

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN DURBAN)

Case No: D286/10

Reportable and of interest to other Judges

In the matter between

DAVID JOHN RANGLES

APPLICANT

and

CHEMICAL SPECIALITIES LIMITED

RESPONDENT

JUDGMENT

AC BASSON, J

1] The respondent (Chemical Specialties Limited) has sought and the applicant (Mr. David John Randles) has consented to the determination of the issues as set out in paragraph [108] of the respondent's response to the applicant's statement of case on an *in limine* basis. Paragraph [108] reads as follows:

"[108] Whether the disclosures relied upon by the Applicant constitute

protected disclosures having regard to the definition thereof, and to the provisions of Section 5 of the Protected Disclosures Act No. 26 of 2000 ("the PDA"). In this regard the Respondent pleads that all material times:

[a] the Applicant was acting as a legal practitioner or a person whose occupation involves the giving of advice as contemplated by Section 5 (a) of the PDA;

[b] the disclosures relied upon by the Applicant were made to the Applicant with the object of and in the course of obtaining legal advice as contemplated by Section 5 (b) of the PDA;

[c] accordingly, the disclosures relied upon by the Applicant as having been made by him to the Respondent and the Johannesburg Stock Exchange are not included in the definition of protected disclosure set out in the PDA, in that way they were made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with Section 5 of the PDA."

- 2] The Court is requested to consider the following three questions:
- (a) Who bears the onus and duty to begin in relation to the issues raised in paragraph (108) (that being whether the disclosures relied upon are "*protected disclosures*", in particular, given the fact that the definition thereof excludes disclosures made by a legal advisor where the information was disclosed in the course of obtaining legal advice)?
 - (b) Whether the disclosures relied upon by the applicant constitute "*protected disclosures*" as defined by the Protected Disclosures Act 26 of 2000 ("the PDA"). In determining this question the Court is

asked to accept the following facts purely for the purposes of determining the legal point:

- (i) That the disclosures relied upon by the applicant constituted disclosures as defined in the PDA.
 - (ii) That the applicant was acting as a legal practitioner or person whose occupation involved the giving of legal advice as contemplated by section 5(1) of the PDA.
 - (iii) That the disclosures relied upon by the applicant were made to the respondent with the object of and in the course of obtaining legal advice as contemplated by section 5(b) of the PDA.
- (c) Thirdly the Court is asked to consider whether on the facts as set out by the applicant in its statement of claim, if they were all found to be true and correct without the hearing of evidence, the applicant has made out a case that the disclosures constituted “*protected disclosures*” as contemplated in the definition section of the PDA (the exception).

- 3] Before turning to these questions, it is necessary to briefly refer to the facts that gave rise to the present dispute and more in particular, the present application before the Court. In summarizing the facts I also had regard to the facts that were presented to my learned brother Cele, J in the urgent application that served before him under case number D42/201 (see the next paragraph).

The urgent application

- 4] The applicant brought an urgent application to interdict the respondent from proceeding with any disciplinary action or enquiry against him on the charges as set out in the charge sheet against the applicant dated 20 January 2010. Cele, J granted the following order:

*“(1) The respondent is interdicted from proceeding with any disciplinary action or enquiry against the applicant on the charges as set out in its charge sheet against the applicant of 20 January 2010 pending the outcome of a dispute referred to the Commission for Conciliation, Mediation and Arbitration, and if the conciliation does not resolve the dispute, **pending the adjudication of that dispute by the Labour Court.**”¹*

(2) The Respondent is directed to pay the costs of this application.”

- 5] It appears from the judgment in that matter that the respondent opposed the urgent application on two grounds namely that the applicant has not satisfied the several legal requirements (*facta probanda*) for the relief under the Protected Disclosures Act (PDA). Secondly the respondent disputed the applicant’s entitlement to rely on the PDA. Cele, J, however, concluded that the applicant has shown the existence of a *prima facie* right in the relief that he sought and that he ought *not* to be subjected to a disciplinary hearing “*until such time that this matter is properly heard and a decision on it is made*”.² The applicant has since remained on suspension with pay.

¹ Court’s emphasis.

² At paragraph [59] of the judgment of Cele, J.

General background facts

- 6] In his statement of claim, the applicant makes the following factual statements. He was employed by the respondent as an executive director. In this capacity he was responsible for, *inter alia*, the worldwide legal affairs of the respondent; managing all aspects of the respondent's public company and corporate governance obligations and overseeing the respondent's worldwide ethics and compliance program. It appears from the judgment of Cele, J (in the urgent application) that it is also common cause that the applicant had been practicing as an attorney for many years.
- 7] On 4 August 2009 the applicant made a report to the auditing committee and the board of directors of the respondent. In this report, the applicant advised the auditing committee and the board of directors that, in his opinion, the respondent contravened the law and the code of ethics of the respondent and/or the King II-report on standards of good corporate governance that the respondent purported to adhere to in its annual reports.
- 8] The respondent responded to the contents of the report on or about 12 October 2009. According to the applicant's statement of claim, he did not believe that the response was adequate or dealt appropriately with the issues and concerns raised by him in this report. On or about 30 December 2009 the applicant submitted a more comprehensive report to the Johannesburg Stock Exchange (the regulatory body for listed

companies) and to Mr. Wood (“Wood”) the managing director of the respondent.

- 9] The applicant raised various issues in both these reports. They are listed in paragraphs 11.1 to 11.13 of the applicant’s statement of claim. The allegations include the following: contraventions of the Companies Act; inappropriate use of company funds; the increase of earnings to certain directors without authority; failure to disclose financial interests as directors by Wood and the financial director, Mr. MacKinnon; inappropriate transfer of shares when the company was a private company; and, a double cession of the debtors’ books to different banks.
- 10] It appears from the judgment of Cele, J that a dispute between Wood and the applicant arose about a share entitlement of the applicant in the company. Although the applicant had resigned his position as a director he retained his position as an employee of the company. The civil claim against Wood for the applicant’s share entitlement is still pending.
- 11] On 4 January 2010 the applicant was handed a copy of the charge sheet, with two charges. He was also simultaneously suspended pending the disciplinary hearing. The applicant then approached the Labour Court for the order which was granted by Cele J (*supra*). As already pointed out, the applicant has remained on suspension with pay ever since.
- 12] The applicant subsequently filed his statement of claim in which he prays for an order that the disciplinary proceedings against him be declared to be an occupational detriment on account of a protected disclosure in

terms of the PDA. The applicant also prays for an order interdicting and restraining the respondent from proceeding with any such disciplinary action against him and from subjecting the applicant to any other occupational detriment as defined in the PDA on account of the fact that the disclosures made by the applicant constituted a protected disclosure. The applicant lastly prays for an order that he be compensated in an amount that this Court deems just and equitable.

- 13] The respondent subsequently filed its statement of response. It is in paragraph [108] (*supra*) of the statement of claim that the respondent disputes that the applicant has made out a cause of action in terms of the PDA.

The PDA

- 14] I do not for purposes of this judgment intend to dwell on the purpose of the PDA. Pillay, J in *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 ILJ 195 (LC) gave a detailed exposition of the purpose of the PDA (see paragraphs [166] *et seq*). I am generally in agreement with her exposition of the purpose of the PDA. Suffice to emphasise that whistleblowers need the protection of the law against suffering an occupational detriment when making a “*protected disclosure*” as defined in the PDA. This much is also clear from the pre-amble of the PDA where 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”.

Who bears the onus?

- 15] It is trite that the incidence of onus is a matter of substantive law and based upon broad principles of experience and fairness (see LAWSA vol 3(1) at paragraph 310.) In *Pillay v Krishna* 1946 A 946 at 951 – 952 the Appellate Division (as it then was) sets out the legal principles in relation to pleadings and the onus as follows:

“The first principle in regard to the burden of proof is thus stated in the Corpus Juris: " Semper necessitas probandi incumbit illi qui agit " (D. 22.3.21). If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: " Agere etiam is videtur, qui exceptions utitur: nam reus in exceptione actor est " (D. 44.1.1). (Exceptio does not mean, of course, an exception in the sense in which the term is now used in our practice.) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.”

- 16] The question whether or not an employee is entitled to the protection afforded by the PDA may arise in various contexts depending upon the nature of the occupational detriment. For example, an employee can claim

that he was dismissed following making a protected disclosure. Such a dismissal may constitute an automatically unfair dismissal in terms of section 189(1)(h) of the LRA. An employee can also refer a dispute in terms of section 191(13) of the LRA complaining that he or she was demoted on account of having made a protected disclosure as defined in the PDA.³ The ultimate onus to prove a fair dismissal rests on the employer (see section 192(2) of the LRA). Although the LRA is silent on the incidence of onus to prove an unfair labour practice, it is generally accepted that he or she who alleges an unfair labour practice (in other words the employees) must prove the allegation.

- 17] The onus to prove that an employee is entitled to the protection provided for by the PDA rests on the *whistleblower* (the employee). For example, if the whistleblower wishes to succeed with an unfair labour practice claim (on the basis that he or she had suffered an occupational detriment such as a demotion on account of having made a disclosure), the whistleblower must first prove that the disclosure was protected as contemplated by the PDA and that he or she was subjected to an occupational detriment.⁴ Having said this, it should be pointed out that the issue of onus in the context of the PDA is not specifically regulated in the PDA. The whistleblower must, however, set out his or her cause of action in his or her statement of case and in doing so must plead such facts that will bring

³ Section 186 (2) (d) of the LRA provides that an unfair labour practice mean any unfair act or omission that arises between an employer and employee involving an occupational detriment other than dismissal in contravention of the Protected Disclosure Act 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

⁴ See Grogan Workplace Law (10th edition) at page 85.

him- or herself within the parameters of the relevant sections of the PDA.⁵

18] I did not, however, understand the parties to disagree that the applicant bears the onus to prove that he or she is in fact entitled to rely on the statute pleaded (in this case the PDA). Where the parties differ is whether or not the applicant also bears the onus to prove that the disclosure made by him as a legal advisor was *not disclosed in the course of obtaining legal advice in accordance with section 5 of the PDA*.

The Protected Disclosures Act

19] The PDA defines a disclosure and protected disclosure as follows:

"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) that a criminal offence has been committed, is being committed or is likely to be committed;*
- (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;*
- (c) that a miscarriage of justice has occurred, is occurring or is likely occur."*

"protected disclosure' means a disclosure made to-

- (a) a legal adviser in accordance with section 5;*
- (b) an employer in accordance with section 6;*

⁵ See the urgent application under case no D42/2010 where Cele, J held as follow at paragraph [56]: *"The applicant appears to believe in the truth of his disclosure. The disclosure was first made to the board and when the applicant was not satisfied about the type of response given to them, he escalated the disclosure to the JSE as the respondent is a public company. His disclosure comes across as having been made in good faith. At trial he may success to prove it to be a protected disclosure."*

- (c) *a member of Cabinet or of the Executive Council of a province in accordance with section 7;*
- (d) *a person or body in accordance with section 8; or*
- (e) *any other person or body in accordance with section 9,*
but does not include a disclosure-
 - (i) *in respect of which the employee concerned commits an offence by making that disclosure; or*
 - (ii) ***made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5; “***⁶

20] Section 5 referred to of the PDA reads as follows:

- “5 Protected disclosure to legal adviser*
- Any disclosure made-*
- (a) *to a legal practitioner or to a person whose occupation involves the giving of legal advice; and*
 - (b) *with the object of and in the course of obtaining legal advice,*
- is a protected disclosure.”*⁷

Section 6 of the PDA protects employees who make “*protected disclosures*” to their employers. This section reads as follows:

- “Any disclosure made in good faith -*
- (a) *and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or*

⁶ The Court's emphasis.

⁷ *Ibid.*

(b) *to the employer of the employee, where there is no procedure as contemplated in paragraph (a)."*

21] The protection granted to the whistleblower is set out in section 3 of the PDA. In terms of this section no employee may be subjected to any occupational detriment by his or her employer on account or partly on account of having made a protective disclosure. It is, however, also clear from the provisions of the PDA that the protection afforded by the PDA is not unconditional and that certain requirements must be met before an employee may be entitled to the protection afforded by the PDA. The protection afforded to an employee (the whistleblower) must therefore be understood by reference to the definition sections which define what is a disclosure and what constitutes a "*protected disclosure*". These sections should also be understood against the general purpose of the PDA which is to encourage a culture of whistle blowing.⁸

Legal advisors

22] Legal advisors appear in the PDA in two contexts.

- (i) The first is a disclosure made by an employee (the whistleblower) "**to**" a legal advisor. It is clear from the definition of what constitutes a protected disclosure that a disclosure made "**to**" a legal adviser (in terms of section 5 of the PDA) may be considered to be "*protected*" disclosure.

⁸ See the introductory paragraph of the PDA which reads as follows: "*To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.*"

- (ii) The second is a disclosure “**by**” a legal advisor of certain information. If regard is had to the definition of a “*protected disclosure*” it appears that what is *not* protected in terms of the PDA is a disclosure “**by**” a legal advisor of the information that was disclosed to him or her by an employee “*in the course of obtaining legal advice in accordance with section 5*”. The person who will therefore not be able to claim the protection afforded by the PDA is firstly, the person whose occupation involves the giving of legal advice (section 5(a) of the PDA) *and* secondly, if the person (in his capacity as a legal advisor) receives the disclosed information from someone (the whistleblower) who disclosed the information with the object of and in the course of obtaining legal advice (section 5(b) of the PDA). Once these two requirements have been met, the disclosures (*by* the legal advisor) will not be protected in terms of the PDA. What therefore appears to be specifically excluded from the protection of the PDA is that information disclosed to a legal advisor which will normally falls within the parameters of what is referred to as “*legal privilege*”. (I will return to the issue of legal privilege in more detail hereinbelow.)

Onus of proof

- 23] The crux of the dispute now before the Court, concerns who bears the onus to prove that section 5 of the PDA applies or do not apply. The

respondent argued that there are certain jurisdictional requirements that must be met for a whistleblower to fall within the ambit of the protection afforded by the PDA such as, *inter alia*, that the whistleblower must be an employee. In addition hereto the PDA will not apply if the disclosure is not a disclosure as contemplated by the PDA. I am in agreement with this submission. A party relying on a statute bears the onus to bring him- or herself within the four corners of the act he or she relies upon. Does that also mean that the applicant now bears the onus to prove that the *exclusion* provided for in section 5 of the PDA does *not* apply to him?

- 24] The applicant argued that the *respondent* bears the onus to prove that the exclusion provided for in section 5 of the PDA applies in light of the fact that he (the applicant) has not in his statement of case referred to the provisions of section 5 apart from a reference that he, *inter alia*, handled the respondent's legal affairs. Nor did he allege that the provisions of section 5 do not apply. Put more bluntly: The applicant did not plead such facts in his statement of claim that would *exclude* him from the exclusion provided for in the definition of a protected disclosure. The issue of the applicant's exclusion from protection by virtue of the fact that he is the respondent's legal advisor, is raised for the first time in the respondent's response as a *defense* to the applicant's claim that he is entitled to the protection afforded by the PDA on the facts set out in the statement of claim. It is lastly argued that in accordance with the general principles relating to the incidence of the onus of proof, the *respondent* therefore

bears the onus to prove that the exclusion provided for in the definition of a “*protected disclosure*” applies by virtue of the fact that the applicant was the respondent’s legal advisor at the time the disclosures were made and that he had received the information as contemplated by the PDA.

- 25] In summary: The dividing line in the argument therefore appears to be the following: The respondent is of the view that that applicant bears the onus to prove that the exclusion provided for in the definition of a protected disclosure (re legal advisors) does not apply to him. In other words, the applicant should have made the averment that section 5 does not apply to the disclosures made by him in his statement of claim and therefore the applicant bears the onus in this regard. The applicant is, however, submitting that the respondent is raising a *defense* namely that, because the disclosures were made “*by*” a legal advisor in the context provided for in the PDA. The disclosures therefore do not attract the protection provided for in the PDA. The *respondent* therefore attracted the onus to prove that the exclusion applies.

Legal privilege

- 26] The parties were not in dispute that legal privilege is an important and in fact an essential pillar of our legal system. As already pointed out where the parties differ is *who* bears the onus (in the context where the applicant - who is a legal advisor - made certain disclosures) to prove that his disclosures fall within or without of the parameters of protection afforded to by the PDA.

27] The principle of legal privilege is firmly entrenched in our common law and refers to the professional privilege that attaches to information disclosed to a legal advisor for the purpose of obtaining legal advice. It is recognised that it is necessary that members of the public (and other legal entities such as companies) may, and should in good faith, seek legal advice from a legal advisor with the confidence that such questions asked by and information provided to the legal advisor during this process would not be disclosed. The importance of legal privilege particularly in an adversarial legal system was confirmed by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 141 (CC). The Constitutional Court also accepted that the right to professional privilege has crystallised into an implicit constitutional right:

“The right to legal professional privilege

“[183] The applicants did not assert that the Constitution itself protects legal professional privilege and I therefore do not need to explore that question now. We are thus primarily concerned with the common-law right to legal professional privilege, and with how that right is protected by s 29(11) of the Act. Again, because it is accepted by all the parties to this case that the legislation and common-law principles in question are consistent with the Constitution, the applicants' arguments must be assessed, in the first instance, in the light of the applicable provisions of s 29 of the Act. Of course, both the common-law right and the statutory provisions must be dealt with in a way that complies with s 39(2) of the

Constitution. I turn first to consider the right to privilege and then deal with s 29(11).

*[184] The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. **It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients.** This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of s 35 of the Constitution, and for that reason it is to be taken very seriously indeed.*

[185] Accordingly, privileged materials may not be admitted as evidence without consent. Nor may they be seized under a search warrant. They need not be disclosed during the discovery process. The person in whom the right vests may not be obliged to testify about the content of the privileged material. It should, however, be emphasised that the common-law right to legal professional privilege must be claimed by the right-holder or by the right-holder's legal representative. The right is not absolute; it may, depending upon the facts of a specific case, be outweighed by countervailing considerations.”⁹

See also footnote 123 where the Constitutional Court referred with approval to the following extract from Zeffertt:

⁹ Court's emphasis.

“See Zeffertt et al The South African Law of Evidence (formerly Hoffmann & Zeffertt) (LexisNexis Butterworths, Durban 2003) at 557 - 8 for a discussion of the possibility that the right to legal professional privilege has crystallised into an implicit constitutional right.”

- 28] See also *S v Safatsa* 1988 (1) SA 868 (A) at 886 where the Court emphasised the importance of legal privilege with reference to the High Court of Australia in *Baker v Campell*:

*“The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired: see *Waugh v British Railways Board* [1980] AC 521 at 535, 536....*

*The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. **It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation....**”¹⁰*

- 29] Legal privilege extends to both *external* and *internal* (salaried) legal advisors (the so-called in-house lawyers). See *Mohamed V President of*

¹⁰ *Ibid.*

The Republic of South Africa and Others 2001 (2) SA 1145 (CPD) where the Court held as follows:

'8. The extent of legal professional privilege

.... The learned authors of the leading textbook on evidence Hoffmann and Zeffertt The South African Law of Evidence 4th ed at 250 - 1 deal with the question as follows:

'Many qualified lawyers are, today, employed as full-time, salaried legal advisers by corporations or statutory bodies. It was held in Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (supra) that, because a salaried legal adviser, whether a barrister or a solicitor, who is employed by a government department, has the same duties as a lawyer in private practice, professional privilege, within defined limits, attaches to confidential communications between the salaried adviser and his "client", that is to say, his employer. It is quite clear from the tenor of the decision that the same would apply to a private commercial concern. The view of Lord Denning MR to this effect has, as its rationale, that the rules of privilege had been worked out when most legal advisers were in independent practice. Today, things are different; and salaried legal advisers

". . . are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the

same duties to their client and to the Court. They must respect the same confidences. They and their clients have the same privileges."

.....Leading modern commentators accept categorically that the privilege extends to communications made to salaried legal advisers. Whether such an adviser will, in South Africa, be regarded as acting in a professional capacity, is an open question.'

The leading modern commentators to which Hoffmann and Zeffertt refer are collected in footnote 8 at 251 and, having read both, I am satisfied that the authors are correct in their comment that in England privilege extends to communications made to salaried legal advisers.

The authors of the more recent South African textbook on the law of evidence, Principles of Evidence by Schwikkard Skeen & Van der Merwe, deal with the topic more tersely but in the same vein. At 123 para 10.3.2.1 the learned authors deal with the topic of acting in a professional capacity as follows:

"Whether an adviser is acting in her professional capacity will be a question of fact in each case. Although a strong inference can be drawn that this requirement has been fulfilled where a fee has been paid, the absence of such payment does not necessarily mean that an adviser was not acting in her professional capacity. Hoffmann and Zeffertt submit that the weight of legal opinion in England supports the view that salaried legal advisers (that is those employed by corporations and statutory bodies) must also be considered as acting in a professional capacity for the purposes of legal professional privilege. Whether the South

African Courts will follow this approach remains an open question.'

....The respondents relied upon the dictum of Lord Denning in Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise. The relevant part of the dictum (at 376f - 377b) reads as follows:

'the law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the Judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the Court. They must respect the same confidences. They and

their clients have the same privileges. I have myself in my early days settled scores of affidavits of documents for the employers of such legal advisers. I have always proceeded on the footing that the communications between the legal advisers and the employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned. There are many cases in the books of actions against railway companies where privilege has been claimed in this way. The validity of it has never been doubted. I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser...

...To conclude, I believe that the rules relating to professional privilege, as they are currently understood, should remain confined to the relationship between legal practitioners in private practice and their clients. But, because of the anomalies that I have demonstrated in the law as it now stands, I think a new privilege has to be created, a privilege that relates to any confidential communication whose secrecy may be regarded as serving the public interest. Anyone who has made a confidential communication to any adviser should be able to claim it. If he does so, the court should be required to determine, on a social balance,

whether society would best be served by disclosure or non-disclosure. And if the court should find it necessary to hear the communication to determine this issue, it must be entitled and required to hear the evidence in private. By this relatively simple means the present invidious position in which doctors, psychiatrists, clergymen, journalists, accountants and many others are put by our law would be considerably ameliorated.'

.....

In the circumstances I accordingly find that legal professional privilege can lawfully be claimed in respect of confidential communications between Government and its salaried legal advisers when they amount to the equivalent of an independent adviser's confidential advice. This finding is not, however, dispositive of the matter."

- 30] It is also a general rule that the person who claims legal privilege also bears the onus to prove the circumstances which justifies it. See *Mohamed (supra)* where the Court held as follows at paragraph 5 of the judgment:

"5. The onus of proof

It is common cause that the onus in respect of the claim of legal professional privilege rests upon the respondents. This accords with first principles and is in line with the notion that the onus of establishing a constitutionally acceptable justification in terms of s 36 of the Constitution rests upon the party relying on it (see S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) at para [9]).

The applicant conceded that a claim to legal professional privilege constitutes a justifiable limitation within the limits prescribed by s 36 of the

Constitution. This concession was rightly made in the light of the decisions in Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625 (E) at 643C; Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others 1995 (2) SA 433 (SE) at 453C - D; and Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T) at 850B.”

- 31] Having broadly restated the well-known common law principles relating to legal privilege, the next question to consider is whether or not section 5 of the PDA retains the common law principles regarding legal privilege? I am of the view that it does. A plain reading of section 5 of the PDA appears to reaffirm the common law principle of legal privilege attaching to the information disclosure to a legal advisor for the purpose of obtaining legal advice. I am also persuaded by the argument that there is a presumption that the legislature intends to amend the common law as little as possible.
- 32] I am furthermore not persuaded that it could have been the intention of the legislature to place an onus on the whistleblower to prove a *negative* (namely that the exclusion in respect of information provided for by a legal advisor does not apply). I also do not accept that there rests an onus on the applicant to plead that the information he received was not privileged prior to the issue being raised by the respondent. I therefore accept that the privilege afforded by section 5 of the PDA is properly raised by the respondent in paragraph [108] of the pleadings as a defense or as an exception to the relief claimed.
- 33] In the event, I am of the view that in setting up a defense to the case made out by the applicant (in terms of paragraph [108]) of the statement of

case, the respondent has attracted the onus of proof in this regard. I am of the view that this approach is in accordance with the common law principle to the effect that the party who claims professional privilege bears the onus to prove the circumstances which would justify such a reliance. As was pointed out by the Court in *Mohamed* (at 1150), a claim to legal professional privilege constitutes a justifiable limitation within the limits prescribed by s 36 of the Constitution.¹¹ The person who wishes to rely on a claim of legal professional privilege must place such facts before the Court to justify its reliance on legal privilege. Lastly I am of the view that there are persuasive policy considerations in not placing an unnecessary onus on the person seeking the protection of the PDA. By doing so it may have the effect of preventing or deterring a legitimate whistleblower from claiming the protection afforded to him or her by the PDA. See also *Tshishonga* (*supra*) where Pillay, J held the following in respect of the question who bears the onus of proving that disclosures were made “*in good faith*” as required by the PDA:

“To saddle the employee with a burden of proof would set too high a standard which, if not met, could disqualify the disclosure and bar an enquiry into whether the employer breached the PDA by subjecting the employee to an occupational detriment. Unfair labour practices and unfair dismissal are occupational detriment. Ultimately, the employer bears the burden of proving that it did not commit an unfair labour practice or dismiss the employee unfairly.”

¹¹ In this case the claim was made in respect of information given to a legal advisor in the employ of the State.

- 34] It follows in my view from the foregoing that not only does the respondent bears the onus to prove the exclusion provided for in the PDA is applicable, but also to begin. Although the mere fact that a person bears the onus does not necessarily mean that that person also have to begin, I am of the view that the respondent in these circumstances also attracts the duty to begin. The respondent raised the defense namely that the disclosures were made by a legal advisor in the circumstances envisaged by the PDA. Accordingly it is, in my view reasonable to accept that the respondent is able to present evidence that the motivation of the person conveying the information to the legal advisor did so for the purpose of obtaining legal advice. I am further of the view that it would be unfair to require of the applicant to commence leading evidence about a subjective event which may not be within his personal knowledge.
- 35] In light of the above order it is not necessary to consider the exception raised against the pleadings of the applicant.
- 36] There is one last issue that needs to be dealt with. It appears from the respondent's heads of argument that the respondent is seeking an order discharging the interim interdict granted by Cele, J. It was argued that it is clear from his order that the respondent is interdicted "*pending the adjudication of that dispute by the Labour Court*". I have declined to discharge the order for the following reasons: Firstly, there is no application before me for the discharge of the order. Secondly, on a plain reading of the order disciplinary action is interdicted pending the

adjudication of the dispute by the Labour Court. The purpose of these proceedings was to determine preliminary matters. The real issue or dispute between the parties as it is formulated in the pleadings is not before this Court.

37] In the event the following order is made:

1. The respondent bears the onus and the duty to begin on the issues in paragraph [108] of their response to the statement of claim.
2. The exception is dismissed.
3. The respondent to pay the applicant's costs in determining these issues.

AC BASSON, J

DATE OF HEARING: 29 NOVEMBER 2010

DATE OF JUDGMENT: 1 February 2011

FOR THE APPLICANT:

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FOR THE RESPONDENT:

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