consequent upon the employment of senior counsel.

M C Mamosebo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate HvR Woudstra SC

Instructed by:

Motla Conradie Inc

c/o Uys Jordaan Attorneys

For the Respondent: Mr A Roskam

Instructed by:

Haffegée Roskam Savage Attorneys

- [1] Act 26 of 2000.
- [2] Act 66 of 1995 as amended.
- [3] Act 101 of 1997.
- [4] GNR No. 952 of 05 December 2013 (GG 37118).
- [5] Act 1 of 1999.
- [6] Government Gazette 37118 No 952 dated 5 December 2013.
- [7] Section 38A of the Higher Education Act, 101 of 1997, is substituted by section 2 of the Higher Education and Training Laws Amendment Act, 23 of 2012, (Government Gazette No 36022 dated 19 December 2012). Substitution of section 38A of Act 101 of 1997, as inserted by section 3 of Act 38 of 2003 2. The following section is hereby substituted for section 38A of the Higher Education Act, 1997: Establishment of national institute for higher education 38A. (1) The Minister may, after consultation with the Council on Higher Education, establish a national institute for higher education as a juristic person [in Mpumalanga and in the Northern Cape] with a specific scope or application. (2) A national institute for higher

education is managed, governed and administered by a board. (3) If the Minister establishes a national institute for higher education in terms of subsection (1), the Minister must prescribe particulars of the establishment of the national institute for higher education, its board and its specific scope or application in the Government Gazette.

- [7] Section 38A of the Higher Education Act, 101 of 1997, is substituted by section 2 of the Higher Education and Training Laws Amendment Act, 23 of 2012, (Government Gazette No 36022 dated 19 December 2012).

Substitution of section 38A of Act 101 of 1997, as inserted by section 3 of Act 38 of 2003

2. The following section is hereby substituted for section 38A of the Higher Education Act, 1997:

Establishment of national institute for higher education

38A.

- (1) The Minister may, after consultation with the Council on Higher Education, establish a national institute for higher education as a juristic person [in Mpumalanga and in the Northern Cape] with a specific scope or application.
- (2) A national institute for higher education is managed, governed and administered by a board.
- (3) If the Minister establishes a national institute for higher education in terms of subsection (1), the Minister must prescribe particulars of the establishment of the national institute for higher education, its board and its specific scope or application in the Government Gazette.

[8]

- [9] The Constitution of the Republic of South Africa, 1996, as amended.

[10]

51. General responsibilities of accounting authorities. – (1) An accounting authority for a public entity – (a) must ensure that that public entity has and maintains – (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

[10]

51. General responsibilities of accounting authorities. –

- (1) An accounting authority for a public entity –

- (a) must ensure that that public entity has and maintains –

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

[11] Act 5 of 2000.

[12] 2007

(4) SA 135 (LC); [2007] 28 ILJ 195 (LC) at para 176.

[13] (JA61/11) [2013] ZALAC 24 (12 September 2013 at para 29.

[14]

(2003) 24 ILJ 1677 (LC) at para 21.

[15]

(2005) 26 ILJ 1737 at 1738B.

[16]

[2010] 7 BLLR 730 (LC).

[17]

(2012) 10 BLLR 1001 (LAC) at para 32.

[18]

(2012) 33 ILJ 2353 (LAC) at 2366 para 20.

[19]

(2012) 33 ILJ 2374 (LAC) at 2384 para 28.

[20] Supra at 2366 para 18.

[21] Act 5 of 2000.

[22] At 2373 para 40C.

[23] Supra at 2380 para 15.

[24] See *Pedzinski v Andisa Securities (Pty) Ltd* 2006] 2 BLLR 184 (LC).

[25]

[1999] 10 BLLR 1005 (LAC) at 103G – 104P.

[26] See: *Tshishonga Supra*) at 156 para

[27] Supra at 2373E – G para 41.

[28]

(2002) 23 ILJ 695 (LAC) at 707I – J para 44.

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