



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Reportable

CASE NO: D1092/13

In the matter between

MFANAFUTHI ELIJAH NXUMALO

Applicant

and

MINISTER OF CORRECTIONAL SERVICES

First Respondent

KZN DEPARTMENT OF CORRECTIONAL SERVICES

Second Respondent

VI MAGWA NO

Third Respondent

Heard: 19 March 2015

Delivered: 30 September 2015

Summary: Protected disclosure - no employee may be subjected to any occupation detriment by his or her employer on account, or partly on account, of having made a protected disclosure - an interdict to restrain commencing or continuing with disciplinary proceedings against the Applicant – disclosure not proved - rule nisi discharged.

JUDGMENT

CELE J

Introduction

[1] This application is brought in terms of section 158 (1) (a) (iii) of the Labour Relations Act¹ to interdict and restrain all the Respondents from subjecting the Applicant to any disciplinary proceedings or any occupational detriment as defined in the Protected Disclosures Act² and an interdict to restrain them from commencing or continuing with disciplinary proceedings against the Applicant. The application was opposed by the Respondents. It was initially brought as an urgent application on 17 October 2013 and was enrolled for 21 October 2013. In Court the Respondents delivered what they called an “interim affidavit”. An interim order was granted by consent of the parties in terms of which:

- A procedure was put in place for the Respondents to satisfy themselves as to the authenticity of the transcript annexed to the founding affidavit;
- Time periods were prescribed for the filing of further affidavits, if any;
- Parties were to meet by 24 October 2013 to listen to the original recordings on the cellular telephone of the Applicant;
- The matter set down at the General Public Service Sectoral Bargaining Council, the GPSSBC, emanating from this case, was to be adjourned sine die by consent and
- The Respondents undertook not to proceed with the disciplinary enquiry set down for 22 October 2013 until the finalization of the application.

[2] The set time frames notwithstanding the answering affidavit and therefore the replying affidavit were not filed by the parties. On 31 October 2013 the Respondents sought condonation for their failure to file the answering affidavit, contending that the delay was mainly due to the delays in the process of authenticating the transcript. According to the Applicant that process was completed by September 2013. The opposition to this application was therefore based on the interim affidavit and on the Applicant’s papers.

¹ Act Number 66 of 1995, hereafter referred to as the Act.

² Act Number 26 of 2000, hereafter referred to as the PDA.

Factual Background

- [3] The Applicant is in the employment of the First Respondent's Department of Correctional Services, the Department, stationed as a Head at Medium B, Westville Prison, KwaZulu-Natal, where he holds the rank of a Deputy Director. One of Westville Prison inmates was a Mr Russell Ngubo. He was serving sentence for a murder and other related charges. Before being prosecuted for the criminal charges, Mr Ngubo was the Head of Pietermaritzburg Prison and therefore an employee of the Department. As previous Head of a prison he would be well known in the Department. The Applicant believed that Mr Ngubo was involved in the struggle against apartheid and was imprisoned for activities as a Popcru official and therefore that Mr Ngubo was held in high esteem for his contribution towards the struggle. The Applicant said that Mr Ngubo is a friend with and has lines of communication to people who were similarly involved in the struggle and who are then in positions of power in the present democratic government.
- [4] The Applicant said that as Head of Medium B Westville Prison, he came into conflict with Mr Ngubo. He contended that Mr Ngubo adopted an attitude that he was in charge of Applicant's prison and that wardens and official there such as Applicant were Mr Ngubo's subordinates. The Applicant would not tolerate that attitude and refused to give Mr Ngubo the preferential treatment that Mr Ngubo, according to the Applicant, considered himself entitled to. The Applicant said that Mr Ngubo reacted by threatening to exert the influence that he claimed to wield with persons in positions of power by taunting him, saying that he would arrange for the Applicant to be transferred away from Durban Prison. The Applicant said that in September 2012 Mr Ngubo told him that Applicant's transfer had already been arranged and it was a question of where he would be transferred to.
- [5] In October 2012 Senior Management of the Respondents in KwaZulu-Natal held a meeting. The Second Respondent announced that Heads of prisons were to be transferred. During November 2012 the Applicant had an encounter with Mr Ngubo in which, according to the Applicant Mr Ngubo was talking on a public phone in prison asking the other person on the line why the Applicant was still at Westville Prison. Shortly after that encounter, the Applicant was called to a meeting with the second respondent where he was told by the second respondent that he was to be transferred to Pietermaritzburg Prison.

- [6] The Applicant then said that in January 2013 he had an altercation with Mr Ngubo at which Mr Ngubo said that he was tired of Applicant's behaviour and that the Applicant was soon to be called to a meeting by the Second Respondent. On 15 January 2013 the Applicant was called to a meeting by the Second Respondent to discuss his transfer. Mr David, the Area Commissioner, Durban was also in attendance at that meeting. He took the position that his transfer was motivated by an illegitimate purpose as orchestrated by a prisoner whose interests were in conflict with the legitimate interests of the Department. He was of the view that his employer was about to commit an unfair labour practice relating to a transfer, at the behest of a convicted criminal. In order to obtain evidence of that unlawful state of affairs the Applicant decided to record the meeting with his officially allocated cellular telephone. He later handed the recordings to a firm of attorneys he had instructed. The attorneys arranged for a transcript of the recordings.
- [7] When the First Respondent came to know about the transcribed recordings of the Applicant, a decision was made to charge him with acts of misconduct in that he was alleged to have secretly recorded, transcribed and distributed a discussion involving the Second Respondent and the Acting Regional Head Corporate Services and thus:
- Prejudiced the administration, discipline or efficiency of the Department or office, or institution of the State and
 - Dishonoured the confidentiality of matters, documents and discussions implied as being confidential or secret.
- [8] The Applicant was then suspended from employment by a letter dated 8 April 2013 and the Third Respondent was appointed as the initiator to the disciplinary proceedings. He challenged the lawfulness of his suspension by referring a dispute relating thereto to the GPSSBC. He has placed his reliance on the provisions of the PDA, with particular reference to section 3 thereof.
- [9] In a separate court action, the Applicant initiated review proceedings to challenge his transfer to Pietermaritzburg under Case number D143/2013. An interim court order was granted in his favour staying the transfer pending the outcome of the review application.

[10] In their interim affidavit the Respondents opposed this application basically on the following grounds, namely that:

- The transcript of the Applicant has never been authenticated. No valid authentication certificate has been filed and the attached certificate is not signed;
- The transcriber has not deposed to an affidavit verifying the correctness of the undated transcript. The reading of the transcript demonstrated clearly that the transcriber left out conversations which were in IsiZulu;
- Most of the conversation has been excised and
- The transcript does not show any alleged criminal or irregular conduct on the part of the Second Respondent or any of the employees of the First Respondent.

[11] The Applicant contended that, insofar as he distributed this recording to his legal advisors for the purposes of obtaining legal advice, the recording is a “protected disclosure” as defined in the PDA. It is Applicant’s case that the proposed disciplinary proceedings are illegal in that they contravene section 3 of the PDA. The Applicant sought to interdict the disciplinary action because he believed that the disciplinary action against him was illegal by virtue of section 3 of the PDA. Put differently, section 3 confers on Applicant the right not to be subjected to an occupational detriment if that was “on account or, partly on account, of his having made a protected disclosure. The Court may intervene to stop disciplinary proceedings where the continuation of such proceedings contravenes an established right.”³

[12] As foreshadowed in the interim affidavit the Respondents objected to the admissibility of the recordings or transcript on the basis that the authenticity of the records and of the transcription had not been established and the recordings

³ See *Communications Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 ILJ 1670 (LC) and *SA Municipal Workers Union obo Matala v Mbombela Municipality* (2011) 32 ILJ 2748 (LC).

were obtained unlawfully during a confidentiality that attached to the discussions between an employer and employee grievance in the workplace, where such discussions ought never to be used to discredit the employer.

Evaluation

- [13] Section 3 of the PDA basically provides that no employee may be subjected to any occupation detriment by his or her employer on account, or partly on account, of having made a protected disclosure. As correctly submitted by Mr Crompton for the Applicant the term “disclosure” is defined in the PDA to include “any disclosure of information regarding any conduct of an employer or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tend to show one or more of ...” various types of impropriety that are set out at sub-paragraphs (a) to (g) of the definition. It is not required that the disclosure must, in and of itself, prove the impropriety. It is sufficient if it “tends to show” the impropriety.⁴
- [14] 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. In terms of section 5 of the PDA a disclosure may be made to a legal advisor, such as an attorney.
- [15] In *Communications Workers Union v Mobile Telephone Network (Pty) Ltd* Court held that⁵:

⁴ See *Radebe and another v Premier, Free state and others* 2012 (5) SA 100 (LAC).

⁵ (2003) 24 ILJ 1670 (LC) at paragraph 21.

“However as I have noted the protection extended to employees by the PDA is not unconditional. The PDA sets parameters of what constitutes a protected disclosure as well as the manner of permissible disclosure by workers. The definition of disclosure clearly contemplates that it is only the disclosure of information that either discloses or intends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA. Disclosure must also be made in good faith. An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirements of good faith. However more extensively established by the PDA might be in the employment context, I do not understand what was intended to protect what amounts to mere rumours or conjecture.”

- [16] Accordingly, it is only the disclosure of information that either discloses or intends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA. Secondly, disclosure must also be made in good faith. The applicant bears the onus to prove his entitlement for the protection he avers flows from the PDA.

Authenticity

- [17] The Applicant is before Court today because he has been charged by the First and the Second Respondents for misconduct. While the Respondents have not said so in so many words, it is probable that the two charges are dependent on the transcript of the discussion the Applicant had with the Second Respondent and Mr David. If that is the case, at the disciplinary hearing, it is the Respondents who have to prove every element of the misconduct complained of. The Respondents have to prove that the Applicant secretly recorded, transcribed and distributed a discussion involving the Second Respondent and Mr David thus prejudiced the administration, discipline or efficiency of the Department or office, or institution of the State and that he dishonoured the confidentiality of matters, documents and discussions implied as being confidential or secret. It is the Respondents who would have to prove the authenticity of the transcript they will rely on. All that the Applicant had to do in this case was to make reference to the transcript of the discussion as is referred by the Respondents in the charge sheet for the hearing he seeks to interdict.

- [18] While the Applicant is the one who filed a transcript on record, he must be understood to have filed what he believed is the material to be used by the Respondents at his disciplinary hearing which the applicant seeks to interdict and restrain from taking effect. In my view, the Respondents are being opportunistic in demanding the Applicant to authenticate a transcript which the Respondents intend to use against the Applicant. That defence therefore stands to fail.

Unlawfulness of transcript

- [19] South African law recognises two types of monitoring, being participatory and non-participatory interceptions. Non-participatory monitoring occurs when the interceptor invades or eavesdrops and/or records a communication which he or she is not privy to, such as phone tapping.⁶ In the present matter the applicant was part of the deliberations being recorded and it is thus a case of participatory monitoring which was never intended to be prohibited.⁷

Disclosure

- [20] The Applicant contended that the transcript contained compelling circumstantial evidence which proved that his transfer was motivated by illegitimate purpose and was orchestrated by a prisoner Mr Ngubo. These submissions are not borne out by the transcript referred to. Even after the Applicant had introduced the discussion around Mr Ngubo and his demands to the wardens, the Second Respondent made it abundantly clear that Heads of Prisons were not to succumb to the demands of prisoners. The Second Respondent suggested that information on what was discussed might have leaked to Mr Ngubo. He also referred to political pressure emanating from well-known prisoners in general terms but intimated that such was not to compromise decisions of Heads of Prisons. While he referred to telephone calls that came from politicians, the Second Respondent steadfastly insisted on there being no justification to deviate from the prison rules. He intimated that Mr Ngubo had to be transferred to another prison due to difficulties he was reportedly causing. Mr Ngubo was indeed subsequently transferred by the Second Respondent to Serfontein Prison.

⁶ See *Lenco Holdings Limited & Others v Eckstein & Others* 1996 (2) SA 693 (N).

⁷⁷ See *Tap Wine Trading CC & Another v Cape Classic Wines Western Cape CC & Another* 1999 (4) SA 194 (C).

[21] There is thus no compelling circumstantial evidence which proved that the Applicant's transfer was motivated by illegitimate purpose and was orchestrated by a prisoner, Mr Ngubo. In the absence of a disclosure of information that either discloses or intends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA there cannot be talk of there being protected disclosure. Neither can it be said that the Applicant suffered any occupational detriment.

[22] Accordingly, the rule nisi is discharged with no order as to costs.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the Applicant: Mr D Crompton
Instructed by Brett Purdon Attorneys.
2. For the Respondents: Mr K T M Moerane / Ms Z Rassool
Instructed by the State Attorney, Durban.