REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 73/11

SOUTH AFRICAN MUNICIPAL WORKERS'

UNION NATIONAL FUND **Appellant**

and

JANE EDITH ARBUTHNOT **Respondent**

Heard: **19 March 2013**

Delivered: **05 June 2014**

Summary: Protected disclosure- employer- trustees of a pension fund requesting legal opinion on their liability, if any- employee receiving opinion and forwarding it to union member before employer having sight of the opinion -employee dismissed for forwarding confidential documents contrary to instructions- Labour Court finding that disclosure protected on basis that it was reasonable and substantively true- Appeal Employee asking union member to keep opinion secret- employee disclosure *mala fide*- employee making premature disclosure before employer could consider it. Employee on final warning for similar offence- Dismissal not automatically unfair. Labour court decision set aside. Appeal upheld.

Coram: Waglay JP, Tlaletsi DJP and Coppin AJA

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment of the Labour Court (Van Niekerk J) upholding the respondent's claim that her dismissal was automatically unfair on the basis that she was subjected to an occupational detriment for making a protected disclosure in terms of the Protected Disclosures Act 26 of 2000 ('PDA').

Background facts

[2] The appellant is a fund established by the South African Municipal Workers Union (SAMWU) in terms of the Pension Fund Act 24 of 1956.The respondent was employed by the appellant as a paralegal officer from June 2007 and she was reporting to Mr Themba Mfeka('Mfeka'), the appellant's principal officer.

[3] The appellant lost a significant amount of money due to an investment it had made in the Living Hands Trust, an entity controlled by Fidentia[1] . Subsequent to this loss, the appellant instructed its attorneys to obtain counsel's opinion concerning the trustees' liability to the beneficiaries of the fund for the possible breach of their fiduciary duties relating to their decision to invest a substantial sum of the appellant's pension funds in the Living Hands Trust.

[4] On receipt of the opinion from counsel and on 1 October 2008, at 10h16, the appellant's attorneys emailed the opinion to the appellant. It was received by the respondent. The attorneys also telephoned Mfeka and informed him that the opinion had been emailed to the appellant's office.

[5] At 14h05 of the same day, the respondent forwarded the opinion to Mr Odendaal ('Odendaal'), the national benefit officer of SAMWU. He was required to oversee the benefit schemes instituted for the benefit of SAMWU members and he would also sometimes attend meetings of the appellant. Odendaal was not a trustee of the appellant, nor was he entitled to receive the opinion.

[1] A company which according to the appellant gained widespread notoriety for losses it had incurred and was subsequently placed under curatorship.

[6] When Mfeka's returned to his office on the next day, 2 October, he asked the respondent whether she had given the opinion to anyone. She claimed not to have done so. There is a dispute about whether Mfeka had instructed the respondent not to forward the opinion to anyone on 01 October 2008, (the day she received the opinion). What is not in dispute, although originally denied by the respondent, was that Mfeka had instructed her on 2 October 2008 that the opinion was not to leave the appellant's offices.

[7] On 6 October 2008, the respondent was called to Mfeka's office, where she was asked, in the presence of the appellant's chair and vice chair, whether she had passed on the opinion to anyone. She replied that she had not. Mfeka then asked her whether she had sent the opinion to the union and she again responded in the negative. He further enquired whether she had sent the opinion to Odendaal. She denied this as well. Mfeka then confronted the respondent with a copy of the email that she had addressed to Odendaal on 1 October. It was then that the respondent admitted that she had lied and that she had sent the opinion to Odendaal. She then stated that after sending the opinion to Odendaal she telephoned him and asked him to keep the opinion confidential.

[8] Following on the above, as the respondent was already on a final written warning for a similar offence, namely, for divulging information to an outsider in violation and disregard of the rules of the appellant and instructions from her superior, she was charged with insubordination, dishonesty and disloyalty. A hearing was duly held and she was found to have committed the misconduct complained of and dismissed. The respondent, unhappy with the outcome of the disciplinary hearing, referred her dismissal dispute to the CCMA for conciliation. The matter was subsequent referred to the Labour Court for adjudication.

<u>The Labour Court</u>

[9] The respondent did not raise the issue of protected disclosure in terms of the PDA at the disciplinary hearing, but raised it for the first time at the Labour Court when she challenged the fairness of her dismissal.

[10] The Labour Court upheld the respondent's claim that she was dismissed for making a protected disclosure in terms of the PDA. The Labour Court held that at the time the respondent forwarded the opinion to Odendaal, she reasonably believed that the opinion was substantively true and that it disclosed a breach of fiduciary duty by the appellant's trustees. In dealing with the seriousness of the disclosure, the Labour Court held that the consequences of any failure by the trustees of a retirement fund to comply with a legal obligation would be exceptionally serious. The Labour Court arrived at this conclusion after considering the fact that some R150 million of the monies under the control of the appellant was lost in the investment made by its trustees in the Living Hands Trust.

<u>The Appeal</u>

[11] The appellant seeks to overturn the decision of the court *a quo* on the basis that the respondent cannot be protected by the PDA as the disclosure she made to Odendaal did not comply with section 9 of the PDA in that it was not reasonable for her to make the disclosure and that she did not act *bona fide* when she made the disclosure.

[12] The appellant's further ground of appeal is that the court *a quo* erred in finding that the information disclosed by the respondent was substantively true as required by section 9 of the PDA.

[13] The sub-sections of section 9 of the PDA that embody the requirements for a protected disclosure, insofar as they are relevant to this matter, read as follows:

> *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;*
>
> *...*
>
> *is a protected disclosure if—*
> *(ii) in all the circumstances of the case, it is reasonable to make the disclosure.*

[14] Having regard to the grounds of appeal and the relevant legislation, this Court has to be satisfied that the respondent:

(i) reasonably believed that the information she disclosed to Odendaal was substantially true;

(ii) that in making the disclosure to Odendaal she acted in good faith; and

(iii) that the disclosure was a protected disclosure, because in all the prevailing circumstances, it was reasonable to make that disclosure.

<u>(i) Did the respondent reasonably believe the information disclosed was substantially true?</u>

[15] The appellant argued that the Labour Court erred in applying the standard that the reasonable belief must be that the information shows or tends to show a failure by the employer to comply with a legal obligation. The appellant submittedd that section 9 of the PDA required a higher standard than, simply, a failure to comply with a legal obligation. What is required, submits the appellant, is that the information disclosed must be objectively true and the discloser of the information must subjectively believe that the information disclosed is substantively true. Hence, even if the information disclosed is objectively true, but the discloser did not subjectively believe that the information was true, the reasonable belief requirement in s9 of the PDA is not met. The appellant thus tried to divide "reasonable belief" into two concepts, each self-standing with its own independent elements that required to be fulfilled in order to clear the first hurdle towards having the disclosure declared protected in terms of the PDA. According to the appellant, the reasonableness of belief entailed an element of accuracy of the information disclosed and the belief itself was, simply, a personal or subjective observation. This argument is misconceived. The PDA provides that a disclosure is protected if, *inter alia*, the person who makes the disclosure reasonably believes that the information is true. The enquiry is not about the reasonableness of the information, but about the reasonableness of the belief *vis à vis* the truthfulness of the information. The requirement of "reasonable belief" does not entail demonstrating the correctness of the information,

because a belief can still be reasonable even if the information turns out to be inaccurate. In this regard, this Court, in *Radebe v Premier Free State Province,*[2] held that:

> *The requirement of 'reason to believe' cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. Disclosure of hearsay and opinion would, depending on its reliability, be reasonable. A mistaken belief or one that is factually inaccurate can nevertheless be reasonable, unless the information is so inaccurate that no one can have any interest in its disclosure.*

[16] Moreover, the appellant's failure to challenge the accuracy of the information regarding the trustees' breach of their fiduciary obligation meant that the respondent's reasonable belief that the information was true cannot be faulted. Accordingly, in my view, the Labour Court correctly held that:

> 'This formulation does not require an employee to believe that any wrongdoing has actually or definitely occurred; it is sufficient that the employee believes that the available evidence suggests that it has.
>
> In the present instance, the applicant's uncontradicted evidence was that she read the opinion to suggest that the trustees of the fund may be in breach of their fiduciary obligations and that they were potentially personally liable for the beneficiaries' loss...'

[17] The Labour Court was therefore correct in concluding that the respondent reasonably believed that the information disclosed was substantially true.

(ii) Was the disclosure made in good faith?

[18] The appellant contends that the respondent acted in bad faith in disclosing the opinion to Odendaal. It submitss that the respondent's action was tainted by bad faith because the information was disclosed prior to any of the trustees having had the opportunity to have sight of it. In brief, the appellant contends that the timing of the disclosure rendered the respondent's conduct *mala fide.*

[2] *Radebe v Premier Free State Province* 2012 (5) SA 100 (LAC) at para 36.

[19] In dealing with the question of good faith, the court in *Radebe* [3]*,*in assessing whether the employee had satisfied the requirement of good faith, stated:

> '*Whilst good faith and honesty may conceivably amount to the same thing, I am of the view that a case by case approach is the proper one for a court considering these issues. Factors such as reckless abandon, malice or the presence of an ulterior motive aimed at self advancement or revenge, for instance, would lead to a conclusion of lack of good faith. A clear indicator of lack of good faith is also where disingenuity is demonstrated by reliance on fabricated information or information known by the employee to be false. The absence of these elements on the other hand is a strong indicator that the employee honestly made the disclosure wishing for action to be taken to investigate it.'*

[20] It is important to note the actions of the respondent in dealing with the element of good faith. It is not disputed that the respondent was on a final written warning for divulging information in violation and disregard of the rules and instruction of her superior. The final written warning dated 16 September 2008 in terms records the following:

> '*At about 09h00 this morning, you came to my office to discuss the response you had drafted to the Pension Funds Adjudicator. During this discussion I questioned you as to your reasons of making attachment of information about SA Quantum....*
>
> *You argued that I always twist what you say and you are sick and tired of arguing with me and stormed out my office, despite me telling you to come back. You actually replied on your way out that you are not prepared to come back.*
>
> *Let me remind you that all correspondence to the Pension Funds Adjudicator or any statutory body leaves the office in the name of the Principal Officer and therefore I sanction such correspondence, there needs to be full understanding and agreement on the contents thereof.*
>
> *I consider this as serious insubordination and therefore give you a final written warning, with effect from today, the 16th September 2008. This*

[3]Supra at para 35.

warning will be valid for a period of six months, and should you be found guilty of misconduct similar or related to this behaviour, this warning will be taken into account in considering the appropriate sentence.'

[21] This warning was consequent upon the respondent acting in violation of the instructions not to send any documents to anybody without the approval of the Principal Officer of the appellant, Mfeka. The letter clearly demonstrates the attitude of the respondent to undermine her superior's instruction. It is trite that in an employment relationship an employee is obliged to carry out the lawful commands and instructions of the employer.

[22] Despite this final written warning, the respondent, only two weeks later, sent the opinion to Odendaal. According to the appellant, the respondent appears to have displayed an attitude of defiance towards her superior and had committed an act of insubordination by sending the information to Odendaal. Having failed to retain her employment after the disciplinary hearing, the respondent grabbed on to the defence of protected disclosure. Hence, so the appellant argues the absence of good faith in passing the opinion to Odendaal.

[23] Good faith, in my view, entails in part that there should be no ulterior motive, revenge or malice in making the disclosure.[4] It is common cause that the respondent did not claim protected disclosure at the disciplinary hearing and that her reliance on protected disclosure only surfaced for the first time during the proceedings before the Labour Court. The inference that the appellant wants this Court to draw is that the reliance on the protected nature of the disclosure was more of an afterthought, in an attempt to downplay the tendency of the respondent to disregard the employer's instruction.

[24] During the examination and cross-examination of the respondent, who initially maintained that she was not instructed to not send the opinion, was obliged to concede that she was instructed not to send it. When an employee makes a disclosure with the aim of disclosing some improprieties, he, or she, should be able to admit and take responsibility for his, or her, actions. This cannot be

[4] *Radebe* supra para 35

so where the employee lies and denies that she had made a disclosure to a third party. More importantly, if the respondent had the interest of the appellant at heart, as she claimed, she should not have instructed Odendaal to keep the opinion confidential: what was required of him was to act on it.

[25] The purpose of the PDA is to protect employees from being subjected to an occupational detriment for having made a disclosure. An employee would be afforded protection only if he, inter alia, satisfies the Court that the disclosure was made in good faith. Earlier on, I indicated that good faith entails in part the absence of an ulterior motive, revenge and malice in making the disclosure. In addition, it is also a requirement that the party making the disclosure intends thereby for the wrong disclosed to be remedied, or addressed, in some way. In the present matter, by asking Odendaal to keep the opinion confidential, it cannot be said that the respondent intended Odendaal to address the issues raised in the opinion. Rather, the only reasonable inference to be drawn is that the respondent wanted to keep Odendaal abreast of what was happening at the appellant. I say this because the appellant had not yet seen the opinion at the time it was forwarded to Odendaal. It was an opinion requested by the appellant and at that stage the respondent had no idea what the appellant would or would not do with it. This issue is supported by the fact that she did not want Odendaal to act on the opinion. Her evidence that the appellant might not act on the opinion or even destroy it is at best speculative, particularly, because the opinion was not final and required further information before it could be finalised.

(iii) Was it reasonable to make the disclosure?

[26] While the appellant does not dispute the finding that the improprieties disclosed in the opinion were exceptionally serious, it argues that, for reasons stated above, (i.e. the timing of the disclosure) it also cannot be said that it was reasonable to make the disclosure. According to the appellant, the fact that the respondent disclosed the opinion prior to the trustees having received it made it unreasonable for the respondent to make the disclosure and that such action was evidence of bad faith.

[27] The appellant sought the opinion because it wanted to ascertain the extent, if any, of the liability of the trustees concerning the beneficiaries' fund. The respondent, in my view, acted prematurely in sending the opinion without first ascertaining whether the appellant would react in a particular way in light of the opinion. She should have awaited the reaction of her employer before disclosing the opinion. The respondent could not just assume that nothing would be done. In fact, there is nothing to demonstrate that at the time the respondent forwarded the opinion to Odendaal she had any reason to believe that the appellant would not act on the opinion. Mfeka, who instructed the appellant's attorneys to brief counsel to furnish an opinion on the possible liability of the trustees, was phoned by the attorneys and informed that the opinion was forwarded to the appellant's office. Therefore, it can be inferred that it was unreasonable for the respondent to have sent the opinion to Odendaal before the appellant had even had a look at it and decided what if any action it would or would not take. I therefore agree with the appellant that the respondent acted prematurely and before the appellant had an opportunity to act on the findings and recommendations in the opinion.

[28] When all the facts and circumstances are taken into account, I am of the view that the respondent did not act in good faith in making the disclosure, nor was it reasonable for her to make the disclosure when she did and that the disclosure made by the respondent was not a protected disclosure as contemplated in the PDA and that the respondent actions are, thus, not protected by the provisions of the PDA.

[29] In the premises, the respondent's dismissal was not automatically unfair. Concerning the costs, I am of the view having regard to law and equity that this is a matter where each party should bear its own costs.

[30] In the result, the following order is made:

1 The appeal is upheld.

2 The order of the Labour is set aside and replaced with the following:

'(i) the applicant's dismissal was not automatically unfair.

(ii) There is no order as to costs.’

Waglay JP

I agree

Tlaletsi JA

I agree

Coppin AJA

APPEARANCES:

FOR THE APPELLANT:	Adv C E Watt-Pringle SC
	Instructed by Bowman Gilfillan Inc
FOR THE RESPONDENT:	Adv G A Leslie
	Instructed by Malcolm Lyons and Brivik Inc