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SCOPE OF PROTECTION: A RETROSPECTIVE AND PROSPECTIVE OVERVIEW OF THE PROTECTED DISCLOSURES ACT 2000

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ABSTRACT

Following South Africa's transition to democratic rule, numerous whistle-blowers have raised the alarm regarding corruption and improprieties at work, in both the private and public sectors. To prevent the negative consequences of whistleblowing, the Protected Disclosure Act, 2000 came into force in February 2001 and was subsequently amended in 2017. However, despite the existence of this law, the sometimes-devastating consequences that have followed disclosures have led to debates on legal protection or rather, the lack thereof of whistle-blowers. This article therefore aims to reflect on how South African courts, have interpreted the protection provided by this Act for whistle-blowers. More particularly, issues concerning the meaning of disclosure, meaning of good faith and the nature of compensation that the courts have awarded are highlighted.

KEYWORDS: Whistle-blower, South Africa, Protected Disclosure Act, Disclosure, Occupational Detriment.

RÉSUMÉ

Depuis la transition démocratique de l'Afrique du Sud, de nombreux lanceurs d'alerte ont tiré la sonnette d'alarme face aux actes de corruption et de fraude, tant dans le secteur privé que dans le secteur public. Pour lutter contre les répercussions négatives que peut entraîner le signalement de ces violations, la Loi sur les divulgations protégées (Protected Disclosure Act, 2000) est entrée en vigueur en février 2001, puis a été modifiée en 2017. Malgré tout, les retombées parfois dramatiques consécutives aux révélations d'informations compromettantes ont donné lieu à des débats sur la protection juridique, ou plutôt l'absence de protection, des lanceurs d'alerte. Cet article a donc pour vocation d'analyser la manière dont les tribunaux sud-africains se sont saisis de cette nouvelle législation, notamment leur interprétation des notions de divulgation, de bonne foi, et la nature des indemnisations accordées aux lanceurs d'alerte.

MOTS-CLÉS : Lanceur d'alerte, Afrique du Sud, loi sur les divulgations protégées (Protected Disclosure Act), divulgation, préjudice professionnel.

Whistleblowing is widely recognised as a mechanism to combat fraud and corruption in the society. In many countries, including South Africa, whistle-blowers have been instrumental in drawing attention to corrupt practices in the private and public sectors. However, while these whistle-blowers have been widely celebrated for blowing the whistle, retribution is unfortunately a common occurrence. This is because of the traditional view that whistle-blowers are troublemakers who should be punished for disloyalty.

This retribution which is known as occupational detriment has been defined in section 3 of the Protected Disclosure Amendment Act 2017 (PDAA) as all adverse effects including any disciplinary action, dismissal, civil claim, transfer, threats, harassment, retention, or acquisition of contract to render services among others, to a worker who made a protected disclosure in good faith. Although the scope of protection of the PDAA was extended in 2017 by the addition of the term « worker », hereby including independent contractors, consultants, advisers, other service providers, or possibly other people in the value chain who may have witnessed the wrong conduct.

The sometimes-devastating consequences that have followed disclosure have led to debates on legal protection or rather, the lack thereof. Against this backdrop, the intention of this article is not to analyse in its entirety the protection offered by the PDAA to whistle-blowers. Rather, this article aims to reflect on how South African courts, particularly the Labour Court has interpreted the protection provided by the PDAA for whistle-blowers[1].

More particularly, issues concerning the meaning of disclosure, meaning of good faith **(I)** and the nature of compensation that the courts have awarded are highlighted **(II)**.

I - MEANING OF DISCLOSURE

The first requirement for an employee to gain protection is to make a disclosure that falls within the scope of a disclosure in terms of the PDAA. Section 1 defines disclosure as « any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker

1 The PDA, though the primary legislation for whistleblowing, together with the Constitution, the Labour Relations Act 66 of 1995 (LRA) and other pieces of legislation forms part of the regulatory framework for whistleblowing in South Africa. Hence, when workers are subjected to occupational detriment because of making a protected disclosure, in terms of section 4 of the PDA, employees may seek relief under the LRA. Such claims are generally framed as unfair labour practices.

who has reason to believe that the information concerned shows or tends to show… », information regarding the conduct that is listed in paragraphs (a) to (f) of this section.

Furthermore, this disclosure must be made to either of the persons prescribed in sections 5 to 8 or made within the context of the procedure provided in section 9 of the Act (general protected disclosure). However, there were some initial inconsistencies in the interpretation of disclosure by the courts. This is best illustrated by the *Radebe v. Mashoff Premier of Free State Province*, hereinafter called the *Radebe* Trilogy.

In the *Radebe* trilogy, the courts also engaged with the meaning of good faith. Apart from when a disclosure is made to a legal advisor in terms of section 5, disclosures made to any other person including general disclosures must be made in good faith. Although the context of this case is a general disclosure, the argument and analysis of the court is relevant to protected disclosures in terms of sections 6 to 8 of the PDAA.

A - *RADEBE 1*

In terms of the judgement history of this trilogy, « *Radebe 1* » which was reported as *Radebe & another v. MEC, Free State Province Department of Education*[2], was an application for an interdict to stop the respondents from proceeding with a disciplinary enquiry against the applicants on the basis that it constituted an occupational detriment as contemplated in the PDAA.

In this case, the two applicants who are employees of the Department of Education in the Free State Province were served with a disciplinary hearing notice following their signing of a document which requested an investigation into instances pointing to « fraud, corruption and nepotism » on the part of the MEC. This document was sent to the office of the President of the Republic of South Africa, the National Minister of Education, the Premier of Free State, the first respondent, the Head of Education, the Deputy Director-General of the Free State Administration, and the Lejweleputsa District Director of Education.

Upon receipt of this document, the National Minister of Education directed that an investigation be conducted. However, the two employees were uncooperative with the investigators, who in the absence of any evidence, found that the allegations were malicious and speculative. These investigators recommended that the disciplinary measures be taken against the applicants. After receiving these charges, the employees approached the High Court to determine whether the disciplinary enquiry constituted an occupational detriment. The court dealt with the application on the basis that it was a general disclosure in terms of section 9 of the PDAA and considered whether the requirement of good faith was met.

In dismissing this application, the judge held that the applicants cannot be said to have acted in good faith because they provided no basis for their allegations neither could they reasonably have believed the information to be true. According to the court, « they repeatedly and monotonously bandy about the words fraud, corruption and nepotism as if these have been proven »[3]. This is at odds with *CWU v Mobile*

2 [2007] JOL 19112 (O).

3 § 30

Telephone Networks[4], where the court stated good faith does not necessarily require « proof of the validity of any concerns or suspicions that an employee may have, or even a belief that any wrongdoing has actually occurred »[5].

Following the decision of the high court in *Radebe 1*, charges were laid against the employees. At the disciplinary hearing the employees argued that they were whistle-blowers and absented themselves from the hearing.

At the end of this hearing, the parties were found guilty of the charges. The sanction was that both employees be demoted to the next lower rank with immediate effect[6]. Subsequently, the applicants referred an unfair labour practice dispute to the Educations Labour Relations Council. The dispute was not resolved, leading to *Radebe* 2 - reported as *Radebe & another v. Mashoff Premier of Free State Province & others*[7].

B - *RADEBE 2*

In *Radebe 2*, the court unpacked the broad statements the judge in *Radebe 1* had made. This required a determination of whether the document by the applicants was in fact disclosure within the context of the PDAA.

In interpreting this, the court gave « disclosure » a narrow meaning, emphasising that the information should be regarding the conduct of an employer[8]. In considering whether the respondents were the employers of the applicants, the court analysed the definition of an employer in terms of the PDAA and the provisions of the Employment of Educators Act of 1998 (EEA). The court concluded that the respondents were not the employers of the applicants. Since the information implicated the MEC[9] and the Minister, the information disclosed could not be regarded as a « disclosure » in terms of the PDAA.

Arguably, this approach contradicts the purpose of the PDAA which is to create a culture that facilitates the disclosure of information by employees relating to criminal or other irregular conducts. Furthermore, very often, when working in government or within a group of companies, an employee not well versed in the organogram of these entities may not know the specific identity of his or actual employer[10].

Similarly, the court in *Radebe 2* considered other elements of the definition of disclosure such as the employees must have reason to believe the information showed or tended to show an impropriety. In interpreting « reason to believe » the

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4 [2003] 8 BLLR 741 (LC).

5 § 21.

6 The applicants appealed against the findings of the disciplinary hearing. The outcome of the appeal confirmed the demotion of the first applicant while the sanction for the second applicant was altered.

7 [2009] JOL 23696 (LC).

8 § 43.

9 Member of the Executive Council.

10 R. Le Roux, « The Protected Disclosures Act 26 of 2000: Is This as Good as It is Going to Get for Whistleblowers - A Review of Some Recent Jurisprudence », *Stellenbosch Law Review*, 21 (3), 2010, p. 508.

court explained this to mean that the discloser must believe the information to be reasonably true. Consequently, the court held that reason to believe in the PDAA should be understood as « there are facts upon which reason to believe could be based. Clearly, speculations and opinions do not amount to facts upon which a reason to believe can be based (…) there must be a factual basis upon which a belief must rest ».

The court concluded that the information in the disclosure document was baseless and speculative and therefore not to protected under the Act. However, this approach of the court excludes honestly held opinions from the protection of the PDAA, leading to the perpetuation of a culture of silence. Besides the above, the court held that the actions of the applicants including the refusal to participate in the investigation and the disciplinary hearing suggests a lack of good faith.

The *Radebe 2*'s technical approach to applying the various elements of what constitute a disclosure is problematic as it could preclude potential whistle-blowers from coming forward. Fortunately, this severity was tempered in *Radebe 3* where the Labour Appeal Court (LAC) applied some of the principles developed by the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v. Engineering Council of South Africa* in 2010[11].

C - *RADEBE 3*

In *Radebe 3* - reported as *Radebe & another v. Premier, Free State and others*[12] -, the issue for determination was whether the appellants had made a disclosure within the context of the PDAA. Within this context, the appellate court had to decide whether a disclosure was made to the employer of appellants and whether they lacked the requisite « good faith » and « reason to believe » when making the disclosure. While highlighting that not all disclosure is protected, the court considered this specific case within provisions of section 6 and to a limited extent, section 9 of the PDAA.

In considering the requirement of who the employer of the appellants is, the appellate court held that the lower court erred in its resort to the EEA as the definition of an employer in the PDAA is clear and unambiguous. According to the court, the correct approach when interpreting a statutory provision « is that one must focus on the language in the relevant provision and not resort to extraneous sources unless the provision is unclear and/or ambiguous ». Also, the interpretation of words in a legislative provision must be determined according to their natural or primary meaning and within their specific context.

The court further stated that the approach of the lower court that the conduct complained of should be that of the employer not its employees, limits and excludes the conduct of a wide range of officials in State departments. Consequently, the court held that the lower court's finding that the Free State Department of Education was where the appellant was employed was correct. For this reason, their employer is the head of the education portfolio in Free State in the person of the MEC who has

11 2010 (2) SA 333 (SCA).
12 2012 (5) SA 100 (LAC).

oversight regarding all educational matters in the province and the Superintendent General is an employee appointed by the MEC.

Therefore, the court held that the disclosure falls within the scope of the PDAA and the court *a quo* erred in holding otherwise. In addition, the disclosure complies with section 7 of the PDAA since it was also made to the Premier of Free State who appoints MECs.

The next question to be answered is whether the disclosure was made in good faith by the appellants and whether they had reason to believe the information they disclosed showed or tended to show an impropriety. The appellate court stated that the Labour Court's interpretation of these terms was too narrow and introduced an element of truth and verification. That is, there must be factual accuracy of the allegations before a disclosure is made.

Citing the *City of Tshwane Metropolitan Municipality v Engineering Council SA*, the court stated that this narrow interpretation is inconsistent with the broad principles of the PDAA, namely, the encouragement of whistle-blowers to facilitate accountability and transparent governance. Therefore, the court held that in determining these two requisites, honesty plays a pivotal role and must be accessed on a case-by-case basis[13]. The court went ahead to mention some factors such as malice or the presence of an ulterior motive that could lead to the conclusion of lack of good faith. Furthermore, the court stated that equating reason to believe to personal knowledge of the information disclosed would set a very high standard which would frustrate the operation of the PDAA. The LAC found that that the disclosure sufficiently raised the red flag concerning the conduct of the MEC and other officials and objectively, the call of the appellants for investigation of those matters was honest.

Overall, the appellate court held that the appellants made a disclosure that is protected in terms of the PDAA and the disciplinary action instituted against them amounts to unfair labour practice in terms of section 186 of the LRA. The court ordered that the appellants be reinstated to their respective positions.

II - DETRIMENTS AND REMEDIES

Section 3 of the PDA provides that no employee may be subjected to any occupational detriment by any employer on account of having made a protected disclosure. However, this protection is not automatically extended to whistle-blowers unless a nexus between the disclosure and occupational detriment is established. According to the court in *CWU v. Mobile Telephone Networks (Pty) Ltd*, there must be some « demonstrable nexus » between the disclosure and the occupational

13 This approach was followed in subsequent cases. For example, in *SA Municipal Workers Union National Fund v Arbuthnot* (2014) 35 ILJ 2434 (LAC) at § 21 to 28, the court considered the actions of the employee and the timing of the disclosure (which was used to determine the reasonableness of the disclosure) and held that the employee had not acted in good faith. See also, *Potgieter v Tubastse Ferrochrome & Others* (2014) 35 ILJ 2419 (LAC) and *Beaurain v Martin NO & others* (1) (2014) 35 ILJ 224 (LC).

detriment[14]. Furthermore, the protected disclosure must be the dominant or likely reason for the dismissal[15].

To determine this, the court draws reference from the principles applied in establishing whether the dismissal of striking workers is for employer's operational reasons or for participation in a protected strike[16].

Once the occupational detriment is established, section 4 of the PDAA provides remedies to the whistle-blower. The cases below highlight how the courts have applied these remedies.

A - The case of *Grieve v. Denel (Pty) Ltd*

One of the first cases to test the extent of the protection under the PDAA is the case of *Grieve v. Denel (Pty) Ltd*. In this case, the applicant who was employed as a safety and security manager in a company that manufactures explosives submitted a report to his employer's board of directors alleging misconduct on the part of a senior employee. He was suspended and a disciplinary hearing was convened to deal with allegations of misconduct against the applicant. Grieve subsequently applied to the court for an interim relief interdicting the employer from the disciplinary hearing.

Considering the facts of the case, the court was satisfied that the applicant had established *prima facie* a causal link between the disciplinary action and the protected disclosure made. The court further noted that the applicant had no other remedy available and granted the interim interdict. However, in subsequent cases, decisions of the court shifted the focus from employees applying for interdicts to employees seeking compensation for the occupational detriment suffered because of a protected disclosure.

B - The case of *Pedzinski v. Andisa Securities (Pty) Ltd*

In *Pedzinski v. Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)*[17], the applicant who was employed as a compliance manager discovered certain members of staff were involved in irregular trading of shares. She reported the matter to her supervisor as well as other persons in the SCMB group. A month after, she was informed that her position would become redundant due to operational requirements. She claimed her dismissal was automatically unfair in terms of section 187(1)(c), (f) and (h) of the Labour Relations Act. After establishing that her disclosure fell within the ambit of section 6 of the PDAA and that this disclosure was the dominant reason for

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14 At § 19. See also, *Maqubela v SA Graduates Development Association & others* [2014] JOL 31484 (LC), the court denied the application for an interim order interdicting the suspension of the applicant pending disciplinary proceedings because there was no nexus between the disclosure made and the proposed disciplinary action against him.

15 See *TSB Sugar RSA LTD (RCL Food Sugar Ltd) v Dorey* (2019) 40 ILJ 1224 (LAC), where the LAC held a finding that an employee was subjected to an occupational detriment because of a protected disclosure will be based on the conclusion that the sole or predominant reason for the occupational detriment was the protected disclosure.

16 *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)* 2006 27 ILJ 362 (LC) § 45, where reference is made to the *SACWU v Afrox Ltd* 1999 20 1718 (LAC).

17 2006 27 ILJ 362 (LC).

her dismissal, the court ordered the payment of compensation equal to 24 months remuneration - the maximum compensation that can be ordered for an automatically unfair dismissal.

Clearly, the court wanted to punish the employer's devious use of the employee's ill health to dismiss her[18]. This can be argued to be an implied acknowledgement of the non-patrimonial loss suffered by the employee.

C - The Tshishonga saga

Few years after the decision in the above case, the issue of compensation following a disclosure was considered in some detail in the *Tshishonga* saga. The major question for determination was whether a disclosure made to the media can be regarded as a general disclosure in terms of section 9 of the PDAA. The reported judgements making up this saga are *Tshishonga v Minister of Justice & Constitutional Development* (*Tshishonga*)[19], *Tshishonga v Minister of Justice & Constitutional Development* (*Tshishonga 2*)[20] and *Minister of Justice & Constitutional Development v Tshishonga* (*Tshishonga 3*)[21]. In this saga, Tshishonga who was employed as deputy director-general in the Department of Justice and Constitutional Development was suspended and subjected to a disciplinary hearing for making allegations to the media against his employer, former Minister of Justice and Constitutional Development, Dr Penuell Maduna. At the disciplinary hearing, the chairperson found that the information divulged to the media was a protected disclosure within the scope of the PDAA.

As a result, it was found that there was no basis for Tshishonga to be suspended and his suspension and the disciplinary enquiry constituted occupational detriment in terms of section 1 of the PDA. Tshishonga subsequently instituted an unfair labour practice claim for compensation in terms of section 186(2)(d) of the LRA.

In *Tshishonga 1*, the Labour Court had to determine *in limine* whether it was bound by the ruling of the disciplinary tribunal. This matter was brought within the scope of section 191(13) of the LRA which permits an employee to refer a dispute to the Labour Court concerning an unfair labour practice claim if the employee alleges subjection to an occupational detriment in terms of the PDAA. The court held that it is not bound by the findings of the disciplinary inquiry. In *Tshishonga 2*, the major question for determination was whether the disclosure to the media about impropriety in the workplace is protected under the PDAA.

The judgement in this case represents one of the most comprehensive jurisprudential analyses of the PDAA and constitutes a *locus classicus* as far as the interpretation of the PDAA is concerned. However, the reference to this case will focus on the court's interpretation of compensation.

Upon holding that the decision made to the media was a general protected disclosure in terms of section 9 of the PDAA, the court ordered the payment of

18 § 97-99.

19 2006 27 ILJ 1541 (LC).

20 2007 4 BLLR 327 (LC).

21 2009 30 ILJ 1799 (LAC).

compensation equal to 12 months remuneration - the maximum compensation possible for an unfair labour practice. The judge acknowledged that the purpose of compensation within the context of the PDAA is to redress patrimonial and non-patrimonial losses.

Consequently, the court considered *inter alia* the relentless victimisation of Tshishonga by his employer, his forceful termination, his high legal costs, the failure of the government department responsible for the observance of the PDAA to account for its inaction by not giving evidence and ordered the payment of the maximum compensation possible. However, the judge's reference that compensation for an unfair labour practice is not « not a common law claim in delict for « insults and ill-treatment », an injuria not amounting to defamation » seem more focused on the severity of the occupational detriment[22]. This is like the court's approach in the *Pedzinski*'s case discussed above. Subsequently, this order for compensation formed the basis for appeal in *Tshishonga 3*.

On appeal, the court in *Tshishonga 3* had to determine what is just and equitable in circumstances where the compensation is for non-patrimonial loss. The LAC affirmed that compensation in terms of the LRA provides redress for patrimonial and non-patrimonial loss, but suggested that the lower court failed to establish the employee's actual patrimonial and non-patrimonial loss[23].

Nonetheless, the court stated that an award for a *solatium* will only be justified for non-patrimonial loss if attack on dignity and reputation or an onslaught on humanity can be proved[24]. Outlining some factors, the court noted that the non-patrimonial loss suffered by Tshishonga is similar to *action injuriarum* in terms of which *solatium* is granted[25]. Consequently, an award for R100 000 was granted for non-patrimonial loss while R177 000 was granted for patrimonial cost incurred by the respondent in having to defend himself.

The *Tshihonga* saga, particularly the detailed interpretation of compensation to redress whistle-blowers' non-patrimonial losses, is a very positive step towards protecting whistle-blowers. This approach has been applied in some recent cases. For example, in *Chowan v. Associated Motor Holdings*[26], the court found that the employer was liable for damages for the impairment to dignity suffered by the employee. However, in other cases, the court remain hesitate in granting the maximum possible compensation for occupational detriment such as dismissal or unfair labour practice because of protected disclosure made[27].

22 § 300.
23 § 15.
24 § 16 & 19.
25 § 16.
26 (2018) 39 ILJ 1523 (GJ).
27 See for example, *John v Afrox Oxygen Ltd* [2018] 5 BLLR LAC.

Conclusion

The judgements discussed above indicate that whistle-blowers will generally be protected in terms of the PDAA provided two broad requirements are met: that the disclosure was protected and occupational detriment occurred as a result. Despite this seemingly positive outlook, there are few concerns.

First, in all the cases where the whistle-blowers were apparently successful in their action under the PDAA, they were no longer employed by the employer in respect of whose impropriety the disclosure was made. This suggests that the PDAA is limited in terms of providing job security for whistle-blowers.

Second, although these whistle-blowers were vindicated, their non-patrimonial loss is significant and till date, compensation to address this remains severely limited and insufficient.

Third, it is striking how in many of these cases, parties had to approach the courts repeatedly to enforce legal protection (for example, *Tshishonga* and *Radebe* sagas).

Fourth, the technical requirements, which some lower courts continue to interpret strictly may undermine the purpose of the PDAA.

All of these highlight the need for urgent legal reform to promote the effective protection of whistle-blowers.