

Reportable and of interest to other Judges

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN BRAAMFONTEIN)**

Case No: JS 1179/2010

In the matter between:

ZIXOLISILE FENI

APPLICANT

and

PAN SOUTH AFRICAN LANGUAGE BOARD

RESPONDENT

JUDGMENT

AC BASSON, J

- 1] This (unopposed) application was dismissed on 2 March 2011. Here are my brief reasons for my order.
- 2] This was an application in terms of which the applicant (Mr. Feni) applied

for an order in the following terms:

- “1. Condonation of the late filing of this application;*
- 2. That the disclosures made by Applicant against Mr. Swepu and the Respondent are protected disclosures in terms of the provisions of the Protected Disclosures Act 26 of 2000 (the Act);*
- 3. That the disciplinary proceedings undertaken by the Respondent against Applicant constitutes occupational detriment and is in contravention of section 3 of the Act and are declared unlawful and invalid;*
- 4. Declaring the disciplinary enquiry held by the Respondent against Applicant on 15 June 2010 null and void;*
- 5. Declaring the recommendation of the disciplinary enquiry to be invalid;*
- 6. Declaring the dismissal of the Applicant by the Respondent invalid;*
- 7. That the Respondent is directed and ordered to immediately reinstate Applicant to his position with the same terms and conditions as before, restore all benefits and privileges and pay his arrear salary from the date of dismissal with 15,5% interest;*
- 8. That the Respondent is ordered to pay the costs of this*

application;

9. *Further and/or alternative relief.”*

- 3] Before I turn to the merits of the application it should be pointed out that the applicant has already been dismissed at the time of this application hence the prayer that this Court must declare the dismissal of the applicant “invalid” and order his reinstatement. In fact, it appears from the applicant’s founding affidavit that the applicant was dismissed as far back as 17 June 2010.
- 4] Mr Malema on behalf of the applicant confirmed to this Court that no dispute concerning an unfair dismissal has been referred to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”). It does, however, appear from the papers that the applicant had referred a dispute about his unfair suspension to the CCMA on 4 June 2010. However, as already pointed out, no dispute about an unfair dismissal was referred to the CCMA.

Ad jurisdiction

- 5] I raised the issue of jurisdiction with counsel for the applicant and pointed out to Mr. Malema that this Court does not have jurisdiction to adjudicate an unfair dismissal dispute without the dispute first having been referred to conciliation and without a certificate of non-resolution first having been issued by the CCMA. Mr. Malema, however, insisted that this Court does

have jurisdiction to grant the relief sought in the Notice of Motion. He argued that the Court's powers derive from the provisions of the Protected Disclosures Act 26 of 2000 (hereinafter referred to as "the PDA") and that the Court has the necessary jurisdiction to grant the relief despite the fact that the matter has not been referred to conciliation. In this regard it was argued that this Court may in terms of section 4 of the PDA declare that the disciplinary proceedings constitute an occupational determinant in contravention with section 3 of the PDA and that this Court may consequently declare the disciplinary enquiry to be "null and void" and declare that the dismissal of the applicant was "invalid". As already pointed out the applicant is seeking his immediate reinstatement coupled with an order that his arrear salary be paid with 15.5% interest.

Brief background

- 6] The applicant (Mr. Feni) was employed as the Head of Legal Services on 2 July 2008. He was also appointed as a member of the Executive Management of the respondent.
- 7] On 20 February 2009 the applicant was suspended on allegations of financial misconduct. I do not intend repeating all the events that transpired after the applicant's suspension. Suffice to point that the applicant continued to be part of the Executive Management of the respondent even after his suspension. During discussions at this level the applicant and a certain Mr. Swepu had various discussions about work

related issues. It is clear from the applicant's papers that the applicant and Swepu had various and serious disagreements over the running of the respondent. In the papers the applicant also accuses Swepu of financial mismanagement.

- 8] The applicant decided to "blow a whistle on Swepu" to the Board of the respondent and to the Minister of Arts and Culture regarding his (the applicant's) suspicion that Swepu did not complete his degree at the University of the Western Cape and that he was misusing the financial resources of the respondent. The allegations were investigated by the respondent. Prof Ngubane (chairperson of the respondent) addressed the staff and informed them that the allegations were unfounded. It appears from the papers that, after these allegations, the relationship between the applicant and Swepu deteriorated even more. The applicant again made a report to Prof Ngubane and advised him "about the incorrect manner in which they dealt with the investigation of Mr. Swepu". The applicant also informed Prof Ngubane about how the board has been misled into approving an acting allowance for Swepu whereas he did not qualify for it. When Prof Ngubane failed to meet with the applicant to discuss these issues, the applicant wrote a letter to the chairperson of the Audit Committee and complained about Prof Ngubane's failure to deal with the issues. The applicant also wrote to the chairperson of the Standing Committee on Public Accounts. After this letter Prof. Ngubane referred the matters raised by the applicant for investigation by internal auditors.

- 9] On 13 May 2010 the applicant was served with a notice of suspension. As already pointed out, the dispute in respect of the unfair suspension was referred to the CCMA.
- 10] On 18 May 2010 the applicant was served with a notice to appear before a disciplinary enquiry. Although the charges do not specifically refer to the disclosures made by the applicant, the applicant alleges that all the charges relate to the disclosure that he had made. Charge 1 relates to the making of false statements prejudicial to the acting CEO of the Board. Charge 2 relates to the making of statements prejudicial to the PANSALB Board. Charge 3 relates to the misappropriation and improper use of company property and charge 4 relates to insubordination in that the applicant had refused to comply with instructions and directives issued by the PANSALB Board to desist from persistently and continually raising the allegations concerning the acting CEO's qualifications.
- 11] On 17 June 2010 the applicant was served with an outcome of the disciplinary hearing recommending his dismissal.
- 12] In brief it is the applicant's case that he was disciplined after he had made certain disclosures against Swepu and that this constitutes an occupational detriment in terms of the PDA. The applicant submitted that this Court should declare the disciplinary proceedings "unlawful ab initio" in that they are "in violation of the provision of section 3 of the Act" and order his reinstatement.

Jurisdiction

13] I have already indicated that I have dismissed the application. The application was dismissed on the basis that this Court does not have the necessary jurisdiction to entertain the matter:

- (i) The applicant has been dismissed months ago. Firstly, the applicant approached this court on motion whereas it should have done so by means of a referral of a statement of claim. Secondly, no dispute about the fairness of the dismissal was referred to the CCMA for conciliation. Consequently, no certificate of non-resolution in respect of the dismissal dispute has been issued. This Court's jurisdiction to deal with automatically unfair dismissal disputes is dependent upon a certificate of non-resolution of a dispute referred to conciliation. I will return to this point hereinbelow.
- (ii) This Court does not have the jurisdiction to grant the orders sought (in terms of the Notice of Motion) in terms of section 4 of the PDA. I will return to this point in more detail hereinbelow.

The Protected Disclosure Act 26 of 2000

14] It is accepted that the purpose of the PDA is to protect whistleblowers against suffering of an occupational detriment (which includes, but not limited to, dismissal, being subjected to a disciplinary hearing or suspension)¹ when making a “*protected disclosure*” as defined in the PDA.

¹ An “occupational detriment” is defined in relation to the working environment of an employee,

This much is also clear from the pre-amble of the PDA wherein it is specifically stated that the purpose of this Act is to *“create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures”*.

- 15] Section 4 of the PDA sets out the remedies available to an employee in the event an employee is subjected or may be subjected to an occupational detriment. This section reads as follows:

“4 Remedies

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

(a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act 66 of 1995), for appropriate relief;

or

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

as: *“(a) being subjected to any disciplinary action; (b) being dismissed, suspended, demoted, harassed or intimidated; (c) being transferred against his or her will; (d) being refused transfer or promotion; (e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage; (f) being refused a reference, or being provided with an adverse reference, from his or her employer; (g) being denied appointment to any employment, profession or office; (h) being threatened with any of the actions referred to paragraphs (a) to (g) above; or (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.”*

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

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

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

(3) Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state.

(4) The terms and conditions of employment of a person transferred in terms of subsection (2) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer. “

Occupational detriment in terms of section 1 and 3 of the PDA but short of dismissal

- 16] It appears from a reading this section that two scenarios are envisaged by the legislature. The first is where an employee is subjected to an occupational detriment whilst still in employment. The second is where an employee is dismissed and the dismissal amounts to an occupational detriment in terms of section 1 of the PDA. In respect of the former, section 4(2)(b) of the PDA provides that any occupational detriment (short of dismissal) in breach of section 3 of the PDS is deemed to be an *unfair labour practice* as contemplated in Part B of Schedule 7 to the LRA.²
- 17] In terms of section 4(1) of the PDA an employee who has been subjected or may be subjected to an occupational detriment may approach any court (including the Labour Court) for appropriate relief or pursue any other process allowed or prescribed by any law. Where an employee has been subjected to an occupational detriment (in breach of section 3 of the PDA) other than dismissal the employee, such an occupational detriment is, as already pointed out, deemed to be an *unfair labour practice* as contemplated by the LRA. A dispute about an occupational detriment

² See footnote 1 for a list of the different types of occupational detriments.

(short of dismissal) may be referred to the Labour Court *provided* that the matter has been referred to conciliation and the matter remains unresolved (section 4(2)(b) of the PDA). This much is also clear from section 191(13) of the LRA,³ where it is specifically stated that the Labour Court has jurisdiction to *adjudicate* a dispute about a occupational detriment (which is deemed to be an unfair labour practice) referred to it but *provided* that the dispute was first referred to conciliation in terms of the LRA and *provided* that the CCMA has issued a certificate of non-resolution of the dispute.⁴

Urgent application in terms of section 191(13) of the LRA

18] Section 191(13) of the LRA also envisages the situation where an employee approaches the Labour Court on an urgent basis on the ground that he has been subjected or is about to be subjected to an occupational detriment (which is deemed to be an unfair labour practice). An employee

³Section 191(1)(a) reads as follows: “An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act. (b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5)(b).”

⁴ This was confirmed by the Court in *Tshishonga v Minister of Justice & Constitutional Development & Another* (2006) 27 ILJ 1541 (LC) where the Court held as follows: “[15] However, subsection (13) of s 191 permits an employee to approach the Labour Court directly for adjudication in a situation such as the present where the employee alleges that he has been subjected to an occupational detriment by the employer in contravention of s 3 of the PDA for having made a protected disclosure. **This is to be read with s 4 of the latter Act which provides that an occupational detriment short of dismissal is deemed to be an unfair labour practice and that any disputes in relation thereto must follow the procedure set out in the Labour Relations Act and may be referred to the Labour Court for adjudication.** See also s 186(2)(b) of the LRA. Adjudication in this regard would proceed in the same way as adjudication of inter alia an automatically unfair dismissal or retrenchment in terms of s 187 read with s 191(5)(b) of the LRA and it would be a trial de novo.” (Court’s emphasis.)

who, for example, is about to be subjected to a disciplinary hearing (provided that it amounts an occupational detriment in terms of the PDA) may therefore approach the Labour Court on an urgent basis for an order to prevent or stay a disciplinary hearing. The Labour Court will, however, only issue an *interim order* pending the final resolution of the dispute to be referred to conciliation. As already pointed out, the Labour Court will only grant an interim order because it can only adjudicate the dispute once a certificate of non-resolution has been issued by the CCMA. (See *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551 (LC).⁵)

Dismissal in breach of 3 of the PDA

- 19] Section 4(2)(a) of the PDA expressly states that a 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. Section 4(2)(a) further expressly states that the dispute about such a dismissal must follow the procedure as set out in Chapter VIII of the LRA.
- 20] The PDA is in my view clear. If the employee has been dismissed and the dismissal is alleged to have amounted to an occupational detriment in terms of section 3 of the PDA, the employee must, in terms of section

⁵ The Court held as follows: “[9] The powers conferred upon this court are expressed in wide terms so that any employee who has been subjected, is subject or may be subjected to an occupational detriment in breach of s 3 may approach the Labour Court for appropriate relief. Since conciliation is a prerequisite before this court can grant final relief, in matters of urgency where the occupational detriment will occur unless the employer is interdicted and restrained, ‘appropriate relief’ must therefore include the power to grant an interim interdict pending the resolution of the underlying dispute. The court only has jurisdiction to determine the underlying dispute once the conciliation process has run its course. This is nonetheless the type of case where the court clearly has the power to order the status quo to be preserved or restored pending determination of the main dispute.”

- 191(1) of the LRA, first refer a dispute to the CCMA for conciliation. A dismissal in contravention of the PDA on account of an employee having made a protected disclosure as defined in the PDA constitutes an automatically unfair dismissal in terms of section 187(1)(h) of the LRA. Once a certificate of non-resolution has been issued, the employee may refer the dispute about his or her automatically unfair dismissal to the Labour Court for adjudication in terms of section 191(5)(b)(i) of the LRA.
- 21] Furthermore, an employee, who has allegedly been dismissed automatically unfairly, cannot approach this Court on motion proceedings and claim reinstatement. The dispute *must* be referred to this Court by way of a statement of claim which complies with the requirements as set out in Rule 6 of the Rules of the Labour Court. Footnote 1 of the said Rules specifically states which disputes must be referred to the Labour Court in terms of a statement of claim and specifically includes disputes about an automatically unfair dismissal. Apart from the fact that the dispute in this case has not been referred to conciliation, it is also not competent in terms of the Rules of this Court for the applicant to have approach this Court on motion. Secondly, I have already pointed out that a certificate of non-resolution is a jurisdictional requirement. It is for this reason that this Court refused to refer the matter to the trail roll when Mr. Malema requested the Court to do so.
- 22] In light of the foregoing, the application is dismissed. As the matter is unopposed I make no order as to costs.

AC Basson, J

Date of proceedings and date of order: 2 March 2011.

Date of reasons: 24 March 2011

Appearances:

On behalf of the applicant:

Adv VMJ Malema instructed by Makhafola and Verster Attorneys