IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

REPORTABLE

Case Number: JS140/08

In the matter between:

NTOMBI GLADYS RADEBE	First Applicant
VERONICA LEAH DLAMINI	Second Applicant

and

F B MASHOFF **PREMIER OF FREE STATE PROVINCE**	First Respondent
M C MOKITLANE **MEC FOR EDUCATION FREE STATE**	Second Respondent
M RAMOKETSI **SUPERINTENDENT GENERAL OF EDUCATION** **FREE STATE PROVINCE**	Third Respondent

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JUDGMENT

MOSHOANA AJ

INTRODUCTION

[1] This is a referral brought in terms of the provisions of Section 191(13) of the Labour Relations Act. The Applicants complain of an unfair labour practice perpetrated against them as contemplated in Section 186 (2) (d) of the Labour Relations Act. The section provides that an unfair labour practice mean any unfair act or omission that arises between an employer and employee involving an occupational detriment other than dismissal in contravention of the Protected Disclosure Act 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act. At the commencement of the trial, I was informed by Bruinders SC, appearing for the Respondents, that there is no dispute that a demotion is an occupational detriment as defined in the Protected Disclosure Act, (hereinafter referred to as the PDA). He further informed me that the appropriate remedy would be that of reinstatement to the positions before demotion.

[2] The real issue for determination in this matter, is whether on 9th December 2005, the 2 (two) Applicants made a disclosure as contemplated in the PDA. Should the Court find that the document signed by the 2 (two) Applicants does not amount to a disclosure in terms of the PDA, that shall be the end of the matter. However if the Court finds that a document amounts to a disclosure in terms of PDA, then the Court shall address itself to other requirements that make that disclosure protected. The Court would equally deal with the issue of the remedy in terms of the PDA.

BACKGROUND FACTS AND EVIDENCE

[3] The 2 (two) Applicants are employees of the Department of Education in the Free State Province. Prior to being demoted, the First Applicant was employed as a School Management Developer. In 2007 she was demoted to a position of a Senior Education Specialist in (ABET). The Second Applicant was employed as a Principal of Thabong Primary School at Lejweleputswa Education District, prior to being demoted. The sanction of demotion in respect of the Second Applicant was converted to a suspension without pay on appeal. The suspension

was to be for a period of 3 (three) months from the 1st August 2007. It is apparent that the 3 (three) months suspension was never effected or challenged by the Second Applicant after it was issued. The Second Applicant's testimony in Court was that she was not aware of this outcome and had not seen it before. Nonetheless for the purposes of this judgment, the Court would address itself to the question whether the demotion in respect of both ought to be set aside on the basis that it was effected contrary to the PDA.

[4] On the 9th December 2005, the First and Second Applicants signed a document wherein they requested investigation into various allegations of corruption, nepotism, fraud and fruitless and wasteful expenditure. The said document was forwarded to the President of the Republic of South Africa, the National Minister of Education, the Premier of the Free State Province, the MEC for Education Free State, the Superintendent General for Education Free State, the Deputy Director General for Education Free State and the District Director, Lejweleputswa Education District. It is this document that the Applicants contend is a disclosure in terms of the PDA. On the other hand the Respondents contend that it was not one in terms of the PDA. I shall deal with this issue later in this judgment.

[5] Upon receipt of the document, the National Minister of Education instructed the provincial office to launch an investigation into the allegations as they appeared to be serious to the National Minister. The provincial office in turn caused to be appointed a team from Labour Relations. One Tladi and Geldenhuys were appointed as the investigation team. Tladi and Geldenhuys commenced their investigations around January 2006 and completed same around February 2006. The 2 (two) Applicants refused to cooperate with the investigating team, on the basis that prior to their arrival, the State Attorney had issued a letter wherein an indication was that the allegations are malicious, baseless and defamatory. According to the instructions given to the State Attorney, the 2 (two) Applicants were to desist from making allegations that are defamatory and malicious. Secondly they refused to cooperate on the basis that Tladi and Geldenhuys were from the Department as they sought the investigation to be conducted by a so- called independent

investigator. Both the Applicants made statements to the investigating team setting out the basis of their refusal to cooperate. The investigation team continued to hold interviews with various individuals mentioned in the document. This included one Xaba whose evidence I might return to when I analyse the evidence. In short, Xaba raised through the 2 (two) Applicants certain concerns relating to his previous so- called whistle blowing which was investigated but no outcome was made known to him. This alleged whistle blowing occurred in 2003, by him and the First Applicant. When a statement was obtained from him, he disclosed that one Sekala, who was an employee of the department, had received cash from a recycling company. Tladi established that Sekala was actually an assistant to Nyaredi, the driver. In investigating that, both Sekala and Nyaredi sought to dispute the allegation. Tladi went to a point of requesting a trip authority document which could not be furnished to him by the transport section. In investigating, he also spoke to one Qhithi, who disputed an allegation of not properly appraising Xaba. Since there was no co-operation from the 2 (two) Applicants, Tladi together with his colleague issued a report setting out their opinion and recommendations. The opinion was as follows: -

"It is the opinion of the investigating team that the allegations that had been made are baseless and unfounded and malicious and cannot be found or established after making the proper investigations. Due to the fact that Dr. Radebe and Ms. Dlamini did not co-operate with the investigating team it was not possible to investigate all the allegations."

The team recommended as follows: -

"1. The Superintendent General Education should not establish a commission of enquiry to investigate or call any agency of the State to investigate these allegations as they are made out of malice and speculation.

2. Disciplinary measures be taken against Dr. Radebe and Ms. Dlamini."

[6] On the 24th May 2006, disciplinary charges were brought against the First and Second Applicants. The charges were set out as follows: -

In respect of the Second Applicant: -

Charge 1: You have contravened Section 18 (1) (dd) of the Employment Educators Act 76 of 1998 in that on the 9th December 2005 and at Welkom, you committed a common law or statutory offence namely *crimen iniuria* by publishing and/or communicating defamatory statements in respect of the MEC for Education (Free State), the Chief Financial Officer and the Lejweleputswa District Director (Department of Education), to the effect *inter alia* that either and/or all of the mentioned were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure**. First alternative, Charge 1**, you have contravened Section 18(1) (q) of the Employment of Educators Act 76 of 1998 in that on the 9th December 2005 and at Welkom, you conducted yourself in an improper, disgraceful or unacceptable manner when you published and/or communicating defamatory statements in respect of the MEC for Education (Free State), the Chief Financial Officer and the

Lejweleputswa District Director (Department of Education), to the effect *inter alia* that either and/or all of the mentioned were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure.

Second alternative to Charge 1, you have contravened Section 18(1)(f) of the Employment of Educators Act 76 of 1998 in that on the 9th December 2005 and at Welkom, you unjustifiably prejudiced the administration, discipline or efficiency of the Lejweleputswa District Director or the Department of Education when you published and/or communicating defamatory statements in respect of the MEC for Education (Free State), the Chief Financial Officer and the Lejweleputswa District Director (Department of Education), to the effect *inter alia* that either and/or all of the mentioned were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure.

[7] In respect of the First Applicant the charges as set out above were repeated against her, in addition she faced the following charges: -

Charge 2: You have contravened Section 18 (1) (dd) of the Employment Educators Act 76 of 1998 in that on the 30th January 2006 and at or near Dealsville and/or Welkom, you committed an act of dishonesty when you requested an official at Lejweleputswa District namely Ms. Van Tonder to complete and backdate an itinerary for an official journey for the 27th January 2006.

First alternative to Charge 2, you have contravened Section 18(1)(q) of the Employment of Educators Act 76 of 1998 in that on the 30th January 2006 and at or near Dealsville and/or Welkom, you conducted yourself in an improper, disgraceful or unacceptable manner when you requested an official at Lejweleputswa District Office namely Ms. Van Tonder to complete and backdate an itinerary for an official journey.

Second alternative to Charge 2, you have contravened Section 18(1) (f) of the Employment of Educators Act 76 of 1998 in that on the 30th January 2006 and at or near Dealsville and/or Welkom, you unjustifiably prejudiced the administration, discipline or efficiency of the Lejweleputswa District Director or the Department of Education when you requested an official at Lejweleputswa District Office namely Ms. Van Tonder to complete and backdate an itinerary for an official journey for the 27th January 2006.

Charge 3: You have contravened Section 18(1) (dd) of the Employment Educators Act 76 of 1998 in that on the 10th February 2006 and at or near Welkom, you committed an act of dishonesty when you communicated the unavailability of the Accounting Officer to the insurers Glenrand MIB as reason for the incomplete claim form whilst being aware that the damage to your subsidised vehicle registration number **245 DOC FS** resulted from an unauthorised trip.

Alternative to Charge 3, you have contravened Section 18(1)(f) of the Employment of Educators Act 76 of 1998 in that on the 10th February 2006 and at or near Welkom , you unjustifiably prejudiced the administration, discipline or efficiency of the Lejweleputswa District Office or the Department of Education when you communicated the unavailability of the Accounting Officer to the insurers Glenrand MIB as reason for the incomplete claim form whilst being aware that the damage to your subsidised vehicle registration number **245 DOC FS** resulted from an unauthorised trip.

Charge 4: You have contravened Section 18(1) (a) of the Employment Educators Act 76 of 1998 in that on the 27th January 2006 and at Welkom, you failed to comply with or contravened this Act or any other statutory, regulation or legal obligation relating to education and the employment relationship; when you undertook an unauthorised official trip with your subsidised vehicle with registration number **245 DOC FS** to Dealsville.

Alternative to Charge 4, you have contravened Section 18(1) (f) of the Employment of Educators Act 76 of 1998 in that on the 27th January 2006 and at Welkom, you unjustifiably prejudiced the administration, discipline or efficiency of the Lejweleputswa District Office or the Department of Education when you undertook an unauthorised official trip with your subsidised vehicle with registration number **245 DOC FS** to Dealsville.

[8] It is common cause that charges in respect of the First Applicant (Charges 2 to Charge 4) did not arise as a result of the publication of the document. There was serious splitting of charges. Nonetheless such is of no moment for the purposes of this judgment.

[9] Upon being served with the charges as spelled out above, the 2 (two) Applicants launched an application in the High Court of South Africa Orange Free State Provincial Division, wherein they sought to interdict the inquiry which was due to proceed on the 14th June 2006. The basis thereof was that they considered themselves as whistle blowers in terms of the PDA- the inquiry amounted to an occupational

detriment. The Court, per Musi J delivered judgment on the 28th September 2006, to the effect that the application to interdict the inquiry fell to be dismissed with costs.

[10] At the disciplinary hearing, the 2 (two) Applicants raised an objection that since they consider themselves as whistle blowers, they would not subject themselves to a disciplinary hearing. The Chairperson of the inquiry ruled that the issue has already been decided by the High Court. He decided to proceed in the absence of the 2 (two) Applicants. The inquiry proceeded, both the Applicants were found guilty of the second alternative to Charge 1, which specifically alleged that they unjustifiably prejudiced the administration, discipline or efficiency of Lejweleputswa District Office when they published and/or communicated defamatory statements in respect of the MEC for Education (Free State), the Chief Financial Officer and the Lejweleputswa District Director (Department of Education), to the effect *inter alia* that either and/or all of the mentioned were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure. The sanction in respect of both was that of demotion to the next lower rank with immediate effect. The

evidence of the First Applicant was that she was demoted to more than 2 (two) ranks lower than the post she held. The 2 (two) Applicants appealed against the finding of guilt and the sanction. As it was pointed out above the appeal outcome confirmed the demotion of the First Applicant and altered the sanction in respect of the Second Applicant. The Applicants then referred a dispute to the Education Labour Relations Council alleging an unfair labour practice. The dispute could not be resolved; accordingly the matter was referred to this Court in terms of Section 191 (13) of the Labour Relations Act.

[11] In Court the First Applicant testified that she holds a degree as a Doctor of Education obtained in the year 2000 from Vista University. In 2003 she and Xaba made a disclosure with regard to appointments in the administration section and fraud in relation to forged signatures. She confirmed that the allegations were investigated, but she did not receive a report. In respect of the 2005 document, she testified that at the Golden Gate Conference, the MEC announced that certain officials were to return to their posts. One Mahlaku challenged the decision and ended up in this Court with a

cost order. In respect of the District Director, she testified that Ms. Mothsweneng and the MEC are family friends. With regard to the redeployment of Mr. Monnane to Bloemfontein, she testified that the MEC had created space for him and got the position of the CFO. She testified that he did not have qualifications. With regard to the re-skilling process, she had a problem with the expenditure that was incurred as it was a waste of time and a wasteful expenditure. She testified that a Mr. Moloi was working in a pub owned by the MEC's husband. With regard to office movement, she testified that there was a wasteful expenditure.

[12] As to why they made a disclosure, she testified that as employees they felt that the beneficiaries of education should be able to get what the government intended for them. They felt that there was a wasteful and fruitless expenditure, which should be curbed. Corruption was happening and no steps were taken, which must stop. She testified that if there is theft it deprives the learners and if not addressed it would lead to loss of money to build schools. She said nepotism deprives service delivery. Appointments should be able to make the department grow - friends and relatives should not stand on the way.

They needed to protect the department against all that. All they wanted was to have the issues investigated and if found be stopped. She testified that no annexures were attached - reason being that since they requested an investigation they will provide the said documents to the investigation team. They made no disclosures to the media.

[13] Since there was no investigation, the allegation that they made baseless claims cannot be made. Since she was not aggrieved, she could not follow the grievance procedures. She gave reasons for not cooperating with Mr. Tladi, which reasons relate to the letter of the State Attorney and the fact that the team was not independent.

[14] She confirmed that in the document there were speculations some of which did not materialise whilst others did, in particular the Bodiba issue. In respect of the relief, she sought reinstatement and compensation. In cross-examination she confirmed that by large the document contained speculations and not facts. She could not dispute procedures having being followed by the department. In respect of the position of the District Director she confirmed having applied together with Ms. Motshweneng, she

confirmed having been short listed and being interviewed together with her and others. Further, she testified that she did not object to the appointment. She also testified that she formed a belief that Ms. Motshweneng was appointed because of some friendship between her and the MEC.

[15] About the redeployment process she did not dispute that same followed procedure. With reference to the report of the interview, she stated that same is not a true reflection of what transpired. With regard to the MEC's appointees, she testified that process was followed, all she was worried about, was the professionalism around the appointments, them having happened after they had blown the whistle. She confirmed that nobody ever informed her that there were any irregularities in respect of the appointments. She could not dispute a process followed for the appointment of the DDG. She could not dispute the tender procedures. She further confirmed that there are no documents to support the allegations. They speculated that due to the alleged relationship with the MEC there was influencing of the awarding of the tenders. On the other hand the Second Applicant testified that she held an MA degree obtained in 1995. She is a

registered Psychologist. She corroborated certain portions of the First Applicant's evidence. In respect of the catering issue, she testified about a Mr. Moloi who was awarded a catering tender, who had disclosed to her that he is a family friend of the MEC and was working at the pub owned by the husband of the MEC. She also testified about the training of the SMT's, wherein the First Applicant requested her school to tender for the catering, which she later established Mr. Mokoena was awarded. She testified that the tender was awarded because Monnane was a close friend of Mr. Mokoena- this she had heard from other people. She also testified about social club meetings at Flamingo, whereat certain statements were uttered by Mr. Motshweneng to the effect that she would get the post of the director once the MEC is appointed. With regard to the cooperation, she testified that the letter of the State Attorney had already judged the issues and they needed a neutral person. She further testified that she was on sick leave for depression. She has since been sidelined as the Deputy Principal. In cross-examination she did not dispute any tender processes that were put to her, nor did she testify that she was aware of any objection to the processes. She testified that she never sought to enquire how the catering tender was awarded. She testified that she blew the whistle as she saw certain things recurring.

[16] Xaba testified that he is the Chief Provisioning Clerk at Odendaalsrus. He was part of the first disclosure in 2003. In respect of nepotism and favouritism, he testified about one M J Motsamayi whose appointment was questionable as he did not have qualifications. He testified that Mr. Motsamayi and Mr. Monnane were acquaintances from Kroonstad. He testified about the disposal system and confirmed that he made a statement to Mr. Tladi. He testified that certain things were not mentioned in the statement, although he had disclosed them to him. In cross-examination he confirmed that the 2003 complaint was investigated. He did not lodge any grievance because he was not aggrieved that the outcome was not made known to him. He testified that he lodged some grievances with the District Director which were not attended to. He was victimised, moved from one section to another. He confirmed that he disclosed in his statement that Mr. Sekala received some money from the recyclying company. The Applicants closed their case.

[17] Michael Tladi testified that he works in Labour Relations within the department of education and has been there since 2003 to date. His

duties are to investigate complaints of misconduct. He testified about the process leading to his appointment as an investigator and the manner in which he investigated the allegations. In cross-examination it was suggested to him that his investigation was poor as he did not investigate certain issues. At all times he was steadfast that to the extent that the investigation was poor, it was because of the lack of cooperation from the Applicants.

[18] Hazel Elizabeth Motshweneng testified that she is employed by the Department of Education Free State. She was never a friend to the former MEC. She also testified about the procedure leading to her appointment and the appointment procedures in general. She also testified about the transfers and the issue relating to Dr. Cingo School. In respect of the Western Holdings, she testified that the agreement was between the Western Holdings and Public Works. She also testified with regard to the tender processes. In cross-examination, she testified that she was hurt and offended by the disclosure document, which alleged certain things against her.

She testified that she did not see the MEC peeping during the interview. When confronted with this apparent contradiction from what

was put to the witnesses, she testified that she was involved in 2 (two) interviews around that time and she does not recall exactly what had happened.

[19] Lastly Vukelwa Eunice Qwelane testified that she is in the Free State Education Head Office, in the Department of Acquisition and Logistic Management. She testified about the tender procedures, wherein she confirmed that there are 2 (two) ways, one relate to the tendering and the other to the quotation system. She also testified how the quotation and the tender processes worked. In respect of the tender of Mr. Mokoena, she testified that the tender processes were followed and Mr. Monnane was not involved. She also testified about the Mafereka tender which had followed processes. In cross-examination Woudstra SC sought to suggest to her that since she was at Head Office, she might not be aware of non-compliance of tender processes at the district level. However, she testified that there was never a tender to a Mr. Moloi and Mr. Ngoepe that she was aware of.

[20] The Respondent closed its case.

ISSUES TO BE DECIDED BY THE COURT

[21] In terms of the Pre-Trial minutes, the following were set out as issues to be decided by the Court: -

21.1 Whether the Applicants suffered occupational detriments?

21.2 Whether the Affidavit constituted a disclosure as defined in Section 1 of the PDA?

21.3 Whether the publication of the Affidavit signed by both Applicants constituted a protected disclosure as defined by Section 1 (i) of the PDA?

21.4 Whether the disclosure complied with Section 9 of the PDA?

21.5 Whether the disclosure was made in good faith?

21.6 Whether the demotion of the Applicants constituted an occupational detriment?

21.7 Whether the Applicants are estopped from bringing the present application by virtue of their failure to raise any defence relating to the PDA during the course of the disciplinary hearing?

21.8 Whether an investigation was concluded to the allegations of the Applicants?

21.9 Whether there has been compliance with Rule 6 (1) (b) (ii) of the Rules of the Labour Court?

21.10 Whether First Applicant was demoted 2 (two) ranks lower to the post of Senior Education Specialist in adult basic education and training?

[22] It is worth mentioning that the issue of the jurisdiction of the Labour Court was also raised, however it fell away. Equally the issue whether demotion constituted an occupational detriment became common cause.

[23] In my judgment I am not to deal *in seriatim* with all the issues raised, but shall determine them in one batch.

SUBMISSIONS

[24] Both representatives submitted written Heads of Argument. I must pause and express gratitude as same was very helpful to the Court in coming to the conclusion of this matter.

[25] Woudstra SC appearing for the 2 (two) Applicants submitted a rather lengthy set of heads, attached a document relating to how the press would behave and the extracts of the Public Finance Management Act No. 1 of 1999. It is not worthwhile to repeat each of the submissions made. However the main submission on behalf of the Applicants was such that the document amounts to a disclosure which is protected in terms of the PDA. Woudstra relied
heavily on the decision of this Court in **Tshishonga v Minister of Justice and Constitutional Development and another 2007 (28) ILJ 195 (LC)**. He submitted that in line with that decision, the Court must follow the approach adopted therein when assessing issues relating to *bona fides* and whether the requirements of the PDA had been met. He submitted that the decision of the High Court in respect of the Applicants was clearly wrong and need not be followed. He

submitted that much as the Applicants had referred to speculations, some of the statements they made were not speculations but facts. One incident they speculated became true. Therefore the Court must not read too much into the fact that there is reference to speculation. He submitted that the Court should not be misled by the fact that the Applicants used the word speculation. What is required is to establish whether the Applicants reasonably believed that the information in the document was true and tended to show an impropriety. In dealing with the speculative paragraphs he submitted as follows: -

25.1 The facts as set out in (A), page 3, regarding Concordia Secondary School were not disputed by the Respondents and it was confirmed by Dr. Radebe that Ms. Ramahlala became principal of the said school.

25.2 A speculation of nepotism in (A), page 3, (second last paragraph) and the facts set out in paragraph 1.2 are based on what the MEC said regarding Ms. Motshweneng, the earlier appointment of Mr. Motshweneng's husband and the evidence of Ms. Dlamini regarding the discussion in the Flamingo Club. These are facts and not speculation.

25.3 The facts set out in (A), page 7, second paragraph relate to the appointment of Mr. Masiu as Deputy Chief Education Specialist. No contrary evidence was tendered by the Respondent and it was submitted that Masiu was appointed as such in January in 2006.

25.4 The facts set out in (A) page 10, paragraph 1 and 2 relate to the appointment of Ms. Moleke and high speculation of nepotism regarding her relationship with Mr. Monnane. She was appointed first as principal of the Dr. Cingo Secondary School and later as SMD is factually correct and confirmed by Mr. Motshweneng. She said that she did not know Ms. Moleke and could not comment on any relationship with Mr. Monnane.

25.5 The speculation mentioned in (A), page 10, paragraph 6 relates to the tenders awarded to Mr. Mokoena from Qwaqwa and these facts were not disputed. It was also not disputed that the tenders were awarded when Mr. Monnane was District Director. Ms. Qwelane admitted that a tender emanating from a specific district should according to the policy of the department have been awarded to a principal of the school in the district.

[26] He further submitted that save for the allegations made in (A), page 2, second last paragraph, all the other speculations were based on facts which the Applicants reasonably believe to be true and tended to show an impropriety. In this regard it is significant that the undisputed evidence was that the allegations were very serious and were directed to MEC and to Mr. Monnane. In Court, he submitted that the MEC is the employer and any disclosure about her conduct should be the conduct of the employer. He further submitted that reference in Section 6 to an employer relates to any employer, to the extent that a disclosure to another employer other than the employer of the employee would be sufficient for the purposes of the PDA. He further submitted that employees are entitled in terms of the PDA to question the decisions of the employer. He further submitted that employees who make allegations have a duty to assist in the investigation, however the refusal to assist by the Applicants was reasonable given the treatment they received, firstly by the letter from the State Attorney, lack of proper investigations and the victimisation by the investigating team. On the aspect of the remedy he submitted that properly interpreted the provisions of PDA suggest that an employee who had been subjected to occupational detriment is entitled to reinstatement and compensation. He submitted that the compensation is for *inuiria* in respect of the treatment they received

after the disclosure. Such treatment would encapsulate the fact that they were not protected as they should have been, they visited doctors and Dr. Radebe was placed 2 (two) ranks lower. In his submission all of that entitled the Applicants to a maximum compensation in terms of the Labour Relations Act.

[27] On the other hand Bruinders SC, for the Respondents, submitted that the so-called disclosure document does not cross the first hurdle, which is, whether same is a disclosure in terms of the Act? He submitted that the disclosure if it is found to be one was not made in good faith

In respect of disclosure to other individuals, same did not meet the requirements set out in Section 9. In the end he submitted that the application should be dismissed with costs. On the issue of the remedy he submitted that the Act properly interpreted and in line with the decision of the Constitutional Court in **Equity Aviation Services (Pty) Ltd v CCMA & Others (2008) 12 BLLR 1129 (CC)**, the Applicants are not entitled to compensation in terms of the Labour Relations Act.

ANALYSIS

[28] For the purposes of this judgment, it would be appropriate to analyse the provisions of the PDA and where necessary, in an attempt to illustrate a point, compare to similar legislation in other jurisdictions.

THE LAW

[29] In this case what ought to be considered is the PDA, to a limited extent the Employment of Educators Act and the authorities that already dealt with some provisions of the PDA. In terms of PDA 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 tend 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 obligation to which that person is subject;

(c) That a miscarriage of justice has occurred is occurring or 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 (4) of 2000 or that any matter referred to in paragraph (a) to (f) has been, is being or is likely to be deliberately concealed.

[30] What becomes clear from the definition is that the disclosure must be of information showing or tending to show (a)-(f).

[31] In terms of the Oxford dictionary the word information is defined to mean facts or details about somebody or something. Inform is defined as to tell somebody about something especially in an official way.

[32] It is therefore clear to this Court that information should be facts. Information does not in the Court's view include questioning certain decision and or processes of an employer.

[33] In **Tshishonga,** the Court there stated that information includes but is not limited to facts. Further it was held that information would include such inferences and opinions based on facts which show that the suspicion is reasonable and sufficient to warrant an investigation.

[34] Further it is clear from the definition that the information should be regarding any conduct of an employer or an employee of that employer.

[35] In the Court's view the information cannot be regarding a conduct of another person who is not an employer or an employee of that

employer. Of course if the word person employed in (b) above is given a wider meaning, conduct of any other person which includes a legal person would be contemplated. In which event disclosure about conduct of any employer or employee would suffice. In my view the word person should be given a limited meaning such that it should refer to the employer of the discloser or the employee of that employer. If that was not so then the opening phrase "*any conduct of the employer or the employee of that employer"* would make no sense. In **Hibbins v Hester Way Neighbourhood Project, 2008 yet unreported judgment of the EAT of 16 October 2008**; the tribunal in interpreting the provisions of the UK legislation found that the word person employed there should be given a wider meaning. Unlike the provisions of the PDA, a qualifying disclosure as defined does not carry the phrase referred to earlier. Accordingly disclosure about the conduct of another employer was found to qualify.

[36] The PDA defines an employer to mean any person: -

(a) who employs or provide work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person;

(b) who permits any other person in any manner to assist in the carrying on of or conducting of his, her or its business, *including any person acting on behalf of or on the authority of such employer.*

[37] The parties have agreed as common cause that both Applicants are employed by the Department of Education of the Free State. Therefore their employer is the Department of Education Free State. Therefore it is appropriate at this stage consider what the Employment of Educators Act 76 of 1998 (EEA) provides.

[38] In terms of the EEA, an educator means any person, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and educational psychological services at any public school, departmental office or adult basic educational centre

and who is appointed in a post or an educator establishment under this Act. The fact that the Applicants were appointed under the EEA seems to be common cause and could be inferred from the charges that were put against them referred to earlier in this judgment.

[39] The EEA defines an employer as follows: -

In relation to any provisions of Chapter 4, 5 or 7 which applies to or is connected with:-

(a) an educator in the service of the Department of Education means the Director General;

(b) an educator in the service of a Provincial Department of Education means Head of Department.

[40] The EEA further defines the Head of Department in relation to a Provincial Department of Education to mean Head of the Provincial Department of Education.

[41] In terms of Section 3 of the EEA, the following obtains: -

Employers of educators and other persons

(1) Save as is otherwise provided in this section

(a) the Director-General shall be the employer of educators in the service of the Department of Education in posts on the educator establishment of the said Department for ***all purposes of employment;*** and

(b) the Head of Department shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department ***for all purposes of employment***.

(2) ***For the purposes*** of determining the salaries and other conditions of service of educators, the Minister shall be the employer of all educators.

(3) ***For the purposes*** of creating posts: -

(a) on the educator establishment of the Department of Education, the Minister shall be the employer of educators in the service of the said Department; and

(b) on the educator establishment of a provincial department of education, the Member of the Executive Council shall be the employer of educators in the service of that department.

(4) A public school shall be the employer of persons in the service of the said school as contemplated in section 20(4) or (5) of the South African Schools Act, 1996 (Act No 84 of 1996).

[42] Therefore it appears to be so that the First Applicant's employer is the Head of the Provincial Department of Education, which appears to be Superintendent General of the Department of Education Free State. Again it appears that in respect of the Second Applicant, the employer

is Thabong Primary School as contemplated in Section 3(4) of the EEA.

[43] Accordingly, the information to be disclosed or disclosed by the Applicants should be in relation to the conduct of their employers. Even if I were to accept, only on the basis of the PDA, that their employer might include other persons, certainly the MEC and the Minister do not qualify to be employers as contemplated in the PDA. The fact that that is so is implicit from the provisions of Section 6, which protects disclosure to employer read with Section 7, which protects disclosure to Member of Cabinet or Executive Council. Most importantly, subsection 7 (c) provides that the Member of Cabinet or Executive Council should be responsible for an organ of state.

[44] Organ of State means any department of state or administration in the National or Provincial sphere of government or any municipality in the local sphere of government; of any other functionary or institution when- exercising a power or performing a duty in terms of the Constitution or provincial constitution; or - exercising a public or performing a public function in terms of any legislation.

[45] It cannot be disputed that the Department of Education in the Free State is an organ of state. It also cannot be disputed that the Member of Executive Council, being the Second Respondent in this matter is responsible for the Department of Education. However, being responsible does not necessarily mean that the Second Respondent by virtue of that becomes an employer in terms of PDA.

[46] In terms of the definition, that disclosure must be made by any employee who has reasons to believe that the information concerned shows or tends to show one or more of the improprieties set out in paragraphs (a) – (g).

[47] What becomes clearly discernable from that phrase is that the employee must have reason to believe.

[48] In the matter of **Vumba Intertrade CC v Geometric Intertrade CC 2001 (2) SA 1068 (W) ,** the full bench dealing with the provisions of Section 8 of the Close Corporations Act 69 of 1984, which had the phrase *reason to believe* had the following to say: -

"The Appellant's case therefore amounted to no more than an opinion by the sole member of the Applicant who, on his own version, had no knowledge of ***any facts on which such belief could be based****. Coupled with an inference which the Appellant sought to draw from the Respondent's failure to produce its financial statements in response to a demand based on such belief and an unwarranted inference from an undertaking given by the sole member of the Respondent. It is necessary to emphasise that before a Court can decide how to exercise the discretion vested in it by section 8 of the Close Corporations Act, there must be reason to believe that the close corporation will be unable to pay the costs of the Applicant if successful in its defence…. Although the phrase" there is reason to believe" places much lighter burden of proof on Applicant than, for instance the Court is satisfied* ***… the reason to believe must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice****… In short there must be facts before the Court on which the Court can conclude that there is reason to believe that the Plaintiff's*

Close Corporation would be unable to satisfy an adverse cost order, and onus of adducing such facts rests on the Appellant."

[49] The decision of ***Vumba*** was quoted with apparent approval by the Supreme Court of Appeals in the matter of **MTN Service Provider (PTY) LTD v AFROCALL (PTY) LTD 2007 (6) SA 620 at paragraph 7 i – j.** It therefore follows in my judgment that the phrase reason to believe should be accorded the same meaning as it was in ***Vumba's*** decision.

[50] Therefore in my judgment, the Court must be satisfied that there are facts upon which reason to believe could be based. Clearly speculations and opinions does not amount to facts upon which a reason to believe can be based. Woudstra relied on the decision of **Darnton v University of Surrey (2003) IRLR 133**, where it was held that the reasonable belief had to be based on the facts understood by the worker and not as actually found to be the case. It is important to note that the EAT was there dealing with the phrase as employed in 43B (1) of PIDA (the UK statute) which provides: -

“ In this part a “qualifying disclosure “ means any disclosure of information which, ***in the reasonable belief of the worker making the disclosure****, tends to show one or more of the following-“*

On the other hand PDA, in section 1 refers to “*any employee who has* ***reason*** *to believe”.* In my view the word reason means basis, in a form of facts and not baseless speculations or opinion.

In ***Darnton,*** what the tribunal got wrong in the view of EAT was to apply a wrong test when assessing reasonable belief. Instead of assessing facts available to the worker at the time the tribunal concentrated on their veracity. (*Paragraph 33) see also* ***Babula v Waltham Forest College (2007) IRLR 346***

So even if one is to follow lavishly the test applied by the EAT, there must still be facts upon which a believe is based. However my interpretation of the PDA suggests a slightly different test. The test being, there must be a factual basis upon which a believe must rest.

[51] The information concerned has to show or tend to show an impropriety. Obviously the question would be what the phrase" *shows or tends to show* "mean. In the **Tshishonga** decision, information tends to show, was to found to mean something less than a probability. In **Black's Law Dictionary 7th Edition 1999**, "show" is defined as meaning *to make (facts etc) apparent or clear by evidence, to prove.*

[52] Oxford: the new shorter Oxford English Dictionary defines it to mean *the action or an act of exhibiting or presenting something.*

[53] For a disclosure to be a disclosure in terms of the Act, it must have all the elements, being the following: -

1. Disclosure of information;

2. Regarding any conduct of an employer or an employee of that employer;

3. Made by any employee who has reason to believe;

4. That the information concerned shows or tends to show one or more of the following improprieties listed in a – g

[54] Accordingly in my judgment if any of the elements is wanting, what then appears like a disclosure is not a disclosure in terms of the PDA, in which event the protection is lost.

[55] In terms of Section 3 of PDA, no employee may be subjected to any occupational detriment by his or her employer on account or partly on account of having made a protected disclosure. In terms of Section 6 any disclosure made in good faith and substantially in accordance with any procedure prescribed or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned or (b) to the employer of the employee where there is no procedure as contemplated in paragraph (a) is a protected disclosure. Any employee who, in accordance with a procedure authorised by his or her employer makes a disclosure to a person other than his or her

employer is deemed for the purposes of this Act to be making a disclosure to his or her employer.

[56] What need to be determined first before considering good faith is whether a disclosure is made to an employer and whether the deeming provisions kicked in? In my view any disclosure not made to the employer of the employee disclosing the impropriety does not receive any protection under Section 6. Further, for the deeming provisions to kick in, there must be a procedure authorised by the employer. In other words if an employer has a procedure providing that disclosures should be made to Manager A, any disclosure to Manager B would be deemed to be a disclosure to the employer. Also if the employer has appointed an outside agent for the purposes of disclosures, then disclosure to that outside agent would be deemed to be to an employer. Since an employer is defined by the PDA, it would also mean any person acting on behalf of or on the authority of such an employer. For those provisions to kick in there must be an indication that the person is acting on behalf or is authorised by the employer. In this matter I do not find that disclosure to the

following falls under the provisions of Section 6. (Those are the President of the Republic of South Africa, the National Minister of Education, the Premier of the Free State Province, the MEC for Education Free State, the Deputy Director General for Education Free State and the District Director Lejweleputswa Education District.)

[57] In respect of the Deputy Director General for Education, firstly he is not the employer of any of the Applicants nor is there any evidence to suggest that the Deputy Director was acting on behalf of or on the authority of the employer. The same goes with the District Director. It appears to be so that Section 6 does not contemplate disclosure to employees of the employer. If that was so, the definition of an employer would have provided that an employer means any person including the employee of that employer. The PDA is specific that that person must be acting on behalf or on the authority of such an employer. It is therefore apparent that, in respect of the First Applicant, the Superintendent General for Education, being Head of the Provincial Department, is her employer. Having considered the definition, the information must be about the conduct

of the Superintendent General for Education in her instance. In respect of the Second Applicant considering, the provisions of the EEA, the conduct complained of must be that of Thabong Primary School. Even if the Second Applicant is treated at the same level as the First Applicant, the conduct should be that of the Superintendent General for Education Free State.

[58] In terms of Section 7, any disclosure made in good faith to a member of Cabinet or of the Executive Council of a province is a protected disclosure if the employee's employer is: -

(a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;

(b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or

(c) an organ of state falling within the area of responsibility of the member concerned.

[59] In this matter if the disclosure was a disclosure as defined in the PDA, then disclosure to the MEC, the Minister of Education, the Premier of the Free State Province and the President of South Africa would be protected.

[60] However in my judgment the hurdle to be crossed first, is whether the information disclosed is a disclosure as defined in the PDA? If an Applicant fails to cross that first hurdle, it matters not whether the disclosure was to the employer, the member of Cabinet or Executive Council. Although in considering protection in that regard the second hurdle would be to show that the disclosure was made in good faith.

[61] It seems clear that the South African Legislation was modelled on the Public Interest Disclosure Act of 1998, applicable in the United Kingdom. In terms of section 43B of the said Act a “qualifying disclosure” would mean any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the improprieties. What immediately distinguishes that definition from the PDA is the fact that the information should be regarding the conduct of an employer or an employee of that employer **(See David**

Lewis: whistle blowing at work: on what principles should legislation be based? Industrial Law Journal (30) and Whistle blowing in corruption an initial and comparative review January 2003 by K Drew). In terms of section 43C, the disclosure has to be made in good faith in respect of all other cases except to disclosure to legal adviser in terms of 43D. It is interesting to note that in New South Whales the Protected Disclosure Act of 1994 is only meant for public officials, ought to be made voluntarily and not in the course of official duties. The New South Whales Act also provides that the disclosure by the Public official must be of information that shows or tends to show that a public authority or another public official has engaged, or is engaged or proposes to engage in a corrupt conduct. In terms of that legislation an investigating authority may decline to investigate any disclosures that are made frivolously or in vexation. Such disclosures, where the investigating authority had declined or discontinued an investigation do not find protection. Interestingly, the Act in New South Whales, specifically states that a disclosure made by a public official that principally involves questioning the merits of government policy is not despite any other provisions of the Act

protected. The Act makes it a criminal offence to willfully make false statement or mislead or attempt to mislead the investigating authority.

[62] The Protected Disclosure Act, 2000 of New Zealand protects employees not only from dismissal and victimisation but guarantees employees immunity from civil and criminal proceedings. It is apparent that what cuts through the pieces of legislation that I was able to lay my hands on, the *bona fides* of the discloser is an issue.

[63] It seems clear that in the matter of **Greve v Denel (Pty) Ltd 2003 (4) BLLR 366 (LC)** a disclosure that was considered to be worthy of protection was of information that on a *prima facie* basis was both carefully documented and supported. I accept that such should be t he case. This was also accepted by this Court in the matter of **CWU and Another v Mobile Telephone Networks (Pty) Ltd 2003 (8) BLLR 741 (LC)**.

[64] In that judgment Van Niekerk AJ as he then was had the following to say: -

"The definition of disclosure clearly contemplates that it is only the disclosure of information that either discloses or tends to disclose forms of criminal or either misconduct that is the subject of protection under the PDA. The disclosure must also be made in good faith. An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirements of good faith. It does not necessarily follow though that good faith requires proof of the validity of any concerns or suspicion an employee may have, or even a belief that any wrongdoing has actually occurred…I do not consider that it was intended to protect mere rumours or conjecture."

[65] The **Tshishonga** matter unlike this one had to deal with disclosure to the media. In that matter the provisions of Section 9 of the PDA was analysed and dealt with. In this matter Woudstra submitted that Section 9 does not find application in so far as the Applicants are concerned. In his submission the disclosure was made to an employer therefore the provisions of Section 9 do not apply. In the self same argument the contention was that Section 7 does apply. The other distinguishing feature is the fact that the Respondent in that matter led no evidence. Actually it was contended that there was no

protection because media was not one of the bodies contemplated in the PDA and if it was, disclosure was not done responsibly. In the matter before me the Respondent led evidence to demonstrate that certain processes were followed and some investigation was conducted. Most importantly this Court in **Tshishonga** at paragraph 111 stated that the purpose of giving evidence by an employer is to demonstrate that any belief was reckless, dishonest, unreasonable and in bad faith. Unfortunately the Court in **Tshishonga** did not have evidence to demonstrate that the belief was reckless, dishonest, unreasonable and made in bad faith. In this matter the Respondent led evidence firstly to show that there was no impropriety in the appointment of the District Director, the tenders to Mokoena and others and a whole lot of aspects that the Applicants complained about.

[66] At paragraph 176 of the **Tshishonga** judgment this Court stated that the inquiry is a four staging inquiry, which entails:-

1. Analysis of information (*most importantly not evidence*) to determine whether it is a disclosure.

2. Whether it is protected.

3. Whether employee was subjected to occupational detriment.

4. The issue of the remedy.

I may add, in analysing the information a court must determine whether the disclosure of such an information amounts to a disclosure as defined by the PDA

[67] At paragraph 181, the Court said that unsubstantiated rumours are not information. To this I agree. In **Ross v Commissioner Stone N O and Others,** this Court although dealing with a review application had the following to say

"In my view, it is not the purpose of the Act to give licence to employees to make unsubstantiated and disparaging remarks about their employers and later hide behind the Act."

The preamble of the PDA makes it clear that the employees have to act in a responsible manner, since the whole idea is to rid organs of state and private bodies of criminal and other irregular conduct inconsistent with good governance

[68] In **Tshishonga**, it was also held that disclosure of disagreement with policy is not disclosure of an impropriety. At paragraph 199 the Court stated that an employer should be given a chance to explain or correct the situation. An employee who refuses to engage runs the risk of not being able to show that his believe is reasonable. In **Ross** the Court confirmed that the disclosure was not *bona fide* because the Applicant there turned down an opportunity to be clarified. In the matter before me, the Applicants were given an opportunity to elucidate the allegations that they had made but chose not to make use of that opportunity. They spurned the opportunity on reasons that are not good enough.

Ironically their “disclosure” document is replete with a plea for thorough investigation and/or deeper investigation. It therefore becomes difficult to understand the reasonableness of their belief if

an opportunity to be clarified was spurned. The principles as clarified in **Tshishonga** were followed by this Court in **THERON V THE MINISTER OF CORRECTIONAL SERVICES AND ANOTHER 2008 (5) BLLR 458 (LC) and ENGINEERING COUNCIL OF SOUTH AFRICA AND ANOTHER V THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND ANOTHER 2008 (6) BLLR 571 (T)**. In **Theron**, the matter involved an application to review a decision to remove from a post. In the **Engineering Council**, Section 9 was examined against the facts before court.

DOES SECTION 9 FIND APPLICATION?

[69] As pointed out earlier, Woudstra submitted that Section 9 does not find application in this matter. On the other hand Bruinders argued that as for the Deputy Director General and the District Director, disclosure to them falls under Section 9. It does appear that the contention by Bruinders is correct, in that the Deputy Director General (DDG) is not the employer neither is the District Director (DD). As pointed out earlier, it has not been contended that they act on behalf of or on the

authority of the employer. It then follows that any disclosure to an employee has to meet all the requirements set out in Section 9. Those requirements include *bona fide,* that the allegations are substantially true and that it was reasonable to make the disclosure. The fact that Woudstra argued that Section 9 finds no application simply suggests that the disclosure to the DDG and the DD does not meet the requirements of Section 9. Accordingly in my judgment Section 9 does find application in respect of the DDG and the DD. However given the approach I take at the end of this matter it matters not.

DOES THE INVESTIGATION OF THE ALLEGATIONS HAVE TO BE A PROPER ONE IN TERMS OF THE PDA?

[70] In my view, much as there is an obligation on the part of an employer to investigate any allegations of wrongdoing, it does not seem to be one that arises from the PDA. To that extent, it matters not whether the investigation was properly carried out or not. Of course in this matter, the fact that there was no proper investigation was as a direct

result of the non cooperation on the part of the Applicants. It does not accord to the Applicants to make allegations that have various speculations and when they have to clarify them, decide not to participate and later cry foul that the investigation was shoddy and improper.

DOES THE DOCUMENT OF 09 DECEMBER 2005 AMOUNT TO A DISCLOSURE IN TERMS OF THE ACT?

[71] This question was also raised and considered by the High Court per Musi J. The document contains a number of issues, which for the purposes of this judgment would be considered individually. Before I do so, it is worth mentioning that in general terms the complaint by the Applicants is about the conduct of the MEC. As I have pointed out, the MEC is not their employer, therefore complaints about her conduct amounts to no disclosure in terms of PDA.

REDEPLOYMENT OF PRINCIPALS AND DEPUTIES

[72] In respect of that, the document suggests that the MEC did that without consulting. The concerns raised therein, which in my judgment do not amount to information, was about legal and financial implications, payment of acting principals, legal and financial implications of the demotions and the requested reasons, because of their speculation that the MEC was perhaps paving ways for her favourites.

[73] Implicit therein is that the MEC is speculated to be engaged in nepotism. The question becomes whether such information is one upon which a reason to believe can be formed? Other than a speculation, there is no basis factually to suggest that the MEC was engaged in nepotism. It is not about whether it is true but whether there is basis to believe. The belief might be there but is baseless. It is improper to suggest that wild allegations that the MEC is possibly paving way for favourites, is worthy of protection. The Applicants gave some examples about Concordia and Bodiba. However all of that is nothing other than speculation. The fact that ultimately a speculation

in respect of Concordia and Bodiba materialised, does not suggest that at the time when the disclosure was made such was based on any reason to believe. The happening was not proof of nepotism either

THE ISSUE OF THE DISTRICT DIRECTOR

[74] It seems that what is being questioned by the Applicants is the redeployment of Mr. Motshweneng to Bloemfontein. Firstly it is not apparent from the document that the concern was that the redeployment was done contrary to the policies. The allegation relate to the MEC being allegedly in breach of protocol by announcing the coming in of the District Director. In terms of the document, the MEC's statement that anybody who does not support District Director shall meet her wrath raised speculations of nepotism and questions to be investigated. Such in my view is not information, but some questions raised by an uninformed person who if she had taken time to investigate the allegation before disclosing would have found facts

that suggest that such is so or not . In my view, the disclosure is not about the conduct of the employer and is a speculation of nepotism.

THE RESKILLING OF PRINCIPALS

[75] What is again apparent is that the Applicants are complaining about the conduct of MEC in the selection process. They choose to raise questions and give no information that show or tend to show an impropriety. Accordingly I find that the disclosure is not in terms of the PDA. It is questioning of selection procedures applied by the MEC for unknown reasons. Again it raises uninformed questions.

NEW OFFICES MOVEMENT

[76] In the document what is apparent is an allegation made by the Applicants that there is a 3 (three) year contract between the Department of Education and Western Holdings. Obviously the evidence revealed that such a contract did not exist in the first place.

The contract was between Public Works and Western Holdings. All that was being raised are questions and not information that tends to show impropriety. The Applicants assumed that there is a fruitless expenditure. This assumption is obviously based on wrong facts in that there existed no contract between the Department of Education and Western Holding. Put to its lowest ebb, there is no basis to believe that such a contract existed. This again would not qualify as a disclosure in terms of the PDA.

MEC'S APPOINTEES

[77] The Applicants raised only questions, did not give any information of impropriety. At best for them, there is an allegation of nepotism in respect of the appointment of Motshweneng. However the alleged nepotistic conduct is that of the MEC and not the Department of Education as represented by the Provincial Head. The speculations are that posts would be given to favourites who come from Kroonstad. This statement is baseless and is not worthy of any protection in terms of the PDA.

APPOINTMENTS IN THE FREE STATE DEPARTMENT OF EDUCATION.

[78] In respect of that, all that has been stated is removal of what appears to be an effective and efficient person. No information at all to suggest that the removal was improper. Further an allegation is made that the MEC elevated the Chief Director to the DDG. No information to suggest that the elevation was improper nor was there one that show or tend to show an impropriety. All what it is, is uninformed questions and not information. The Applicants pointed that the appointments in the administration section highlights nepotism. Clearly this is a vague and baseless statement which evinces an opinion which is not based on anything. Again they seem to complain on behalf of Mr. Xaba, who in their view blew a whistle yet he does not know the outcome and was being moved from one section to another. No information that the alleged move from one section to another amounts to an impropriety. Xaba himself seem to have not been aggrieved by that, he took no action since, neither did he take issue with the non attendance of his alleged grievances. The Court was not placed in possession of the 2003 document to assess whether such was a disclosure in terms of the PDA. In any event all what is contained in here is opinions,

speculations, baseless and unsupported allegations. This is not information in terms of the PDA.

THE SMT'S TRAINING IN FREE STATE

[79] In respect of that the speculation is about tenders which speculations are clearly baseless.

TENDERS

[80] On that the Applicants state that the tenders were given to favourites and family members and reference was made to the learner transport tender. Most importantly they want the role of the MEC to be investigated. There is no iota of information of non compliance with the tender processes. This, in my view would not amount to a disclosure of impropriety as contemplated in the PDA. It is clear to me that there is no law that suggests that giving tenders to *favourites* and *family members* is improper. Of course what is improper is to award tenders to those without following processes and influencing the

tender processes improperly by using favouritism and nepotism. Such an allegation is absent at all. Having considered the document, I

come to the conclusion, which was also arrived at by the High Court, that there is no disclosure worthy of protection.

IS THE "DISCLOSURE" *BONA FIDE?*

[81] Even if I were to accept that there was a disclosure in terms of the PDA, I do not believe that the disclosure was *bona fide*. In the first instance when the Applicants were given an opportunity to be clarified they spurned that opportunity. I do not accept as valid, to hide behind the letter of the State Attorney or the fact that Tladi and his colleague were from the Department. It is apparent throughout the document that the Applicants were yearning for an investigation which is deeper and thorough. More so in their own document they attached no supporting documents, which they claim was in their possession at the time. Clearly if they were *bona fide* they would have attached those documents to their so- called disclosure document when they

presented it for instance to the President of South Africa and the Minister of Education. The fact that they would have provided the documents to an independent investigation team is rather opportunistic. That can only demonstrate lack of *bona fides* on their part. In fact that the Applicants acted in a reckless manner to make allegations of nepotism and favouritism, when they had not taken time to obtain documents that *prima facie* show that the appointments or the redeployments were flawed. They had such an opportunity. They pondered and agonised about this for a long time. They found December to be an opportune time as they had enough time in their hands, so they testified.

[82] Even when they were presented with an opportunity at a disciplinary enquiry to at least support their allegations, they chose not to present evidence to support their view. At that time, the High court had already found that the inquiry was not an occupational detriment in terms of the PDA. The High Court in the application to interdict the disciplinary inquiry should have been given all the information to support the allegation yet such was not provided. Hence the Court came to the conclusion that the allegations are baseless.

THE ISSUE OF THE REMEDY

[83] Given the approach I intend taking in this matter it would be purely academic to deal with this issue. I however wish to express my view since the issue was argued before me

[84] The issue of the remedy is fortunately dealt with in Section 4 of the PDA. Most importantly Section 4 (2) provides as follows: -

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

(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: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

[85] Section 193 of the Labour Relations Act deals with remedies for unfair labour practices. In terms of 193 (4) an arbitrator appointed in terms of the Act may determine any unfair labour practice, dispute referred to the arbitrator, on terms that the Arbitrator deems reasonable, which may include ordering reinstatement or compensation.

[86] Much as the Act refers to an arbitrator, I suppose that the Labour Court considering a remedy for an unfair labour practice in terms of PDA would be guided by the subsection. In my view, the subsection contemplates that the Court may order re-instatement, if not, re-employment and if not compensation. The Court cannot in my view order re-instatement and compensation. This seems to be so, regard being had to what the Constitutional Court has said in the **Equity Aviation decision**. In this matter, if I had found that there was a disclosure which was protected and as conceded amount to an occupational detriment, then the remedy was going to be re-instatement to their old positions and if the Applicants did not wish to be reinstated, I would have considered compensation but certainly not both. The argument by Woudstra that the Court in considering compensation in a form of *solatium* would be compensating for *injuria*

seems to be at odds with subsection (4). The compensation, the re-instatement or re-employment should be for the unfair labour practice committed and nothing else. It seems that the Argument by Woudstra is premised on the provisions of Section 193 (3), which provides that if a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

[87] In the first place, if there was a dismissal it would have qualified as being automatically unfair by virtue of Section 4 (2) (a), which provides that any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of LRA . In the matter before me, there is no dismissal, which could be automatically unfair. Accordingly the provisions of Section 193 (3) find no application to the matter before me.

THE ISSUE OF COSTS

[88] Both representatives argued that costs must follow the results. On the issue of costs, I am guided by the provision of Section 162 of the Labour Relations Act. I have to consider the issue according to the requirements of the law and fairness. In my view, in law, a successful party should not be deprived of its costs. However in fairness other considerations come into play. I considered the ongoing relationship between the Applicants and their employer and have come to the conclusion that in fairness it would be appropriate to make an order that each party to bear its own costs.

CONCLUSION

[89] In summary, I have considered whether the document amounts to a disclosure and came to a conclusion that same does not cross the first hurdle, being whether it is a disclosure? In respect of whether the disclosure is a protected one the PDA simply list the parties to whom it can be made in good faith to achieve protection. Section 9

could be used for general protection. As argued by Woudstra, Section 9 in his submission finds no application. I found that Section 9 finds application in respect of 2 (two) individuals to whom the document was disclosed, assuming that it is a proper disclosure in terms of the PDA. The disclosure in respect of those 2 (two) does not meet the requirements set out in Section 9 (the information is not substantially true for instance. See ***Muchesa v Central and Cecil Housing Care EAT yet unreported 22 August 2008***). In respect of the disclosures made allegedly in terms of Section 6 and 7, I found no basis upon which it can be said that they were made *bona fide* and are worthy of protection. I also found that the conduct complained of is that of the MEC and not of their employer. In terms of the PDA such is not a conduct worthy of protection even if I had found that it is a protected disclosure in a sense that it was made to the Minister, to the President and to the Premier. There is no indication in the document of any conduct which shows or tends to show impropriety by the Superintendent General, who in terms of the EEA is the employer of the First Applicant. Neither is there an indication that there is any conduct which shows or tends to show impropriety on the part of Thabong Primary School, which happen to be the employer of the Second Applicant. I found that in any event the bona fides of the

Applicants are questionable. In all the circumstances I am constrained to make the following order: -

1. The claims of the First and Second Applicant are dismissed;

2. Each party to pay its own costs.

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 20 October 2008

Date of Judgment: 17 February 2009

APPEARANCES

For the Applicants: Advocate Woudstra SC instructed by Henning Viljoen Attorneys

For the Respondents: Advocate Bruinders SC instructed by The State Attorney