IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 955/2016

In the matter between:

FAITH ERLINA WARD **Applicant**

and

ORACLEMED HEALTH (PTY)LTD **Respondent**

Heard: 18 -20, 29 June 2018

Delivered: 02 October 2018

Summary: Automatically unfair dismissal dispute i.t.o ss187(1)(h) of the LRA-General test applicable in section 187 dismissals is not the only test applicable in automatically unfair dismissal under ss 187(1)(h), as PDA's requirements have to be proven- It is enough that an employee show that some of the information disclosed was substantively true- the Labour Court not required to determine the correctness of the information-Meaning of good faith- an employee is required to show good faith-motive for dismissal led to dismissal of the claim-section 158(2)(a) of the LRA-Court may refer a dispute to the CCMA for arbitration after ruling that it has no jurisdiction.

JUDGMENT

MABASO, AJ

Introduction

[1] Mlambo JP[1]in *Radebe and Another v Premier Free State Province and Others*[2] in giving guidance as to the interpretation of the Protected Disclosure Act, 26 of 2000 (the PDA) provisions said,

> 'There is further, in my view, an overlap when determining whether the employee making the disclosure was acting in good faith and further whether he had the requisite reason to believe when making a disclosure that improprieties had been committed or were continuing. Honesty plays a pivotal role in both situations. *Whilst good faith and honesty may conceivably amount to the same thing, I am of the view that a case by case approach is the proper one for a court considering these issues*. *Factors such as reckless abandon, malice or the presence of an ulterior motive aimed at self advancement or revenge, for instance, would lead to a conclusion of lack of good faith*.'[3](Own emphasis)

[2] In the pre-trial minute, the parties had indicated that this Court has to determine three issues, Firstly, whether the applicant tendered her resignation in May 2016 and whether the respondent accepted such resignation. Secondly, if there is a dismissal, whether this Court has jurisdiction to adjudicate this matter in that it is an automatically unfair dismissal dispute[4] and lastly, whether the disclosure made by the applicant to the Financial Service Board (the FSB) is a disclosure in terms of the PDA.

[1]-As then he was. Writing for the Court.
[2] [2012] 12 BLLR 1246 (LAC).
[3] Ibid, para 35. See also *Communication Workers Union v Mobile Telephone Network (Pty) Ltd and another* ZALC 59 (26 May 2003) (2003) ,24 ILJ 1670 (LC) ("MTN") at para 21, where *Van Niekerk AJ* of this Court said: The disclosure ***must also*** be made in good faith. An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirements of good faith. (Own emphasis)
[4] in terms of ss 191(5)(b)(i) read ss with 187(1)(h) of the LRA 66 of 1995, as amended.

[3] Midtrial, Counsel for the parties agreed that the issues of resignation and dismissal were no longer in dispute, therefore, this Court was urged to determine whether such dismissal was automatically unfair or not in terms of the provisions of subsection 187(1)(h) of the Labour Relations Act[5] (LRA) which provides that the dismissal is automatically unfair if the reason for the dismissal is in contravention of the PDA by the employer in that the employee had "*made a protected disclosure defined in [the PDA]*".

[4] The Applicant is Ms Faith Erlina Ward (the Applicant) who was dismissed by OracleMed Health (Pty) Ltd (the Respondent) following an anonymous email that she sent to the FSB. The reason for dismissal, according to the respondent, is that the applicant breached the contract of employment "related specifically to the preservation of secrecy, misuse of information and integrity."[6]It is common cause that the applicant was dismissed on 03 August 2016 (the second dismissal dispute).

[5] Subsequent to her dismissal, the applicant declared an unfair dismissal dispute at the Commission for Conciliation, Mediation and Arbitration (CCMA), which remained unresolved after conciliation. The applicant then referred the dispute to this Court, alleging that her dismissal was automatically unfair. Whereas, the respondent averred that this Court has no jurisdiction due to the fact that the applicant's dismissal is ordinary misconduct which should have been dealt with under subsection 191 (5)(a) (i)[7] of the LRA. Therefore, causation is in dispute, meaning this Court has to determine whether it has jurisdiction or not and if it finds that it has the jurisdiction then it will continue to determine if the dismissal was fair or not.

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[5] 66 of 1995, as amended (the LRA)

[6] Ibid 5, page 5.

[7] (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved—

(a)the council or the Commission must arbitrate the dispute at the request of the employee if—

(i)the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b) (iii) applies;

<u>Summary of evidence:</u>

[6] The evidence of the applicant, in her attempt to support her allegations that this dispute is an automatically unfair dismissal dispute is summed up as follows:

6.1 She joined the respondent in April 2010 as a Junior Policy Administrator.

6.2 In April 2014 she was promoted into the position of Underwriting and Policy Administration Manager. Her duties were that of policy administration and management of the administration department.

6.3 She remained in this position until May 2016 when she resigned with immediate effect on 12 May 2016 following *"a horrible argument with the CEO of the company round about May …felt that [her] right to dignity at the time was violated by [the CEO]"*.

[7] She averred that the working environment was tense in her department because it was understaffed as the respondent failed to replace those employees who had resigned, she was not allowed to take leave.

[8] As a result of the strenuous working environment, she went to visit an Occupational Health Therapist, who diagnosed her with Burnout Syndrome, and issued her with a report recommending to the respondent that she be assisted by reducing her work responsibilities. Following this recommendation, the respondent through Ms Pat Hainsworth, the COO, and who was the CEO's wife, made an undertaking to the applicant that the respondent would "*do all efforts necessary with regard to making sure that I take the necessary breaks and holidays*." Indeed, she did take a week's vacation on a cruise, however, when she returned she found that there were still a lot of duties awaiting her.

[9] In February 2016 the applicant fell ill and had to be hospitalised. Later she learned that she had a panic attack, and when her sister visited her in hospital the applicant told her that it was that in her mind she had just been thinking about her workload. At some stage, she was hospitalised twice. And she blames all that strain on her health on her working environment and lack of support from the management of the respondent.

[10] Despite all of these, on 11 May 2016, the applicant was called into the office of Mr Van Der Knaap (the CEO), who accused her of being a poor performer. During this meeting, it was mentioned to her that the Occupational Health Therapist's report was *"a complete lie, [she] made [the respondent] look bad,* "and she was labelled obese. The following day she reported for duty, after she had spoken to her family which resulted in her resigning with immediate effect.

[11] On 20 May 2016, she referred an unfair dismissal dispute against the respondent to the Commission for Conciliation, Mediation and Arbitration (CCMA) claiming constructive dismissal [8](first dismissal). The respondent did not accept the resignation letter and sent her a correspondence demanding that she should serve four weeks' notice[9] and do a proper handover. On payday, she did not receive her salary and leave days to pay, as she had 17 leave days due. Upset by the respondent's conduct, on 03 June 2016 she sent the letter to the FSB claiming that the respondent was committing misconduct and violating applicable laws in the way it conducts its business.

[12] The constructive dismissal dispute was subsequently settled in that the applicant was *"reinstated*" and be appointed in a different position and further that money that was owed to her was to be paid by the respondent. She

[8] Section186(1)(e) of the LRA

[9] Ss 37 (1)(c)(i) of BCEA: 37. Notice of termination of employment. — (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than—

(a)…

(b)…;

(c) four weeks, if the employee—

(i)has been employed for one year or more…"

resumed duty on 20 June 2016. The letter that had been sent to the FSB was brought to the attention of the respondent, and therefore the applicant was summoned before a disciplinary hearing to answer to allegations of misconduct which involved her release of confidential information to the FSB. The applicant was later dismissed which resulted in this dispute.

[13] During the trial she referred to some of the bundle of documents presented before this court insisting that she reasonably believed that the disclosed information was substantially true. Moreover, averred that the disclosure was done in good faith.

[14] It was only during cross-examination that the applicant painted a different picture of the respondent's management especially the COO, for example, she mentioned that the COO had a good relationship with her, she had a sympathetic attitude towards her and also financed her daughter's wedding. About being understaffed, the applicant confirmed that the COO started the interviewing process which was interrupted when she fell ill. She attributed the excessive hours that she worked to the fact that she was "performance-driven". In respect of the alleged abusive behaviour from the CEO, she said it started after she presented the respondent with the report from the Therapist.

[15] During cross-examination, the applicant proceeded to explain in detailed her complaints to the FSB which *inter alia,* consisted of the complaint (complaint 1) which says that the respondent sold a policy *"to a company in Angola – Seadrill which included a financial benefit -it stated that in the event of that of any employee not occasioned by any circumstances excluded in the policy, if the benefit will be paid in the amount of USD$5 000 per insured person"*. She confirmed that a company called Constantia Group is an insurer and the respondent is an administrator who is issuing policies on behalf of Constantia Group. I propose not to deal with each and every complaint as I state below that there were concessions made and the inquiry that I have been asked to conduct in this matter.[10]

[10] The FSB investigated and made its findings.

[16] According to the applicant, there was something amiss about what the respondent did as her understanding was that the respondent was registered as a short-term insurer and when she communicated with the FSB to highlight that something was not right because the funeral benefits will only be offered under long-term insurance, she conceded when it was put to her, being supported by a document titled " Policy Schedule for Seadrill Angola LAD" which formed part of her bundle of documents before this Court, that this complaint was not substantially true as the respondent had conducted the transaction in a proper manner and that the issued funeral cover was issued by Constantia Group which has both short and long-term insurance covers.

[17] I propose to look at complaint 6, the applicant stated that the policies issued on the respondent's paper for inpatient and outpatient, as a result of this in 2015 Aon Brokers advised the respondent that it was not licensed to issue such policies which included the Afrox policy on the respondent paper, as the respondent's licence did not carry the benefit. The applicant further stated that the respondent was allowed to issue policies to individuals but not to companies or groups. When this was brought to the attention of the CEO, he instructed her to correct this. Since the CEO did not testify, I accept this version. Again, I need to emphasise that I am not saying this statement by the applicant is correct or not, as such inquiry is not before me since the purpose of the PDA does not suggest such inquiry to be initiated by this Court. I must indicate at this juncture that if the general section 187 test, which is *"the dominant or most likely cause of the dismissal"*[11]was the only test applicable in this matter, not the second leg test (the PDA requirements test), my conclusion below would have been different, because the CEO did not testify.

[18] The full list of complaints is contained in the email dated 03 June 2016. The applicant made concessions that her complaints were not substantially true, but said she only realised this when it was put to her during cross-

[11] See:*Garnevska v DBT Technologies (Pty) Ltd t/a DB Thermal* (JS581/15) [2018] ZALCJHB 23 (26 January 2018), at paras 32 -36.

examination. However, she was adamant that at the time of the disclosure she had laboured under the impression that those complaints were substantially true.

[19] Under cross-examination, the applicant confirmed that the email was sent to FSB when she was angry at the respondent due to non-payment of her salary and moreover, she was vindictive. Part of the cross-examination in this regard is as follows:

> ‘**Respondent’s representative**:” so you could pay them back?
>
> **Applicant**: I wrote to the FSB because I felt it was justified.
>
> **Respondent’s representative**: ja, you paid them back because you were angry, am I correct?
>
> **Applicant:** I wrote to FSB, yes.
>
> **Respondent’s representative:** just answer my question, you paid them back because you were angry?
>
> **Applicant**: I said yes yes.”

[20] During cross-examination it transpired that despite all the concerns that the applicant had, she was aware of the internal grievance procedure to be followed but she opted not to use one, and the relationship between her and the managers was not as bad as she painted. For example, when her daughter was getting married one of the managers used his credit card to buy a dress for her at a fee of R12 000.00. The applicant confirmed that she had a “*personal relationship as well*” with the COO of the respondent.

[21] Further, the applicant conceded that complaints 1 to 7 had no substance. She further confirmed that following the complaint, the respondent submitted a response to FSB which was accepted by the Registrar of the FSB as satisfactory. Following these concessions, Mr Van Graan submitted that what

this Court needs to look at is that the information disclosed was simple information and further that, the position of the applicant at the time of the disclosure, the training that she had, the experience of success counts against her. In essence, I must determine the state of mind of the applicant by 03 June 2016.

[22] In its endeavour to refute the claim that at the time when the applicant made the disclosure, she could not have reasonably believed that the respondent was committing misconduct and/ or violating law in its operation, the respondent called its general manager, Mr Martin O' Brien Van Der Westhuizen, whose evidence centred around two issues namely whether the disclosure was a *bona fide* disclosure and whether the applicant could have reasonably believed that the complaint had substance. The evidence of this witness can be summarised as set out below.

[23] He joined the respondent in October 2015 and confirmed that the applicant at the time was the manager of policy administration. Policy schedules were drafted by the administration department headed by the applicant. In respect of complaint 1, the policy document in its introductory paragraph shows that the policy was between Cedral Angola and Universal Serguros. With this, he testified that it was not possible that the applicant was under the impression that the respondent was the insurer, taking into account that she was a manager in the same department that generated the policy document.

[24] In essence, this witness draws this Court's attention to documents which were presented by the applicant which shows that it was not possible that the applicant reasonably believed that the information was substantially true. The evidence of Mr Van Der Westhuizen did not assist this Court, as he did not bring something different from what the applicant said. For example, he could not comment on what the applicant said about the CEO following the Aon Brokers' findings, as discussed in paragraph 17 above.

<u>The law and application thereof</u>

[25] A dismissal is automatically unfair if *inter alia,* an employer in dismissing an employee acts contrary to the provisions of section 187(1)(h) of the LRA which provides that if the reason for dismissal is *"a contravention of the Protected Disclosures Act,2000, by the employer, on account of an employee having made a protected disclosure defined in that Act".*[12] In its preamble, the PDA recognises that criminal and other irregular conduct in the organ of state and private bodies are detrimental to good, effective, accountable and transparent governance and can hamper good governance. Therefore, employees who report their employers to relevant authorities have to be protected.

[26] In order to determine the issues before this Court, I opine that the following has to be taken into account: that section 192 of the LRA provides that an employee must establish the existence of the dismissal, and once this has been successfully discharged, then an employer must prove that the dismissal was fair. However, in matters of this nature, an evidentiary burden lies with such dismissed employee to show that there is a legitimate claim for automatically unfair dismissal.[13]

[27] In this matter, I must take into account that the test is one of balance of probabilities, in that a party whose version of facts appears to be more probable is entitled to an order, and that if there is an issue that has to be decided based on an inference, a court has to " *select a conclusion which seems to be the more natural, or plausible, conclusion from among several considerable ones, even though that conclusion be not the only reasonable one".*[14]

[28] The representative for the applicant, during the trial was not clear as to whether the applicant relies on section 8 or 9 of the PDA however, during the closing arguments he confirmed that the reliance was on section 9.Whether

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[12] Own emphasis

[13] *Kroukam v SA Airlink (Pty) Limited* (2005) 12 BLLR 1172 (LAC), at para 28.

[14] *Govan v Skidmore* [1952] 1 All SA 54 (N)

the applicant's representation submission was wrong or right is not important, because even if he had stated that the applicant's case was based on subsection (8)(1)(c)(i)[15] my conclusion, below, was to be the same as both sections 8 and 9 require that disclosure should be in "good faith". I now proceed to set out key subsections of s 9 of PDA which have relevance in this matter, and they read thus:

> '9. General protected disclosure
>
> (1) Any disclosure made **<u>in good faith</u>** by an employee or worker –
>
> (a) who **<u>reasonably believes</u>** that the information disclosed, and any allegation contained in it, are **<u>substantially true</u>**; and
>
> (b) **<u>who does not make the disclosure for purposes of personal gain</u>**, excluding any reward payable in terms of any law;
>
> is a protected disclosure if—
>
> (i) one or more of the conditions referred to in subsection (2) apply; and
>
> (ii) in all the circumstances of the case, it is reasonable to make the disclosure'[16]

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[15] 8. Protected disclosure to certain persons or bodies.—(1) Any disclosure made in good faith to—
(a)…
(b)…, or
(c)a person or body prescribed for purposes of this section; and
in respect of which the employee or worker concerned reasonably believes that—
(i)the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and
(ii)the information disclosed, and any allegation contained in it, are substantially true,

[16] (2) The conditions referred to in subsection (1) (i) are—
(a) that at the time the employee or worker who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;
(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee or worker making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;
(c) that the employee or worker making the disclosure has previously made a disclosure of substantially the same information to—
(i) his or her employer; or
(ii) a person or body referred to in section 8,
in respect of which no action was taken within a reasonable period after the disclosure; or
(d) that the impropriety is of an exceptionally serious nature.
(3) In determining for the purposes of subsection (1) (ii) whether it is reasonable for the employee or worker to make the disclosure, consideration must be given to—

[29] Subsection 9 (1) provides that the disclosure should be made in good faith by such an employee who has reasonably believed that such information is substantially true and by doing so it was not for personal gain. These are the key requirements that must be met before moving to subsections 2 and 3 of section 9. Clearly, in this matter, the respondent says the applicant acted *mala fide* as she presented the information to the FSB being motivated by being vindictive. I have to remind myself that the issue is about the reasonableness of the belief, not of the reasonableness of the information disclosed. [17]

[30] The central point in this matter is the issue of good faith as partly indicated by the respondent's representative during the trial. One has to determine the state of mind at the time of releasing the information to the FSB. The SCA in the matter of *Mbethe,*[18] where it had to determine good faith based on the state of mind using inference said,

> *'[20] In our law it would not be a matter of mere assertion by an applicant that he possesses the requirement of good faith. Although the test for good faith is subjective, relating as it does to the state of mind of an applicant, it is nevertheless subject to an objective control. The state of mind of an applicant has to be determined by drawing inferences from the objective facts, as revealed by the evidence.*

(a) the identity of the person to whom the disclosure is made;
(b) the seriousness of the impropriety;
(c) whether the impropriety is continuing or is likely to occur in the future;
(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;
(e) in a case falling within subsection (2) (c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;
(f) in a case falling within subsection (2) (c) (i), whether in making the disclosure to the employer the employee or worker complied with any procedure which was authorised by the employer; and
(g) the public interest.
(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (2) (c) where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure.

[17] *SA Municipality Workers Union National Fund v Arbuthnot* (2014) 25 ILJ 2434 (LAC), at para 15.

[18] *Mbethe v United Manganese of Kalahari (Pty) Limited* (503/2016) [2017] ZASCA 67; 2017 (6) SA 409 (SCA) (30 May 2017).

[21] The appellant states that he has acted in good faith in order to protect the interests of the respondent. The Respondent denies this and alleges that the appellant lacks an honest purpose in seeking leave to institute a derivative action in the name and on behalf of, the respondent. The dispute is whether the appellant has misrepresented his state of mind'.

[31] This Court, by Van Niekerk AJ (as he then was), in the matter of *MTN* [19] held that,

'However, as I have noted, the protection extended to employees by the PDA is not unconditional. The PDA sets the parameters of what constitutes a protected disclosure, as well as the manner of permissible disclosure by workers. The definition of "disclosure" clearly contemplates that it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA. The disclosure must also be made in good faith. An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirement of good faith. It does not necessarily follow though that good faith requires proof of the validity of any concerns or suspicions that an employee may have, or even a belief that any wrongdoing has actually occurred. The purpose of the PDA would be undermined if genuine concerns or suspicions were not protected in an employment context even if they later proved to be unfounded. There is no doubt why disclosures made in general circumstances require in addition to good faith a reasonable belief in the substantial truth of the allegation. However more extensive the rights established by the PDA might be in the employment context, I do not consider that it was intended to protect what amounts to mere rumours or conjecture'.

[32] Section 9 of the PDA does not suggest that an employee should have had a reasonable belief that ***all*** the information that he disclosed should be substantively true. That could not be the intention of the legislature. I am aware that the LAC in *Kroukam v SA Airlink* said "*section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient*

[19].See fn 3 above.

to raise a credible possibility that" the dismissal falls under it. It is simpler if the dispute is about subsections 187(1)(a) ;(b);(c);(d);(e);(f); and (g), but (h) requires more in that provisions of the applicable PDA (the PDA requirements test) has to be investigated based on the evidence before Court.

[33] Taking in account what I have said in paragraphs 17, 18,21,24 and 25 above, that the applicant has evidential burden to produce evidence that raises a credible possibility of his claim and that she has no onus of proof, coupled with the fact that the onus in this matter is with the respondent, I rule in favour of the applicant that at the time when she disclosed the information she reasonably believed that some of the information(only in respect of complaint 1) was substantively true. However, an applicant, whether she relies on section 6, 8 and/ or 9, the PDA requirements test requires her to show among others, good faith.

[34] *In casu*, the circumstances before and immediately after the first dismissal, guide this Court to draw the inference in respect of the state of mind of the applicant at the time when the disclosure was made, to determine good faith. The applicant painted the picture of the environment she worked under as she stated that the CEO "violated her right to dignity" in the meeting that took place in May 2016; she was accused of being a poor performer despite not getting support from the management, labelled a liar and wanted the respondent to look bad as per the Occupational Health Therapist report; she twice suffered from the panic attack and the only reason that she could think of was the work overload. All of these resulted in the resignation and the constructive dismissal dispute being declared.

[35] It is common cause between the parties that the respondent did not immediately comply with section 40 of the BCEA, in that the applicant was entitled to payment of remuneration on termination of employment. The applicant constantly during cross-examination confirmed that this was the motive to approach the FSB, as stated in paragraph 16 above. In amplifying this point, the following exchange is also important,

'**Respondent's representative**: Right. Now, both your statement of case and in the outcome of the disciplinary hearing no other reason was given by you as motivation for blowing the whistle, the proverbial whistle, am I correct?

Applicant: that is correct.

Respondent's representative: So, we can accept today that what motivated you to blow the whistle was your anger for the non-payment, am I correct?

Applicant: Yes, I didn't get my salary, and I phoned the FSB, and I told them what was happening in the company.'

[36] Clearly, cannot be faulted in concluding that the circumstances which led to the first dismissal and then none payment of her salary and leave days led to the applicant approaching the FSB. Therefore, vindictiveness which can be classified as the personal gain or " *malice or the presence of an ulterior motive aimed at self advancement or revenge*" was the reason for the disclosure. The LAC in *SA Municipality Workers Union National Fund v Arbuthnot*[20] held that,

'Good faith, in my view, entails in part that there should be no ulterior motive, revenge or malice in making the disclosure. It is common cause that the respondent did not claim protected disclosure at the disciplinary hearing and that her reliance on protected disclosure only surfaced for the first time during the proceedings before the Labour Court. ***<u>The inference that the appellant wants this Court to draw is that the reliance on the protected nature of the disclosure was more of an afterthought</u>***, in an attempt to downplay the tendency of the respondent to disregard the employer's instruction…. [21]

And

[20] (2014) 35 ILJ 2434 (LAC)
[21] Ibid, para 23

"***In addition, it is also a requirement that the party making the disclosure intends thereby for the wrong disclosed to be remedied, or addressed, in some way***.'[22]

[37] In *casu*, applying the latter principle[23], the applicant confirmed that the only time she knew about the PDA was when she approached a company called clientèle reporting the dismissal then the official there told her that the disclosure was a protected one, and she did not use this defence during the disciplinary hearing. The applicant could not explain her intention of making a disclosure to the FSB, as Mr Van Graan repeatedly asked the applicant about her intention to report the respondent to the FSB and she confirmed that she was vindictive. Based on above I, therefore, conclude that the applicant failed to meet the requirement found in ss 9(1)(b) of PDA which is "who does not make the disclosure for purposes of personal gain", as clearly the evidence indicates that she made the disclosure in bad faith as her motive was not to remedy the wrong but motivated by bitterness as a result of what is stated above.

Costs

[38] I am aware that subsections 162(1) and (2) of the LRA give this Court a discretion to make a costs order. In terms of ss (2)(a), cost order may be made against a party who referred a dispute in this Court which such matter should have been referred to arbitration. This was a borderline manner in respect of jurisdiction, and the applicant testified that she came in this Court following advice from clientèle as she was not aware that the disclosure could have been covered under the PDA. I, therefore, find that the law and fairness dictate that there should be no costs order.

[39] Mr Dzimba asked that in case I find that this Court has no jurisdiction, I should refer the dispute to the CCMA for arbitration. I have taken into account that the respondent advised this Court that the applicant was dismissed for

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[22] Ibid, para 25
[23] *Arbuthnot* supra.

releasing confidential information to the third party and that no evidence was led in respect of that, as provisions of ss 187(1)(h) dispute were the focus.

[40] In the premises, I make the following order:

Order

1. The applicant's dismissal was not automatically unfair.
2. The applicant's dismissal relating to misconduct, in terms of section 158(2)(a) of the LRA is stayed and is referred to the CCMA for arbitration.
3. There is no order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the applicants: Adv Dzimba

Instructed by: Kobras Attorneys

For the respondent: Adv Van Graan SC

Instructed by :Jan Kemp Nel Attorney