

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 2528/2006

In the application between:

N.G. RADEBE

1st Applicant

V.L. DHLAMINI 2nd Applicant

and

THE MEC: FREE STATE PROVINCE
DEPARTMENT OF EDUCATION

Respondent

JUDGEMENT:

H.M. MUSI J

HEARD ON:

31 AUGUST 2006

DELIVERED ON:

28 SEPTEMBER 2006

- [1] This is an application for an interdict aimed at stopping the respondents from proceeding with a disciplinary enquiry that was to be held on the 14th of June 2006. The application had been brought on the basis of urgency on 13 June 2006 but it was postponed *sine die* to allow for the filing of a full set of affidavits by both parties with an agreement that the proposed disciplinary hearing would be

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kept in abeyance pending finalisation of the matter. The matter has now been set down for hearing as an opposed application. On the papers as they stand, the applicants seek a final interdict, but their counsel informed the court from the outset of the hearing that they now seek an interim interdict pending a referral to the Education Labour Relations Council of an unfair labour practice dispute. This stance is in recognition of the fact that a final interdict could not be granted on motion proceedings in the type of dispute at the root of this application.

- [2] The applicants' case is based on the provisions of the Protected Disclosure Act, No. 26 of 2000 (the Act), arising out of the fact that the applicants divulged certain information relating to the affairs of their employer, the details of which will emerge shortly. Now a full outline of the provisions of this Act is to be found in the case of **GRIEVE v DENEL (PTY) LTD** (2003) 24 ILJ 551 (LC) from p. 555 – 557 and I do not intend to repeat them here. It will suffice to confine myself to a brief exposition of only those

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provisions that are most relevant for present purposes.

[3] The applicants aver that the proposed disciplinary enquiry would amount to an occupational detriment as defined in section 1 of the Act. An occupational detriment is defined in section 1 (the definitions section) as including *inter alia* subjecting an employee to a disciplinary inquiry. In terms of section 3 no employee may be subjected to an occupational detriment by his/her employer on account, or partly on account, of having made a protected disclosure. A protected disclosure is defined as a disclosure made to the persons/bodies mentioned in sections 5, 6, 7, 8 and 9 and made in accordance with the provisions of each of such sections. But before these provisions can come into play, the disclosure must answer to the definition of that term as set out in the definitions section.

[4] Now for the background to the dispute. The first and second applicants are employed by the Free State Department of Education respectively as school

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management and governance developer and school principal and are both based in Welkom. During December 2005 the applicants compiled a document containing certain allegations against the member of the provincial executive council ("the MEC") responsible for education in the Free State Province. In essence, the applicants set out what they purport to be instances pointing to fraud, corruption and nepotism in the running of her portfolio by the MEC. This document was forwarded to the office of the President of the Republic of South Africa, the National Minister of Education, the Premier of the Free State, the MEC for Education in the Free State (the first respondent), the Head of Education, being the Superintendent General for the Free State, the Deputy Director-General of the Free State Administration and the Lejweleputswa District Director of Education. The intention of the applicants was that the relevant authorities should investigate or cause to be investigated these allegations of fraud, corruption and nepotism.

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[5] The applicants received an acknowledgement of receipt of the document from some of the addressees and they exchanged some correspondences with the office of the National Minister of Education and the Public Service Commission amongst others in a follow-up to the disclosures. The latter indicated that an investigation would be conducted but nothing firm in that direction has been reported.

[6] In the meantime, the first respondent responded to the disclosure by taking the view that the allegations made were baseless, defamatory of her and were calculated to destabilise the functioning of her department. The first respondent communicated this to the applicants by way of a letter from the office of the state attorney, which also warned the applicants that if they did not desist from spreading baseless allegations against the first respondent, appropriate legal steps would be taken against them. The applicants were not impressed by all this and gave notice that they would press ahead with their demand for an investigation. It is unnecessary to record all the unsavoury developments that followed. What is important is that the applicants were subsequently served with the notice of a disciplinary enquiry that triggered the instant application.

[7] The notice was issued by the Free State Education Department in terms of item 5 of Schedule 2 of the Disciplinary Code and Procedures for Education and the main charge is framed as follows:

“You have contravened to Section 18(1)(dd) of the Employment of Educators Act, 76 of 1998, in that on 09 December 2005, and at Welkom, you committed a common law or statutory offence namely crimen injuria by publishing and/of communicating defamatory statements in respect of the MEC of Education (Free State), the Chief Financial Officer and the Lejweleputswa District Director, (Department of Education Free State), to the effect inter alia that either

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and/or all of the officials mentioned, were guilty of nepotism, favouritism, corruption and/or acts or practices which resulted in fruitless expenditure.”

Then follow numerous alternative charges. The first alternative charge is essentially that the applicants conducted themselves in an improper, disgraceful or unacceptable manner when publishing or communicating the defamatory statements referred to in the main charge. In the second alternative charge it is alleged that the applicants unjustifiably prejudiced the administration, discipline or efficiency of the Lejweleputswa District office of the Department of Education when publishing or communicating the alleged defamatory statements referred to in the main charge. It is unnecessary for purposes of this judgement to detail the further alternative charges.

[8] In response the applicants launched the instant application wherein they seek to interdict the respondents from proceeding with the proposed disciplinary enquiry pending a referral of an unfair labour practice dispute to the Education Labour Relations Council for conciliation and, if that fails, to arbitration or adjudication, where *viva voce* evidence would be heard and a final determination made whether the disciplinary enquiry would indeed amount to an occupational detriment and therefore an unfair labour practice.

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[9] I should mention that the second respondent has been joined in these proceedings on the basis that he is in terms of section 3(1)(b) of the Employment of Educators Act No. 76 of 1998, the employer of the applicants. There was some debate at the hearing about whether the first respondent, who is the target of the disclosure, is the employer of the applicants. It was pointed out that it is information regarding the conduct of an employer or his/her employee that qualifies as a disclosure in terms of section 1 of the Act. If the first respondent is not an employer then the disputed information about her or any of her employees would not be a disclosure as defined. It was contended on behalf of the respondents that since the second respondent is the actual employer, the first respondent could not be the employer.

[10] On behalf of the applicants it was contended that the first respondent is a co-employer and I was referred to the provisions of section 3 of the Employment of Educators Act to the effect that the National Minister of Education is an employer for purposes of determining salaries and conditions of employment of educators as well as for creating posts nationally and that the first respondent is an employer for purposes of creating posts in the province. The point, however, is that the applicants are employees of the Department of Education in the Free State. The first respondent is the political head of such department and the person with ultimate responsibility for education in this province. I shall assume in favour of the applicants, without deciding it, that the first respondent is at least a co-employer.

[11] Now the requirements for the grant of an interim interdict are well known. In argument, Mr. Gough for the respondents conceded that the pending disciplinary enquiry would *per se* violate the rights of the applicants to the protection of section 3 of the Act and therein lies potential for irreparable harm. In this regard Mr. Gough agreed with Mr. Grobler for the applicants. The latter had referred to

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the judgment in **GRIEVE v DENEL (PTY) LTD** *supra* at 563 F – H. Mr. Gough also conceded that the applicants had no satisfactory alternative remedy. Regarding the question of where the balance of convenience lies, Mr. Gough said that the respondents would be prejudiced if, having obtained the interim relief, the applicants then dragged their feet in the prosecution of the proposed referral of an unfair labour practice dispute to the Education Labour Relations Council. He did not press the submission that the balance of convenience did not favour the grant of the relief.

[12] The real issue for decision is, whether the applicants have established a *prima facie* right, though open to doubt. This calls for a determination of whether the information is *prima facie* a protected disclosure. Put otherwise, does the information disclosed contain the basic elements which, if subsequently established in a trial, would meet the requirements of the Act for a disclosure to enjoy protection?

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[13] Now, the disclosure herein was made not only to the employer, but to outside parties as well. Certainly the State President, the Premier of the Free State, the Deputy Director General of the Free State Province and the Lejweleputswa District Director are not employers of the applicants. This is therefore an instance of an external or general disclosure which falls squarely within the requirements of section 9 of the Act. In this regard it may well be that the information would *prima facie* satisfy the requirements of section 6 (disclosure to an employer), section 7 (disclosure to a member of the cabinet or an MEC of a province), section 8 (disclosure to the public protector and the like) and it will be noted that the requirements of these sections are less stringent. The point, however, is that once the same information has been disseminated to persons or bodies other than these, the requirements of section 9 must be met, for reasons that follow. (Section 5 is clearly not applicable to the instant matter.)

[14] The legislature has singled out persons or bodies designated in sections 7 and 8 as persons or bodies to whom employees

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could report suspected wrongdoing in the workplace without fear of reprisals and made it easier for the whistle blowing employees to do so by not prescribing any definite procedure to do so. The rationale for this is probably that these high ranking state officials could, by virtue of the status and nature of their positions, be trusted to keep the information confidential. Preservation of confidentiality is also at the root of the disclosure in terms of section 6, which must be made by following a set procedure. If no procedure is prescribed or authorised by an employer, the disclosure can only be made to the employer. In other words, if the disclosure is not made to the employer and the employee does not follow the prescribed procedure where one exists, then he or she cannot claim protection under the provisions of section 6 and must therefore satisfy the requirements of section 9.

[15] It is clear that whereas the Act seeks to encourage employees to expose wrongdoing in the workplace, it also incorporates mechanisms meant to safeguard the reputations and interests of employers and all those against whom allegations of wrongdoing are made, bearing in mind that the allegations may turn out to be false. The need to strike a balance between the competing interests was stated as follows in **COMMUNICATION WORKERS UNION v MOBILE TELEPHONE NETWORKS (PTY) LTD** (2003) 24 ILJ 1670 (LC) at 1678 I – J:

“The PDA contemplates and protects disclosures made in private rather than in public. This is obvious given the

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potential damage to reputation of persons against whom allegations are made, and an integral element of the balance between the protection of rights to reputations and the protection of free speech in the workplace.”

[16] It is necessary to first set out the requirements of section 9 and thereafter to determine whether the allegations contained in annexure “C” to the founding affidavit satisfy those requirements on a *prima facie* basis. I should indicate at this juncture that, in considering the latter question, this being an application for interim relief, I shall adopt, as I am obliged to, the approach enunciated in **WEBSTER v MITCHELL** 1948 (1) SA 1186 (WLD) at 1189, as qualified by **GOOL v MINISTER OF JUSTICE AND ANOTHER** 1955 (2) SA 682 (CPD) at 688 E.

[17] It is worth noting that in their opposing affidavits the respondents do not, save in some minor respects, give any explanation to clarify the instances of alleged wrongdoing cited by the applicants. In other words, the respondents have not set up facts in contradiction that may be said to throw serious doubt on the case of the applicants. The position taken by the respondents is essentially that the allegations of wrongdoing are without any basis and false and that none of the instances cited disclose any wrongdoing on the part of the respondents. Otherwise, the

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respondents go on to give their version of what happened on the occasions that some officials of their department met the applicants subsequent to the disclosures. The respondents allege that the applicants refused to co-operate with the team that was set up to investigate their (the applicants), complaints, but that otherwise nothing untoward was found. In the premises, the matter stands to be decided on an assessment and analysis of the information disclosed by the applicants.

[18] It should be noted that even before the requirements of section 9 can be considered, the disputed information must answer to the definition of a disclosure as set out in section 1 of the Act. In terms hereof, in disclosing the information regarding conduct of an employer or his/her employee, the employee must have reason to believe that the information shows or tends to show any of the instances of impropriety as set out in paragraphs (a) – (g) of the definition. I am prepared to hold in favour of the applicants, without deciding it, that they may reasonably have believed that the information tends to show some impropriety on the part of the first respondent and/or some of her employees and that it is a disclosure as defined.

[19] Now section 9 reads in part as follows:

“(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.”

[20] The critical question is whether the disclosure by the applicants was made in good faith and in the reasonable

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belief that it, and the allegations contained therein, were substantially true. This is the threshold that must be crossed before the further requirements of the section can be considered.

[21] Now the memorandum, annexure “C” to the founding affidavit, is divided into seven items or subheadings, namely:

- 21.1 Redeployment;
- 21.2 Reskilling of principles;
- 21.3 New office movements for the MEC’s appointees;
- 21.4 Appointments in the Free State’s Department of Education;
- 21.5 School Management Teams (SMT);
- 21.6 Training in the Free State;
- 21.7 Allocation of tenders.

The memorandum covers some 9 pages and it will not be possible nor helpful to reproduce it here. I shall simply give a brief summary of what is alleged under each heading and comment thereon as I go along.

[22] Under redeployment, the applicants express a general complaint that the first respondent has unilaterally redeployed some school principals without consulting their school management developers and that she had announced the unceremonious removal of some two SMD’s at a conference. They questioned the motives for the redeployments in the following terms:

“Therefore we request that reasons behind the redeployment process be investigated, because speculations are that the MEC was perhaps trying to pave ways for her favourites to occupy these respective posts.”

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Quite clearly these allegations disclose nothing untoward on the part of the first respondent who may have had legitimate reasons for redeploying the people concerned. The allegation that she was paving the way for some favourites is pure speculation.

[23] The applicants also cite the case of a school whose deputy principal had been acting as principal since 2005. They say that he was abruptly removed and a deputy principal from another school in the same town was appointed as new acting principal. Thereafter this vacant post was advertised. The insinuation is that the first respondent conveniently advertised the post to pave the way for the permanent appointment of the new acting principal. They say that this is an instance of nepotism. They speculate that the new acting principal has been moved from his earlier post in order to make way for his wife, who was head of department at the same school, to be moved into her husband's place. This is all pure speculation and the applicants themselves make it clear that they are speculating. It is unnecessary to comment further on the remainder of the allegations under redeployment as it is all speculation. Whereas the applicants ascribe the first respondent's conduct in all the instances to nepotism, they do not say that the first respondent is related to any of the officials concerned and if so, how.

[24] Under reskilling of principals, the applicants refer to a workshop organised for school principals and held at the Stanville Inn in Welkom. They query the reasons for holding such a workshop as well as the criterion that first respondent used to select participants and complain that the SMD's (like the first applicant), who are the immediate supervisors of the principals, were not consulted. They say that principals from outside Welkom were accommodated at Stanville Inn and that the catering was provided by a private caterer during the whole of the workshop. They suspect something untoward in the reasons for holding such a seminar and query which budget was used for the accommodation and catering; who were the private caterers and whether proper tender procedures were followed in engaging them. Again the allegations disclose no wrongdoing. The applicants want an investigation without providing any factual

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basis for it.

[25] Item three is devoted largely to office accommodation for officials of the Department of Education in Welkom and Odendaalsrus. The applicants complain that when the Odendaalsrus office was closed, sections of the department were moved to premises in the Western Holdings Mine Office Complex, in spite thereof that apparently there was office space at a complex called Amercosa, which was already being used by the Department. They say that this move isolated the affected officials and caused them inconvenience in the form of logistical problems. They say that later in the same year of 2005 the officials were moved back Amercosa. They query this whole exercise and allege that the inexplicable move to Western Holdings was due to the fact that the former district director of the department had signed a three year lease contract with Western Holdings which is due to expire during 2006. No basis is laid for the existence of the alleged lease contract. The applicants themselves state this to be an allegation without identifying the source thereof. Again there is no indication of any wrongdoing by the first respondent. The applicants want an investigation to be conducted purely on the basis of rumours and conjecture.

[26] Under item 4 the applicants complain about the appointment by the first respondent's predecessor of two officials as Values in Education officials on three years term contracts. They query the reasons for the appointments and seem to suggest that the officials are presently not doing the work they were appointed for. They then say that one of these officials has been acting as Deputy Chief Education Specialist and insinuate that he is keeping the position open for one of the first respondent's favourites. They state the following:

“Therefore it is evident that the present District Director is an extension and a replica of the ex-District Director as she continues to pursue his interests characterized by nepotism instead of pursuing the goals of Department.”

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Again the applicants provide no factual basis for this sweeping allegation.

[27] Under items 6 and 7 the applicants simply request an investigation of the matters set out therein without giving any factual basis therefore. None of the instances of impropriety set out in paragraphs (a)-(g) under the definition of disclosure in section 1 of the Act are alleged, save for the vague, sweeping allegation of nepotism and corruption.

[28] The only allegation worth commenting on under item 5 is that relating to the experiences of one Mr. Xaba. The applicants say that Xaba was victimised by the former district director for Lejweleputswa, whom they alleged to be a favourite of the first respondent, for blowing a whistle on corruption and fraud allegedly committed in the provision section of the Lejweleputswa office of Department of Education. Now apparently a departmental investigation had been conducted into the matters raised by Xaba but the applicants claim that the outcome thereof has never been made known. In the meantime Xaba is still being victimised by being moved from office to office. Now Xaba has filed an affidavit in support of these allegations. However, he only confirms what the applicants allege without providing details of his own. It may well be that there is some basis for the allegations concerning Xaba so

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that *prima facie* the requirements of section 9 may be said to have been met in this instance. But the matter does not end there.

[29] Even if the information regarding Xaba would *prima facie* constitute a protected disclosure, the balance of convenience is tilted against granting interim relief solely on that basis, when by far the bulk of the information does not qualify for protection. At any rate, insofar as there may be a case for protection on that account, the applicants are at liberty to raise it as a defence in the pending disciplinary hearing. Another factor that negatively impacts on the grant of interim relief is the fact that it is only now that the applicants propose to refer the dispute to the Education Labour Relations Council when it has been on since June 2006.

[30] To conclude, in disclosing the information contained in annexure “C” to the founding affidavit the applicants cannot be supposed to have acted in good faith when no basis existed for the allegations contained therein, nor could they reasonably have believed the information to be substantially true. Compare **GRIEVE v DENEL (PTY) LTD** *supra* at 560 C – D. (However, the latter case is distinguishable from the instant case because the information there appears to have been thoroughly researched

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and documented.) Nor can it be said that it was reasonable, in all the circumstances of this case, for the applicants to make the disclosures, particularly given the very serious nature of the allegations; and it is clear that they had made no attempt to verify the information. Yet they repeatedly and monotonously bandy about the words fraud, corruption and nepotism as if these have been proved. The overall picture that emerges is that the applicants are generally dissatisfied with the manner in which the MEC runs her portfolio and they betray a complete lack of respect for her.

[31] In the premises, the application is dismissed with costs.

H. M. MUSI, J

On behalf of applicants: Adv. S. Grobler
Instructed by:
Rossouws
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On behalf of respondent: Attorney I.P. Gough
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