IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1914/19

In the matter between:

MICHAEL MDUDUZI LUTHULI **Applicant**

And

SOUTH AFRICAN NATIONAL BLOOD SERVICE **First Respondent**

THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN NATIONAL BLOOD SERVICE **Second Respondent**

Heard: **15 October 2019**

Delivered: **30 October 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

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[1] The applicant, seeks an interim order interdicting and restraining the respondents from subjecting him to any further form of occupational detriment as defined under section 1 of the Protected Disclosure Act[1] (the PDA), pending the outcome of a protected disclosure dispute that is before this Court under case number J1914/19. It is common cause that the applicant had initially referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), and a certificate of outcome was issued on 30 September 2019.

[2] This application was initially enrolled on 19 September 2019 and was postponed to 15 October 2019. During that period, the applicant filed and served his statement of claim, in which he seeks declaratory orders that;

(i) the disclosures he made on 25 and 31 July 2019 are 'protected disclosures' as envisaged in the provisions of the PDA;

(ii) that he was being subjected to an occupational detriment on account of having made such protected disclosures;

(iii) that the respondents have contravened section 3 of the PDA;

(iv) an order directing the respondents to comply with the duties and legal obligations arising from section 3B of the PDA, and to investigate his 'disclosures';

(v) an order that the second respondents be interdicted and restrained from subjecting him to any disciplinary action on account of or partly on account of having made the protected disclosures on 25 and 31 July 2019.

[3] The applicant is currently employed as the first respondent's Company Secretary, a position he has occupied since 15 May 2014. The first respondent is a non-profit company licensed under section 53 of the National Health Act,[2] with its primary mandate being to provide blood transfusion and

[1] Act 26 of 2000
[2] Act 61 of 2003

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other related services to the general population. The second respondents constitutes members of the Board of Directors (Board) of the first respondent.

[4] The applicant alleges that he made a protected disclosure with the Executive Committee (EXCO) of the first respondent on 25 and 31 July 2019. Having made the disclosure he had expected the respondents to within 21 days from the disclosure, acknowledge receipt of that disclosure in writing, and to have informed him of whether a decision was made to investigate the matter in accordance with section 3B (1)(a) and (b) of the PDA. He was only informed of a decision by the Board after the 21 days had passed, and even then, only after he had lodged an unfair dismissal dispute pertaining to an occupational detriment in terms of section 186(2)(d) of the Labour Relations Act (LRA).[3]

[5] The applicant further alleges that only on 31 August 2019 did one member of the Board (Professor William Gumede), inform him that in a meeting held on 28 August 2019, the Boar resolved that he (applicant) should be advised that the trust relationship between him and the respondents had broken down, and his options were either to resign from his position or be subjected to a disciplinary enquiry. The charges he was to answer to should he choose to be subjected to a disciplinary enquiry, included that he had in his capacity as Company Secretary, recorded the proceedings of an EXCO meeting without its knowledge or approval. He was given until 4 September 2019 to make a decision.

[6] The applicant conceded that he had indeed recorded the EXCO meeting held on 22 July 2019 and had kept the audio recording thereof, which he had also made available to the Court. He however defended his actions, contending that it was part and parcel of his duties as Company Secretary to record EXCO meetings and to keep a record. His primary contention is that the recordings are proof that the first respondent's Chief Executive Officer (CEO) had in that meeting, conducted himself in a manner that breached his legal duties and obligations.

[3] Act of 1996 (as amended)

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[7] On 5 September 2019, he informed Professor Gumede in writing that he will not resign as he had done nothing wrong by recording the EXCO meeting. He further in his response stated that he viewed the conduct of the respondents as amounting to occupational detriment as a result of which he had referred a dispute to the CCMA.

[8] On 11 September 2019, the applicant was issued with a letter of his immediate precautionary suspension with full pay. In the letter of suspension, he was also informed that his grievance against the CEO would be dealt with in accordance with the first respondent's policy by an independent chairperson. The respondents conceded that the institution of disciplinary proceedings is imminent. It was however pointed out that the applicant in this application has not challenged the suspension or sought that it be uplifted.

[9] Before dealing with the merits of this application, two preliminary issues raised on behalf of the applicant need to be disposed of. The first relates to a further supplementary affidavit filed on behalf of the respondents, which the applicant had objected to. The basis of that objection was that the supplementary affidavit filed on 11 October 2019 was done without notice, or an agreement between the parties, or leave of the Court.

[10] It is correct that with any motion proceedings, the sequence and timing for the filing of the affidavits by the respective parties is set out in Rule 11 of the Rules of this Court. In *Rockridge Game Farm (Pty) Ltd v Breedt and Others*[4], it was reiterated that any other affidavit besides the normal three sets of affidavits is a further affidavit, which can only be permissible with the leave of the Court, and where such consent was not granted, that affidavit so filed is *pro non scripto.*[5]

[11] The submissions made on behalf of Mr Belger on behalf of the respondents that the further affidavit was necessitated by the fact that new material was raised in the replying affidavit cannot be sustainable, on the basis that it is trite that a case ought to be made out in the founding affidavit in any event, and

[4] (34949/2013) [2017] ZAGPPHC 408 (27 July 2017)
[5] See also *Hano Trading CC v J R 209 Investments (Pty) Ltd* (650/11) [2012] ZASCA 127 (21 September 2012) at paragraphs 10 - 14

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not in the replying affidavit. Accordingly, there is no need to respond to new evidence or material raised in the replying affidavit by way of a further affidavit. Even if there was such a need, such a further affidavit can only be permissible if filed with the leave of the Court.

[12] Equally so, the fact that the applicant did not in the founding affidavit raise or give a full account of certain events is not an exceptional ground for the purposes of allowing the supplementary affidavit. Thus, to the extent that any such new material was raised in the replying affidavit or was not raised in full in the founding affidavit, this cannot be a basis for making exceptions in regard to the trite rules related to the sequence and timing of the filing of affidavits. To that end, the supplementary affidavit as filed by the respondents and the evidence contained therein is disallowed.

[13] A second preliminary point raised on behalf of the applicant by Mr Kela related to the fact that the CEO (Dr Jonathan Louw) of the first respondent, was also the deponent in the answering affidavit, and in circumstances where he was the subject of the complaint leading to the protected disclosure. Again, this preliminary point lacks merit, especially since it is based on the first respondent's own whistle-blowing policy. Mr Kela relied on clauses 5.6.2 and 5.7.6 of the policy, which essentially provides that if the CEO is implicated in the tip-off, he should be excused from any association from the matter until it is fully dealt with. The policy is an internal document that has no bearing on the authority and mandate of the CEO to depose to an affidavit in these proceedings, and to the extent that the applicant does not take issue with that authority on any other ground, in my view, that should be the end of the matter.

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<u>The legal framework and evaluation:</u>

[14] To the extent that the applicant seeks interim relief, the legal requirements in this regard are trite as restated in *Moyane v Ramaphosa and Others.*[6] Thus, the applicant needs to establish a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the

[6] (82287/2018) [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP) at paragraphs 26 – 27

right, if an interdict is not granted; the balance of convenience must favour the grant of the interdict; and that he has no other reasonable remedy. Furthermore, whilst it is appreciated that a Court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and then, even so, only in the clearest of cases.[7]

[15] The applicant seeks relief under section 158(1)(a)(i) or (ii) of the LRA read together with section 4(1)(a) of the PDA as a result of already being subjected to (and likely to) be subjected to further occupational detriment on account of having made a protected disclosure as envisaged in section 6 of the PDA. He contends that his *prima facie* right is based in the provisions of section 3 of the PDA. He further relies on the protection afforded to him as a whistle-blower under section 159(4) of the Companies Act[8]; and his constitutionally protected right to fair labour practices under section 186(2) of the LRA.

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[7]See also *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 65

[8] Act 71 of 2008.

Section 159: **Protection of Whistle-blowers**

(1) To the extent that this section creates any right of, or establishes any protection for, an employee, as defined in the Protected Disclosures Act, 2000 (Act No. 26 of 2000)—
   (a) that right or protection is in addition to, and not in substitution for, any right or protection established by that Act; and
   (b) that Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective whether that Act would otherwise apply to that disclosure.

(2) Any provision of a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of this section.

(3) This section applies to any disclosure of information by a person contemplated in subsection (4) if—
   (a) it is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned; and
   (b) the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, has-
      (i) contravened this Act, or a law mentioned in Schedule 4
      (ii) failed or is failing to comply with any statutory obligation to which the company is subject;
      (iii) engaged in conduct that has endangered or is likely to endanger the health or safety of any individual, or damage the environment;
      (iv) unfairly discriminated, or condoned unfair discrimination, against any

[16] It was submitted on behalf of the applicant that to the extent that what he sought was an interdict *pendente lite,* what was at issue was a right which was the subject matter of the main action and which he sought to protect by means of interim relief. It was further submitted that given the nature of the relief he seeks, all that he needed to demonstrate are reasonable prospects of success and the balance of convenience, and that in the end, whether he had made a protected disclosure or not was the subject for adjudication by the Court that will be seized with the main dispute.

[17] The respondent's contention was that the applicant has not made any disclosures let alone protected disclosures. They contend that what the applicant seeks is in effect a final order with a view of seeking to prohibit being subjected to any disciplinary action and the consequences which may flow from such disciplinary action. In their view, the applicant's complaints are to be dealt with in accordance with the first respondent's internal grievance procedures. To this end, it was submitted that in accordance with the provisions of section 3B of the PDA, the applicant was accordingly informed of this approach.

[18] In its preamble, the purpose of the PDA is to make provision for procedures in terms of which employees in both the private and the public sectors may disclose unlawful or irregular conduct by their employers or by other employees and to provide for the protection of employees who make such disclosures.

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person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or

(v) contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.

(4) A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section-

(a) has qualified privilege in respect of the disclosure; and

(b) is immune from any civil, criminal or administrative liability for that disclosure.

[19] The approach in a determination of whether a disclosure, if any, is protected was aptly summarised in *TSB Sugar RSA Ltd (now RCL Food Sugar Ltd) v Dorey*[9] as follows;

> "The proper approach to the primary question in this appeal is: first to determine whether the various disclosures of information constitute disclosures as defined in s 1 of the PDA; secondly, to decide if the disclosures are protected disclosures, as contemplated in s 1, read with s 6 of the PDA; and thirdly, whether Dorey was subjected to an occupational detriment (discipline and dismissal) by RCL on account, or partly on account, of having made a protected disclosure. The last enquiry requires careful consideration of the evidence regarding the reason for the dismissal to establish if the disclosure causally accounted or partly accounted for the dismissal"

[20] Under the provisions of section 3 of the PDA, employees making *'protected disclosures'* are not to be subjected to occupational detriment on account of, or partly on account, of having made that disclosure. An "*occupational detriment*" in relation to the working environment of an employee is defined in section 1 of the PDA to include *inter alia*, being subjected to any disciplinary action, being dismissed or being otherwise adversely affected in respect of his or her employment including employment opportunities and work security.

[21] Certain obligations under section 3B of the PDA are imposed on the person or body to whom a protected disclosure was made, including taking a decision as to whether the matter would be investigated; or whether the disclosure will be referred to another person or body if that disclosure could be investigated or dealt with more appropriately by that other person or body; and in writing acknowledge receipt of the disclosure by informing the employee or worker of the any decision in regards to the disclosure made, and the reasons in that regard.

[22] Central however to any determination as to whether a protection under the provisions of the PDA is due is whether in fact such a 'disclosure' as defined under section 1(b) of the PDA was made; whether such a disclosure is

[9] (2019) 40 ILJ 1224 (LAC) at para 56

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protected as defined in section 1 of the PDA,[10] and whether the employee was/is/being subjected to some occupational detriment as a consequence of that disclosure. It follows that the onus is upon the applicant to prove that he made a disclosure as defined, and that any further steps that the respondents seeks to take against him will constitute an occupational detriment.[11]

[23] The provisions of section 6 of the PDA[12] essentially provides guidelines as to whether the disclosure made is legally protected or not. Thus, this will depend upon whether the disclosure was made according to a substantively correct procedure; whether it was not made for purposes of personal gain; whether it was made without committing a criminal offence; whether it was made in good faith and is reasonably believed by the whistle-blower to be true; and whether it was made to the right authority.[13]

[24] Furthermore, it is accepted that a disclosure made in terms of the PDA need not be factually accurate. What is required in order for the disclosure to be protected is that the employee making such a disclosure must have reasonably believed that the information disclosed is substantially true, and that at the very least, tended to show that an impropriety (criminal activities or misconduct) has, is being, or may be committed, or that the respondent has,

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[10] A "protected disclosure" is defined in section 1 of the PDA to include a disclosure made to an employer in accordance with section 6 of the PDA. Section 6(1) reads:

> 'Any disclosure made in good faith -
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> (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
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> (b) to the employer of the employee where there is no procedure as contemplated in paragraph (a), is a protected disclosure.'

[11] *Van Alphen v Rheinmetall Denel Munition* (Pty) Ltd ([2013] 10 BLLR 1043 (LC); (2013) ILJ 34 3314 (LC) at para 22

[12] Section 6(1) reads:

> 'Any disclosure made in good faith -
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> (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
>
> (b) to the employer of the employee where there is no procedure as contemplated in paragraph (a), is a protected disclosure.'

[13] See sections 5 – 8 of the PDA and the Regulations Relating to Protected Disclosures, 14 September 2018, Government Gazette No. 41904

is failing, or may in the future fail to comply with its legal obligations.[14] In the end, not all information disclosed would qualify as protected.

[25] A further important consideration is that there must be a causal link between the disclosure and the occupational detriment, which link is examined by an assessment of the timing of the institution of the charges or the occupational detriment; the reasons given by the employer for instituting the charges or occupational detriment; the nature of the disclosure; and the person responsible for taking the decision to institute the charges.[15]

[26] Applying the above legal principles to the facts of this case, and bearing in mind the nature of relief sought, the following observations are made;

26.1 It is common cause that the first respondent has a whistle-blowing policy which had been in effect since September 2017. Disclosures (tip-offs) are ordinarily received through the first respondent's Fraud Hotline Administrator and sent to the Legal Manager. Where the Legal Manager is implicated, any tip-offs must be sent to the CEO. Should the CEO and the Legal Manager be implicated, tip-offs should be sent to the Chairperson of the Audit Committee. Should the Chairperson of the Audit Committee be implicated, the tip-offs would be sent to the Chairperson of the Board.

26.2 The applicant contends that the disclosures he made are contained in Annexures 'F' and 'G' to the founding affidavit. It was common cause that 'Annexure F', which the applicant referred to as a report, was sent by way of email to EXCO and Board members. This was contrary to the provisions of the very same policy the applicant sought to rely on. Clause 5.4 of the policy specifically provides that in order to be in compliance with the PDA, reports (tip-offs) are to be sent to the first respondent's Fraud Hotline in a particular format. Other than that, and to the extent that the complaint was against the CEO, such a report

[14] See *Chowan v Associated Motor Holdings (Pty) Ltd and Others* [2018] ZAGPJHC 40; [2018] 2 All SA 720 (GJ); 2018 (4) SA 145 (GJ); (2018) 39 ILJ 1523 (GJ); *John v Afrox Oxygen Limited* [2018] 5 BLLR 476 (LAC); (2018) 39 ILJ 1278 (LAC) at paras [21] and [25]

[15] *Independent Municipal & Allied Trade Union & another v City of Matlosana Local Municipality & another* (2014) 35 ILJ 2459 (LC)

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was to be sent to the Chairperson of the Audit Committee. Clearly as the applicant had conceded in the replying affidavit, he did not follow this particular procedure designed by the first respondent, and his contentions that he did not follow the whistleblowing procedure on the basis that it was compromised cannot be an excuse, more particularly since the CEO was in any event part of the very same EXCO that the report was sent to.

26.3 The fact that in making the disclosure the applicant failed to follow the procedure laid out in the policy raises question of his *bona fides* as correctly submitted on behalf of the respondent. From the contents of the report, it is apparent that the applicant and the CEO were not having the best of working relationships, with this being apparent from a variety of issues the applicant had raised, including questioning the CEO's management style, his alleged history of finger-pointing when things go wrong, his failure to take responsibility, his demeaning treatment of other employees and propensity to seek their blind loyalty, reference to the CEO as being belligerent, vicious, vindictive, unprofessional, a bully, and lacking leadership etc.

26.4 On the face of it, the report was not just about raising any impropriety if any. I agree with the submissions made on behalf of the respondents that by sending the report to the entire Board and EXCO, this was also designed to not only 'expose' the CEO's limitations as a leader but also to humiliate and belittle him, and to essentially cast aspersions on his character. If ever there is any doubt about these observation, in paragraph 19 of the report, the applicant states;

> *"Also, the Board needs to know that the CEO is not just the well-mannered, and softy-spoken gentle person he portrays in meetings. There is another side to this man, that some of us have to deal with daily. That way no one will be able to say 'I did not know'"*

26.5 My observations in regards to the *bona fides* of the applicant are further fortified by an assessment of whether any disclosure made is protected. Bearing in mind that as to whether a protected disclosure

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was or was not made is an issue for final determination in a matter pending before the Court, a *prima facie* view however should be premised on the context within which the report came about and its contents and objectives**.**

26.6 The report is a six and half paged document titled *"SANBS Tip-offs",* and is essentially a narration of what transpired in an EXCO meeting held 22 July 2019, and the applicant's own explanation of the events in regards to what he deemed to be unfounded attacks against him by the first respondent's CEO. This is evident from the first sentence in the report, in which the applicant states that *'he felt compelled to respond in detail to the unfounded and patently false allegations levelled against him'* at that meeting. At paragraph 18 of the report he reiterated that he wrote it 'to tell his side of the story'.

26.7 In the report, the applicant confirmed that the issue of tip-offs and how they should be handled internally was introduced as an agenda item following a tip-off that was lodged by the recognised union, NEHAWU against the CEO in June 2019, related to allegations of misconduct. The tip-off however was received by the CEO rather than the Legal Manager. According to the applicant, NEHAWU had raised its concerns with him and HR Executive about the CEO receiving the tip-offs. It however transpired that since February 2019, the CEO had issued an instruction that all tip-offs be sent to him, and that in a case where he was implicated, the tip-off should be sent to the Chairperson of the Audit Committee.

26.8 The applicant further alleges that since NEHAWU had raised its concerns, this had prompted the CEO to start looking for a 'fall guy', which happened to be him. What triggered the disclosure however were the events that took place in an EXCO meeting held on 22 July 2019. The applicant alleges that the CEO in that meeting, rude, crass, demeaning, dishonest and a bully, and had lied about why he had taken over the tip-offs. The applicant further alleges that the CEO

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in order to extricate himself, had sought to shift the blame on him, by accusing him of not managing the tip-offs.

26.9 Other than complaining about the general conduct of the CEO, the applicant further alleged that the CEO in December 2018 had informed him that the Board did not want him, and had offered him 6 months to leave the first respondent. He further complained about the conduct of the CEO towards other employees in general, and his quest to obtain the loyalty of these employees towards him rather than the first respondent.

26.10 Clearly the report was not just about 'tip-offs' or a disclosure of some impropriety as its heading suggested. Even if the applicant had reason to believe that the alleged interference by the CEO with the tip-off procedures amounted to an impropriety of some sort, which is something for the trial court to determine, the fact that he raised this issue within the context of a variety of other matters including his own personal views on the character of the CEO, again raises concerns about his *bona fides*.

26.11 The report was closely followed by **'Annexure G'** addressed to the Board, which is the applicant's complaint/grievance he had lodged on 31 July 2019 against the CEO to the first respondent. The applicant attached the report to the grievance, and incidentally refers to the contents of that report as the grievance. He stated that the grievance had been on-going since February 2018 but came to a head on 22 July 2019. He sought that the grievance hearing should *inter alia*, determine whether the conduct of the CEO in a meeting of 22 July 2019 constituted an unfair labour practice; or an attempt to constructively dismiss him; whether he was abusive, demeaning, insulting and threatening; or whether his conduct constituted gross dishonesty; or improper conduct unbecoming of a senior employee; or whether he had brought the company into disrepute. He further sought the hearing to determine whether the Board should not institute disciplinary action against the CEO.

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26.12 At this stage of the judgment, and to the extent that the applicant deemed the report and his grievance collectively to be a protected disclosure, it is of importance to distinguish between a disclosure as defined in section 1 of the PDA, and an internal grievance, which ordinarily is resolved by way of the employer's own grievance procedures.

26.13 The respondents' approach, as ventilated in the answering affidavit by the CEO, is that the application before the Court is merely a stratagem to avoid the imminent disciplinary hearing, as inherent in the stratagem is an attempt to bolster the applicant's case by alleging that his concerns, couched in the form of a grievance, can be elevated to protected disclosures, enjoying the protection under the PDA. Louw averred that the applicant's concerns are merely a grievance against him, which grievance is in the process of being dealt with internally.

26.14 In *Kabe v Nedbank Ltd*[16], it was stated that;

> "The grievances by the applicant do not meet the definition set out above **(Definition of 'protected disclosure' in Section 1 of the PDA**). At a workplace, it is awaited that employees would be aggrieved now and then. It is for that reason that a good practice dictates that an employer should have in place a dedicated procedure to deal with employees' grievances. Some grievances have merit whilst others do not. Regard being had to the preamble of the PDA, it was not enacted to allow employees to disparage their employers. Ordinarily, grievances are more about personal feelings of employees. The PDA is not intended to deal with personal feelings but with criminal and irregular conduct. It is largely concerned with more serious breaches of legal obligations."

26.15 It is further trite that the scheme of the PDA encourages internal procedures and remedies to be exhausted before the disclosure is made public.[17] In *Alphen v Rheinmetall Denel Munition*, it was further confirmed that the lodging of a grievance does indeed constitute an

[16] (2018) 39 ILJ 1760 (LC) at para [29]
[17] *Chowan v Associated Motor Holdings (Pty) Ltd and Others* at para 44

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exercise of a right conferred by the LRA for the purposes of a claim of automatically unfair dismissal under section 187(1) of the LRA. This was because the act of lodging a grievance is merely an assertion of a right not to be treated unfairly, something which is guaranteed under the protection of fair labour practices enshrined in section 23(1) of the Constitution and section 185(b) of the LRA.[18]

26.16 In consideration of the above, the starting point is that a disclosure cannot be protected if it is made in fulfilment of an existing duty of the employee in the normal scope of his or her work. Furthermore, whether a report or disclosure of notorious information could or could not constitute the substance of a protected disclosure will be dependent on the circumstances of each case and the nature of information disclosed.[19]

26.17 In this case, and on the applicant's own version, he is accountable to the Board as Company Secretary, and in accordance with the provisions of section 88(1) of the Companies Act, his scope of duties included *inter alia*, recording EXCO meetings and ensuring that minutes were properly recorded and distributed.

26.18 It can be accepted from the applicant's own version that what he had disclosed in his report to EXCO, was what was extensively discussed in the very same EXCO meeting of 22 July 2019. The report, as can be gleaned from its very first sentence, was merely a response to what the applicant deemed to be 'unfounded and patently false allegations

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[18] At paragraphs [19] – [20]

[19] *Goldgro (Pty) Ltd v Mcevoy* (2019) 40 ILJ 1202 (LAC) at para 23 where it was held;

"The question of the prior knowledge and extent of the knowledge of the persons or entity to whom the disclosure is made has been the subject of judicial consideration. In *Beaurain and Others v PHSDSBC (Labour Court, unreported, C15/2012, per Steenkamp J, 16 April 2014))* it was held that a "report" of notorious information could not constitute the substance of a protected disclosure. That case concerned poor ventilation in a hospital, the subject matter of protracted prior discussion, complaints and investigation. In *City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another* Wallis JA dealt with a submission that prior knowledge by the employer of the subject matter of the disclosure is a bar to the disclosure qualifying as a protected disclosure. That view was rejected. That situation is distinguishable from the present case; the appellant, here, was not merely "aware" of the facts; it was, through its board, actively addressing the issues and the respondent was an active participant in so doing."

levelled against him' by the CEO in that meeting, in the presence of EXCO. Other than the concerns raised in regards to whether the CEO had interfered with the first respondent's tip-offs' policy, I am in agreement with the submissions made on behalf of the respondents that the report, as already indicated elsewhere in this judgment, is more about personally attacking the CEO and his management style, and consists of the applicant's own opinions on his own interactions with the CEO and the latter's management style and treatment of other employees. The conduct the applicant complained of relates in essence to his own personal grievances that have evolved between him and the CEO over time since the latter took over. The definition of a protected disclosure is extremely wide, but it could not have been envisaged that it should cover personal grievances made against senior employees. To the extent that central to the applicant's complaint in regards to the tip-offs is that the CEO interfered with the policy in that regard, whether that constituted an unlawful or criminal conduct is not for this Court to decide.

26.19 *Prima facie*, that report in the light of the subsequent grievance cannot (collectively) acquire the status of a disclosure, let alone a protected one. This is so in that the terms in which the report are articulated indicate that they were driven by personal animosity rather than an intention to make a disclosure to the Board or EXCO. The strident language of the grievance is further a strong indication that the disclosure is not made good faith as required by the PDA, as what he seeks is to ensure that not only are his grievances dealt with, but that the CEO equally faces some consequences.

26.20 Thus, to the extent that the applicant chose to utilise the grievance procedure, the issues raised in the grievance and the process chosen by the applicant cannot morph into a matter falling within the confines of the PDA. If the applicant had reasonably believed that the conduct of the CEO was unlawful, and in the light of the process he chose, it is for the grievance hearing to make such a determination.

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26.21 To the extent that the applicant complained of any occupational detriment, an assessment of the timing of the suspension, the reasons given by the respondents for the suspension reveals that it is common cause that the applicant was placed on precautionary suspension with effect from 11 September 2019, some more than one month since the alleged protected disclosure was made. The suspension is pending investigations into the applicant's conduct related to the recording of the EXCO meeting without its consent. The applicant has not been advised of whether any further disciplinary steps would be taken against him. The applicant nonetheless points to this suspension as being linked to the disclosures he made. It was further submitted on his behalf that the fact that he was already asked by the CEO to resign; asked to withdraw his grievances and further suspended after his referral of the dispute are signs of an occupational detriment .

26.22 To the extent that the whistle-blowing procedures were not followed as conceded by the applicant, and further in the light of the views expressed in this judgment about whether the disclosures, if any were made, and also in good faith, it is doubted that on the face of it, there is causal link between the protected disclosures and the occupational detriment. In this regard, the applicant conceded that indeed he had recorded the EXCO meeting using his own mobile phone. If the respondents had reason to believe that the actions of the applicant constituted misconduct deserving an investigation, that is a matter within their prerogative.

26.23 The fact that the applicant was allegedly told in December 2018, some nine months before the purported disclosure that he should resign cannot possibly be linked to that disclosure for the purposes of a definition of occupational detriment under section 1 of the PDA. This is particularly so since it is not clear as to what the basis of that request were.

26.24 To the extent that the applicant had not deemed it necessary to challenge his suspension, he cannot complain of that step as

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constituting an occupational detriment without even challenging it. In this regard, where the ultimate decision was to be taken that he should be subjected to a disciplinary enquiry, it is not as if he is without remedies. This is so in that first, his grievance hearing will take place. Second, to the extent that the disciplinary proceedings may be instituted against him resulting in an adverse outcome, like all other employees, he will have recourse in the provisions of section 191 of the LRA in protecting his rights. Third, he has already launched proceedings in this Court in regard to the full merits of his alleged protected disclosure.

[27] In the light of the above factors, it cannot be said that the applicant had demonstrated a clear right or even a *prima facie* right to the relief that he seeks. There is no basis for any conclusion to be reached that he stands to suffer irreversible and irreparable harm as he had alleged, in the event that he is not granted the interim relief he seeks. It is further not correct as he had alleged, that he has no alternative remedies. As things stand, he has already pursued his remedies under section 4(1)(B) of the PDA.

[28] It is trite that most applications for an interim interdict are decided on the basis of the balance of convenience, which must favour the grant of an interdict, and this is an exercise that must involve weighing the harm to be endured by an applicant if interim relief is not granted, as against the harm that a respondent will bear, if the interdict is granted. A Court must assess all relevant factors carefully in order to decide where the balance of convenience rests.[20]

[29] In this case, upon a proper assessment of all the relevant factors, inclusive of the nature of the alleged disclosure, it cannot be said that the balance of convenience favours the applicant in circumstances where the respondents' rights and prerogative to conduct investigations into any alleged acts of misconduct and to take any appropriate action where necessary would be compromised.

[20]See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* at para 55

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[30] It follows in the light of the above that the applicant's application must fail. I have further had regard to the requirements of law and fairness, and I am of the view that the facts and circumstances of this case do not call for a costs order.

[31] Accordingly, the following order is made;

Order:

1. The applicant's application is dismissed.

2. There is no order as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	ZD Kela, instructed by Ndumiso Voyi INC
For the First and Second Respondents:	P Belger, instructed by Cowan-Harper-Madikizela Attorneys

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