



(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS467/24

In the matter between:

LINDOKUHLE KUNENE

Applicant

and

AKANI EGOLI (PTY) Ltd t/a GOLD REEF CITY

Respondent

Heard: 10 November 2025

Delivered: 27 February 2026

JUDGMENT

TSHISEVHE, AJ

Introduction

[1] This is an application where the Applicant seeks compensation after he was subjected to an occupational detriment for making a protected disclosure in terms of section 6 and 9 of the Protected Disclosure Act¹ (the PDA).

[2] The Applicant seeks a compensation amounting to R344 400 which equates to his 12 months' salary.

¹ Protected Disclosure Act 26 of 2000.

- [3] On the other hand, the Respondent is opposing the matter stating that the Applicant is not entitled to any relief herein.

Issues in dispute and what need to be decided

- [4] This court is required to decide the following issues:

- 4.1 Did the Applicant make a protected disclosure as envisaged in terms of section 1 of the PDA?
- 4.2 Was the disclosure protected in terms of section 6 and 9 of the PDA?
- 4.3 Was the Applicant subjected to an occupational detriment on account of making a protected disclosure?
- 4.4 Is there a causal link between the disclosure and the disciplinary action, and,
- 4.5 Lastly, was the Applicant subjected to an unfair labour practice in terms of section 186 (2) (d) of the Labour Relations Act² (the LRA).

Salient Background

- [5] The Applicant alleges that he is appointed by the Respondent as a Producer Marketing since 2021 whereas he joined the Respondent in 2011 occupying a different position.
- [6] The Applicant alleges that the Respondent advertised a position of Events Manager on 27 September 2023 and he applied for same, however, he was not shortlisted.
- [7] That on 11 October 2023, he received feedback regarding the advert, telling him that he did not qualify as he only had 2 years of relevant experience. The Applicant then took his cv to Ms Kathy Govender, who after going through his CV agreed with him that he qualifies. She thereafter told him that the Regional Marketing Manager, Mr Gareth Kaschule is the one who does not want him appointed as he wanted someone with Theatre experience.

² Act 66 of 1995, as amended.

- [8] On 2 November 2023, the Applicant was told that he was not successful, the applicant and his colleague Mr. Johannes Mekwe who also applied for the position were given the applications for the said position by their supervisor, Ms Govender who asked them to shortlist candidates for interviews, which request the Applicant refused to do as he believed that he was a suitable candidate. However, Mr Mekwe assisted with shortlisting but he did not shortlist the incumbent, Ms Ashleigh Scott- Roux.
- [9] On or about 21 December 2023, the Applicant lodged a grievance against Mr Kaschule for unfair labour practice as a result of his impropriety in the selection process.
- [10] On 15 January 2024 at the grievance hearing, the Applicant produced a copy of the cv of the successful candidate, alleging that she did not meet the minimum requirements and she was handpicked by Mr Kaschule.
- [11] On 24 January 2024, the Applicant was interrogated on how he got a hold of the cv, which interrogation the Applicant saw as a retaliation and victimisation for whistleblowing acts of impropriety.
- [12] The Applicant and Mr Mekwe were hauled before a hearing for breach of the Protection of Personal Information Act³ (POPIA) facing several charges.
- [13] The Applicant was charged with 3 charges being, breach of Protection of Personal Information Act⁴ (POPI Act) / or revealing confidential information to unauthorised persons and gross dishonesty, alternatively, giving false statement or evidence. The Respondent denies any wrong doing.
- [14] On other hand, Mr Mekwe was charged with unlawful sharing incumbents' cv with the Applicant and he was not found guilty of the charge.
- [15] The Applicant was found guilty of violating whistleblower policy and was given a warning.

Applicant's evidence

³ Act 4 of 2013.

⁴ Protection of Personal Information Act 4 of 2013.

- [16] The Applicant submitted that he was employed by Tsogo Sun in 2011 occupying different positions. That he currently occupies a position of Marketing Producer since 2021.
- [17] That he was hauled before a hearing after he made a protected disclosure in a case where Mr Kaschule asked a candidate to apply for a post as his preferred candidate and further participated in the interviews.
- [18] That the Respondent advertised a position of Events Manager in October 2023 and he applied for same.
- [19] The candidate, Ms Ashleigh Scott- Roux, brought by Mr Kashule was never shortlisted by Mr Mekwe as she did not meet the minimum requirements of the job.
- [20] That he was told by Ms Kathy Govender that he does not meet the minimum requirements. However, after having taken her through the CV, she agreed with him that he qualifies and then told him that *'let me be upfront with you, it is Mr Kaschule who does not want you as he prefers a candidate with Theatre experience'*.
- [21] That the Applicant and Mr Mekwe were asked to shortlist but he refused leaving Mr Mekwe to shortlist alone, where he did not shortlist the incumbent.
- [22] He testified that Ms Ashleigh Scott- Roux's curriculum vitae ('the cv') did not state any theatre experience, no reference, contained no application/covering letter and lacked minimum qualifications as she only had grade 12.
- [23] That he made a protected disclosure in terms of the PDA during a grievance where he reported acts of impropriety by Mr Kaschule. The first one being during the grievance hearing and the second one was at the Commission for Conciliation, Mediation and Arbitration (CCMA). That Mr Kaschule lacked integrity when he excluded him and approached the incumbent, as a result he was unethical thereby violating the Ethics policy.

- [24] That the requirements of the position were applied differently and he was treated unfairly.
- [25] That Mr Kaschule handpicked a candidate and also recommended her for appointment.
- [26] That the incumbent's cv lacked a cover letter and reference, and it was sent directly to him. That Ms Ashleigh Scott- Roux is a friend of Mr Kaschule hence he had a meeting with her before she was appointed. That Mr Kaschule ought not to have participated in the interview due to conflict of interest. Mr Kaschule is the one who set the guidelines for the position and interviews. Mr Kaschule used his position for personal gain as the incumbent is his longtime friend thereby violating conflict of interest policy.
- [27] That he should have been protected as a whistleblower upon making two disclosures. That he views the disciplinary hearing as an occupational detriment for having reported the impropriety of Mr Kaschule and same was a retaliation.
- [28] That immediately when he saw the cv, he kept it in order to use it as evidence in support of the allegations as he had no choice but to use the cv as evidence in support of his allegations.
- [29] He was charged for using the cv at the CCMA because he did not seek prior permission from the Respondent. However, the said cv is also on public domain as it is attached on Ms Ashleigh Scott- Roux LinkedIn profile.
- [30] That he received the cv after Ms Govender placed it in the folder accessible to everyone in the department.
- [31] That he was found guilty of failing to follow the company's Whistleblowing policy thereby violating POPIA and for making false statement on how he got hold of the cv.
- [32] That he was given a final written warning. He further testified that had he not disclosed the cv, he would not have been investigated and issued with a

warning. He testified that what surprised him is that the Respondent did not bother to investigate the allegations he disclosed but only investigated him.

- [33] During cross examination it was put to the Applicant that his application at the CCMA was dismissed and he testified that he is challenging the said decision on review. The Applicant further testified that he does not challenge the employer's failure to appoint him but the occupational detriment that he went through.
- [34] He however, testified that had he been appointed he would not have been here because his rights would not have been violated.
- [35] A version was put to him that he was not shortlisted because he lacked experience and his answer was that he is qualified, further that he is surprised because Ms Ashleigh Scott- Roux does not have the inherent experience but she was appointed.
- [36] A version was put to him that there was no occupational detriment because other employees such as Ms Govender and Mr Mekwe were also charged and he disputed same.
- [37] The Applicant testified that Mr Kaschule created a position well knowing that he wanted the incumbent who is his associate thereby violating policies.
- [38] He was asked if he is of the view that Mr Kaschule was supposed to have recused himself and he testified that, Mr Kaschule could not have a preferred candidate and further participates in the interview process.
- [39] The Respondent's legal representative put a version that Mr Kaschule will not dispute that the incumbent was his preferred candidate and the Applicant concurred.
- [40] A version was put to the Applicant that a final decision to appoint was made by Ms Govender not Mr Kaschule and Applicant disputed same, saying that it happened on paper only, but Mr Kaschule is the one who had powers as he is the one who brought her.

- [41] A version was put to the Applicant that there was no occupational detriment but he was disciplined because of violating the whistleblowing policy and he disputed same.
- [42] A version was put to him that he was not supposed to access the folder as he refused to shortlist but only HR personnel and he disputed same, saying that he even made the Respondent aware that he is in possession of the cv.
- [43] The Applicant further testified that the Respondent was supposed to have investigated Mr Kaschule not him.

Respondent's evidence

- [44] The Respondent called its first witness in Nagarsen Naicker who testified amongst others that:
- 44.1 She is an Industrial Relations Manager within Tsogo Sun Group.
- 44.2 That Mr Kunene lodged a grievance against Mr Kaschule where his allegations were based on the CV of a candidate and she requested a staff member called Rhyno Earl to investigate in order to establish as to how Mr Kunene got hold of the CV as he should not have possession of same.
- 44.3 She submitted that the Applicant was never harassed because Mr Mekwe was also investigated as he was also in possession of the CV's.
- 44.4 During cross examination the witness testified that he considered interest of both the Applicant that those of the Respondent.
- 44.5 A version was put to the witness that he pre-empted the outcome of the investigations because he indicated that Applicant misconducted himself in the email.
- 44.6 The witness further testified that it was irregular for the Applicant to be requested to shortlist candidates for an interview in a position where the Applicant is also a candidate.

44.7 That any employee is justifiable to report misconduct to the employer.

44.8 A version was put to the witness that the fact that the Applicant produced the cv, it was not the only thing peculiar but also the misconduct he reported which the Respondent did not bother to investigate, the witness opted not to respond.

44.9 The witness also testified that there is nothing wrong with Mr Kashcule referring a candidate for interview because he was not the only panel member.

44.10 That they never wanted to victimise the Applicant for reporting misconduct. That they never asked for Mr Kaschule to be investigated despite the allegations, but they were unpacked at the grievance hearing.

44.11 The witness testified that the incumbent was supposed to meet all the requirements for the position as advertised.

44.12 The witness further testified that the investigation was as a result of the Applicant using the cv as evidence during the grievance hearing.

44.13 That he did not ask for Mr Kaschule to be investigated as he did nothing wrong.

44.14 The witness conceded that the Respondent would not have known about the misconduct of Ms Govender had he not reported.

[45] The Respondent called its second witness in Mr Gareth Kaschule who testified amongst other that:

45.1 That he is a General Manager: Online Gambling.

45.2 That he is the one who restructured the organogram reinstating a position of Theatre Manager.

- 45.3 That Human Resources put together the requirements for the position including qualifications, he only assisted with same after they failed to get a candidate.
- 45.4 He was not part of the shortlisting process.
- 45.5 That he never told Ms Govender that he does not want the Applicant but that he prefers someone with Theatre background.
- 45.6 That he directed that during shortlisting, all those who do not have Theatre background should not be considered.
- 45.7 That he headhunted the Ms Ashleigh Scott- Roux, he knew her for more than 10 years as her company was an entertainment service provider at the theme park of the Respondent.
- 45.8 That he had known her as a friend and she was not his first preference but Mr Calum Stevenson was, he however declined to take up the position when he headhunted him.
- 45.9 That he asked the incumbent to send her cv to HR not to him directly.
- 45.10 That the interview panel was comprised of himself, Ms Govender and Deshnee Naidoo with Ms Govender having the final say.
- 45.11 That the Applicant did not qualify for the position as per his CV as he was more of an administrator.
- 45.12 That he never considered him to grow in the position as it could not have worked as it would have been irresponsible of him as they needed a candidate with experience.
- 45.13 That he never had any conflict of interest as his focus was revenue for the Respondent.
- 45.14 During cross examination the witness testified that a CV should be clear when it comes to the requirements of the position.

45.15 That the incumbent met all the requirements, including educational qualifications as she has a diploma.

45.16 That she has never worked in a casino.

45.17 That he discussed the role of the position with Ms Ashleigh Scott- Roux before she could apply.

45.18 The witness conceded that a cv must be clear and state the experience.

45.19 That despite her CV not showing that she had Theatre background, it was uncovered at the interviews.

45.20 The witness testified that Ms Ashleigh Scott- Roux has a Diploma as her short courses in Digital design, Digital marketing and Marketing constitute same and she met all the requirements.

45.21 The witness testified that the above short courses are 3 Diplomas at NQF level 5 but could not explain as to why she was shortlisted as the advert required NQF level 7.

45.22 That it was established in the interview that she had a Diploma.

[46] The next witness of the Respondent was Ms Kathy Ashnee Govender who testified amongst others that:

46.1 That she is a Marketing Manager and she is the one who was fully in charge of the process to recruit Ms Ashleigh Scott- Roux.

46.2 That the advert was done by Head office.

46.3 That she gave the Applicant and Mr Mekwe feedback, telling them that a minimum of 4 years' experience was a requirement and the Applicant did not meet those requirements.

46.4 She denied accepting the Applicant's suggestion that he had 4 years' experience as he also did not have Theatre experience and his CV indicated 2 years' experience.

- 46.5 That she does not recall telling the Applicant that Mr Kaschule does not want him but he prefers a candidate with Theatre experience.
- 46.6 That she requested the Applicant and Mr Mekwe to shortlist and the Applicant refused whereas Mr Mekwe complied.
- 46.7 That she provided access to Mr Mekwe and it was not opening and then she had to drop it in the Marketing drive.
- 46.8 The Applicant should not have accessed it as he refused to shortlist but if he went to the Marketing drive, he could access it.
- 46.9 The Applicant accessing the CV's violated POPI Act.
- 46.10 That she was part of the panel with Mr Kaschule and Deshnee Naidoo.
- 46.11 That they can deviate from the requirements of the position if a candidate is strong in one of the requirements and poor in some.
- 46.12 That Ms Ashleigh Scott- Roux does not have any tertiary qualifications but just short courses whereas the requirement was a degree or diploma. That they used their discretion to deviate from the requirements and appointed her despite her lack of qualifications.
- 46.13 That she was charged with negligence for saving the cv in the Marketing drive.
- 46.14 During cross examination, the witness testified that she cannot recall if she considered the inputs of other interview panel members before she can appoint.
- 46.15 That it would be unethical to discuss the types of question in the interview with a candidate before the interview and also forward the name of that candidate.
- 46.16 That she would not participate in an interview where her friend is a candidate as it will be unethical.

46.17 She further conceded that in exercising their discretion where they lower the requirements of the position during the interview, such conduct tend to exclude other candidates who could have applied for the said post.

[47] The Respondent called its last witness Mr Rhyno Earl who testified amongst others that:

47.1 He is a Surveillance Manager of the Respondent and was tasked with an investigation of how the Applicant got the cv's.

47.2 That the Applicant did no wrong in disclosing the CV's at the grievance hearing but all went wrong when he disclosed them at the CCMA hearing since they do not have an agreement with the CCMA. There was therefore a data breach committed by the Applicant.

47.3 Mr Mekwe was also disciplined.

47.4 During cross examination, the witness could not explain the finding of the chairperson at the hearing that relates to the issue of POPI Act and a version was put to him that the Applicant was not found guilty on that charge.

47.5 He disputed a version that the Applicant's hearing was a retaliation.

47.6 He conceded that if a company fails to conduct an investigation into the allegations of misconduct it will constitute a miscarriage of justice.

Evaluation of evidence and application of the law

[48] The Applicant's case is that he was subjected to a disciplinary hearing by the Respondent after he made a protected disclosure in reporting acts of impropriety by the Respondent' senior staff member, Mr Gareth Kaschule, who amongst others is alleged to have appointed Ms Ashleigh Scott- Roux without following company procedures, which conduct excluded the Applicant from competing for the same position.

[49] Section 1 of the PDA defines impropriety as:

'any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of 'disclosure', irrespective of whether or not- (a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere; (b) the law applying to the impropriety is that of the Republic of South Africa or of another country;'

[50] The Respondent on the other hand argues that the Applicant was disciplined for having misconducted himself as appeared in the charges.

[51] The Respondent further argued that the Applicant was not the only one who was disciplined to show that they did not single him out as Mr Mekwe and their supervisor Ms Govender were also disciplined.

[52] Section 1 of the PDA defines an 'employee' and 'employer' as follows:

"employee" means –

- (a) any person, excluding an independent contractor, who works or worked for another person or for the State, and who receives or received, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer.

"employer" means any person –

- (a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or
- (b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer'.

[53] Section 1 of the PDA defines a 'disclosure' and a 'protected disclosure' as follows:

"disclosure" means any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by an

employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual had been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

“protected disclosure” means a disclosure made to-

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

[54] Section 6 (1) of the PDA provides:

- '(1) Any disclosure made in good faith –
- (a) and substantially in accordance with any procedure authorised by the employee's or worker's employer for reporting or otherwise remedying the impropriety concerned and the employee or worker has been made aware of the procedure as required in terms of subsection (2)(a)(ii); or
- (b) (b) to the employer of the employee or worker, where there is no procedure as contemplated in paragraph (a), is a protected disclosure'.

[55] An 'occupational detriment' is defined⁵ as:

- '(a) being subjected to any disciplinary action;
- (b) being dismissed, suspended, demoted, harassed or intimidated;
- (c) being transferred against his or her will;
- (d) being refused transfer or promotion;
- (e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- (f) being refused a reference, or being provided with an adverse reference, from his or her employer;
- (g) being denied appointment to any employment, profession or office;
- (h) being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of –
 - (i) a criminal offence; or (ii) information which shows or tends to
 - (ii) show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur;

⁵ Section 1 of the PDA.

- (j) being threatened with any of the actions referred to in paragraphs (a) to (h) above; or (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services’.

[56] Unfair labour practice related to protected disclosure is also defined in terms of section 186 (2) (d) the LRA as:

‘any unfair act or omission that arises between an employer and an employee involving an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.’

[57] It is common cause between the parties that the Applicant has been hauled before the disciplinary hearing as a result of being found in possession of the curriculum vitae of an interview candidate.

[58] The Applicant’s defence is that he was reporting acts of impropriety and the manner in which he got the cv is lawful as the cv was placed in the marketing Drive which is accessible to everyone in the department.

[59] Section 3 of the PDA provides that:

“no employee or worker may be subjected to an occupational detriment by his or her employer on account, or partly on account of having made a protected disclosure.”⁶

[60] The Applicant submitted that the disciplinary hearing was a retaliation by the employer for reporting acts of impropriety because if it was not for him, they would never have known.

[61] The Applicant supported his allegation by the fact that the Respondent did not bother to investigate the allegations of impropriety made.

⁶ Section 1 of the PDA defines an ‘impropriety’ as “any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of ‘disclosure’, irrespective of whether or not – (a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere; (b) the law applying to the impropriety is that of the Republic of South Africa or of another country;”

[62] In *Baxter v Minister of Justice and Correctional Service and others*⁷ (Baxter) the Labour Appeal Court (LAC) was instructive as setting out the test that must be satisfied in order for an applicant to succeed in a claim of an automatically unfair dismissal premised on a protected disclosure. The first leg is to prove that a protected disclosure as defined in the PDA was made to the employee's employer in good faith. The second leg is to prove that the disclosure was the main, proximate or most likely cause of the dismissal. The LAC stated as follows in this regard:

'[64] In order to succeed in his claim for automatically unfair dismissal, the appellant was therefore required at trial to establish the following disclosed information regarding the conduct of an employee... of the department to his employer; ii) he had reason to believe the information showed or tended to show the failure or potential failure to comply with any legal obligation to which that employee was subject; iii) the disclosure was made in good faith; and iv) he was disciplined, suspended and dismissed on account or partly on account of having made the disclosure.'

[63] In order for the Applicant to succeed in this matter, this court should first be satisfied that the disclosure made meets the requirements as set out in *Nxumalo v Minister of Correctional Services and Others*⁸ the Court held:

'The PDA is a four staged process entailing firstly, the analysis of the information to determine whether there is a disclosure. Secondly, where there is a disclosure such has to be determined if it is protected. Thirdly, a determination is to be made whether the employee was subjected to any occupational detriment. Fourthly, an assessment of the appropriate remedy is then to be finally made.'

[64] The employee does not have to prove the correctness of the disclosed information, only a reason to believe that there were acts of impropriety.⁹ The LAC in the case of *SA Municipal Workers Union National Fund v Arbuthnot*¹⁰ stated that the 'requirement of 'reasonable belief' does not entail

⁷ [2020] 10 BLLR 968 (LAC) at para 64.

⁸ (2016) 37 ILJ 177 (LC) at para 14.

⁹ See: *Radebe and Another v Premier, Free State and Others* 2012 (5) SA 100 (LAC) at para 20.

¹⁰ (2014) 35 ILJ 2434 (LAC) at para 15.

demonstrating the correctness of the information because a belief can still be reasonable even if the information turns out to be inaccurate’.

- [65] In *Chowan v Associated Motor Holdings (Pty) Ltd and Others*,¹¹ the court held that the employee’s subjective belief that she was being unfairly discriminated against was reasonable for purposes of the PDA. Because the disclosure was made in good faith, it constituted a protected disclosure, notwithstanding disputes about the underlying facts.
- [66] Similarly, in *John v Afrox Oxygen Limited*¹², the Labour Appeal Court reaffirmed that the test is not whether the information itself is objectively correct, but whether the employee’s belief in its truth is reasonable. The court cautioned that requiring employees to prove the accuracy of their disclosures would impose an unduly high threshold and undermine the purpose of the PDA.
- [67] These decisions underscore that the PDA is designed to encourage disclosures, not to deter them through unrealistic evidentiary burdens.
- [68] Therefore, *in casu*, the Applicant successfully discharged this burden and went beyond the test in that, he even proved that the allegations are correct as a result of concession during the hearing of this matter and there is no need to infer his *bona fides* as it is apparent, as outlined below.
- [69] It is important to accentuate that evidence before me suggest that Mr Kaschula’s conduct prior and during the interview is questionable. I am aware that I am not required to decide on the fairness of the recruitment process that led to the appointment of Ms Ashleigh Scott- Roux.
- [70] The Respondent argued that the Applicant’s claim of occupational detriment cannot succeed because they also disciplined Ms Govender and Mr Mekwe. I find the said reasoning to be absurd if not illogical in all material respects as it looks more to be a ruse than anything.

¹¹ 2018 (4) SA 145 (GJ).

¹² (2018) 39 ILJ 1278 (LAC).

- [71] The allegations against Mr Kaschule are gross as compared to any other employee including those faced by the Applicant. In my view all the allegations against Mr Kaschule such as conflict of interest and irregular or unethical conduct led to the appointment of Ms Ashleigh Scott- Roux.
- [72] In terms of the advert, candidates were expected to make their applications with a covering letter. They were also supposed to possess experience in Theatre which requirement the Applicant was said to have lacked and on the other hand, the cv of Ms Ashleigh Scott- Roux said nothing about Theatre experience, but she was appointed, nevertheless.
- [73] The position required a minimum of a National Diploma or a Degree, however, Ms Ashleigh Scott- Roux did not possess none of the two as she only had Matric and short courses. Ms Ashleigh Scott-Roux's cv also did not contain a reference as required in the advertisement.
- [74] Mr Kaschule was asked by the Applicant during cross examination if Ms Ashleigh Scott-Roux possessed any post Matric qualification or NQF level 7 qualifications and stated that she has a Diploma.
- [75] I should state that Mr Kaschule was a prevaricate witness to say the least.
- [76] This version was contradicted by the cv of Ms Ashleigh Scott-Roux as well as the evidence of Ms Naicker and Ms Govender who testified that she did not have post matric qualifications, because if she had same, there would be no need to exercise the said discretion.
- [77] It is therefore shocking to learn that senior members of Management can try to mislead the court under oath to this level.
- [78] As stated above, I am not required to determine if the appointment of Ashley was in line with the Respondent's procurement processes and I do not intend to do so. Neither am I required to determine if the decision not to shortlist the Applicant was fair or not.

Did the Applicant make a disclosure to his employer?

- [79] I wish to state that evidence before me suggest that the Applicant in disclosing the cv at the grievance hearing was enough to constitute a disclosure as defined in terms of section 1 of the PDA.
- [80] The South African approach is consistent with the approach in Canada,¹³ the United Kingdom¹⁴ and the United States of America,¹⁵ the scheme of the PDA encourages internal procedures and remedies to be exhausted before the disclosure is made public.
- [81] I have no doubt that the Applicant tried, by all means, to have the matter addressed internally through a grievance, however, the employer did not want to hear any of it.
- [82] On the other hand, as per the evidence of the Respondent's witness Mr Rhyno Earl, they never bothered to investigate the allegations and what they have done is not enough because they could have easily found the acts of impropriety attributed to Mr Kaschule.
- [83] In my view the employer must take reasonable steps to investigate the allegations. The employer should be given a chance to explain or correct the situation. The motivation for this approach is not to cover up wrongdoing but because the internal remedy may be the most effective.
- [84] It is therefore my considered view that in general, when an employee like the Applicant herein reports acts of impropriety, they run the risk of being isolated, victimised as well as dismissed, let alone being killed by those that he reported as it seems to be a trend of late in this country.
- [85] The Respondent's witnesses testified that they did not have a problem with the fact that the Applicant disclosed the cv to the chairperson of the grievance hearing but only when he used it at the CCMA. The reason behind the employer's unhappiness is that they allege that they do not have any

¹³ *G. Stencell v The Crown, Grievor v. The Crown in Right of Ontario (Office of the Provincial para 192.*

¹⁴ *Calland et al, Bower.*

¹⁵ *Calland et al.*

relationship with the CCMA and as a result the Applicant shared confidential information with third parties.

[86] I find the above reasoning to be unmeritorious, let alone hogwash, because the CCMA is statutory body created or established to assist in the resolution of disputes.

[87] The Respondent's reasoning is not dialectic at all, based on the fact that the undisputed version of the Applicant is that the LinkedIn profile of Ashley contains her entire cv.

[88] It is therefore my firm view that the Applicant has proven that he has made a disclosure to the employer/Respondent herein.

Did the information disclosed by the Applicant constitute a protected disclosure as defined in the PDA?

[89] Evidence before me suggest that the Applicant made a protected disclosure to the Respondent about acts of impropriety in the workplace.

[90] The evidence before this court and concession by Respondent's witnesses, Ms Naicker, Ms Govender and Mr Earl who investigated the Applicant proves that there are acts of impropriety and as a result it is not only a reason to believe that there are acts of impropriety as evidence is abundantly clear.

[91] Ms Naicker also testified that she would not appoint her friend or take part in an interview where her friend is a candidate, this is after Mr Kaschule had spoken to Ashleigh Scott-Roux asking her to apply for the position and further took part in the selection interview that appointed her.

[92] It is a shock if not abhorrent that a candidate or an applicant can be asked to shortlist candidates for interview in a post that he also applied. The conduct of Ms Govender in asking both the Applicant and Mr Mekwe to shortlist was unfair to Mr Mekwe and the Applicant respectively.

[93] Further evidence suggest that the interview panel never exercised its discretion to deviate from the requirements of the post as advertised because

Mr Kaschule and Ms Naicker are not on the same page when it comes to the issue of post matric qualifications. However, her cv laid bare the truth.

[94] It is therefore clear that the disclosure made by the Applicant is a protected one in terms of section 1 of PDA.

[95] In view of the afore-going, I find that the information the Applicant, Mr Lindokuhle Kunene disclosed, falls within the definition of 'disclosure' as defined in section 1 of the PDA, in particular, subsections (b), (c) and (g).

[96] In the circumstances, the disclosure by the Applicant is protected as contemplated in sections 6, 8 and 9 of the PDA.

Did the Applicant suffer an occupational detriment?

[97] The institution of disciplinary action itself is not an occupational detriment. As foreshadowed above, for the institution of disciplinary action to be an occupational detriment, it must be in response to a protected disclosure, and a causal connection must exist between the protected disclosure and the disciplinary action.

[98] It is common cause in this matter that the disciplinary action started immediately after the protected disclosure. It is my considered view that the Applicant has been subjected to occupational detriment for reporting acts of impropriety by Mr Kaschule.

[99] What baffles my mind is the fact that the Respondent saw nothing wrong with the conduct of Mr Kaschule. The Respondent decided to charge the Applicant instead of investigating the allegations that he (Applicant) disclosed.

[100] The charges against the Applicant were nothing but a retaliation for whistle blowing against acts of impropriety. The Respondent protected those who are alleged to have committed acts of impropriety.

[101] In view of the foregoing, the Applicant suffered an occupational detriment as he faced disciplinary action on account of having made a protected disclosure.

[102] As a measure of fighting acts of impropriety, this court expect employers to provide the necessary protection to Whistleblowers in order to completely eradicate acts of impropriety in the workplace.

Was the protected disclosure the main, dominant or proximate reason for the Applicant's disciplinary hearing/action?

[103] As indicated above, the Respondent argued that the Applicant was disciplined for having committed misconduct as he violated POPI Act. In my view, the misconduct charges emanate from the protected disclosure. In the premises, I find that the protected disclosure was the dominant reason for the Applicant's disciplinary action/hearing.

[104] It follows from the above that the Applicant has satisfied the causation test. I find that his protected disclosure was the main and proximate cause for his disciplinary action.

[105] Based on the above, the Respondent violated section 186 (2) (d) of the LRA.

Appropriate relief

[106] Section 4 of the PDA provides that an employee who has been subjected to, is being subjected to, or may be subjected to an occupational detriment as a result of a protected disclosure may approach any court with jurisdiction, including the Labour Court, for appropriate relief.

[107] In a case where an employee is not dismissed, the only remedy or relief he is entitled to is compensation as prayed for by the Applicant.

[108] The Applicant argued that he is entitled to R344 400, which amount constitute a 12 months compensation.

[109] The Applicant produced a proof of registration from UNISA to show that he incurred costs of registration for an LLB degree in order to acquaint himself with legal proceedings.

[110] The Applicant was harassed by the Respondent and suffered emotionally as a result of the Respondent's conduct. On the other hand, the Respondent argued that he is not entitled to any relief.

[111] In the case of *Tshishonga v Minister of Justice and Constitutional Development and Another*¹⁶ the court held that the more serious the nature of the occupational detriment to which the employee is subjected the greater the compensation. Hence dismissal attracts compensation of as much as twenty-four month's remuneration...¹⁷

[112] The longer the dispute endures, the greater the stress on the employee and the higher the compensation should be. This controversy has endured for almost four years.

[113] Employers who act inappropriately against whistleblowers should expect to be fittingly sanctioned. The sanction should be used as deterrence to other employers who do not take strides to protect whistleblowers.

[114] The Applicant therein is not dismissed and therefore the maximum compensation is out of the picture.

[115] This dispute has been on-going since 21 December 2023 being a date that the Applicant first lodged his grievance.

[116] It is my view that the amount of compensation to be awarded should be just and equitable.¹⁸

[117] It is trite that when deciding on the quantum of compensation to be awarded, this Court exercises a discretion. This discretion was enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*,¹⁹ as thus:

‘The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary

¹⁶ *Tshishonga v Minister of Justice and Constitutional Development and Another* (2007) 28 ILJ 195 (LC) at para 197.

¹⁷ *Cork v Mc Vicar, The Times* October 31 1985; Bowers 37.

¹⁸ See: s 194(4) of the LRA; *Melia v Magna Kansei Ltd* (CA (Civ Div)) *Court of Appeal (Civil Division)* 2005 EWCA Civ 1547; [2006] I.C.R 410; [2006] I.R.L.R. 117; 2005 WL 2893795.

¹⁹ (2007) 28 ILJ 2238 (LAC) at para 30.

enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[118] Based on the above, it is my considered view that the Applicant should be awarded compensation for an amount of R229 600, which amount represents eight months' salary of the Applicant.

Costs

[119] I have a wide discretion when it comes to the issue of costs. In exercising this discretion, it must be considered that as a point of departure, it is now trite that in employment disputes under the LRA, costs are ordinarily not awarded.²⁰

[120] The Applicant was self-representing and as a result, he is not entitled a normal cost order.

[121] The further Applicant argued that he should be awarded a 12 months compensation because he incurred costs when he registered for an LLB degree at the University of South Africa.

[122] The Applicant further argued that he could have appointed an attorney but decided to rather invest in his own education so that he can represent himself and that was as a result of the Respondent's conduct.

[123] The Applicant further argued that he paid around R10 700 per semester at the University of South Africa since 2024.

[124] I deem it appropriate to make a cost order against the Respondent for reasonable costs incurred in the litigation, such as stationery, copies and transportation etc.

²⁰ *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC); *National Union of Mineworkers v Samancor Limited (Eastern Chromes Mines)* 2021 JDR 1249 (CC); *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC).

[125] Accordingly, and for the reasons set out above, I exercise my wide discretion when it comes to costs in favour of making a costs order against the Respondent.

[126] I am of the view that a cost order is warranted in this matter.

[127] In the premises, the following order is made:

Order

1. The Respondent is ordered to pay the Applicant an amount of R229 600, subject to statutory deductions, which amount represents eight (8) month' salary.
2. The Respondent is ordered to pay reasonable costs incurred by the Applicant in prosecuting this application, such as those stated in paragraph 124 above.

N. Tshisevhe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Lindokuhle Kunene (Self-represented)

For the Respondent: Mr F Cronje

Cronjes Attorneys

LABOUR COURT