



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

CASE NO.: D1171/2014

Not Reportable

In the matter between:

JAMES PATRICK BAXTER

Applicant

and

THE MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

First Respondent

THE ACTING NATIONAL COMMISSIONER OF

THE DEPARTMENT OF CORRECTIONAL SERVICES

Second Respondent

THE REGIONAL COMMISSIONER OF THE

DEPARTMENT OF CORRECTIONAL SERVICES FOR

THE REGION OF KWAZULU-NATAL

Third Respondent

Heard: 23 March 2018

Delivered: 01 August 2018

Summary: Dismissal - alleged to constitute protected disclosure – disclosure to be made *bona fide* with no ulterior motives – employee had ulterior motive – disclosure not protected – on alternative claim Court already seized with matter – expedient to consider fairness of dismissal – dismissal found to be substantively and procedurally fair.

JUDGMENT

Cele J

Introduction

- [1] This is a claim in which the Applicant, Mr Baxter, contends that his dismissal was automatically unfair as envisaged in terms of Section 187(1)(h) of the Labour Relations Act¹ in that, it constituted an occupational detriment as defined in Section 1 of the Protected Disclosures Act² ("PDA"). In the alternative, he contends that the dismissal was substantively and procedurally unfair. Both claims are opposed by the Respondent on the basis that there is no protected disclosure made by Mr Baxter in terms of which he would be entitled to the relief sought. In respect of the alternative claim it was contended that this Court does not have jurisdiction to determine Mr Baxter's claim.

Factual Background

- [2] Mr Baxter commenced his employment with the Department of Correctional Services, the Department, on 17 November 1986 as a Warder at St Albans Prison, Port Elizabeth. He was appointed the Area Commissioner: Kokstad Management Area with the C-Max Prison, as from 1 January 2007. Shortly after his appointment as Area Commissioner in Kwazulu-Natal (KZN) Mr Mnikelwa Nxele, the Third Respondent, was appointed to the post of Regional Commissioner, and thus became Mr Baxter's immediate superior. The two had previously known each other and, at that point, there was a good relationship between them. Of relevance to this matter, in 2013 the following persons were appointed in the positions as indicated:

2.1 Mr AMF Mnguni as Regional Co-Ordinator: Security;

¹ Act 66 of 1995 ("LRA").

² 26 of 2000.

2.2 Mr Mathenjwa as Head Correctional Centre: Ebhongweni;

2.3 Mr Mchunu as Area Co-Ordinator: Pietermaritzburg;

2.4 Mr Mbanjwa as Head Directional Centre: Serfontein and

2.5 Mr Mdlalose as Head Correctional Centre: Port Shepstone.

- [3] The Kokstad management area of Mr Baxter comprises of both Kokstad and Port Shepstone and one or two other smaller facilities in the area. As part and parcel of Mr Baxter's duties he was from time to time placed on appointment panels to deal with the appointment and promotions of various officials within the department, including some of the five hereinabove named. The accepted practise was that, an Area Commissioner had to sit in the panel if the appointment or promotion to be made fell within his or her area of administration. An area Commissioner would also sit in a panel where appointments or promotions fell outside the area of his or her administration if such appointments or promotions were of senior departmental officials.
- [4] The Department undertook various learnership programs through which candidates who participated in them could thereafter be employed by it. During April 2013 Mr Baxter's daughter Ms Raneesha Baxter successfully applied for one such learnership program. Her appointment was approved by the Acting Regional Commissioner on 15 January 2014. According to Mr Nxele an adverse report was given to him pertaining to Mr Baxter's behaviour in allegedly influencing the appointment of his daughter.
- [5] On 13 February 2014 Mr Nxele then decided to have the appointments for the learnership program suspended pending the outcome of an investigation which he commissioned to be conducted in relation thereto. On the following day, 14 February 2014 Mr Baxter sent a telefax to Mr Nxele requesting an investigation

to be conducted against the entire learnership program as well as against the 2013 appointments of the five officials earlier referred to. Mr Baxter further addressed another letter to Mr Nxele in which he requested an audience with the Acting National Commissioner and the Minister of the Department about corruption and abuse of power by Mr Nxele.

[6] On 18 February 2014 Mr Nxele issued Mr Baxter with a letter, contemplating to suspend him. And on 20 February 2014 Mr Baxter received a suspension letter with allegations that he interfered with the recruitment processes for the learnership of Kokstad Management Area by talking to panel members for the shortlisting and appointment of his daughter and the further reasons for the contemplated suspension were specifically stated to be:

6.1 Mr Baxter's allegations in respect of the Third Respondent,

6.2 His request for an investigation and audience with the Acting National Commissioner and the Minister; and

6.3 The allegations made to the Acting National Commissioner on the weekend of 15/ 16 February 2014.

[7] On 24 April 2014 the Department served Mr Baxter with a notice to attend an internal disciplinary enquiry. Mr Baxter was subsequently found guilty of the five counts of misconduct he was charged with and was dismissed on 1 December 2014. The five charges were described as:

"COUNT 1

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7, annexure A, paragraph (6) in that during the learnership intake 2013/ 2014 you

compromised the integrity and credibility of the selection process by asking the Chairperson of Kokstad Management Area Selection Panel Mr Khumalo BC if he saw the forms of your daughter, which question conveyed the innuendo that she should be appointed whereby you prejudiced the administration, discipline or efficiency of the Department.

COUNT 2

Whilst employed in Kokstad Management Area as Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (27) in that around the 09 March 2014 it is alleged that you refuse to obey security regulations by refusing to open your car boot and be searched as required by the correctional services B-Order, 3.14.

COUNT 3

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (10) in that around the 22 February 2014 you violated your suspension condition by communicating with a Whatsapp with official Zikalala SN and even threatening her to summon her to court.

COUNT 4

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (1) and that around the 19 February 2014 you failed to submit sick leave within the five days period as stipulated by the determination and directive on leave of absence in the public service.

COUNT 5

Whilst employed in Kokstad Management Area as Area Commissioner, you are alleged to have contravened SMS Handbook Chapter 7 1/2006 annexure A, paragraph (28) in that around the 20 February 2014 you showed a document to Mr Patrick Zibuyele Marau which you claim that the said official challenged the Department of Correctional Services for not appointing him which was misrepresentation because that was not in line with what was recommended by the Committee.”

- [8] Mr Baxter referred a dismissal dispute to the bargaining council wherein he contended that his suspension, disciplinary process and dismissal constituted occupational detriment as defined in section 1 of the PDA and that his dismissal was automatically unfair as envisaged in section 187 (1) (h) of the LRA. When the dispute could not be resolved at conciliation, he referred it to this Court by means of the statement of case. The Respondent filed its statement of defence, averring that Mr Baxter was simply one of a number of its employees who were subjected to disciplinary proceedings arising from allegations of serious misconduct, which had the effect of destroying the employment relationship, in which they were found guilty.

Evidence

Applicant's version

- [9] Mr Baxter bore the onus to prove the allegations constituting protected disclosure he relied on. As dismissal was common cause the Respondents bore the onus to prove that dismissal was substantively and procedurally fair. He testified and then called one witness Dr Mdletshe. The Respondent called three witnesses being Mr Diko, Ms Sibutha and Mr Nxele. The allegations on the protected disclosure appear to take two forms namely, those made to the Acting National Commissioner, Ms Jolingana about Mr Nxele and those made to Mr Nxele about other staff members. The evidence in chief of Mr Baxter about what he told Ms Jolingana, as he was led by his Counsel Mr Schuman is briefly that:

"Now I want you to concentrate on Point 4, did you make allegations to the National Commissioner as is alleged in that paragraph? --- Yes, I did. M'Lord, the ANC referred to in this paragraph refers to the African National Congress.

Oh I thought it was Acting National Commissioned. --- Yes, but indeed on the question this is true that I contacted Ms Jolengana over that period as indicated earlier.

What allegations did you bring to her attention, these numerous allegations that he refers to can you tell us what that was about? --- Amongst others it was the issues that I testified about yesterday the irregularities in respect of promotions, irregularities in respect of appointments, that was the basis of it and that the suspension of Kokstad learnership and that type, that's basically the allegations that I made.

Can you just set out everything that you told her, can you list for us all the matters which you mentioned to her on that occasion or over that weekend as alleged? --- I cannot precisely say whether I mentioned the specific names to her, unless I can refresh my memory with the WhatsApps, but I specifically mentioned the promotions of the people that I testified about, mostly also about the learnership programme and previous learnership programmes. One of it specifically is the learnership programme where a relative of Mr Nxele was found not to have been on the list and he stopped the process. This could have been either in telephone calls or it could have been in WhatsApps and sms's but I remember Busisiwe Dlamini is one of the specifics that I mentioned to Ms Jolengana. I also spoke about the withdrawal of 20 learners at the Durban learnership programme to be sacrificed for people whose name was given as a list to the chairperson, whereas the process was almost finished with the learners of Durban and then they replaced those members with the names that they wanted.

Can you tell us what exactly occurred about Busisiwe Dlamini? --- At that time I was still working at the Acting Deputy Regional Commissioner in the Regional Office and we had a recruitment drive. Then because the Regional Commissioner wanted to be personally involved he instructed us not to send

the approval of the learnership programmes directed to headquarters he wants to see it himself. He was in a meeting in Pretoria at the time so we had to send these documents to him where he was. After some time he called me back and he said that those things are going nowhere the whole process must be stopped because there are certain names that are not there. He then confided in me to tell me that Busisiwe's name was not there and at that time Busisiwe was working in his office on a so-called internship programme.

CELE J What did he say about Busisiwe's name? --- Her name was not on the list.

He complained about that? --- She was definitely not on the list, she was not even on the cross list for that.

So he was complaining about the absence of her name? --- That's correct.

MR SCHUMANN And she was in his office on an internship, do you know who she was? --- I recall that, I must apologise I cannot precisely say how the family structure works but at the time I heard it as to say that Busisiwe is the daughter of his mother's sister but I know, M'Lord, pardon me it is so much like this is my small cousin or small sister or small nephew I don't specifically know how it is termed but I even went to the funeral of Busisiwe's mother in Richmond so I know that for a fact. She was on a so-called learnership internship programme. I call it the so-called because she was one of the only ones that didn't have a qualification and an internship programme it's unlike a learnership programme or a voluntarily programme it is a programme that is designed specifically for graduates, people with either a diploma or a degree to gain training or experience in the workplace. If my memory serves me correctly, even up today because she works at Kokstad at some stage she is still busy with her studies and she worked in the office of the Provincial Commissioner not in an office she worked in his office as a secretary.

When the Regional Commissioner discovered that her name was not on the list of people approved for the learnership programme what did he do? --- He

instructed me to stop the process and I must tell the candidates they must start over with it because he believed that there was some other CV's or applications that was not collected.

Ultimately what happened? --- We had to start the process over and Busisiwe happened to be one of the learners that were appointed in Kokstad management area.

Were you on the panel that appointed her? --- No, I was not on the panel, strangely so that Busisiwe was one of the only people outside of Kokstad that was interviewed by Sibutha and the panel consisting of the panel that was for Kokstad but not with the same chairperson.

She was interviewed by a different panel? --- She was interviewed by a different chairperson, the other panellists were the same panellists."

- [10] The issues that Mr Baxter testified about were the irregularities in respect of promotions, appointments and the suspension of Kokstad learnership program. I am indebted to Mr Schuman for Mr Baxter in the well laid out summary of this evidence.

The appointment of Mr Mnguni

Mr Baxter's version:

- [11] Mr Baxter testified that in May 2013, he had participated as a member of the panel who had interviewed candidates for the post of Regional Co-ordinator: Security, Kwazulu-Natal Region. After scoring the candidates, one Mr Shane Pillay achieved the highest score and was recommended by the interview panel for the post. Mr PZ Marau was the second recommended candidate and Mr MAF Mnguni was in third place. The panel members signed off an interview schedule form, as per the normal process, reflecting the scoring and panel's

recommendations. However, subsequent to the interview process Mr Baxter was surprised to discover that neither Mr Pillay nor Mr Marau had been appointed to the post, which had been given to Mr Mnguni, the third placed candidate. Shortly thereafter he had communicated his concerns to Mr Nxele at a function at the Karridene Hotel. Mr Nxele had simply replied that Mr Baxter should inform Mr Pillay not to worry because there was another position which Mr Nxele had earmarked for him.

[12] Mr Pillay referred a grievance and unfair labour practice dispute for adjudication and, in the course of those proceedings produced documents which he provided to Mr Baxter. These documents included the interview schedule signed by the panellists³ and a document purporting to be the interview minutes and recommendations of the panel.⁴ The panel comments and recommendations in the memorandum corresponded with the signed off interview schedule form and recommended Pillay as the preferred candidate.

[13] Mr Baxter testified that Mr Pillay's memorandum coincided exactly with the discussions and recommendations of the interview panel of which he was a member. Mr Mnguni had been appointed to the post in terms of another memorandum purporting to contain the discussions and recommendations of the interview panel.⁵ This memorandum differed significantly from Mr Pillay's memorandum both in respect of some of the comments relating to the candidates and, most significantly in respect of the alleged recommendations of the interview panel. Mr Baxter said that, the document in terms of which Mr Mnguni had been appointed falsely represented the discussions and recommendations of the interview panel. When the official green files containing the departmental records of the various appointment processes were eventually produced by the Department, the document at page 43A of Exhibit D was discovered. This document (the official interview sheet signed off by the members of the panel as contained in the Department's file) corresponds

³ See page 43 of Exhibit D

⁴ At pages 62 to 76 of Exhibit D.

⁵ pages 44 to 61 of the Exhibit D

exactly with the document at page 43 (emanating from Shane Pillay), confirming both the authenticity of the Pillay documents and the correctness of Mr Baxter's version. Mr Baxter contended that in the circumstances, there could be no doubt that the memorandum recommending Mr Mnguni to the post was a forgery.

- [14] Mr Baxter testified that, while Mr Nxele as the Regional Commissioner was not bound to follow the recommendations of the interview panel, he was required to fully justify any departure from its recommendations in writing. He could not alter the recommendations of the panel to justify the appointment of the third place candidate.

Respondents' version:

- [15] Mr Nxele admitted having received a memorandum which recommended the appointment of Mr Mnguni. He decided to support the recommendation by signing the memorandum, thus appointing Mr Mnguni against the post. The recommendation was brought to Mr Nxele bearing signatures, inter alia, of the Chairperson of the panel, Mr Davids signed on 24 June 2013, Ms Mchunu being the Custodian of the records for the Human Resources (HR) of the Regional Office signed on 27 May 2013 and Mr Wiggle, the Acting Regional Commissioner: HR: Support Services signed on 28 May 2013. He denied committing any wrong doing by appointing Mr Mnguni. He denied having met Mr Baxter at Karridene Hotel in July 2013 where they could have discussed the concerns of Mr Baxter about Mr Mnguni's appointment. He said that in July 2013 he was in the United States of America. He had recently been married in that year.

- [16] A number of positions were advertised and around the first week of December 2013, groups of panellists were called to the Regional Office to conduct interviews for those positions, which included several Deputy Directors' posts and Heads of Centre positions. Mr Baxter was one of the members appointed

to those panels. The process culminated with the appointment of: Messrs M H Mdlalose, T M Mathenjwa, D K Mbanjwa and Mchunu.

The Appointment of Mr M H Mdlalose

Applicant's version:

- [17] Mr Mdlalose applied for the position of Assistant Director, Head of Correctional Centre in Kwazulu-Natal, Port Shepstone. In terms of the requirement for the post, Applicants were required to have a relevant Bachelor's degree or National Diploma and seven years relevant experience in a supervisory post. As Mr Baxter was the person to whom the incumbent would report, it was the practice for the area head to be on the panel and he or she would normally chair it. The Third Respondent authorised the appointment of panel members and Mr Baxter was not included in the panel but Ms Nombuso Mkhize was the chair.
- [18] Mr Baxter testified that, the Third Respondent had informed him and others that Ms Mkhize was his girlfriend. Mr Baxter was also aware of a personal relationship between the Third Respondent and Mr Mdlalose which he inferred from the fact that the Mr Mdlalose had been an active participant at the Third Respondent's wedding ceremony in 2013, to which Mr Baxter was an invited guest.
- [19] Referring to the curriculum vitae (CV) of Mr Mdlalose Mr Baxter said that Mr Mdlalose held only a Teacher's Diploma from the Eshowe College of Education in biology and mathematics. He stated that while a Teacher's Diploma might be relevant to a teaching position within the Department, it bore no relevance to a Head of Centre position. In addition, Mr Mdlalose did not have seven years of supervisory experience relevant to the position. Yet, notwithstanding the above, Mdlalose was the successful candidate. He said that Mr Mdlalose should have been excluded during the shortlisting process because he did not meet the requirements for the post. Mr Baxter confirmed that it was possible for people

to be appointed to a post despite not possessing the relevant qualification, if it could be motivated on the basis that the candidate nevertheless possessed scarce skills and there were no other more suitable candidates for the position. Accord to Mr Mdlalose's CV, he possessed no such scarce skills and there were other eminently qualified and suitable candidates. However, Mr Baxter conceded that he was appointed to six or seven other panels at the time which dealt with more senior appointments.

Respondents 'version:

- [20] Mr Nxele's evidence was that Ms Mkhize was qualified to chair the panel as she was a Deputy Director acting in the post of a Director. Mr Nxele said that he and Ms Mkhize were romantically involved more than 20 years prior to her chairing the panel. Mr Nxele said that he simply approved the recommendation of the panel. Mr Baxter did not take issue with any of the other panel members who recommended Mr Mdlalose for the post nor could he dispute that Mr Mdlalose scored the highest in the interview.

The Appointment of Mr Mathenjwa

Mr Baxter's version:

- [21] Mr Mathenjwa applied for the position of Head of Centre, Ebongweni, the C-Max Prison in Kokstad, being the "Closed Maximum Centre", that is, the highest security prison in the country which had its own policies and procedures which differed from that of other prisons. Mr Baxter said that he was part of the shortlisting panel which had recommended six shortlisted candidates for the approval of Mr Nxele who did not approve the list, but instead he removed three of the shortlisted candidates and requested the panel to relook at other candidates. When cross-examined Mr Baxter said that he was told by Mr Nxele to "look for Mr Mathenjwa". Mr Mathenjwa was included as one of the shortlisted candidates in the second round short listing. Mr Baxter did not serve on the

reconvened shortlisting panel but was present during the interviews of those candidates. He scored Mr Mathenjwa 4, 3, 3 and 3 for the four questions he was required to answer at the interview, but other panellists had scored him much higher, including giving him a full 5 out of 5 in respect of some of the questions. Mr Baxter explained that there was a measure of objectivity to the process as the questions and expected answers were relatively standard and it was strange that other panellists could score Mr Mathenjwa 5 out of 5 when his response, according to Mr Baxter, warranted only a 3.

- [22] Moreover, Mr Baxter said that Mr Mathenjwa did not hold a Degree in Behavioural Sciences as required by the post and had no relevant experience at a C-Max institution. Nevertheless, he was appointed to the post.

Respondents' version:

- [23] The Respondent's version is that Mr Baxter did not testify in his evidence in chief that Mr Nxele told him to look for Mr Mathenjwa and that it was improbable that he would omit to mention such an instruction in his evidence in chief if it was ever given. Mathenjwa was included as one of the shortlisted candidates. Despite being part of the original shortlisting panel, Mr Baxter testified that he could not explain how Mathenjwa ended up being included in the shortlist, said the Respondent. Even if there was such an instruction, which was denied, Mr Baxter did not give effect to it as he was unable to explain how Mr Mathenjwa's name was included on the second shortlist. Mr Nxele did not approve of Messrs Diko, Godden and Mbono and directed the "panel to look at other candidates." Mr Mathenjwa's name was not mentioned on the documents. The second short list did not conform to Mr Nxele's directive as included certain names and excluded others, considered by the panel. It was also not disputed that the three names on the initial shortlist which Mr Nxele did not approve belonged to Senior Correctional Officers who were much junior to Mr Mathenjwa who was the only candidate from those interviewed, who had previous experience as Head of Centre.

The Appointment of Mr D K Mbanjwa.

Applicant's version:

- [24] Mr Baxter and Dr Mdletshe who was the Area Commissioner: Pietermaritzburg, were members of the panel in respect of the position of Head of Correctional Centre, Seefontein. A shortlist had been drawn up and sent to Mr Nxele who, according to the Applicant, then instructed that Mr Mbanjwa "cannot be eliminated". His name subsequently appeared on both the shortlist and the "gross list" which contained the names and the information of every person who had applied for the position. The evidence of both Mr Baxter and Dr Mdletshe was that they remembered clearly that Mr Mbanjwa's name had not appeared on the initial gross list and that he had not, therefore, applied for the position. They said that Mr Nxele was corrupt because he knew that Mr Mbanjwa did not apply for the post but ultimately appointed him to the post. They further said that Mr Mbanjwa did not have the necessary qualification and, although he had been acting in the post, this was not enough to overcome his lack of qualification.

Respondents 'version:

- [25] Both Mdletshe and Mr Baxter were unable to dispute that Mbanjwa's application was received before the closing date and that his name appeared in the correct alphabetical order on the gross list. Neither one of them was able to produce the gross list which allegedly did not feature Mbanjwa's name in support of their contentions.
- [26] Mr Baxter and Dr Mdletshe conceded that they scored Mr Mbanjwa very high and that he was the best performing candidate at the interviews. They unanimously and strongly recommended him for the post. Mr Baxter conceded that none of the panel members expressed any reservations about the recommendation in the recommendation which served before Mr Nxele and

which was ultimately approved by him. Mr Baxter conceded that he did not disclose to Ms Jolingana that he actually recommended Mr Mbanjwa for appointment. Mr Baxter conceded that he never spoke to Mr Nxele about Mr Mbanjwa and only mentioned him in the WhatsApp messages on 14 February 2014. In seeking to excuse his own role in Mr Mbanjwa's appointment, Mr Baxter stated that he was then also a party to the corruption. It was contended that Mr Baxter failed to establish that Mr Nxele inserted Mr Mbanjwa's name on the gross list after the fact and was accordingly guilty of corruption. Mr Baxter's disclosure to Ms Jolingana about Mr Mbanjwa was said to be patently untrue as he had had sight of the gross list which featured his name prior to making the disclosure.

- [27] The cross-examination of Mr Nxele was confined to Mr Mbanjwa's qualifications. This was said to be clearly an afterthought and sought to reduce the complaint to one of an unfair labour practice dispute. In the event that there were genuine misgivings about his qualifications, it was incumbent upon the panel to record this in the recommendation. Mr Nxele's evidence was that Mbanjwa met the requirements for the post and his suitability was confirmed by the recommendations of the panel which he accepted. The averment made was that, to the extent that Mr Baxter and Dr Mdletshe sought to rely on comments made by Mr Davids in relation to Mr Mbanjwa, such evidence fell to be disregarded as hearsay.

The appointment of Mr Mchunu

Applicant's version:

- [28] Mr Baxter was initially appointed to the panel in respect of the position applied for by Mr Mchunu but had recused himself as Mr Baxter's wife had applied for the same position. Mr Baxter referred to the interview documentation provided in the green file, saying that there was nothing to justify the appointment of Mr Mchunu ahead of the other candidates. He noted that Mr Mchunu's score

sheets were missing from the documentation. In regard to the process generally, Mr Baxter testified that it had been clearly unsatisfactory with various people excluded from shortlists and others added. Invariably, he said, those persons who were added to shortlists when they should not have been ended up being appointed to the post. The majority of such candidates were from the Empangeni area where Mr Nxele had previously served as the Area Commissioner.

Respondent's version:

[29] It was pointed out that Mr Baxter was not a member of the panel that interviewed Mr Mchunu and his evidence in respect of this appointment was therefore hearsay and carried no evidentiary value. Mr Baxter conceded in any event that he did not mention alleged irregularities related to Mr Mchunu to Mr Nxele. Mr Baxter conceded that he could not state in what respect Mr Nxele was corrupt in relation to Mr Mchunu other than the fact that he signed off on the appointment. Mr Baxter's evidence on Mr Mchunu must in any event be viewed against the backdrop that his wife applied for the same post and was not shortlisted. Mr Baxter attributed this to Mr Nxele. Dr Mdletshe's evidence was also limited. Although he was a member of the panel, he was not present during Mr Mchunu's interview and was unable to give any evidence about his performance and how he was scored by the panel.

[30] His complaint centred on the fact that he was excluded from the final recommendation. It was wrong of the chair of the panel to agree that Dr Mdletshe would be part of the final panel to consider the recommendation and thereafter to proceed without him. However, it might have later become clear that he could have added nothing to such discussion in circumstances where he did not interview Mr Mchunu. Dr Mdletshe's evidence pointed to alleged irregularities in the process adopted by other panel members. There was no evidence that Mr Nxele was involved in those events or that he had knowledge

thereof. Dr Mdletshe made extensive reference to statements attributed to Messrs Davids and Mchunu. They were not called as witnesses.

Ms Busisiwe Dlamini and Mr Ngubo

Applicant's version:

- [31] In his notice of an application to amend the citation of the parties, in answer to a point taken by the Respondent in the statement of defence, Mr Baxter included further particulars in which he then for the first time made reference to Ms Dlamini and Mr Russell Ngubo. Mr Baxter said that Mr Nxele had stopped the entire 2011/2012 learnership program when he discovered that Ms Dlamini had not been appointed to the learnership program. The selection process then recommenced Ms Dlamini and she was placed into the program. Mr Baxter said that he handed to Ms Jolingana copies of documents of Ms Dlamini's application for the learnership program wherein she had indicated, in her CV, that she was working in the Regional Commissioner's office. Mr Baxter said that it was irregular of Mr Nxele to allow her to work with him and that he should have referred a matter of the employment of a close relative of his to the Acting National Commissioner. He testified that Ms Dlamini did not qualify for the internship, she was not from the locality, which was a requirement and that the Chairperson of that panel, Ms Sibutha, was not qualified to chair it. Mr Baxter stated that it was his duty, at the time in 2011, to check all learnership recommendations before these were processed to the Regional Commissioner's office. He said that he checked them and found an irregularity.
- [32] In respect of Mr Ngubo, Mr Baxter further said that Mr Nxele allowed Mr Ngubo, a politically influential prisoner, certain extraordinary privileges including the transfer of a departmental official from the prison at Ngubo's instance.

Respondents' version:

- [33] Mr Nxele's evidence was that he found Ms Dlamini already working at the regional office when he arrived to assume his duties. He therefore had nothing to do with her employment. The Respondent said that it was strange that Mr Baxter found an irregularity in the learnership program but took three years to report it. The Respondent said that it was only once he had "stopped the processes involving the daughter of Mr Baxter, hell broke loose in that all kinds of things were said and all kinds of insults came from Mr Baxter." Mr Baxter was said to have acted with ulterior motive, maliciously and was bent on revenge.
- [34] In the case of Mr Ngubo, an inmate serving a sentence of 25 years imprisonment, the allegation was that Mr Ngubo knew in advance that Mr Baxter was about to be transferred from Kokstad to Sevontein and Mr Baxter then inferred that Mr Ngubo was running or managing the correctional centre. In his evidence, Mr Nxele denied the allegations or imputations against him by saying that this was nothing but an attempt to discredit him before Ms Jolingana.

Communications made by Applicant to Mr Nxele.

- [35] Exhibit D contains a number of texted messages exchanged between Mr Baxter and Mr Nxele starting on 6 December 2013 to 30 December 2013 and resuming on 13 to 14 February 2014. They were about Applicant's concerns on what he considered were irregular recommended appointments of the staff within and outside of his area of operation. He also complained of the treatment received by his wife, who having not been short listed for a post, was however called to an interview venue, only to be snubbed and not called into the interview room. In respect of the exchange of Monday 9 December 2013, Mr Nxele sent Mr Baxter a text message in the following terms:

“Patrick, I really want to caution you this time about your travelling which has not been sanctioned. It will seem lately you are very loose and judging by comments you make to even my support staff you either asking for trouble if not challenging me and my authority. I really don’t need this but if it is the last thing we must have between us I will comply.”

- [36] On the morning of 30 December 2013 Mr Baxter received a belated birthday message from Mr Nxele and his text message in response states that, while Mr Baxter did not blame Mr Nxele, at that point in time, people on the interview panels had abused their status at the expense of hardworking and dedicated officials to foster their friendships. In respect of the treatment meted out to his wife he said that he would not:

“accept personal injustice to my family and those I am privileged to lead”.

- [37] On 13 February 2014 a series of text messages passed between Mr Baxter and Mr Nxele who had promised that they would meet to discuss the issues, including that of Mr Mathenjwa, but the meeting had not occurred. The first text from Mr Baxter reminded Mr Nxele of the need to meet and discuss, inter alia, the Mathenjwa issue. Mr Nxele’s response proposed a meeting on the following week. At 08h20 Mr Baxter again texted Mr Nxele and he mentioned the incident in regard to his wife and an issue relating to his daughter, Raneesha who had applied for a position in the Departmental Learnership Programme and had been interviewed on 8 January 2014. At around this time she had received a call to say that her application had been successful and she had been accepted into the programme. The program was subsequently stopped by Mr Nxele.

Evaluation

- [38] The main cause of action relied upon by Mr Baxter is the infringement of the provisions of the PDA. He averred that he made various disclosures to the Second and Third Respondents which constitute protected disclosures in terms

of Section 6(1)(a), Section 6(1)(b), and/or Section 9(1) read with Section 9(2)(c)(i), of the PDA.

[39] To the extent relevant in this application, section 1 of the PDA defines a disclosure as:

“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 tends to show:

(a)

(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; ...”

[40] “Occupational detriment” is likewise defined in Section 1 and includes subjecting an employee to any disciplinary action, dismissing, suspending, demoting, harassing or intimidating an employee.

[41] When seen against the definition, the complaint by Mr Baxter is that: upon Mr Baxter disclosing to the Department that he had a reason to believe that there is conduct of an employee of the Department which shows, or tends to show that that employee has failed or is failing or is likely to fail to comply with any legal obligation to which that employee is subject to comply but the Department has subjected Mr Baxter to disciplinary action by suspending and thereafter dismissing Mr Baxter. {My emphasis} The complaint of Mr Baxter shall now be examined in relation to such disclosure.

The appointment of Mr Mnguni

[42] Effectively Mr Baxter is saying a recommendation to appoint Mr Pillay was deviated from (as a legal obligation) when a recommendation to appoint Mr Mnguni was generated and carried through to Mr Nxele. As Mr Baxter disclosed this fact, he is then subjected to disciplinary action which finally led to his dismissal. Documentary evidence reveals indeed that there is a recommendation made to appoint Mr Pillay. However, the evidence of such a deviation is murky. Mr Davids who was the chair of the panel signed the recommendation for the appointment of Mr Mnguni. The evidence of Mr Davids was therefore very crucial in informing Court why there was such a deviation. The hearsay evidence led by Mr Baxter about Mr Davids in this regards has no basis for its admissibility. The result is that this Court has not been informed why there is this discrepancy of two contradictory recommendations. The evidence of Mr Baxter on how Mr Nxele undertook to appease Mr Pillay with a junior appointment has its own challenges. The date when such a discussion took place remained unclear. The date of July 2014 was said to have been wrongly inserted by attorneys of Mr Baxter. When it was put to Mr Baxter that Mr Nxele was not in South Africa in July 2013, given as a correct date, August 2013 was resorted to. This was against a firm denial by Mr Nxele that such a meeting ever took place. Mr Baxter resorted to saying the records of Karridene Hotel, where the meeting was said to have taken place, could be produced. No such records were produced. The evidence of Mr Baxter failed to reach a standard at which it would be favoured by the probabilities of this matter.

[43] It cannot therefore be said that Mr Baxter had a reason to believe that there was conduct of an employee of the Department which showed, or tended to show that there was an employee who failed or was failing or was likely to fail to comply with any legal obligation to which that employee was subject to comply. No alleged protected disclosure was therefore proved to have been made.

The appointment of Mr Mdlalose

[44] Mr Baxter's complaint was that he was not part of the panel; that Ms Mkhize was not qualified to chair the panel and that Mr Mdlalose did not have qualifications for the post. Mr Baxter did concede in his evidence that at the time, he was appointed on seven other panels which then dealt with more senior appointments. Ms Mkhize was a Deputy Director and she acted as a Director. She was accordingly qualified to chair the panel as did Mr Baxter, as a Director. Mr Baxter could not dispute that Mr Nxele and Ms Mkhize were romantically involved some twenty years before and that he found her already working at the Regional Commissioner's office. In respect of qualifications for Mr Mdlalose, the panel which interviewed him found him qualified and most suitable for the post. A Teachers Diploma was relevant to a teaching post. A Head of Prison where there is teaching done could be better suited with this Diploma as a scarce skill. Mr Baxter was not a member of the panel and thus he could not testify on the reasoning behind Mr Mdlalose being found to have met the set requirements. The appointment of Mr Mdlalose went through various stages until it was approved by Mr Nxele as the last functionary. No proper foundation was laid by Mr Baxter for this Court to find that there is conduct of an employee of the Department which shows, or tends to show that any employee failed or was failing or was likely to fail to comply with any legal obligation to which that employee was subject to comply. Consequently, no alleged protected disclosure was therefore proved to have been made.

The appointment of Mr Mathenjwa

[45] This is an instance where the panel which included Mr Baxter short listed candidates some of whom were not approved by Mr Nxele. He instructed that other candidates were to be looked for. However under cross examination Mr Baxter then said that Mr Nxele told him to look for Mr Mathenjwa. Where and the circumstances under which this was said remain unclear. He had not disclosed this in evidence in chief. Yet Mr Baxter told Ms Jolingana that some

people were removed from the shortlist and Mr Mathenjwa was pushed in. Mr Baxter said that he did not know how Mr Mathenjwa ended up being included in the shortlist. In his evidence he did not carry out the instruction given by Mr Nxele. His evidence in this regard was clearly contradictory. On the generated documents Mr Nxele disapproved the shortlisting of Messrs Diko, Godden and Mbono but he said that the panel was to look at other candidates without mentioning the names of Mr Mathenjwa. The final approved list did not conform to Mr Nxele's recommendations as the panel excluded certain names and included others as panellists decided.

- [46] I therefore conclude that no proper foundation was laid by Mr Baxter for this Court to find that there is conduct of an employee of the Department which shows, or tends to show that any employee failed or was failing or was likely to fail to comply with any legal obligation to which that employee was subject to comply. Consequently, no alleged protected disclosure was therefore proved to have been made.

The appointment of Mr Mbanjwa

- [47] According to both Mr Baxter and his witness Dr Mdletshe, Mr Mbanjwa's name was not included in the initial shortlist. When that list was seen by Mr Nxele, he instructed that Mr D K Mbanjwa "cannot be eliminated" and his names then appeared in the gross list with the names of all applicants and in the shortlist. The alleged initial gross list was never produced. Yet the names of Mr Mbanjwa appeared in the alphabetical gross list with a date stamp, suggesting that the application was lodged on time. The very Applicant who raised an issue about Mr Mbanjwa scored Mr Mbanjwa very high as the best performing candidate. Both Dr Mdletshe and Mr Baxter strongly recommended Mr Mbanjwa for the post. If it were true that Mr Baxter was part of the corruption, as he suggested in his evidence, he ought to have given details of the corrupt activities in respect of when and where the plan was mooted. He did not. In the deliberations of the panel Mr Baxter could have raised and recorded the issues of concern instead

of giving a high score. Mr Mbanjwa had been acting in the post for a considerable period of time. Any comments allegedly made by Mr Davids about Mr Mbanjwa remain hearsay evidence in respect of which no foundation was laid for its acceptability.

[48] I find therefore that there is no conduct of any employee of the Department which shows, or tends to show that any employee failed or was failing or was likely to fail to comply with any legal obligation to which that employee was subject to comply. Consequently, no alleged protected disclosure was therefore proved to have been made.

The appointment of Mr Mchunu

[49] Mr Baxter was initially appointed to the panel in respect of this position. He recused himself as his wife applied for the same position. He therefore had a vested interest in this position. Dr Mdletshe was a panel member and Mr Davids chaired it. As the Mr Baxter conceded that he did not mention alleged irregularities related to Mr Mchunu to Mr Nxele and as Mr Baxter conceded also that he could not state in what respect Mr Nxele was corrupt in relation to Mr Mchunu other than the fact that he signed off on the appointment, this matter needs no further examination except for comments already made in paragraph 30 hereof. No protected disclosure was therefore proved to have been made.

Ms Busisiwe Dlamini and Mr Ngubo

[50] Mr Nxele's evidence that he found Ms Dlamini already working at the regional office when he arrived to assume his duties stood very much unchallenged. In respect of the learnership program, I find indeed that it was strange that Mr Baxter found an irregularity in the learnership program but took three years to report it. The Respondent is correct to say it was only once the processes involving the daughter of Mr Baxter had been stopped that hell broke loose.

[51] In the case of Mr Ngubo, the allegations were very sparse and far apart. They were more of conclusions than assertions. Again, no protected disclosure was proved to have been made in respect of the two persons.

[52] The cancellation of the learnership program involving the daughter of Mr Baxter and the failure to short list and interview the wife of Mr Baxter appear to have been what infuriated Mr Baxter. He even declared that he would not “*accept personal injustice to my family and those I am privileged to lead.*” He displayed an attitude that he was too senior to be subjected to the ordinary rules of the Department. He refused to be searched or to have his family members subjected to ordinary prison regulations. He reached a stage in his career where he thought his team work would be constituted by those he wanted and when other panellists differed from him, he cried foul. Clearly, if his wife had been appointed to the post she applied for and if the learnership program of his daughter had not been cancelled, his subtle interference notwithstanding, and if appointments in his area were done according to his wishes, he would have been content.

[53] He left it undisputed that Department officials such as the Minister, the National Commissioner and the Regional Commissioner were to be searched upon entering the prison precincts. The search had nothing to do with the status of an official but everything to do with protection necessary and distinctive of the prison environment which is a high risk area. What Mr Baxter said upon discovering the cancellation of the learnership program is informative of his attitude. He said: “*When it touches the very innocent child I have to do what is expected of me as her father.*” So the employment of her daughter by the Department was to him a high priority. I note that part of the opening address by Mr Schuman for Mr Baxter is: the following:

“At around the time that these issues between the regional commissioner and Mr Baxter were coming to a head she was removed from the learnership programme, and that, M'Lord, prompted certain further developments, and one of those developments was that Mr Baxter sent letters to both the regional

commissioner and to the acting national commissioner requesting audiences and pointing out the nature of the irregularities complained of and others. M'Lord, it will become apparent from the evidence that prior to that point in time Mr Baxter had hoped that by engaging with the regional commissioner he would mend his ways and he would cease this interference in the appointments to positions which then had a direct impact on Mr Baxter performing his job functions.”⁶

[54] Disclosure is only protected if it is made in good faith. Therefore to enjoy protection, the employee must *bona fide* have believed that the information disclosed was true. In the case of *SA Municipal Workers Union National Fund v Arbuthnot*⁷ the Labour Appeal Court held that good faith requires that the disclosure is made without ulterior motive, revenge or malice. The court accepted that although *Arbuthnot* had reasonably believed that the information disclosed was substantially true, it did not accept that the disclosure had been made in good faith. It was held that the disclosure was not protected.

[55] In the present matter a conclusion is irresistible that whatever was disclosed to Ms Jolingana and to Mr Nxele by Mr Baxter was driven by ulterior motive, revenge or malice. I therefore conclude that the provisions of the PDA find no application in this case.

Whether the dismissal of Mr Baxter was substantively and procedurally fair

[56] In terms of section 191 (5) (a) of the Labour Relations Act, a dispute pertaining to the dismissal of an employee ought to be referred to arbitration. Due to the fact that a dispute about the misconduct of the employee was pleaded as an alternative claim Court has now been seized with this matter. As the statement of claim was filed in February 2015, the amended section 158 (2) (b) of the LRA is applicable and Court finds it expedient to continue with these proceedings,

⁶ See page 17 of the transcript.

⁷ (2014) 35 ILJ 2434 (LAC)

instead of stopping the proceedings and refer the matter to start *de novo* before a commissioner. All evidence which the parties wanted to be considered was led during the trial which has stretched over more than two years.

[57] Mr Baxter was charged with 5 counts of misconduct. He was found guilty of all five but was acquitted only on the alternative charge of count 5.

[58] Mr Baxter was legally represented at the internal disciplinary hearing. His attorney challenged the version put forth by witnesses called by the Department. When Mr Baxter was given a chance to testify, he declined and so his version was never given under oath. About this, the Chairperson Advocate M B Matlejoane of the Pretoria Bar had this to say:

“In the circumstances of this matter and in light of the findings that I have already made, the fact that Mr Baxter did not testify in order to give probative value to the version that he put to the employer’s witnesses, it is my finding that by his conduct, Mr Baxter has caused the trust relationship between himself and his employer to break down irretrievably. He compounded the problem by trying to justify his actions rather than accept responsibility for where he had clearly erred.

The charges of which Mr Baxter was found guilty are of a serious nature. His position places a particular responsibility on him to act in a lawful, proper and procedural manner. Senior officials like Mr Baxter are expected to behave with impeccable moral rectitude and he failed himself and his employer in this instance.

[59] Ms Matlejoane found the only appropriate sanction to be that of dismissal in respect of counts: 1, 2, 4 and 5 but a final written warning on count 3. It remains unclear if dismissal is a sanction for each of the four counts or it is the cumulative effect of all four counts put together. She did say though that the charges he was convicted of are of a serious nature.

[60] During the trial before me, evidence led was more about the contravention of the provisions of the PDA and nothing really was said about the substantive and procedural fairness of the dismissal. In respect of count four though, evidence demonstrated various steps which were to be taken at various intervals to ensure that a sick leave form was submitted. The supervisor of the employee had a role to play. The evidence of the Applicant was that he submitted the sick leave form a day after he was off sick to his secretary who was to forward it to the Regional Commissioner, as a supervisor. The transmission appears to have been incomplete. It remained common cause that Mr Nxele did nothing to ensure compliance with the set procedure. I am unable to find the bases on which Mr Baxter was found guilty of this infraction. The worst that could happen was to grant him leave without pay. Mr Baxter should have been found not guilty of this charge. As a passing remark, even if he were guilty, it is such a petty misconduct as to attract only a written warning at first transgression.

[61] I must agree with Ms Matlejoane that counts 1, 2 and 5 are individually very serious, more as they were committed by a senior person who is supposed to be exemplary. In respect of count one, Mr Baxter was senior to Mr Khumalo and in a subtle way actually told him to look for his daughter's name and appoint her. In respect of count two, as already alluded to, he gave himself an exemption he really was not entitled to. He should have lived by example to ensure that everyone was seen as equal before the law. In count five, Mr Baxter was steering trouble at his work place. He was sworn to confidentiality as a panellist and he breached it. He challenged the authority of his supervisor by using a colleague. Considered individually or cumulatively, the charges justify a dismissal.

[62] The only procedural ground of merit raised is one of a delayed disciplinary hearing, which should have been held within 60 days from the suspension date. However, no demonstrable prejudice was caused to Mr Baxter. On the contrary, it prolonged the date of his dismissal. The benefit of the finding on the delay is however neutralised by the general fair procedure adopted at the internal

disciplinary hearing to the point that it cannot be said that the whole procedure was vitiated by this delay.

[63] I accordingly issue the following order:

1. The dismissal of Mr Baxter by the Respondents was not automatically unfair as envisaged in section 187 (1) (h) of the LRA as it did not constitute an occupational detriment in terms of the provisions of the PDA.
2. The dismissal of Mr Baxter was substantively and procedurally fair.
3. No costs order is made.

Cele J

Judge of the Labour Court of South Africa.