REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT, JOHANNESBURG

Case no: JA 61/11

In the matter between:

**JACOBUS PETRUS MALAN** **Appellant**

and

**JOHANNESBURG PHILHARMONIC ORCHESTRA** **Respondent**

**Heard:** **02 November 2012**

**Delivered:** **12 September 2013**

**Summary:Alleged automatically unfair dismissal for making protected disclosures in terms of the PDA- respondent facing financial difficulties – appellant concerned about respondent's financial situation- and discussed with two respondent's directors- appellant sending anonymous letter to the respondent's auditor and distributing letters to respondent's employees- appellant charged and dismissed for bringing the respondent into disrepute- appellant alleged automaticallyunfair dismissal for having disclosed improprieties when he had the meeting with the two directors- no evidence to show that previous disclosure of the same nature was made which was not resolved by the respondent- disclosure made in the letters was common knowledge - evidence showed that appellant was provided new information he was not aware of by the directors- disclosure not protected by virtue of the PDA-**

**Alternative claim of substantive and procedurally unfairness of the dismissal- Labour Court lacks jurisdiction to entertain a misconduct dispute-** appeal

**dismissed with costs- Labour Court's order set aside and replaced with an order to the effect that dismissal of the applicant was not an automatically unfair dismissal as contemplated by section 191(5)(b) and that it had no jurisdiction to determine the applicant's alternative claim of his dismissal.**

**Coram: Waglay AJP, Zondi AJA and Musi AJA**

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**JUDGMENT**

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WAGLAY AJP

[1] This is an appeal against thejudgment of the Labour Court in which Bhoola Jdismissed with costs the appellant's application to have his dismissal declared automatically unfair. The appellant's claim was that he had been subjected to an occupational detriment for making a protected disclosure, alternatively that his dismissal was both substantively and procedurally unfair.

The Dispute

[2] The appellant was dismissed from the employ of the respondent, a non-profit section 21 Company, on 6 April 2009, for misconduct, in that, it was alleged that he brought his employer into disrepute. At the time of his dismissal, the Appellant was on a fixed term contract which commenced 1 July 2008 and was due to end on 30 June 2009.

Background

[3] The appellant, a classical musician, was employed by the respondent as principal B; Oboe. The appellant was one of the founding members of the respondent.

[4] The issue that gave rise to the appellant's dismissal arose from his concerns relating to the financial activities of the respondent. Although these concerns developed during 2007 when salaries were fractured and paid late, they intensified when the appellant attended the Annual General Meeting (AGM) on 5 December 2008 where he was informed of the decision to terminate the services of Stone Music, the respondent's recording studio.

The Meeting with Roberts

[5] Subsequent to the AGM,the appellant raised his concerns with Gary Roberts (Roberts), a director of the respondentand also artistic director and section leader of the appellant's section. The appellant testified that at that point what was the weightiest of matters in his mind were the issue of fractured salaries and the payment of salaries. Roberts confirmed that the appellant's basic question was about the financial health of the respondent. According to Roberts, the appellant wanted to know whether the staff should be concerned about the financial wellbeing of the respondent and if there was a problem with expertise or with getting sponsorships. Roberts suggested that the appellant speaks to Steven Jurisich(Jurisch),another director of the respondent in this regard.

The meeting with Jurisch

[6] In the meeting with Jurisch, the appellant raised the same questions he had raised with Roberts. The conversation related to financial management issues and about the fractured salaries. During this discussion,Jurisich told the appellant that commissions were being paid to the CEO on significant amounts received from the State Lottery. Jurisch added that in 2006/7 the percentage commissions paid on Government funds had been reduced compared to that of private sources of funding. Jurischalso told the appellant that he had objected to a large slice of the funding going to the CEO as commissions because the CEO was paid a salary. The appellant was alarmed on receiving this information. The appellant indicated that during the conversation with Jurisch, he felt it would be useful for him to get access to the financial statements, even the unaudited ones, in order to assess to whom payments were made and at what point of month or when they were made. The appellant then offered to obtain the financial statements from the auditors.

The meeting with the auditors

[7] The appellant approached the respondent's auditor, one Gillian Smith (Smith), on 5 March 2009 to obtain a copy of the respondent's annual financial

statements. He raised with Smith the issue about the late payment of salaries. According to the appellant, Smith refused him access to the financial statements because he was not a director. While Smith acknowledged that the appellant had no ulterior motives when approaching her she did indicate, during the conversation when he asked for audited financial statements,that the appellant approach the directors for the information. She also provided the appellant with a list of directors. She indicated that the appellant seemed to accept her explanation for the refusal to provide him with financial statements. She also indicated to him that his concerns needed to be addressed to the CEO and to the respondent's board. Smith also indicated that the appellant's allegation that the financial statements were being withheld by the auditors on account of non-payment was incorrect as payment had simply been deferred. She pointed out to him that deferred payment did not constitute the failure to make payment. Smith indicated to him that the auditors would enquire about the non-payment of service providers and on the amounts involved and the reasons for the non-payment. She also informed him that where employees were aggrieved about salaries not being paid, they had legal recourse.

<u>The letter of March 2009</u>

[8] After the meeting with the auditors, the appellant sent an anonymous letter from his friend’s email to the auditor. The auditor correctlyassumed the emailed letter was from the appellant as they had discussed the issues raised in the letter and she forwarded the letter to Bokaba, the CEO of the respondent. The letter was headed *“To Whom It May Concern*”. In my view it is necessary to quote the entire letter, it said:

> *“As a member of the Public and as a close associate of the Johannesburg Philharmonic Orchestra (JPO) I am concerned about the financial and managerial conduct of this remarkable Symphony orchestra. Since its conception in 2000, being the replacement orchestra of the previously known National Symphony Orchestra, the JPO has built a good reputation artistically in South Africa and abroad enjoying the talents of the best conductors and soloists the world has on offer. Not to mention the very remarkable input from private and public sponsors who willingly came to the rescue of a cultural*

*institution for all South Africans. Since 2000 audiences have shown a healthy increase in both subscribing members and ad hoc public support.*

*Given a mixed bag of experiences with the orchestra I have come to the conclusion that some serious issues regarding financial and managerial conduct have lead to irritations with orchestra members and service providers amongst others.*

*The JPO functions as a section 21 company.*

*With a board of 9 directors of whom I believe only about 4 are actively involved in the daily affairs of the JPO, some issues have come up and proved to be serious irritation factors, not only in terms of human relations, but definitely so in terms of finances.*

*I will try to list some of my concerns as follows:*

*1 I am concerned about the fact that the CEO not only receives a very high salary, which is a rather big and unrelated portion compared to the salaries earned by the working musicians, but also receives high commissions from additional sponsorships. Although previously professional recruitment officers were appointed, Mr Shadrach Bokaba has been the only recruitment officer for sponsorship for a long time. Money from the government and the Lottery [has] been slow in being available, which called for ongoing [pleads] to the private sector to step in as rescuers.*

*2 A most disconcerting fact to me is that Mr S. Bokaba received a commission on government and Lottery money earmarked for the JPO. As this is mainly sourced from taxpayers money/public institutions, I feel this type of remuneration to be unethical.*

*3 I am also concerned about the fact that the chairman of the board, Mr Walter Masetla receives a monthly salary while no other director earns a salary. Mr Masetla only chairs the AGMs and meetings held by the board of Directors. As was agreed initially that Directors would offer their services free of charge for an institution belonging to the public and for a greater cause, this doesn't make sense.*

*4 Were these commissions ratified by the board as a whole and are they being disclosed for tax purposes?*

*5 Appointment of a bookkeeper and certain other office staff for the task of developing an education schedule with excellent salary packages despite the fact that very little progress is being made with this department.*

*6 As the JPO already works in collaboration with SAMET (South African Music Education Trust) – with a separate staff corps, as a sort of "outreach education arm" for which the CEO receives a further highly paid salary, teachers for these projects often complain of non- or late payments. There is a general feeling that SAMET's goals of establishing music tuition centres are a failure.*

*7 that during the last two AGMs the financials have been released late for 2007, and not scheduled for 2008, due to non-payment of the auditing company for the 2007 audit (Grant Thornton) and other reasons not known to me.*

*8 In terms of non-payment of service providers, this issue seems to be more wide spread. Apart from the auditors, rumours are heard of unpaid accounts for the recording studios (Stone Music), the Linder Auditorium, ad hoc musicians, including international soloists and conductors.*

*9 Musicians salaries are late on a monthly basis and [have] almost become a joke amongst musicians. Yet the salaries of the office staff are being paid punctually.*

*10 concerns about human relations may also be noted briefly, as this may be the smoke turning from a potential fire smouldering from within, however unnoticed at this time.*

*11 This include[s] arrogant behaviour in general which can be proved by the letters received by at least one conductor of international standing that the staff member concerned may not communicate with him any longer. Many anecdotes, matters of discipline and personal experience of this nature may be found amongst members of the orchestra.*

*12 Unilateral decision making has been an irritation many times, the most sensational being the dismissal of Stone Music end of 2008 as the recording studio for the JPO. Given that the owner of Stone Music played an active role in establishing a career for the CEO mentioned above, being dismissed without negotiations, this conduct seems to be very unbecoming.*

*I am very concerned about the issues raised here which may (hopefully not) only represent the ears of the hippo, and especially the unaudited financials for 2008, as this year may reveal the most information in terms of the company's financial health.*

*There may be many of the issues mentioned here in need of verification. It seems to be a task that may have to be investigated. Hopefully this can be resolved by those who are willing and equally concerned about having and running an institution and a country with a clean conscience.*

*Yours, concerned".*

[9] Subsequent to this letter, the appellant was charged with trying to obtain company information fraudulently and bringing the company into disrepute, and was brought before a disciplinary hearing.

The appellant's letter to staff and third parties

[10] The hearing was scheduled for 24 March 2009 at 10am. Days prior to the hearing the appellant requested a postponement of the disciplinary hearing, which request was refused, on 20 March 2009, the appellant addressed a letter to his colleagues and friends setting out the background to the charges against him and requested their assistance. The appellant distributed the letter by placing copies on the music stands in the orchestra pit prior to a performance. The letter stated the following:

*"Dear Colleagues and Friends*

*Due to a mix of circumstances I have landed in a very unfortunate situation with the management of the JPO. I will bring this to light in a moment.*

*I need your support.*

*I believe in helping me, the orchestra as a whole will find benefit.*

*I assure you that in this appeal I mean no harm to anybody, including management and board members. I believe human error is possible. I also believe that any problem can be rectified in a dignified manner. Should I be* *proved wrong, I undertake to apologise and then rectify as much as it may be humanly possible for me.*

*Please remember that some members may have only good experiences to share. Yes there are good points as well.*

*I would like to hail the introductory words used by our chairman Mr Mosetlhi during the AGM of November 2008, more or less as follows:*

*"The JPO may be proud to be run in a way that demonstrates "democracy in action".*

*This is my story:*

*Having experienced a number of irritations with matters of governance in the JPO during the last year, it actually came to a crisis in my own mind during the last AGM in November 2008.*

*I decided around a month ago to have some facts and figures clarified for myself. It made sense that I needed to verify my concerns before I could come to any conclusions about my irritations.*

*My first step was to inform two directors on the board that I am unhappy about a number of issues, of which the financial health of the JPO was an issue foremost on my list.*

*I found that these two directors had the same concerns as me. They were willing to share more information with me given their positions where more issues were revealed to them either through board meetings or situations at the office. A number of further issues and questions came to light that to my mind of serious ethical nature.*

*They were in agreement with me that by having an indepth look at the financials of the company will be a fair place to start.*

*I think arranged a meeting with the auditing company Grant Thornton's partner in charge of the JPO Gillian Smith. On the strength of my status as company member I assumed that the financials for the past year may be made available to me.*

*Mrs Smith however informed me that the financials cannot be made available to me as they have an agreement with the Board of Directors to only reveal* *detailed financials to Directors. Fair enough I thought, I could request the Directors to request copies thereof.*

*Mrs Smith then informed me that due to the fact that the audited financials for 2007 have up to that point not been paid. That meant that the financials for 2008 were not to be audited, due to the auditing firms own set of rules and regulations. (The situation may have changed since then).*

*I think lodged a letter of concern, unsigned, as I was afraid to become a whistle blower, which I emailed to the auditing company.*

*I will now list my concerns hereto for all company members to see, and for anyone else who may share with me the dream of having an orchestra with a secure financial and ethic foundation. The artistic side is fantastic. My sincere congratulations to all musicians!*

*MANAGEMENT IS ACCUSING ME OF OBTAINING INFORMATION FRAUDULENTLY AND SUMMONED ME TO A DISCIPLINARY HEARING.*

*They seemingly want to block me from obtaining more information.*

*Please help me to have concerns clarified and verified BY SIGNING THIS LETTER!*

*1 I am concerned about the fractured payment of salaries which has become a monthly pattern.*

*2 I am concerned about the fact that the orchestra is still too young to afford a high salary wages to management staff, especially when there is a need for more instrumentalists.*

*3 I have an ethical problem with the fact that the chairman of the Board Mr Mosetlhi earns a monthly salary while no other director does.*

*4 I have an ethical problem with a Board that seems to have a majority vote to ratify such a salary.*

*5 I am concerned about the fact that overseas artists have not been paid, for as long as a year.*

*6 I have an ethical problem with the fact that salaries of management may be paid punctually (I need the financials to verify this).*

*7 I have a problem with the appointment of an expensive financial officer while there might have been people willing to help in view of the light that sponsorship is apropos a deal of goodwill.*

*8 I have an ethical problem with the fact that Mr Bokaba requests commissions on money allocated by government and the Lottery. (The Lottery is also a public institution.)*

*9 I once again have an ethical problem with the board's ratification of these commissions.*

*10 I am concerned that PAYE has not been paid over to SARS.*

*11 I have a problem with Mr Bokaba's appointment of yet another board member without the consent of the company members (in fact it may be imminent).*

*12 I have a problem with the fact that detailed financials may not be seen by company members.*

*13 I am concerned about SAMET for which Mr Bokaba also receives an excellent salary package and of which Mr Mosetlhi is the Board Chairman. I believe honoraria of two teachers are also fractured. Given the association of SAMET with the JPO I wish to know more about them.*

*14 I am concerned about what appears to be Mr Bokaba's unilateral decision to dismiss Stone Musician as the orchestra's recording studio. The Artistic Director was not consulted. Their professional services were replaced by amateurs. Stone Music retrieved its equipment.*

*15 The [rumour] is that management feels Stone Music is too expensive. I feel we can't afford such expensive management.*

*16 I am unimpressed with a number of experiences I had in terms of arrogant behaviour from office staff.*

*17 I am concerned about the fact that so many Board Members are inactive.*

*18 I am concerned that the Company Members never get together to discuss matters such as being mentioned here.*

*So much money goes into places we need to verify. All of that could have been waiting in an endowment fund for rescue when the Lottery is late!*

*Please empower me and our Company Members. Please remember that we all own this Company. We are responsible for this Company. We are also liable for its losses. Reckless Trading and the Titanic may have something in common!*

*The Company Members have the authority to override decisions made by the Board. They also need help from time to time.*

*I have to stand up to a disciplinary hearing on Monday 24th at 10h00.*

*Charges:*

*1 Obtaining company information fraudulently.*

*2 Bringing the company into disrepute.*

*I don't have enough verified information to back me up. I am being blocked from obtaining information which is a fundamental right. In the process an attempt is made to criminalise me as well to phrase it more daringly. With your mandate the Company Members will be allowed to get access to minutes of the board meetings and detailed financials.*

*VERY IMPORTANT: I have requested a postponement of the Hearing in order to prepare and arrange for a representative.*

***This fair request has not been granted.***

*I suspect this is unfair procedure and may have to be reported to the CCMA. It is common law for any accused to be able to prepare. As you know my working schedule for the week leaves no time left.*

*Please sign and/or present yourself as my representative at the hearing should I not succeed in postponing it. Any number of representatives is welcome.*

*Yours*

*Kobus Malan*

*Please sign here:*

_______________________”

[11] According to the appellant, he distributed the above letter to approximately 40 to 45 musicians some of whom were employees of the respondent while others were *ad hoc* extra musicians retained only for specific performances. He felt that he had no alternative but to approach his colleagues because there was no trade union in the work place and he did not know if there was a grievance procedure in place. He claimed that he had followed the advice of Solidarity, a trade union, to approach employees directly. The appellant furthermore indicated that a number of colleagues sympathised with him but very few were willing to sign the letter and that he destroyed signed copies to avoid those who had signed the document from being victimised.

[12] On arrival at his disciplinary hearing on 24 March 2009, the appellant was issued him with new charges:

> ‘1 Bringing the employer into disrepute with other employees and third parties.
>
> 2 Breach of duty of good faith.’

[13] The disciplinary hearing was held on 27 March 2009. At the hearing the appellant read a prepared statement. The appellant was found guilty of bringing the employer into disrepute with other employees and third parties. As a result the appellant was dismissed. His internal appeal failed and he referred the matter to conciliation which also failed. Subsequently to the failure of the conciliation process, the appellant referred his dispute allegingautomatically unfair dismissal to the Labour Court.

<u>The Labour Court</u>

[14] At the Labour Court,the appellant, Roberts, Jurisch, Smith,Chakarayan, Frazer and the CEO Bokaba testified. I have dealt with Smith’s evidence in relation to the meeting that the appellant had with the auditors. The evidence of the appellant and Jurisch forms part of the background facts recorded above.Roberts’ testimony was that the appellant was acting out of self-interest. According to Roberts the decision to terminate the Stone Music

contract was that of the board. He took issue with the appellant's anonymous letter to the auditor because it presented a disastrous picture of the respondent suggesting that it was punctuated by mismanagement and arrogance. He indicated that some of the concerns raised by the appellant were valid but already in the public domain. He stated that the second letter spread like wild fire in the profession and did enormous damage to the credibility of the respondent as an institution so much so that it received only three applications for senior positions. He further indicated that the appellant had alternative methods of raising his concerns: he could have called a members meeting or could have requested Roberts or another board members to raise any of the issues with the board. He would have been willing to call a specific board meeting for this purpose had the appellant approached him.

[15] MiroslavChakarayan gave evidence on behalf of the respondent. He was a concert master of the orchestra and its founding member. He was quite disconcerted about the fact that the appellant had addressed members of the orchestra and left the second letter for everybody to read before a performance. He indicated that he was resentful about the intrusion because the arrival of the guest conductor was imminent. The appellant did not obtain permission from him to make announcements to the orchestra and he felt that it was inappropriate for the appellant to place the letter before musicians during a rehearsal. He felt that the appellant could have addressed these matters in private. He also indicated that the appellant could have raised these issues at the AGM. He believed that the appellant's conduct portrayed the respondent in a bad light, and said that the Board had been appointed to make decisions on behalf of the respondent and that it was not the concern of any member what the managing director earned. He was offended that the appellant did not approach him or any other members individually or through convening a meeting prior to writing the letter. He said that the appellant's letters caused damage to the image of the respondent and added that late salary payments did not have a significant impact on either him or his wife as they trusted management's ability to run the company properly. Finally, he indicated that the overseas artists who were not paid on time, received

payment together with a letter of apology and that all the artists understood the financial crisis that the respondent was in. He did not view the concerns of the appellant as seriousbecausethe appellant could have raised these matters with the Board.

[16] Penelope Frazer an employee and founding member of the respondent also gave evidence on behalf of the respondent. She was unhappy at the fact that the appellant chose to leave the letters for all persons before their rehearsal and to address everybody. She felt that the appellant could have approached her privately and raised his concerns which could have been reported through the management to the board. She felt that the appellant's conduct had damaged the respondent's reputation and that his conduct put unnecessary suspicion on management. She denied fractured salaries were a monthly pattern and that although it was correct that some overseas artists were not paid on time they had been informed about the delays. She was not aware of any blacklisting of the respondent and in regard to the PAYE issues with SARS,as the accountant had reported at the board meeting, she was in contact with SARS regarding the late payment. She also denied that financials were not disclosed and said staff at the AGM were informed that financials were not being distributed but were available to any member who wanted a copy. She indicated that the statement made by the appellant about the Titanic was reckless and that the Board had been elected by members so they should trust them. She also indicated that the respondent took a long time to recover from the problems created by the letter. She indicated that the appellant could have raised his concerns at the AGM or at a board meeting adding that the appellant's concerns raised in clauses numbered 1 to18 of his letter dated 20 March 2009 created doubts about the management and the board and his concerns in clause numbered 11 were completely untrue. She felt that it was not legitimate for the appellant to express concerns about management's salaries as they were decided by the Board.

[17] The CEO Shadrach Bokaba testified that the Board had approved him receiving a commission for monies collected for the respondent, however, in the first year he chose to forego 40% to 50% of the commission to which he

was entitled of his own volition. In the second year he decided not to claim any commission at all. Thereafter all commissions were cancelled by the Board as being unsustainable and the board developed a performance based evaluation of management. He indicated that all decisions including his salary were ratified by the Board. He indicated that he had paid his taxes. He explained that his salary was split equally between the respondent and SAMET and was in line with administrators of orchestras in Cape Town and Durban and benchmarked on national standards. He indicated that there were instances of late payment to employees and service providers due to the cash flow crisis. He also stated that payments were one or two days late on about three occasions but that management would in anticipation of such approach some musicians to accept late payment. Payments were never two months late as was suggested by the appellant. He denied that management was paid first and testified that office staff took a conscious decision to be the last to be paid and were sometimes paid a month late. He disputed the appellant's version that there were no procedures in place to raise grievances. The appellant did not participate at all in the AGM of 2006 or 2008 and did not even attend the 2007 AGM where he would have had the opportunity to raise his grievances. The reason for terminatingthe contract with Stone Music' was to reduce costs. As a result of the termination of the contract, the respondent broke even and according to him was realising the full benefit of the transaction. He admitted that PAYE was sometimes delayed because of cash flow but it was all paid in full. He drafted the disciplinary charges as he believed that the appellant's conduct had the potential to jeopardise the respondent from obtaining funding and damaged the respondent's reputation. He indicated that his own reputation was tarnished and that the trust relationship between the appellant and the respondent had broken down.

[18] Based on the above facts and circumstances the issue which the Labour Court was to determine was whether the dismissal of the appellant was automatically unfair because he had allegedly been subjected to occupational detriment arising from making a protected disclosure alternatively whether the dismissal was substantively and procedurally unfair based on the appellant having committed misconduct.

[19] With regard to the dismissal on account of a protected disclosure, the Labour Court first determined whether the appellant had made a disclosure as defined by the Protected Disclosures Act 26 of 2000 (PDA). The court considered relevant authoritiesand came to the conclusion that the appellant's letters constituted a disclosure on the basis that it contained information tending to show actual or likely impropriety. The letters disclosed contractual obligations owed by the respondent to employees, unconstitutional payments of salary to the board chairman, non-compliance with tax obligations as well as mismanagement of public funding.[1]

[20] Having found that the appellant did make a disclosure, the Labour Court went on to consider whether the disclosures were protected. In this respect itheld that the starting point was to assess the substance of the disclosures to determine whether the appellant reasonably believed them to be substantively true. After considering each disclosure, the Labour Court held that the evidence had established that the appellant was genuinely concerned about the financial health of the respondent and sought to raise his concerns in his capacity as member and employee in the interests of the respondent. Further, that the appellant undoubtedly acted in good faith and held a reasonable belief that much of the information was substantively true. In respect of the respondent's contention that the appellant's second letter was to seek assistance to be granted postponement of his disciplinary hearing, the Labour Court held that although, it would appear that the appellant mainly acted out of self-interest in seeking postponement of his enquiry, it was clear that his letter raised his concerns about financial impropriety.

[21] Turning to the question whether the disclosures were protected, the Labour Court had regard to section 9(2)(c)(i) of the PDA which provides that a disclosure is protected if the employee had previously made a disclosure of substantively the same information to his or her employer in respect of which no action was taken within a reasonable period after the disclosure. The court also looked at whether the disclosures were protected in terms of section

[1]See para 69 of the judgment.

9(2)(d) which provides for the determination of whether the impropriety was of an exceptionally serious nature.

[22] In relation to section 9(2)(c)(i), the court dismissed the appellant's contention that the discussions he had with Roberts and Jurisch fell within the ambit of the section. The court held that the appellant discussed with them things that they were both already aware of and thatnothing new was disclosed to them. Likewise, the court held that the discussion with Jurisich cannot fall within the ambit of this section since appellant provided no information but that it was Jurisch who provided the appellant with information he was not aware of namely that the CEO (Bokaba) earned a salary and received commissions and the chairman earned a salary.[2]

[23] In respect of section 9(2) (d), the court held that the appellant did not contend that the section was applicable and that none of the impropriety the appellant raised can be considered to be of an exceptionally serious nature. In this respect, The Labour Courtconcluded that:

> *"Therefore, although he acted in good faith and was understandably naive given his artistic temperament, his disclosures do not meet the requirements for protection under the PDA. Although I am cognisant of the applicant's submissions that whistle-blowing should be encouraged and is a primary requirement for a democratic and transparent social order, it must also be responsible and legitimate, hence the extensive requirements in the PDA before a disclosure can be brought under the ambit of its protection...At no stage did the applicant testify that he failed to approach the respondent or comply with its procedures because he feared an occupational detriment- It is common cause that he was conducting an investigation into the issues and was shocked when he received the disciplinary charges*." Para 80

[24] Having found that the appellant's disclosures were not protected under the PDA, therefore not subjected to an occupational detriment, the Labour Courtwent on to determine whether the appellant's dismissal was for a fair reason in terms of section 188(1)(a) of the Labour Relations Act 66 of 1995 (LRA).

[2] At para 79 ofthe judgment.

[25] With regard to the substantive fairness of the dismissal, the Labour Courtheld that the appellant was guilty of bringing the respondent into disrepute by distributing his second letter not only to members but also non-member employees and other third parties.[3] Moreover, the Labour Court found that a number of the allegations of financial impropriety: the imputation of unilateral and dishonest conduct by the CEO; the failure to comply with board procedures and the respondent's constitution; failure to pay salaries to staff when management were paid; and, the siphoning off of donor money into commissions, were untrue and defamatory.[4]

[26] In respect of the procedural unfairness of the dismissal, the Labour Courtdismissed the appellant's contention that his was not afforded sufficient time to prepare for the enquiry. The court found that the appellant had not made any request for postponement to the chairperson but that the appellant relied on his request to Bokaba in the previous enquiry.

The Appeal

[27] The first issue is to determine whether the appellant's dismissal was automatically unfair for making a protected disclosure. Dismissal for occupational detriment is governed by section 187(1)(h) of the LRA which renders automatically unfair a dismissal as a result of an employee having made a protected disclosure. Section 4(2)(a) of the PDA also provides that any dismissal in breach of section 3 of the PDA is deemed to be an automatically unfair dismissal as contemplated in section 187 of the LRA. [5]

[28] Protected disclosure is governed by section 9 of the PDA which reads:

> *'9. (1) Any disclosure made in good faith by an employee—*
> *(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and*
> *(b) who does not make the disclosure for purposes of personal gain, excludingany reward payable in terms of any law;*
> *is a protected disclosureif—*

[3]At par 83 of the judgment.
[4]At para 81 of the judgment.
[5]Section 3 of the PDA reads that: '3. 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.'

*(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)(ii) –*

*(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 her or she makes the disclosure to his or her employer;*

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

*(i) his or her employer; or*

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

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

*(d) that the impropriety is of an exceptional serious nature.*

*(3) Determining for the purposes of section (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; … and*

*(g) in the public interest.'*

[29] Accordingly, the general requirements for a disclosure to be protected are the following: there must be a disclosure; the disclosure must be made in good faith; the disclosure must concern an impropriety, either a criminal offence or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;it must be reasonable for the employee to make the disclosure; and, that one or more of the conditions referred to in subsection 9(2) must be satisfied – for present purposes, any one of them is sufficient.Where the disclosure is made to the employer subsection (c) which is relevant for the present purposes provides that the employee making the disclosure must have previously made a disclosure of substantially the same nature to his or her employer.

[30] For reasons that will be apparent later in this judgment, I do not believe it necessary to deal with the question whether the appellant acted in good faith; for personal gain; or believed that the information disclosed and allegations made were substantively true.

[31] The first issue is whether the disclosures made by the appellant were protected by virtue of section 9(2)(c) which provides that a disclosure is protected when an employee making the disclosure had previously made a disclosure of substantially the same information to his or her employer in respect of which no action was taken within a reasonable period after the disclosure. The appellant argued that by disclosing the improprieties to Roberts and Jurisch, he had discharged the requirement of section 9(2)(c) of the PDA.

[32] The material portion of the definition of disclosure in section 1 of the PDA reads that:

> *"disclosure"means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:*
>
> *(a) …*

*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject."*

The argument before this Court is that the information the appellant discussed had with Roberts and Jurisich made the information discussed a protected disclosure as contemplated by the PDA. The respondent argues on the contrary that the appellant had not provided Roberts and Jurisich with any information they were not aware of. Disclosure means 'action or act of making known'.[6] The question that arises is whether the appellant had made known to Roberts and Juirschany information which they were not aware of? And if so, were they or were they not willing to act on such information?

[33] From the evidence, it is clear that the respondent was facing financial difficulties whichwere a general concern. As Roberts put it, it was no secret that the respondent was not financially stable. It follows that no information emerged during the discussions which either Roberts or Jurisch was not aware of. When asked what the purpose of the appellant's discussions was, the appellant answered that he wanted to ask Roberts whether the respondent's financial challenges were a normal situation. His basic question was to ask if there was any concern about the financial health of the company and if something could be done to remedy the situation. Clearly the appellant was not disclosing any information. Moreover, Jurisch brought to the attention of the appellant information which he was not aware of. This is why the appellant requested the respondent's financial statements. In this respect, when asked about the purpose of obtaining these financial statements, the appellant testified that the purpose of requesting the financial statements was to verify whether the concerns they discussed were founded. The appellant was simply conducting an investigation into the respondent's financial challenges so as to determine the cause of the problem. The evidence can be reconstructed as follows: after discussing with Roberts and Jurisich who shared the same concern about the respondent's financial difficulties, the appellant undertook to request the financial statements in order to obtain clarity about the respondent's financial state. Hence, there is no evidence that

[6] Leyley Brown et al (eds) Oxford English Dictionary vol 1 (2007 Oxford University Press) p 698.

the appellant made any disclosure to either Roberts or Junisch which they were not aware ofraising them of and, in any event, there is no evidence that either of them were uncooperative or unwilling to remedy any wrong or that they or either of them embarked upon a path to victimise the appellant for discussing the issues he raised rather than act on it.

[34] In *Tshishonga v Minister of Justice & Constitutional Development and Another,*[7]it was held thatthe requirement for a disclosure is that information must be disclosed.(See also *Radebe v Premier Free State* 2012 (5) (LAC) SA 100 at para 20). In *City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another,*[8]the courtheld that aperson's opinion is information falling within the meaning of disclosure. Contrary to the latter case, where the employee expressed a view that the employer was creating a danger at work by employing unqualified people to do specialised work, which information was not known to the rest of employees, the present case differs. This is because in this matter, what the employee discussed was common cause to all employees of the respondent. Nothing new was brought that Roberts and Jurisich did not know. Moreover, it was the latter thatprovided the appellant with information he did not know. It follows that the discussions the appellant had with Roberts and Jurisichdo not fall within the definition of disclosure as defined in section 1 of the PDA.

[35] Having found that the discussions the appellant had with Roberts and Jurisch do not fall within the definition of disclosure, it follows that such were not protected. Since the appellant had not disclosedany information,it cannot be said that by writing the two letters the appellant had satisfied the requirements as enunciated in section 9(2)(c) of the PDA mainly that he had previously disclosed the same information in respect of which no action was taken.The appellant has not discharged the requirement of section 9(2)(c) in that at no stage did the appellant argue that he (i) approached the respondent with information of any failure to comply with any legal obligation by the respondent; or, (ii)did not approach the respondent or comply with its procedure because he feared an occupational detriment.

[7](2007) 28 ILJ 195 (LC) at para 179.
[8](2010) 31 ILJ 322 (SCA) at para 41-42.

[36] Furthermore, and assuming the issues raised by the appellant constituted disclosures and that the disclosures were about financial impropriety, then, in order to satisfy the requirement of whether it was reasonable for the appellant to make the disclosure one must take into account the seriousness of the impropriety. The PDA is there to protect whistle blowers who disclose serious improprieties. It is necessary therefore for a person seeking to rely on the PDA not only to establish an impropriety but also to establish that it is serious.

[37] In the present case none of the appellant's complaints satisfy the requirements of establishing a serious impropriety. In the present case the appellant's complaints can be broken down into the following categories:

(i) Firstly, late or fractured payments to employees or service providers – there is nothing to indicate that this was a serious concern or impropriety or that the beneficiaries did not condone these late payments. There was no evidence that any employee took action against the employer for making late payments or indeed any third party had taken or even threatened to take action against the employer as a result of the late payments. By all accounts when the appellant wrote his letter the problem of fractured payments seems to have been resolved and there is no evidence that it was on-going or likely to occur in the future.

(ii) Secondly, the appellant's concerns about the commissions and salary structure of the directors of the respondent and indeed of the CEO was not a concern about an impropriety. If salaries are determined by a duly constituted Board of Directors and there is proper disclosure and there is no evidence that the Board of Directors acted in breach of their fiduciary duties in establishing a person's salary then there can be no impropriety. The appellant's evidence with respect to the salary of the directors of the Board and indeed the CEO falls far short of establishing any impropriety whatsoever. It does raise concerns about the costsof employing the CEO in circumstances of the respondent facing financial difficulties but not impropriety.

(iii) Thirdly, the appellant's concerns that members were denied access to financial statements did not establish a serious impropriety. The objective facts demonstrate that the auditor did not refuse the appellant access to financial statements but that the auditor in fact told the appellant he was free to obtain financial statements from a Board member and in fact provided him with a list of the directors for that purpose. There is no evidence that the appellant requested a member of the board for access to financial statements in terms of the requirements of the Companies Act, nor is there any evidence that if the appellant has simply gone to a director and requested financial statements before penning down his letter that that request would have been refused.

(iv) Finally, the issues about the non-payment of PAYE, other taxes or bills were either untrue or paid albeit after the dates on which the accounts were due.

[38] In any event, none of the appellant's complaints disclose any serious impropriety. The requirement that the impropriety should be serious is an important requirement. One must bear in mind that the PDA should not be interpreted in a manner which would result in the victimisation of the employers. For whistle blowers to receive protection, it is necessary that the impropriety that they disclose be serious and not simply reveal alleged breaches of contract when there is no evidence that those who are allegedly the victims of the breaches have taken any action about it. In fact all the evidence in this matter relating to fractured payments or late payments for instance demonstrate that they were condoned.

[39] In the circumstances, the appellant’s appeal against the finding that his dismissal was an automatically unfair dismissal must fail.

<u>Substantive and procedural fairness of the dismissal</u>

[39] The appellant challenges the Labour Court findings of the alternative claim that his dismissal for misconduct was substantively fair. In this regards, it appears that both parties simply overlooked the fact that the Labour Court had no jurisdiction to deal with the fairness of a dismissal based on misconduct.

[40] In terms of section 191(5)(b), when an employee alleges his dismissal was automatically unfair s/he has to refer the dispute to the Labour Court for adjudication. On the other hand, if the dismissal relates to the conduct of the employee then, in terms of section 191(5)(a) of the LRA the dispute must be referred to the council or the CCMA to be arbitrated.

[41] I have dealt with the appellant's claim of automatic unfair dismissal. As regards his alternative claim, this claim falls under section 191(5)(a) of the LRA as such the Labour Court had no jurisdiction to consider the claim or pronounce thereon unless it, with the consent of the parties, had decided to arbitrate the dispute.

[42] The issue of jurisdiction in respect of dismissals based either of section 191(5)(a) or (b) of the LRA has been dealt with fully in *Wardlaw v/s Supreme Moulding (Pty) Ltd* [2007] 6 BLLR 487 (LAC) (Wardlaw).In that matter, this Court held that while it is the applicant who will determine the nature of the dispute when referring the matter to arbitration or adjudication, the arbitrator or the court must determine whether it has jurisdiction to entertain the dispute. This Court in Wardlawrecognised that it may only become clear after all the evidence is led as to whether or not the body ceased with the matter had jurisdiction to determine the dispute referred to it. Where it is the case that the dispute is not one within the jurisdiction of the body hearing the matter it cannot determine the dispute.

[43] In this matter, the appellant's alternative claim about his dismissal being unfair (based on his conduct) could not be entertained by the Labour Court because it fell within section 191(5)(a) of the LRA and had to be referred to arbitration. It is also not a matter where for purposes of expediency the Labour Court could entertain the matter as section 157(5) of the LRA specifically provides:

> *"(5) Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration".*

[44] In the circumstances, it is up to the appellant, if he so desires to refer his dispute relating to his dismissal based on his conduct to the CCMA for arbitration.

[45] The issue of procedural fairness is related to substantive fairness and must be dealt with at arbitration as well.

[46] With regard to costs, I see no reason why in both law and fairness costs should not follow the result in the appeal. This is so because I am of the view that the appeal on the automatically unfair dismissal issue was of no merit.

<u>Order</u>

[47] In the result, I make the following order;

(i) The appeal is dismissed with costs,

(ii) The order of the Labour Court is set aside and replaced with the following:

“a) The dismissal of the applicant was not an automatically unfair dismissal as contemplated by section 191(5)(b);

b) This Court had no jurisdiction to determine the applicant’s alternative claim of his dismissal being substantially and procedurally unfair as contemplated by section 191(5)(a);

c) There is no order as to costs”

Waglay JP

I agree

Musi AJA

I agree

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Zondi AJA

APPEARANCES:

| | |
|---|---|
| FOR THE APPELLANT: | Gilbert Marcus SC and Adv Jason Brickhill |
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