IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO: J1029/2010

In the matter between:

THE INDEPENDENT MUNICIPAL AND ALLIED

TRADE UNION obo GLORIA NGXILA-RADEBE **APPLICANT**

And

EKURHULENI METROPOLITAN MUNICIPALITY **1ST RESPONDENT**

ADV N. CASSIM S.C **2ND RESPONDENT**

JUDGMENT

AC BASSON, J

Nature of the application

[1] This is an urgent application in terms of section 158 (1)(a) of the Labour Relations Act 66 of 1995 ("the LRA"). The applicant, IMATU obo Ms Gloria

Ngxila-Radebe (hereinafter referred to as “the applicant”), seeks an order declaring that the disciplinary hearing conducted against the applicant to be an occupational detriment as contemplated by the Protected Disclosures Act No 26 of 2000 (hereinafter referred to as “the PDA). In addition, an order is sought in terms of which the 1st Respondent (the Ekhuruleni Metropolitan Municipality (hereinafter referred to as “the respondent”) is interdicted from subjecting the applicant to any occupational detriment or unfair labour practice on account of, or partly on account of, having made certain disclosures relating to the conclusion and payment of certain installments in respect of a contract that was concluded by an employee on behalf of the respondent with Microsoft. (I will return to the details of the contract hereinbelow.)

[2] In the Notice of Motion, application is made for final relief. However, during argument the applicant sought in the alternative that an interim interdict be granted pending the finalization of proceedings to be instituted in terms of the LRA. (I will return to the question whether or not the Court should grant final relief in these circumstances hereinbelow.)

[3] The application is opposed by the respondent on the basis that the applicant did not satisfy the legal requirements for the relief under the PDA and, in particular, on the basis that the applicant has not demonstrated a clear right for the relief sought.

[4] Most of the facts are common cause. It was, in particular common cause that the applicant had made certain disclosures about the fact that the contract that was concluded with Microsoft was unauthorized and that when an application for condonation for the conclusion of the contract with Microsoft was thereafter made to the Council (after it was acknowledged that no authority was obtained prior to concluding the contract), that *that* application did not disclose certain crucial facts to the Council. (I will return to this issue hereinbelow.)

Brief exposition of the facts

[5] The applicant is employed by the respondent as a manager of contracts. She is currently being subjected to disciplinary proceedings before an external independent chairperson (the 2nd respondent).

[6] The disciplinary hearing against the applicant has already commenced on 30 April 2010 and certain evidence has already been led by the respondent in the absence of the employee or her representatives. (I will return to the charges and the evidence that has already been lead hereinbelow.)

The contract with Microsoft

[7] The charges brought against the applicant arise from the following facts: In 2005 Mr. Collin Pillay (hereinafter referred to as “Pillay” - the then Executive Director of Information Communication Technology of the respondent) concluded a contract on behalf of the respondent with

Microsoft Ireland Operations Limited. The contract sum was *R 13 371 466.37*. It is common cause that Pillay did not have authority to conclude the contract and that no procurement process was followed. The effective date of the contract was 1 January 2008 and payment was to be done in three equal annual installments. Microsoft would invoice the respondent in three equal annual installments.

[8] The applicant disclosed the fact that the conclusion of the contract was unauthorized to the then Acting Executive Director: ITC (Ms Mathabathe) and then to Mr. Ngwenya who acted in Pillay's position.

[9] As a consequence, Mathabathe applied on 6 February 2006 to the Council for the condonation of the action of concluding the contract to the amount of R 13 371 466.37.

[10] On 9 February 2006 the Executive Mayor authorised (and therefore condoned) the conclusion of the contract concluded between Microsoft and Pillay on behalf of the respondent.

[11] It is common cause that Mathabathe did *not* disclose all the relevant facts in the condonation application to the Council in which she sought authority for the conclusion of the contract with Microsoft. Mathabathe was subsequently dismissed, *inter alia,* for her failure to do so. This application to the Council for condonation did not disclose the fact that three annual payments had to be made to Microsoft and that the contract sum would consequently be subject to exchange fluctuations between the Rand and

US Dollar (which would have affected the payments). The fact that VAT was to be added to this amount was also not disclosed to the Council.

[12] The first two payments were done on time namely in March 2006 and November 2007. The third payment was due in 2008.

[13] Payments to Microsoft were made by a Government established company SITA. The respondent made payment to SITA.

[14] The amount that became payable as the third installment amounted to *R 8 504 023.08*. The amount that has already been paid up until that date amounted to *R 11 556 502.97*. The authority that had been obtained for the payment of all *three* installments amounted to *R 13 371 466.37*. The amount that had to be paid to Microsoft therefore exceeded the amount which was authorised for payment.

[15] It is common cause that on 7 April 2008 the applicant informed Mr. Singh (the Executive Director ITC) that there was no authority for the payment of R 13 371 466.37 over the three years (in three installments) and that there was no reference in the aforesaid application for (retrospective) authority or in the resolution of Council to the Rand/Dollar exchange increases and that the authority for the payment in respect of the contract was therefore insufficient for payment of the third installment. It is common cause that the applicant informed him that she could not be involved in such an authorised payment. The applicant submitted that this also constituted a protected disclosure as contemplated by the PDA.

[16] On 15 May 2009 Mathabathe certified the invoice for the third installment. The amount was not paid as the documentation attached thereto was questioned by a certain Mr, Nel.

[17] On 17 June 2009 a meeting took place between SITA, the respondent (represented by a Mr. Reis and a Mr. Renke) and Microsoft. The applicant attended although she was not invited. At that meeting the applicant was informed that the respondent was also charged for the forward cover exchange taken out by SITA. The forward exchange cover was authorised by Singh but was no authorised by the respondent. The applicant again stated that the unauthorized payments could not be made and that approval was to be sought for the payment thereof. She also informed the meeting that the forward exchange cover agreement was to be disclosed and that condonation had to sought.

[18] On 15 September the applicant found out about a memorandum that was to serve before the Bid Evaluation Committee. The applicant informed the chairman thereof that the application was brought on incorrect or misleading facts. The committee did not approve the report. The applicant again argued that this constituted a protected disclosure as contemplated by the PDA.

[19] A further proper and correct application was made for condonation of the authorised order and for payment of the unauthorized sum of money. The payment was eventually authorised on 26 November 2009.

[20] It was submitted on behalf of the applicant that it was as a direct result of her disclosures of the irregularities that she has been charged for delaying the third payment that was to be made to Microsoft/SITA.

Disciplinary proceedings against the applicant

[21] As a result of the substantial losses, the respondent conducted an investigation into conduct in relation to the Microsoft contract and the effective role of various employees' involved the process. According to the respondent, it became apparent that the applicant's failure and refusal to address the issues that arose in respect of the payment under the Microsoft contract, contributed to the loss suffered by the respondent. The applicant was thus charged for the fact that the respondent incurred additional costs as a result of Microsoft's/SITA's invoice not having been paid immediately upon receipt thereof. The said payment was not made timeously because, according to the respondent, the applicant had disclosed the fact that there was no authority for such payment and when authority was sought for the payment, it was sought on the basis of the incorrect contract and without disclosing that part of the amount consisted of forward cover penalties that became payable.

[22] According to the respondent, the fact that the Rand/Dollar exchange rate deteriorated significantly during the period of delay in paying the third installment, the respondent (and the tax payer) became liable for an additional amount in excess of R 6 000 000.00 on the capital sum owed to

SITA. It is this extra amount which the respondent had to pay as a result of the delay in obtaining approval for the amounts that were to be paid, that form the essence of the charges against the applicant. The applicant is accused of being responsible (at least partly) for the delay in making the payment of the third installment to SITA. In this regard the respondent alleges that had the employees (including the applicant) of the respondent acted reasonably, payment could have been made in 2008 or 2009. It is further alleged that the delay (partly caused by the applicant) led to the respondent (and consequently the taxpayer) suffering substantial losses.

[23] For various reasons not directly relevant for purposes of this application, the disciplinary process commenced before the second respondent in the absence of the applicant and certain evidence was led. (I will refer to some of the evidence hereinbelow in so far as it is relevant in arriving at a conclusion whether or not there is a link or nexus between the protected disclosures (if they were indeed protected disclosures) and the charges for misconduct which led to the disciplinary hearing.)

Charges against the applicant

[24] As already pointed out, the misconduct charges against the applicant are based upon expenses incurred by the respondent as a result of exchange flections during the time it took to make payment of the third installment of the contract that was concluded between the respondent and Microsoft. The delay in making the said payment is alleged to have been caused by

the applicant having made complaints relating first to the absence of authority for the payment and secondly, when authority was sought her complaint that misleading facts were presented in the application to the Council for condonation of the conclusion of the contract with Microsoft which necessitated another application for authority to be brought.

[25] The respondent insisted that the applicant is facing charges of *misconduct* relating, in particular to delaying payments which she should have timeously made and which delay has caused the respondent a loss. The applicant, on the other hand, insisted that the misconduct charges are as a direct result of the disclosures made by her of the irregularities in respect of the conclusion of the contract as well as the payments made in respect of the contract. It was therefore the applicant's case that the disciplinary hearing which she is now being subjected to is directly on account of or, at least partly on account of the disclosure that she had made of the irregularities in concluding the agreement with Microsoft and thereafter attempting to provide payment to Microsoft without the payment having been approved by the respondent.

[26] The respondent argued that the applicant fundamentally misconstrues the protection afforded to employees in terms of the PDA and that she is not being disciplined on account of having made any disclosure. The respondent further points out that it should be taken into account that the applicant is not alleging that disciplinary proceedings are brought against

her as a reprisal for having made a protected disclosure. She, so it is argued, appears to be of the view that the PDA provides a free pass for misconduct. This, the respondent argued, does not constitute a legitimate basis upon which the applicant can claim the protection of the PDA. The respondent further argued that if the founding affidavit is properly read, it should be clear that the applicant is making out a case in the papers as to why she is not guilty of the charges that have been brought against her. This, the respondent argued, is a case that should be made out before the disciplinary hearing and, should she be wrongly or unfairly found guilty in the disciplinary hearings, she may claim unfair dismissal under the provisions of the Labour Relations Act 66 of 1995.

(i) Firstly, I am in agreement with the submission that much of what is contained in the founding affidavit relates to the reasons *why* the applicant is not guilty as charged. However, even if this is so, the question which this Court must consider is not whether or not the applicant may have a defense against a charge of misconduct, but whether or not the applicant should have been charged in the first place. In other words, the question which the Court must consider is whether or not the applicant is being subjected to an occupational detriment by her employer on account of or partly on account of having made a protected disclosure in terms of section 3

of the PDA. An occupational detriment includes *"being subjected to any disciplinary action*" (section 1 of the PDA).

(ii) Secondly, the mere fact that the applicant is not directly or overtly charged with having made a disclosure is not fatal to an application in terms of the PDA. I should point out that I find it hard to believe that an employer will overtly charge an employee with having made a protected disclosure. Moreover, the protection granted in terms of the PDA is not, in may view, limited to disciplinary proceedings where an employee is expressly charged with having made a protected disclosure. Where an employee can show a link or nexus between the charges of misconduct leveled against her and the fact that she has made certain disclosures, she will be entitled to the protection afforded by the PDA. See *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551 (LC). In the latter case the applicant was also not directly or expressly charged with making a disclosure. He was charged in relation to disclosures with misconduct arising from the manner in which he obtained the information that led to the disclosures or the purpose to which the disclosures were to be used (see paragraph [16]). In the present case the applicant is also not expressly charged with making disclosures. She is charged with the delays which resulted from her having made disclosures. The question which this Court must answer is whether or not the

applicant has established a link between the charges which have been brought against her and the fact that she has made disclosures. I am also in full agreement with my learned brother Cele, J who said the following in *David John Randles v Chemical Specialties Ltd* (Case no: D42/2010 dated 5 February 2010) where he rejected the contention that an employee must be charged with a charge directly related to the disclosures that were made:

> *"[30] Being subjected to "any disciplinary action" fulfils the definition of an occupational detriment as contained in Section 1 of the PDA. The respondent, however, seeks to persuade the Court that their conduct cannot constitute an occupational detriment because the charges brought against the applicant are not directly related to the disclosures made. The contention is unsound, few employers would be foolish enough to bring directly related charges against a whistle-blower.*
>
> *[31] It is submitted that it is apparent from the above that the respondent's actions were clearly retaliatory measures to the disclosures made by the applicant. It is accordingly submitted that the applicant's disclosures are protected and*

the charges against the applicant are an occupational detriment in terms of the PDA."

(iii) Thirdly, the applicant can merely decide to face the music and defend herself against the charges leveled against her and, if she is found guilty, institute unfair dismissal proceedings in terms of the provisions of the Labour Relations Act 66 of 1995. However, the applicant can, in the alternative decide to approach this Court and seek the relief provided for by the PDA. The applicant cannot be required to do both as they are incompatible with each other. See in this regard: *David John Randles v Chemical Specialties Ltd* (case no: D42/2010 dated 5 February 2010 at paragraph [35] -[36] where the Court held as follows:

"[35] Whether one categorises the issue as one of election or one of estoppel, the outcome is the same. When the applicant was called to attend a disciplinary enquiry and to answer the charges (as amplified from the original 2 charges with their alternatives), he had two choices, namely:

- *he could seek relief under the PDA; or*
- *he could proceed with the disciplinary enquiry.*

[36] But he could not do both, as they are incompatible with each other. Indeed, the relief contemplated by the PDA is designed to stop or prevent a disciplinary enquiry.

> *Between the service of the "charges" on him and 20 January 2010 the applicant advised the respondent of his intention on a number of occasions and took a number of steps to pursue his rights in the disciplinary enquiry. These are listed in the chronology which is attached to these heads of argument. Pursuant to the applicant's representation that he was taking steps to participate in the disciplinary enquiry, the respondent prepared for it, continued to prepare for it, and incurred costs in doing so."*

[27] The question is: Why should an employee face a disciplinary hearing in circumstances where she should not have been charged in the first place? The aim of the PDA is to protect the whistleblower and "*to promote the eradication of criminal and other wrongful conduct in organs of state and private bodies"*. (See for a detailed discussion of the aims of the PDA *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 *ILJ* 195 (LC).) The Court must therefore consider whether or not the applicant deserves the protection afforded by the PDA including but not limited to whether or not a whistleblower should be subjected to a disciplinary hearing. I am also in full agreement with the sentiments expressed by the Court in *Grieve v Denel (supra* at paragraph [8]) where the Court pointed out that the protection afforded by the PDA is designed

to encourage a culture of whistle-blowing. This is clear from the pre-amble that the describes the purposes of the PDA as to –

> *"create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures"*.

[28] Section 3 of the PDA reads as follows:

> *"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."*

[29] Section 6 and 9 of the PDA reads as follows:

> *"6. Protected disclosure to employer*
>
> *(1) Any disclosure made in good faith-*
>
> *(a) 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.*
>
> *9. General protected disclosure*

(1) Any disclosure made in good faith by an employee-

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if-

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

(ii) in all the 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 the 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 exceptionally serious nature.

(3) In determining for the purposes of subsection (1) (ii) whether it is reasonable for the employee to make the disclosure, consideration must be given to-

(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the impropriety;

(c) whether the impropriety is continuing or is likely to occur in the future;

(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;

(e) in a case falling within subsection (2) (c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;

(f) in a case falling within subsection (2) (c) (i), whether in making the disclosure to the employer the employee complied with any procedure which was authorised by the employer; and

(g) the public interest.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (2) (c) where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure."

[30] The remedies provided to an employee is set out in section 4(1) and (2) of the PDA which reads as follows:

"(1) Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may -

(a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act No. 66 of 1995), for appropriate relief; or

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

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

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

(b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be

resolved through conciliation, it may be referred to the Labour Court for adjudication."

[31] An applicant must satisfy a number of conditions before this Court will extend protection to her for having made a (protected) disclosure:

(i) Firstly, the applicant must be an employee.

(ii) Secondly, the applicant (the employee) must have reason to believe that the information in her possession falls within the definition of a *'disclosure'* in terms of section 1 of the PDA. The definition of "disclosure" contemplates that the employee must have disclosed information that either discloses or tends to disclose some form of criminal or other misconduct that is the subject of protection under the PDA which disclosure must be made in good faith (see the next paragraph).

(iii) Thirdly, the applicant must make the disclosure in good faith.

(iv) Fourthly, if there is a prescribed procedure or a procedure authorised by the employer, there must be substantial compliance with that procedure. If there is no such procedure, then the disclosure must be made to the employer.

(v) Finally, there must be some link or nexus between the disclosure and the detriment (for example, being subjected to a disciplinary enquiry).

[32] I have pointed out that the applicant is seeking final interdictory relief against the applicants. In the alternative, the applicant is seeking that an interim interdict be issued pending the finalization of proceedings to be instituted in accordance with the LRA. A dispute has been referred to the South African Local Government Bargaining Council and was set down for con-arb for 8 June 2010. The dispute was, however, withdrawn. I am of the view that a final order is not competent and, at best, the applicant may be entitled to an interim order pending determination of the main dispute. In this regard I am in agreement with the Court in *Grieve v Denel* (*supa*) where the Court held as follows:

> "*[9] The powers conferred upon this court are expressed in wide terms so that any employee who has been subjected, is subject or may be subjected to an occupational detriment in breach of s 3 may approach the Labour Court for appropriate relief.* ***Since conciliation is a prerequisite before this court can grant final relief, in matters of urgency where the occupational detriment will occur unless the employer is interdicted and restrained, 'appropriate relief' must therefore include the power to grant an interim interdict pending the resolution of the underlying dispute.*** *The court only has jurisdiction to determine the underlying dispute once the conciliation process has run its course. This is nonetheless the type of case where the court clearly has the power*

to order the status quo to be preserved or restored pending determination of the main dispute.

[10] At common law a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has jurisdiction to decide the main dispute. Airoadexpress (Pty) Ltd v The Chairman, Local Road Transportation Board, Durban & others 1986 (2) SA 663 (A), National Gambling Board v Premier KwaZulu-Natal & others 2002 (2) F SA 715 (CC) at 731B.

In such a situation the court simply determines whether the applicant has a prima facie right to the relief that is to be sought in the court having jurisdiction to deal with it. This court has accepted that it has jurisdiction to grant interim interdicts in circumstances similar to those which arise in the present case (Venter v Automobile Association of SA (2000) 21 ILJ 675 (LC) at 677E-678B).

[11] The test applied by a court when an interim interdict is sought is well known. The applicant has to establish:

(a) a clear right or a right prima facie established though open to some doubt;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

(d) a balance of convenience in favour of the granting of interim relief; and

(d) the absence of any other satisfactory remedy.

Where the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issue as to whether the applicant's right is prima facie established though open to some doubt, the court approaches the matter by taking the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and considers whether having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant he must fail, but if not then he has established the requisite prima facie case open to some doubt. (Webster v Mitchell 1948 (1) SA 1186 (W) at 1189-90 read with Gool v Minister of Justice & another B 1955 (2)

SA 682 (C) at 687-8; Spur Steak Ranches Ltd v Saddle Steak Ranch 1996 (3) SA 706 (C) at 714C-H.)"[1]

[33] The applicant argued that she is entitled to the relied in terms of the PDA in that she has made a disclosure in terms of the PDA which disclosure is protected. She further alleged that she has suffered an occupational detriment (the disciplinary proceedings) as a result of having made the protected disclosure.

[34] At the outset I must point out that it is not disputed that the disclosures that the applicant has made were disclosures as defined in the PDA. This concession was wisely made. It is clear from the facts that if payment of the third installment had been made without it having been authorised (or on the basis of an authority which was obtained on incorrect information) such payment would have been irregular and contrary to the legal obligation provided for in the requirements of the Municipal Finance Act, 56 of 2003 which has as its object to -

"secure sound and sustainable management of physical and financial affairs of Municipalities and Municipal entities by establishing norms and standards and other requirements for -

(a) ensuring… accountability and appropriate lines of responsibility in the physical and financial affairs of Municipalities and Municipal entities;

[1] Additional emphasis.

(b) the management of their revenues, expenditures, assets and liabilities and the handling of financial dealings;

(c) budgetary and financial planning processes and the coordination of those processes with the processes of organs of state and other spheres of Government."

[35] The disclosures were therefore in respect of a failure or likely failure of a person to comply with a legal obligation in respect of an irregularity in contravention of the provisions of the Municipal Finance Management Act.

[36] A disclosure is only protected if it is made in good faith by an employee who believes that the information disclosed is substantially true and does not make the disclosure for personal gain (see sections 1, 6, 8 and 9 of the PDA).

[37] The fact that the information disclosed by the applicant was correct shows that the applicant had reason to believe that the information that she disclosed would show the aforementioned irregularities. Moreover, payment was indeed only made *after* authority on the correct facts had been sought and obtained in accordance with the supply chain management system. There is no evidence that the applicant did not make the disclosures to the employer in good faith. There is no evidence that the applicant made the disclosures for an ulterior or malicious purpose (see *Street v Unemployed Workers'* Centre [2004] 4 ALL ER 839 – referred to with approval in *Tshishonga* (supra)). There is also no

evidence that the disclosures were made with the intention to harass or discredit the employer (see *Communication Workers' Union v MTN* [2003] 8 BLLR 741 (LC) at [21]). In the present case the disclosures made by the applicant had the desired effect namely that proper authority was obtained for the payments. Lastly, an allegation is made that the disclosures were made as a result of "bad blood" between the applicant and Mathabate. I am not persuaded that this was the case. The respondent in any event does not dispute that Mathabathe withheld crucial information from the Council and that she was subsequently dismissed by the respondent.

[38] There is further no evidence that the disclosures were made in an attempt to obtain a personal gain. I am not persuaded by the allegation that the applicant made the disclosures so as to draw attention away from her own role in handling the contract with Microsoft. The fact remains, her disclosures ultimately led to the contract and payments being properly authorized. The allegation is also made that the applicant did not aim to remedy the problems with the Microsoft contract. I am also not persuaded by this argument. The applicant can hardly be blamed for the actions of Pillay (who had no authority in the first place to conclude the contract) and Mathabathe (who withheld crucial information from the Council when condonation and authority was sought for the first time).

[39] I have already referred to the fact that it is the respondent's argument that the applicant is not charged with having made a protected disclosure. She

is, according to the respondent charged for misconduct and that the mere fact that she has made a protected disclosure does not provide a free pass for whistle-blower's own misconduct. I have no quarrel in principle with the argument that the mere fact that a whistle-blower has made a protected disclosure somehow renders her immune from prosecution for her own misconduct. This is not, and has never been the intention of the legislature in enacting the PDA. I am not persuaded that this is the case here. I have already pointed out that the applicant can hardly be blamed for the actions of Pillay and Mathabathe whose actions caused the respondent to follow a process to obtain the necessary authority.

[40] Moreover, where an employee can show that there is a link or nexus between the occupational detriment (by being, for example, subjected to a disciplinary hearing) and the charge (or charges) of misconduct, the employee will be entitled to the protection afforded by the PDA. This is, after all the purpose of the PDA:

> *"The philosophy and purpose of the PDA*
>
> *[166] Internationally, there is growing recognition that whistleblowers need protection. Whistleblowing is healthy for organizations. Managers no longer have a monopolistic control over information. They have to be alert to their actions being monitored and reported on to shareholders and the public.*

Everyone is alive to their loyalty to the organization. As a safe alternative to silence, whistleblowing deters abuse.

[167] If employees did not turn a blind eye or were not afraid to rock the boat and if employers did not turn a deaf ear or blame the messenger instead of heeding the message, many catastrophes could have been averted.

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

[169] Employees have a responsibility to disclose criminal and other irregular conduct in the workplace. Public servants have an obligation to report fraud, corruption, nepotism, maladministration and other offences. A company can have a cause of action against its directors for failing in their duty to report wrongdoing." (*Tshishonga* (*supra.*)

[41] I have referred to the fact that certain evidence has already been led at the disciplinary hearing before the second respondent. The evidence led is instructive and supports, in my view, the contention that the applicant is being subjected to disciplinary action on account of, or partly on account of, having made a protected disclosure. Firstly, in giving evidence, Mr. Reis conceded at the disciplinary hearing that what the applicant did was what she had to do. He stated the following:

> "*The question is that I did not understanding, me as a person, it is 100% what she did because she was doing her duties." (sic)*

The following evidence establishes, in my view, the link or nexus between the disclosures and the charges:

> *"**The Third Respondent, the problem is that she went running around and telling everyone what was wrong. We must not pay**. We must not pay. But the problem is Mr Chair, the problem was not because of pay. When you owe money to someone you must pay it. If there are irregularities or something like that then you conduct a research or you conduct an investigation in that regard."*
>
> "*The last installment of this contract. **The Third Respondent started making a lot of noise in Council to say**, and I did, I as the originator of that report that was now in – I started running with that in June but I have got it in my statement here." (sic)*

> *"So I was trying to put a report through like three or four months period and then she phoned goes to the Bid Evaluation Committee and tries to discredit the whole system.* ***She is making a noise and everything. Every time the accusation that everyone got, everyone got afraid of signing this thing because they…"***
>
> *"And she said that – I later learned – that she said that these invoices were supposed to be paid a year before."* [2]

[42] I am, in light of the aforegoing, satisfied that the applicant has established a link between the charges and the fact that she had made certain disclosures in respect of the Microsoft contract. The evidence shows that the respondent is blaming the applicant for the delay, which delay was caused by the fact that she had made certain disclosures which turned out to have a factual basis. This, in my view, is sufficient to establish a link that she is subjected to disciplinary action on account of or partly on account of having made a protected disclosure.

[43] I am in light of the aforegoing therefore persuaded that the applicant has established a *prima facie* case open to some doubt.

[44] The respondent also contended that the applicant has an alternative remedy available. This argument, however, loses sight of the fact that section 4 of the PDA affords an employee who is subjected to an occupational detriment in breach of section 3 of the PDA, the right to

[2] Additional emphasis.

approach any court having jurisdiction including the Labour Court. Grogan *Workplace Law* 10th edition page 85 similarly states the following:

> *"Apart from the remedy afforded by Section 186(1)(d), employees may approach the Labour Court or the High Court directly under the PDA itself".*

[45] I am furthermore persuaded that the applicant will suffer an occupational detriment should she be subjected to a disciplinary hearing and that she will suffer prejudice as a result thereof. In this regard I am in agreement with the sentiments express by the Court in *Grieves v Denel* (*supra*) that there is considerable prejudice to an employee in being faced with a disciplinary enquiry (see paragraph [18]). In these circumstances the only remedy available to the applicant to protect her rights conferred by section 3 of the PDA is to approach this Court for an interim order. I am also of the view that the balance of convenience favours the applicant.

[46] Lastly, an attempt was made in the papers to persuade this court that the application was not urgent and that it constituted an abuse of the processes. I am not persuaded that the matter is not urgent. In any event, the respondent insisted that the application be brought on an urgent basis. The second respondent ordered that the application be brought in this court on or before 26 May 2010 and the disciplinary hearing was postponed on that condition.

[47] In the event the following order is made:

(1) The first respondent is interdicted from proceeding with any disciplinary action against the applicant on the charges as set out in the charge sheet against the applicant pending the outcome of a dispute to be referred to the South African Local Government Bargaining Council within ten days of the granting of this order, and if the conciliation does not resolve the dispute, pending the adjudication of that dispute by the Labour Court.

(2) The first respondent is directed to pay the costs of this application.

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AC BASSON, J

Date of hearing: 14 June 2010

Date of the order: 18 June 2010

Date of the reasons: …. July 2010

APPEARANCES

For the applicant : Advocate PHJ van Vuuren

Instructed by : Ac Schmidt Inc

For the respondent: **Advocate MF Welz**

Instructed by : **Bouman Gilfillan**