



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG

CASE NO: JS 1043/12

In the matter between:

SOLIDARITY obo J J H ROOS

Applicant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

THE MINISTER OF POLICE (N.O.)

Second Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE
(N.O.)**

Third Respondent

Heard: 20-21 February 2014

Delivered: 22 April 2014

Summary: (Protected Disclosure Act – employee moved to a functionally non-existent post – claim for compensation – sterilisation of exercise of skills and of promotion prospects in internal auditing capacity - test for compensation).

JUDGMENT

Introduction

Summary of the Applicant's Claim

- [1] The applicant in this matter, Col JJH Roos ('Roos'), claimed that he was removed from his position as Head of Internal Audit of the Crime Intelligence Division of the South African Police Services and appointed as the head of a unit that was yet to be established, known as Inspection and Evaluations because he had made a number of disclosures about fraud and corruption committed in relation to the Secret Service Account of Crime Intelligence. He alleged that these disclosures which had been made to his superiors and to the Directorate of Special Operations ('the Scorpions') over a period from 2004 to 2009 amounted to protected disclosures in terms of the Protected Disclosures Act, 26 of 2000 ('the PDA') and that his transfer to the Inspection and Evaluations unit against his will amounted to an occupational detriment under the PDA. Consequently, he claimed that these actions amounted to an unfair labour practices in terms of the Labour Relations Act 66 of 1995 ('the LRA').

Preliminary Matters at The Commencement Of Proceedings

- [2] On 7 November 2013 the trial was postponed at the request of the respondents, mainly because two of their principal witnesses, Lieutenant General RH Mdluli ('Mdluli') and former Commissioner M Mphego ('Mphego') were not available to testify. At the time, as was also the case when proceedings resumed Mdluli was on suspension and Commissioner Mphego had already left the SAPS. When postponed proceedings commenced in February 2014, the situation had not improved in this respect, even though the respondents had attempted to serve a subpoena on Mdluli on 4 February 2014.
- [3] The sheriff's return of service stated that persons at Mdluli's residence refused to open the door and telephoned the general who instructed them not to receive the subpoena which was then explained to the occupants of the premises and attached it to the main gate. In his opening statement respondents' counsel, Mr *W Mokhari* SC, said that General Mdluli must have

known what the subpoena was concerned with because on previous occasions letters had been addressed to him to avail himself for the purposes of the case. In passing, I note that the respondents did not request the court to invoke the provisions of section 35(2)(a)(ii) of the Superior Courts Act 10 of 2013 to bring General Mdluli before court following his apparent attempt to evade service on the subpoena. Mr *Mokhari* also advised the court that Commissioner Mphego had informed the respondent's legal team that he could not consult with them because he had already consulted with the applicant's legal representatives. Subsequently however, he agreed to consult with the respondent's legal representatives, but did not honour this commitment.

[4] Because the respondents regarded these two individuals as their principal witnesses, they were unable to dispute the merits of the applicant's claim that he had been subjected to an occupational detriment as a result of having made protected disclosures under the PDA about unlawful and corrupt activities in the Crime Intelligence Division. Mr *Mokhari* then made a statement in open court to the effect that:

- 4.1 The respondents could not oppose the applicant's claim on the merits and accordingly abandon the defences raised on the merits to his claim.
- 4.2 The respondents further recorded the applicant's entitlement to transfer to a post comparable to the one occupied by him prior to his transfer at the instance of Mdluli that is the subject matter of these proceedings, the precise nature of the post to be identified in consultation with the Applicant before an order is made in the proceedings or, alternatively to be determined by the court after hearing evidence.
- 4.3 The respondents contested the applicant's claim for compensation on the basis that no payment or alternatively a lesser amount than twelve months' remuneration should be awarded after evidence has been heard on the issue.
- 4.4 Lastly, the respondents tendered the costs of the proceedings including the costs of two counsels.

- [5] In consequence, the only issue for the court to determine was the matter of remedies as described in paragraphs 4.2 and 4.3 above.
- [6] Before any evidence was heard the parties attempted to negotiate a draft order in relation to the placement of the applicant as envisaged by the respondents' statement in open court. Ultimately a final draft order could not be agreed to in its entirety and the parties agreed that the court should settle the final wording in the exercise of its discretion.
- [7] The applicant then led evidence in support of the relief he sought.

Applicant's evidence

- [8] The Secret Services Account, having a multimillion rand budget, is an account that is established within Crime Intelligence. The purpose of the account is to fund undercover operations that would not be operated by the normal account functions of the SAPS. The management of the account is conducted through a Chief Financial Officer in charge of the account, who reports to Parliament separately from the normal SAPS reporting channel to Parliament. The primary function of crime Intelligence was characterised by Roos as the gathering information mostly by undercover work on criminal activities before crimes are committed, such as monitoring the activities of crime syndicates, and then disseminating the information to the relevant operational units so that they can act on it.
- [9] In 2003 the applicant was appointed head of the Internal Audit Department and was responsible for the establishment of the first Internal Audit Section concerned with the Secret Services Account. As head of internal audit the applicant was responsible to see that there was no maladministration of the Secret Service account and that funds were used for the projects for which the funds had been allocated. In all provinces there are Secret Service advance offices handling cash up to the value of approximately R3 million because most of the operations conducted in the section require cash. Part of the auditing function was to examine the documentation provided to vouch for the cash

advances. Like the operations funded in this way, the related documentation is also kept secret.

- [10] In October 2004, the applicant discovered discrepancies in the accounts of the Head Office advance fund. These discrepancies related to payments to a cleaning services company that serviced premises used by Crime Intelligence in undercover operations. The company was co-owned by a certain colonel, who worked in Crime Intelligence, together with his spouse. The applicant testified that this arrangement was completely irregular. The practice was that three quotations had to be requested before services of this kind could be requisitioned and it was found that in this process false quotations had been obtained. At the time The colonel in question was also 'a good friend' of Major-General S Lazarus ('Lazarus'), the Chief Financial Officer of Crime Intelligence.
- [11] The applicant raised his concerns with the legal officer, Brigadier Van Vuuren ('Van Vuuren'), and with a member of the Auditor General's office, Brigadier G Steyn ('Steyn'), who also audited the Secret Service account. He was later advised that there was *prima facie* evidence of fraud in the operation of the account. The applicant had also found evidence of so-called "cover quoting" for repairs to vehicles. This was to ensure that a repairer, who was also a friend of Lazarus, obtained the work. Essentially, this practice amounts to obtaining a spurious quotation against which the favoured repairer's quote would appear more reasonable. Before he obtained a legal opinion from Van Vuuren, Roos was asked by Mphego, who was the Deputy Divisional Commissioner in charge of Crime Intelligence and second in command of the section, what he was busy with. When he told him, Mphego was furious and ordered him to stop his investigations and provide him with a report on the matter within a day. He also instructed Roos not to report the matter to any other persons.
- [12] Roos believed that Mphego was angry because the investigation implicated people he was friendly with as well as implicating Lazarus. Nevertheless, the applicant compiled an information sheet which he provided to Mphego. Because of Mphego's instruction he conducted no further investigations into the cleaning services company or the cover quotations. He was somewhat puzzled that the Commissioner appeared to know what he was investigating and

conveyed this to Steyn. Steyn advised Roos that he had been approached by Divisional Commissioner R Lalla ('Lalla'), together with a Brigadier Ellis. They had asked him what Roos was working on. Steyn told Roos that he believed that his offices were being 'bugged' as it seemed that the pair had been aware of his earlier conversation with the applicant.

[13] In November 2004, Roos was summonsed to another meeting with Mphego, which was also attended by Lazarus and Van Vuuren. On this occasion, Mphego expressed his anger that the Commercial Crime Unit was now reportedly investigating the matter. It was clear to Roos that Mphego assumed he had passed on information about his investigation to that unit. Mphego warned Roos that he was young and he could end his career. Roos protested his ignorance about the role of the Commercial Crime Unit. Van Vuuren then clarified that he was the person who had forwarded the matter to the Commercial Crime Unit. When this was revealed, Roos was asked to leave the meeting.

[14] On 30 August 2005, Mphego issued a letter to Roos informing him that Senior Superintendent Chan Goolam ('Goolam') would henceforth be the head of Internal Audit, despite the latter having no internal auditing qualification nor any experience in internal auditing. According to Roos, Goolam was also a close friend of Lazarus. The applicant made it clear that he was not going to accept this because he had been appointed as Head of Internal Audit and he was convinced that the only reason for the step was because of the fraud and corruption which he had uncovered. Mphego's response was simply that this was a management decision and Roos must accept it. Nonetheless, the following day Mphego advised the applicant that he would alternate on a monthly basis with Goolam as head of internal audit. In Roos's view this was completely unworkable.

[15] During September that year Roos took a weekend off, having been given permission by Gen Lazarus. He received a call from a neighbour that Saturday advising him that there had been a break-in at his house. His papers were strewn about and various notes from his briefcase concerning his fraud investigations were amongst the items that had been removed. It was at that

stage he began to become concerned about his own family's safety as it appeared that the burglary was linked to his work.

- [16] In November that year the post of Head of Internal Audit was upgraded to the rank of Brigadier and Steyn was successful in obtaining the appointment. Roos had also applied for the position.
- [17] In February 2009, Roos was contacted by Colonel T Tolkin ('Tolkin') of the Directorate of Special Investigations ('the Scorpions'). Tolkin advised him that on the instruction of the Minister of Police, the Scorpions were busy with an investigation into fraud and corruption arising in the Secret Services Account and they were approaching him for information. Roos sought and was given an assurance that he would be treated as someone making a protected disclosure in terms of the PDA. Roos then met twice with Tolkin and gave him certain documents.
- [18] In the same year, Mdluli was appointed as Divisional Commissioner of Crime Intelligence. Sometime in July 2009, Roos was contacted by a Col Odendaal ('Odendaal'), also of Crime Intelligence, who told him that Mdluli wanted to set up a meeting with the applicant in a hotel room, an event which apparently was not that unusual in the section. It was the first time that Roos met Mdluli, who told him that he wanted to clean out the corruption in Crime Intelligence and specifically mentioned the name of Lazarus. Two or three days after this meeting, Roos was given a written order by Mdluli instructing him to head up the task team that would conduct the investigation. At that time, the applicant believed that Mdluli was sincere in his intentions to clean up the corruption and prosecute those responsible. Accordingly, Roos was happy to provide Mdluli with a full briefing on all the information he had gathered. Subsequently, Mdluli held weekly meetings with the team engaged in the investigation. In August 2009 Mdluli advised the team that there was an informant in Limpopo who wanted to provide evidence on fraud and corruption particularly involving Lazarus and some of his associates. Pursuant to this, on 26 August 2009, Roos provided Mdluli with a report on the Limpopo source.

- [19] Flowing from the information obtained, which according to Roos concerned serious allegations, the team sought to obtain certain documents about the Secret Service Account, but Lazarus refused to release them. Consequently, the applicant approached Mdluli for assistance and the latter advised him to draft a letter for his signature granting Roos permission to obtain the documents in question.
- [20] However, when Roos asked Mdluli to sign the letter, Mdluli would not do so and Roos sensed that there had been an attitude change on Mdluli's part. Mdluli was no longer friendly and, in the words of Roos, Mdluli "was not the same person who had appointed the team to investigate the fraud and corruption." The applicant said he could no longer arrange any meetings with Mdluli about the investigation. When asked if he could explain the change in attitude, the applicant could only say that he had heard that Mdluli had befriended Lazarus, whom they were supposed to be investigating, and that Mdluli had gone overseas on a trip to Singapore with Lazarus and others who were under investigation. The applicant found himself in a very awkward position without Mdluli's continued support for the investigation and given Mdluli's newfound familiarity with those under investigation.
- [21] On 22 October 2009, the Roos's office at work was broken into, but none of the documents relating to his investigation were taken as he did not keep those in his office. In November, the applicant was contacted by Odendaal, who had been part of the investigating team. Odendaal requested him to come to a meeting with Colonel A Dramat ('Dramat'), who was heading the Hawks. There was a belief that the investigation might be relaunched with the assistance of the Hawks. However, Roos was reluctant to get involved with the Hawks, because the investigation had been initiated at the instance of Mdluli, his superior officer.
- [22] On 3 December 2009, shortly after the overseas trip mentioned above, the applicant was summonsed to attend a meeting at Mdluli's office. Present at the venue were Mdluli, Major-General J Mabaso ('Mabaso'), Odendaal and two other senior officers. While the applicant and others were waiting in the boardroom of Mdluli, the latter came out of the office together with Lazarus and

Van Vuuren. Mdluli confronted the applicant as to who had said they could approach Dramat. The applicant explained that he knew that some of the team had met with Dramat but that he did not go himself.

[23] In the same meeting, the investigating team was attacked by Lazarus who accused them of being 'pathetic' investigators and he questioned how they dared to investigate him. He also threatened to charge the investigators. Roos appealed to Mdluli about how these things could now be said when they had conducted the investigation at his behest. Mdluli's final response was that the organisation was bigger than any individuals and the investigation must be brought to an end.

[24] This turn of events was upsetting to the applicant, because in his view there was ample evidence of fraud and corruption but now that Mdluli had made common cause with some of those under investigation, it had to be disbanded. Following the meeting, the investigation did indeed come to a halt and Roos returned to his normal duties in the Internal Audit section. However, in June 2010 fresh information came to light about additional 'cover quoting' practices and grossly inflated car repair bills of up to R100,000 to R120,000 being paid to a certain repair company. While the applicant was still busy with that audit, he was instructed to stop it by Steyn, his superior.

[25] Soon afterwards Roos received a letter from Mdluli. The letter heralded the establishment of an "inspection and evaluation capacity" within Crime Intelligence. Mdluli expressed the ostensible reason for this new initiative thus:

"It came to the attention of this office that major deficiencies and weaknesses exist in Crime Intelligence, related to Financial Services, Supply Chain Management and Human Resource Management. This could also be attributed to the centralisation of Crime Intelligence and effect it has on the command and control."

[26] The letter went on to identify Roos as the candidate to head this 'capacity', augmented by two other staff members, a lieutenant colonel and a warrant officer, who had asked to be transferred out of Internal Audit. The task set for the unit was "to identify and report deficiencies and weaknesses within the

Crime Intelligence environment on a national as well as a provincial level". The reporting line of the unit was to be to the Head: Operational and Generic Support, Crime Intelligence, Head Office. Roos was directed by Steyn to take up the new position.

[27] Roos pointed out that this position was completely removed from the Secret Service Account and the audit work that he was previously doing. Prior to receiving the letter from Steyn there had been no discussion with him about the establishment of this unit which would fall under the open account section of Crime Intelligence. Moreover, the establishment of the unit had not even been approved by the National Commissioner yet. Roos tried to get a meeting with Mdluli about the appointment, but the latter always found excuses not to meet with him. Consequently, on 5 July 2010 the applicant wrote to Mdluli thanking him for the opportunity to take up the new appointment, but declining it. His reasons for doing so were that he had worked for more than twenty years for the SAPS, mostly in the internal auditing environment, for which he also was qualified. Further, he foresaw that it could damage his career prospects as an internal auditor, whether in the SAPS or elsewhere if he were removed from the internal audit function. He requested that he be allowed to remain where he was and to be given the opportunity to progress because he had already held his current rank for ten years. Roos also recorded his unsuccessful attempts to meet with Mdluli to discuss the matter and complained of the pressure being put on him to leave the section dealing with the Secret Services Account.

[28] On Friday 9 July 2010, Roos was advised by Tolken, who was now working in Crime Intelligence: Counter-Intelligence Investigations following the disbandment of the Scorpions, that Mdluli had instructed Major General Mokgabudi ('Mokgabudi'), the Head of Counter intelligence, to personally investigate and recover classified documents allegedly stolen from the Secret Services Account. A letter to this effect had been issued to Mokgabudi on the same date. On the following day, the applicant received a threatening note in his post box at home which read:

"U keep digging now

its over

nice house”

(sic)

The lettering of the note appears to have been cut and pasted from other documents. The applicant believed that this threat was directly connected to his investigations and that the people behind it would stop at nothing. It upset him greatly and he was concerned about his family's safety.

[29] Mokgabudi summonsed the applicant and Tolkin to a meeting on 12 July 2010. He advised them that he had been tasked with the investigation and also that he had been instructed to find out who had been the whistleblower who had given information about the investigation to the Scorpions in 2009. The applicant pointed out that he had never stole in any documents and that if Mdluli who had appointed him to do the investigation had requested documents from him he would have provided them. The same day Tolkin made an affidavit about his meeting with a whistleblower from Crime Intelligence and the Scorpions investigation into the fraud within the secret services account which flowed from that. In his affidavit, he did not identify the applicant by name as the whistleblower.

[30] The applicant handed over copies of the documents pertaining to his investigations to Mokgabudi, which he detailed in an information note dated 13 July 2010. The Mokgabudi advised him that it appeared that there was enough evidence in the documents to prove that fraudulent activities had taken place, and that he would report this to Mdluli, which he apparently did, though unsurprisingly nothing came of it. On that day he was also issued with a written notice, apparently signed by Mdluli, of the latter's intention to transfer him to the new post. He was invited to make representations on the intended transfer within an unspecified number of days, failing which he would be deemed to have waived his rights. Prior to this, the applicant had never received any response to his letter in which he had given his reasons for not wanting to move to the position.

- [31] The Internal Audit section relocated to a different building at the end of July 2010 but Roos was told to remain where he was to establish the new unit he had been assigned to. On 27 July 2010, the applicant wrote to his superior in Operational and Generic Support, General F N Vuma ('Vuma'), requesting the provision of certain basic infrastructural support and the appointment of appropriate staff. He also asked that a needs analysis be conducted. On Vuma's request, Roos drafted a relatively detailed proposal on the functions of the new unit so that a work study could be conducted. The applicant explained that this step would normally be done *before* any new structure was established. He was later instructed to request the lateral transfer of staff to the new unit even though no work study had been conducted and that the level of posts in the unit could not be determined.
- [32] In late August 2010, the applicant was summonsed to a meeting with Mdluli, which was attended by Lazarus and Mokgabudi, among others. This was the first time the applicant had met with Mdluli since December the previous year. Mdluli accused the applicant of investigating him, based on an alleged anonymous phone call which had been received. However, when the applicant suggested that perhaps he should leave the Crime Intelligence division because of the victimisation he was being subjected to, Mdluli insisted that he had to stay in order to establish the new unit.
- [33] In late November 2010, Vuma advised the applicant that she was moving to the inspectorate division of SAPS and that Mdluli had told her the new unit would not be established. Mdluli flatly denied this when asked about this by Roos. He told Roos not to believe Vuma and he must just be patient as the new unit was going to be established. By then, the applicant had done no concrete operational work in his new role, save for one investigation into the open account of the Advance Office. The lack of work was very frustrating for Roos, but he was told simply to be patient until the unit was properly established. He found it extremely frustrating effectively doing nothing and occupying an office in a virtually deserted building completely cut off from the Crime Intelligence division with the two members of staff who had been transferred with him.

- [34] The applicant did have a further meeting with Mdluli in mid-December 2010, at which Mdluli yet again confirmed that the unit was going to be established and that the post level of the head of the unit would be that of a Brigadier. By that stage the applicant had lost faith in anything that Mdluli said and did not really believe him. Nevertheless, the applicant complained that no work study had even been done yet and this prompted Mdluli to phone Colonel Lombard, who worked in the work study section of head office, to look into it. Between then and March the following year a number of meetings took place with Mdluli and Lombard took place, apparently at the instance of the applicant, in an effort to get matters moving. In March 2011, a new proposed structure for the Crime Intelligence division was produced. For the first time, the Inspection and Evaluation unit appeared and it indicated that a Brigadier would indeed head the unit.
- [35] Even when Mdluli was been suspended in 2011 arising from his alleged involvement in kidnapping and murder, the applicant continued with his efforts to galvanise support from other Commissioners to get his unit going, but received a consistently negative response. He was advised that he had to wait until Mdluli came back, or was fobbed off with more promises that something would be done. At some stage he did secure a very brief audience with a Major General Mantshashe ('Mantshashe'). Roos appealed to him to assist him with the establishment of the unit and Mantshashe promised to speak to Lazarus about it but never got back to him.
- [36] Sometime in May 2011, the applicant learned that the Department of Transport was going to occupy the Forum building where his unit was currently situated and that all remaining SAPS offices would have to leave the building. He wrote to the new head of his section Brigadier MO Nemutanzhela ('Nemutanzhela') asking for his unit to be accommodated in the envisaged relocation of other Crime Intelligence units to the Sancardia building. Nothing had been conveyed to Roos through official channels about any of these arrangements. Nemutanzhela never replied to the letter and some two years later the applicant's unit was ejected from the building and relocated to its current offices. The applicant's experience was that nobody wanted to communicate

with him and he was treated 'like a cancer', even though, in terms of the lines of authority, he was supposed to communicate with various Divisional Commissioners.

- [37] In mid-June 2011, Roos was formally requested to assist the Hawks or, more mundanely, the Directorate for Priority Crime Investigation with the investigation of fraud and corruption which he had discovered at the Crime Intelligence Head Office. Roos was specifically asked to make a statement in hand over any evidence as soon as possible. On 17 June 2011 Roos duly deposed to a detailed affidavit setting out the results of his investigations, and the various measures taken to hamper his activities, most of which has been set out above. He also attached documentation pertaining to the contents of the affidavit.
- [38] At the beginning of September 2011, General Cele, the National Commissioner of Police at the time, finally approved the new structure for Crime Intelligence which had been proposed in March that year. On 16 November 2011, Roos finally submitted a grievance about his treatment ever since he had conducted the various investigations that had exposed fraudulent activities. As a remedy for his grievance he proposed that he either be appointed as a Brigadier and provided with the necessary support for the unit including the appointment of staff with the appropriate skills and experience, or that he be allowed to leave the SAPS on the salary level of a Brigadier in terms of section 35(b) of the South African Police Services Act, 68 of 1995.¹
- [39] Because of the content of the grievance which traversed the issues set out above, the applicant did not want to submit it through the normal channel but directed the grievance to General G Lebeya ('Lebeya'), who was the Deputy National Commissioner responsible for Crime Intelligence. Roos explained to him that all the promises which had been made about the new unit had come to nought. General Lebeya undertook to pass the grievance on directly to Mantshashe who would then return it to Lebeya. Unfortunately, despite the applicant's attempt to ensure that the grievance was handled with discretion

¹ Section 35 of the SAPS Act provides for the: "*Discharge of members on account of redundancy, interest of Service or appointment to public office*"

and despite Lebeya's undertaking, that is not how things turned out and the grievance was simply processed through the ordinary channels with the result that the applicant heard 'corridor talk' about the contents of his grievance.

[40] In early November 2011, the applicant received a copy of a secret report to the Inspector General of Intelligence on the alleged maladministration and crimes committed in respect of the Secret Services Account of the Crime Intelligence Division prepared by Major General Hankel and Major General C P de Kock of Crime Intelligence. The applicant explained that the report was essentially the result of the Hawks' investigation into the division. The ambit of the report was wider than the investigations conducted by Roos, including as did an investigation into vehicle fraud, nepotism, unauthorised travel arrangements for spouses all of which implicated Mdluli. The applicant commented that the allegations of an authorised payment for overseas travel related to the trip which Mdluli made to Singapore, after which his attitude towards Roos's investigations change so dramatically. The report also contained extensive findings on a wide range of unlawful activities including amongst others intimidation of an officer who had provided information to the Hawks; the fraudulent designation of persons as undercover agents; improper salary advances, abuse of air travel services and the requisitioning of covert vehicles. The applicant confirmed that these were the type of issues that he would have been expected to investigate in the performance of his functions in the Internal Audit Section.

[41] In February 2012, Roos received a 'progress report' from Lt Col P J Viljoen ('Viljoen') of the Hawks *inter alia* on the investigation of his complaint about being prejudiced for whistle blowing. The report concluded that the preliminary findings regarding the applicant's allegations had been '90% substantiated', as were the allegations made by another senior officer about rampant corruption taking place on a breathtaking scale. Importantly, for present purposes, the report mentions that the other senior officer confirmed to Lt. Colonel Viljoen that the applicant had been moved away from Crime Intelligence to stop him continuing with his investigation and that Crime Intelligence had intended to isolate him completely.

- [42] In June 2012, Roos was questioned over two days about his investigations by a panel of five members from the Inspector General's office. He was also asked to present them with the findings of his investigation, which he did on 29 June 2012. In relation to the new unit, Roos was due to give a presentation to the newly appointed Divisional Commissioner on 2 July 2012, but the meeting was postponed ostensibly for fear that the premises might be 'bugged'. Approximately half a dozen further requests by the applicant for such a meeting with his new superior also did not yield any results, repeating the applicant's previous experience. There was one management meeting which took place at which it was agreed that the meetings would be held weekly but on for September 2012 he received an e-mail that all further management meetings were indefinitely postponed. The same month, yet another organisational structure was approved for Crime Intelligence in which the applicant's stillborn unit no longer appeared.
- [43] Another consequence of the applicant's inactivity was that his performance ratings during his performance appraisals dropped, even though there was little he could do to remedy the situation. Sometime in 2011, a post at the level of Brigadier became available in the internal audit division of SAPS head office, but the applicant did not apply for it because he felt that he could not honestly say he had been gaining any experience since his expulsion from the Internal Audit Division in Crime Intelligence.
- [44] Roos confirmed that he was seeking his previous post as head of internal audit and promotion to the rank of Brigadier if that was possible. When asked why he was seeking compensation as well he said he had been given nothing to do for three and a half years and had to endure hearing junior members in the service talking about the fact that he was earning a salary whilst doing nothing. Apart from putting his career on hold for such a long period, he had had to endure his office and his home been broken into. Roos further repeated the frustration he felt at being isolated, particularly by his superiors, as if he was 'the bad guy'. He had also concealed from his family the threatening note and was concerned about his safety because the corruption involved millions of rands and he regarded some of the people involved as 'dangerous' individuals.

- [45] Roos believed the intention of these actions was to attempt to break him down simply because he had done his job, which was to investigate fraud and corruption. What made it worse was that he had been specifically instructed by Mdluli to pursue the investigation but the latter had then 'changed sides'. The applicant believed that if it were not for Mdluli's *volte face*, he would still be working in the Internal Audit Division of Crime Intelligence. He also testified that the frustration he experienced impacted negatively on his family life because it made him so irritable. He did not regret bringing the case because his situation was unchanged and fraud and corruption was still continuing in the Crime Intelligence section, where he could make a big contribution. Despite the risks involved, Roos felt that he had little choice but to bring the case otherwise he would be sitting idle in his present position until his retirement.
- [46] Although he was paid whilst he was sitting idle, Roos said he could not describe the feeling of not being able to work or to advance his career. He was now 49 years old and had been a colonel for thirteen years, but it was difficult to advance if you were not actually working.
- [47] The cross-examination of the applicant was effectively confined to the issue of the relief sought because the respondents were not in a position to dispute the applicant's evidence on the merits of his claim. The applicant nevertheless agreed that Mphego had not been responsible for creating the situation in which the applicant now found himself in. He also agreed that Mdluli was currently under suspension, which was related to the same activities which the applicant wanted to investigate and that his activities were currently under investigation by the Hawks, though he did not have a detailed knowledge of their investigations. He conceded also that as things presently stood he could not say who might ultimately be prosecuted as a result of those investigations.
- [48] Roos agreed that if he could not be placed in his previous position, an appointment in a comparable post acceptable to him would address the problem of his present placement. When pressed about the reason for claiming compensation, the applicant pointed out that his career had been damaged by his prolonged spell of enforced inactivity. If he had been in his previous post in of internal audit that would be reflected in his work experience when applying

for another post, but he could not lay claim any work experience for the period after he had been transferred out of internal audit. The transfer had stopped his career. It was this and the unfairness with which he had been treated that underpinned his claim for compensation.

[49] It was put to the applicant under cross-examination that given that his superiors knew about the circumstances which led him to be inactive during this period, he could not just assume that this would count against him if he applied for another post because they would understand his circumstances. Roos disagreed and made the point that the post which had come up for consideration was at Head Office, not in Crime Intelligence, and he did not believe that the persons considering his application would have had the same understanding of his situation. He agreed however that this was his perception but that if he was receiving an application from someone who stated that he had been doing nothing for three and a half years he would not consider such a candidate. However, Roos was adamant that the sterilisation of his advancement prospects was not the only factor underlying his compensation claim. It was also based on the way he had been removed from his existing position where he was performing well as an internal auditor.

Legal principles relating to relief

[50] *Mr Mokhari* submitted that the Courts have adopted a conservative approach in awarding compensation in cases where no patrimonial loss had occurred. Both parties agreed that the most pertinent authority concerning the determination of appropriate compensation in this matter, is the judgment of the LAC in ***Minister of Justice & Constitutional Development & another v Tshishonga (2009) 30 ILJ 1799 (LAC)***. Firstly, the LAC held that:

“[14] As acts which fall within the scope of the definition of occupational detriment are deemed to be an unfair labour practice, it is necessary to have recourse to s 194(4) of the LRA which is the provision governing the award of compensation . It provides that the

compensation awarded to an employee in respect of an unfair labour practice must be just and equitable but cannot be more than the equivalent of 12 months' remuneration.

[15] In summary, once it has been found that an employee has been subjected to an occupational detriment on account of having made a protected disclosure, a court must determine what compensation is just and equitable in the circumstances, which amount is capped at 12 months' remuneration. In the present case the judge in the court a quo appeared to conflate the award of compensation with an amount of remuneration. As already noted s 194(4) of the LRA employs remuneration purely as a means of capping the amount of the award so ordered. By contrast, the court a quo employed remuneration as the basis for the quantification of the award. Accordingly the court a quo erred in its interpretation of s 194(4) of the LRA and this court is thus at large to determine the appropriate amount of compensation."²

(emphasis added)

[51] Secondly, the court considered the appropriate approach to adopt where the compensation related to the determination of non-patrimonial loss:

"[18] The question thus is what is just and equitable in circumstances where the compensation is for non-patrimonial loss. In this connection, some assistance can be gained from the jurisprudence relating to the award of a solatium in terms of the actio injuriarum. In these cases the award is, subject to one exception of a non-patrimonial nature, and is in satisfaction of the person who has suffered an attack on their dignity and reputation or an onslaught on their humanity."³

[52] In *Tshishonga's* case, which also involved a claim under the PDA, the court a quo had awarded the aggrieved employee twelve months' remuneration as

² At 1807

³ At 1808

compensation and had awarded him his costs. Tshishonga had made disclosures relating to improprieties in the Master's Office unit of the Department of Justice & Constitutional Development. He was subsequently suspended on pay and subject to a disciplinary enquiry. A notable feature of the case was that the Minister had insulted him on national television referring to him as a 'dunderhead' and stated that his performance was sub-standard, amongst other things.

[53] The LAC replaced the order of the court a quo with an order that Tshishonga be paid R177, 000 for the patrimonial loss which he incurred in defending the onslaught launched against him following his disclosure to the media. Noting that the courts are usually not generous when compensating for non-patrimonial loss under the *actio injuriarum*,⁴ the LAC also awarded Tshishonga an amount of R 100,000 on account of the embarrassment and humiliation which he had suffered by being removed from the Master's Office and thereafter being suspended and subjected to a disciplinary hearing; the denigration of the employee by the Minister of Justice on national television; the false accusation of poor work performance made by the minister on national television; the gross humiliation of being kept in a non-existent post without any work; the victimization and harassment of being subpoenaed to attend an enquiry at which his testimony was irrelevant, and his treatment for trauma following his disclosures to the media. Certain of these factors had to be given significant weight, in particular the indignity suffered by the employee following the unfortunate, intemperate attack on him by the minister on national television. The gravity of this grossly unfair and irresponsible conduct by the minister was compounded by the role played by the employee in seeking to promote integrity in government. The LAC further took account of the fact that this had all occurred because the employee acted as a whistleblower in terms of the very legislation introduced by the minister's department, which was designed to protect whistleblowers. The Department of Justice was obliged to show the greatest respect for the PDA for, as the promoter of the legislation, it

⁴ At 1808, para [21]

should have known the cardinal importance of the PDA in promoting the constitutional values of accountability and transparency in the public administration of the country.

- [54] The court reduced compensation from 12 months' remuneration to R 100, 000, which Mr Mokhari said was equivalent to two months' remuneration. In his case he was also insulted publicly. In *casu* therefore *Mr Mokhari* submitted that compensation of even three months' salary would be generous. I note that this would amount to approximately R 120,000 based on Roos's salary...

Evaluation

- [55] In this instance, the disclosure made by the applicant was central to his official functions and duties as Head of Internal Audit of Crime Intelligence. The disclosures concerned serious corruption and fraudulent activity implicating very senior officers in the Crime Intelligence Division. The applicant conducted himself with scrupulous discretion in disclosing the outcome of his investigations to the relevant superiors and to other investigative arms of the police when required to do so. He still remained obedient to superiors even when they instructed him to stop investigations when the only plausible reason for doing so was to neutralise his activities.
- [56] His reward was not praise for excelling in what he was expected to do. Instead, he was gradually deprived of his authority in the Internal Audit section and then placed in a state of internal exile in the Crime Intelligence Division, with the obvious aim of preventing him from conducting further investigations. A further inescapable corollary of these actions was that the very object of having an effective internal audit function would be thwarted.
- [57] Not only was he placed in a post in a unit yet to be created and properly authorised, but he was sent to Coventry by his superiors who clearly avoided giving him any assistance in trying to make anything positive of his putative appointment and unit. Apart from being deprived of resources his unit was also physically isolated from the rest of Crime Intelligence. Although he reported for

duty every day, in all probability if he had stayed at home, it would not have been noticed except by the two other staff assigned to the unit. He has had to endure this situation for nearly four years. This prolonged spell of enforced inactivity has deprived the applicant of valuable work experience in his chosen career, an internal auditor. It is true that he did not apply for the Internal Audit post which became available at SAPS Head Office in 2011 and that he could only speculate that he probably would not have been appointed.

[58] At that stage it seems he would have been effectively idle for a year. The applicant's supposition that persons evaluating the candidates for that post might not have been so understanding of his current idleness if they were not familiar with the background to it, was not an unreasonable one. Be that as it may, at best for the respondents, it is obvious that the applicant's prospects of promotion or advancement would have stagnated whilst he was quarantined in the new position. By contrast, had he remained in this post in Internal Audit, his work experience record would undoubtedly have been enhanced and his prospects for advancement based on that factor would have correspondingly improved. How to quantify the extent of this prejudice still remains a difficult question to determine. However, I am satisfied that the prejudice was significant enough to warrant compensation linked to the period during which he was unable to gain additional relevant work experience

[59] The vindictive actions of the applicant's superiors of placing Roos in his current unproductive and meaningless post not surprisingly meant that other staff would have understood him to have been sidelined and respect for him would have diminished as he had picked up from remarks that he was being paid for doing nothing.

[60] A further factor to consider is that even if the actions to immunise corrupt elements in Crime Protection from Roos's investigative scrutiny was the initiative of only a few of his superiors,, the inertia of the respondents in dealing pro-actively with his situation is disturbing. Despite Roos protesting vocally about his treatment and despite his findings being made known and canvassed by other investigative agencies within the police service, no steps were taken by the respondents to remedy the situation. Instead, the respondents have

simply allowed the manifestly improper treatment of the applicant to continue and nothing was done to reverse the prejudicial measures taken against him. In fact, until it became apparent that the respondent's own witnesses were not prepared to co-operate, the respondent was not prepared to concede any of the merits of the applicant's claims and was vigorously defending the action. As in *Tshishonga's* case, it is startling that the police service, which has the primary responsibility for combating and investigating crime in terms of section 205(3) of the Constitution, could have allowed the applicant to be prevented from performing his duties which directly serve those constitutional objects and are critical to the internal integrity of the police service.

- [61] In determining an appropriate amount of just and equitable compensation, all the above factors are relevant in my view. For convenience, it is also useful to determine separately that portion of compensation which can be attributed to the freezing of his ability to accumulate relevant work experience which he was deprived of and that part of the compensation which might be attributable to the other factors discussed above.
- [62] In relation to the applicant's loss of relevant work experience over a period of four years, it seems appropriate to award an amount of compensation for each year he was deprived thereof and I consider an amount of R 15, 000 per year to be fair recompense for this. This is calculated with reference to a period of three and three quarter years at the time of judgment.
- [63] In relation to the claim for compensation for subjecting him to the punitive measures meted out to him for doing his job properly and given the improper and cynical motives for which it was done, I believe that compensation in the amount of R 100,000 is a fair measure of financial redress for what the applicant went through.
- [64] It should be mentioned that the applicant has also potentially exposed himself to a degree of personal risk, evidenced by the burglaries which in all probability were connected with his investigation and the anonymous threat with its menacing overtones. If he had been supported in his activities by his superiors, it might be easier to brush off these incidents as unrelated, but it is an

undeniable cause for concern that these criminal actions were consonant with the official steps taken to shut down his investigations and transfer out of Internal Audit to minimise the risk of him discovering more.

[65] On the matter of his future placement, I have adopted the wording of the draft order agreed to by the parties, subject to settling one or two terms on which they could not agree. In doing so I am mindful of the primary consideration, which is that there is no reason why, as far as possible, the respondents would not wish to utilise the applicant in his capacity as an internal auditor for which he was trained and in which he performed well.

Order

[66] In light of the above, noting that the respondents have conceded the merits of the applicant's claim and the points of agreement reached between the parties on the form that an order should take in relation to the applicant's return to useful employment, the following order is made:

66.1 For the avoidance of doubt it is recorded that:

66.1.1 Colonel JJH Roos ('Roos') is currently on the staff of the South African Police Services (Crime Intelligence) in the position of Colonel and is drawing benefits as such.

66.1.2 Nothing in this order shall affect –

66.1.2.1 his status as such;

66.1.2.2 his rank as Colonel;

66.1.2.3 his remuneration (that is, his basic salary and fringe benefits), which shall remain in full force and effect.

66.2 Nothing in this order shall entail the displacement of any person from his or her position in Crime Intelligence specifically, or in the South African Police Service generally.

66.3 The respondents are obliged –

66.3.1 to redeploy Roos preferably in the Internal Audit section of Crime Intelligence or failing that in an internal audit unit of the South African Police Service and to provide him with work of a comparable nature to that which he performed prior to his transfer to Inspection and Evaluation;

66.3.2 to give preference to Roos in any application for appointment or promotion in a post reasonably acceptable to him within the said Department or in any other Department in which his skills can properly be deployed, as soon as such a post becomes available.

66.4 The respondents must pay Roos compensation under s 194 (4) of the LRA in the amount of R 156,250-00 (one hundred and fifty six thousand, two hundred and fifty rands) within 14 days of the date of this judgment.

66.5 The respondent must pay the applicant's costs of suit, including the costs occasioned by the employment of two counsel.



R G LAGRANGE, J

Judge of the Labour Court

Appearances:

For the applicant: MSM Brassey SC assisted by MJ Engelbrecht

Instructed by: Serfontein Viljoen and Swart

For the respondents: W Mokhari SC assisted by S Tilley

Instructed by: The State Attorney.