THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 1485 / 2019

In the matter between:

RORY GALLOCHER **Applicant**

and

SOCIAL HOUSING REGULATORY AUTHORITY **First Respondent**

MINISTER OF HUMAN SETTLEMENTS **Second Respondent**

Heard: **28 June 2019**

Delivered: **3 July 2019**

Summary: **Jurisdiction – Labour Court does have jurisdiction to consider an urgent application to intervene in the case of suspension of employee – exceptional and compelling reasons however required – exceptional circumstances shown**

Urgency – applicant must establish compelling considerations of urgency – urgency shown

Suspension – whether suspension lawful – principles considered – decision to suspend employee taken at a council meeting where required quorum not

LABOUR COURT

established and regulatory procedures not complied with – no valid decision taken to suspend the employee – suspension unlawful

Occupational detriment – principles considered – on the facts, the employee's suspension constitutes occupational detriment – urgent intervention to uplift suspension justified

Costs – principles considered – no order as to costs made

JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an urgent application to declare his suspension by the first respondent on 20 June 2019 to be unlawful and thus invalid. The applicant has also raised a complaint that his suspension constitutes an occupational detriment and for that reason as well should be uplifted.

[2] Ordinarily, I would be reluctant to entertain these kind of applications, as I have done on numerous occasions in the past, considering the fact that a suspension can be properly challenged in terms of the unfair labour practice jurisdiction and prescribed dispute resolution processes under the Labour Relations Act ('LRA'),[1] and that urgent applications are often abused by litigants who seek to bypass these prescribed dispute resolution processes.[2]

[3] The simple point is that as a matter of general principle the proper prescribed dispute resolution processes prescribed by the LRA must be followed.[3]

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[1] Act 66 of 1995 (as amended).

[2] See for example *Zondo and another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 45; *SA Municipal Workers Union on behalf of Members v Kopanong Local Municipality* (2014) 35 ILJ 1378 (LC) at paras 32 – 33; *Madzonga v Mobile Telephone Networks (Pty) Ltd* [2016] JOL 37300 (LC) at para 63; *Manamela Ida v Department of Co-operative Governance, Human Settlements and Traditional Affairs, Limpopo Province and Another* (J 1886/2013) [2013] ZALCJHB 225 (5 September 2013) at para 53

[3] *Gcaba v Minister for Safety and Security and Others* (2010) 31 *ILJ* 296 (CC) at paras 59 – 60; *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union and Others* (2015) 36 ILJ 152 (LAC) at paras 30 and 32; *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at para 27.

LABOUR COURT

However, this Court can nonetheless intervene, provided an applicant can show extraordinary and compellingly urgent circumstances. In *Booysen v Minister of Safety and Security and Others*[4], it was as follows:

> '… such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.'

[4] The simple question that must thus be answered in this application is whether the applicant has made out a proper case of compellingly urgent and extraordinary circumstances to justify intervention at this stage. If not, that must be the end of this matter for the applicant, and the applicant is compelled to pursue his suspension as an unfair labour practice in the ordinary course. In seeking to advance a case of compellingly urgent and extraordinary circumstances, the applicant relies only on two issues. The first is that the decision taken by the first respondent to suspend the applicant was inquorate and thus invalid. The second is that the applicant's suspension in fact constituted an occupational detriment which would justify such kind of intervention.

[5] The respondents opposed the application. The respondents also raised a number of objections *in limine*, being that this Court did not have jurisdiction to entertain this application, and that the matter was not urgent. A non-joinder point was also raised, but this was not pursued when the applicant abandoned its prayer for a costs order against the council members of the first respondent.

[6] As the applicant is seeking final relief, the applicant must satisfy three essential requirements which must all be shown to exist, being: *(a)* a clear

[4] (2011) 32 ILJ 112 (LAC) at para 54. See also *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 46; *Food and Allied Workers Union and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2013) 34 ILJ 1171 (LC) at para 15; *Uthukela District Municipality* (*supra*) at para 38.

LABOUR COURT

right; *(b)* an injury actually committed or reasonably apprehended; and *(c)* the absence of any other satisfactory remedy.[5]

[7] Before deciding the merits of the applicant's application, I will first deal with the jurisdictional and lack of urgency issues raised by the respondents.

Jurisdiction

[8] The Court in *Gcaba v Minister for Safety and Security and Others*[6] said that jurisdiction means: *'… the power or competence of a court to hear and determine an issue between parties …*'. In the case of applications such as the current application, in which urgent intervention in the suspension of an employee is sought, the Labour Court has the jurisdiction in terms of section 157,[7] and the competence and power in terms of Section 158,[8] to do this. In *Booysen supra*[9], the Court said:

> '…. the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. …'

[9] Whether the Labour Court should ultimately decide not to intervene, but dismiss the application because the applicant should have followed the dispute resolution process prescribed by the LRA and not burden this Court with the matter at this stage, is not an issue of jurisdiction. It is simply a decision made by the Labour Court to the effect that the applicant has a bad claim. It must also be considered that in order for the Court to decide that the

LABOUR COURT

[5] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Mere v Tswaing Local Municipality and Another* (2015) 36 ILJ 3094 (LC) at para 4.
[6] (2010) 31 ILJ 296 (CC) at para 74.
[7] Section 157(1) reads: '*Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court*'.
[8] Section 158(1) reads: '*(1) The Labour Court may (a) make any appropriate order, including (i) the grant of urgent interim relief (ii) an interdict; (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act; (iv) a declaratory order ….*'
[9] Id at para 54. See also *Gradwell* (*supra*) at para 46; *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Uthukela District Municipality* (*supra*) at para 17.

applicant's claim is bad, it has to follow that the Court must have jurisdiction to do so. In *Makhanya v University of Zululand*[10] it was held as follows:

> '… I have pointed out that the term "jurisdiction", as it has been used in this case, and in the related cases that I have mentioned, describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim. ...'

[10] In simple terms, the respondents' jurisdictional objection is founded on a contention that the applicant has a bad claim, which always requires a consideration of the merits of the claim, which cannot happen if the Court does not have jurisdiction to do so. There is accordingly no merit in the respondents' jurisdictional objection. This Court clearly has jurisdiction to entertain the applicant's application.

Urgency

[11] In *Jiba v Minister: Department of Justice and Constitutional Development and Others*[11] the Court dealt with Rule 8, being the Rule applicable to urgent applications in the Labour Court, as follows:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[12] I have dealt with the general requirements for urgency in detail in the judgment of *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[12], and said:

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[10] (2009) 30 *ILJ* 1539 (SCA) at para 52. See also *SA Local Government Bargaining Council v Ally NO and Another* (2016) 37 ILJ 223 (LC) at paras 40 and 42.
[11] (2010) 31 ILJ 112 (LC) at para 18.
[12] (2016) 37 ILJ 2840 (LC) at para 21. See also *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

LABOUR COURT

'What would an applicant who seeks to make out a case of urgency then have to show? In *Mojaki v Ngaka Modiri Molema District Municipality and Others* the Court referred with approval to the following *dictum* from the judgment in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*:

'…. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.''

[13] In *Northam Platinum*[13] I also referred to the consideration that where an applicant seeks final relief, the Court must be even more circumspect when deciding whether or not urgency has been established, and that, in simple terms, the applicant must make out an even better case of urgency. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing or determination.[14]

[14] Further, urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[15] In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for

[13] Id at para 23. See also *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at para 11

[14] *Northam Platinum* (*supra*) at para 24; *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 113D-114C.

[15] See *Golding v HCI Managerial Services (Pty) Ltd and others* (2015) 36 ILJ 1098 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50; *Association of Mineworkers and Construction Union v Lonmin Platinum (comprising Eastern Platinum Ltd and Western Platinum Ltd) and Others* (2014) 35 *ILJ* 3097 (LC) at paras 30-44.

LABOUR COURT

establishing urgency.[16] But the longer it takes from the date of the event giving rise to the proceedings, the more the urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency.[17]

[15] Applying the above principles to the facts *in casu*, the first consideration is that the applicant was suspended on 20 June 2019. His suspension was not preceded by any process that could have forewarned him of his possible suspension. As such, and for all intents and purposes, this is the date when the dispute susceptible for referral to this Court arose. It must also be considered that the actual suspension letter was only issued to the applicant the afternoon of 20 June 2019. It took the applicant only four days, being until 24 June 2019, to file the urgent application. Considering that 20 June 2019 was a Friday and there was an intervening week end, I consider this to be prompt and immediate action, taken at the very earliest opportunity. The first test for urgency is thus successfully passed.

[16] This leaves only the issue of substantial redress in due course. It is of course so that the applicant has pursued an unfair labour practice dispute based on an unfair suspension to the CCMA, on 23 June 2019. This may well afford the applicant, in general, substantial redress in the ordinary course, in the form of the uplifting of his suspension. If the applicant was only challenging the fairness of his suspension, I may well have declined to entertain the matter because of this. But the applicant has contended that the actual decision to suspend him was taken by the first respondent's council when it was inquorate, thus rendering it invalid. This is not an issue that would be dealt with in an unfair suspension dispute. The issue of whether the applicant's suspension was lawful is an issue distinct and separate from whether it was fair, and in this regard, there is not another mechanism to obtain substantial redress in due course.[18] In *SA Municipal Workers Union on behalf of Matola v Mbombela Local Municipality*[19] the Court considered a situation where an employee was suspended without compliance with a specifically prescribed

[16] See *University of the Western Cape Academic Staff Union and Others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) at para 15.
[17] *Northam Platinum* (*supra*) at para 26.
[18] See *Mere* (*supra*) at paras 2 and 35.
[19] (2015) 36 ILJ 1341 (LC).

LABOUR COURT

process in a statutory regulation, and accepted this established urgency. The Court said the following:[20]

> '…. In failing to comply with the requirements of regulation 6 the respondent infringed on a clear right of the applicant not to be suspended without a prior hearing.
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> The harm that the applicant suffers pending the finalisation of the disciplinary hearing is not financial because he receives his salary during the suspension. The irreparable harm that he suffers has to do with his dignity and freedom to work. The impact of the suspension on the freedom to work and dignity of the suspended employee was stated in *Minister of Home Affairs & others v Watchenuka & others*, in the following terms:
> 'The freedom to engage in productive work — even where that is not required in order to survive — is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth — the fulfilment of what it is to be human — is most often bound up with being accepted as socially useful.'

[17] Also, a further central element to the applicant's case is the issue of an occupational detriment. The applicant has explained in the founding affidavit that if his suspension is not immediately uplifted, the individuals that orchestrated his suspension to get him out of the first respondent would have succeeded, and they would be in a position to in essence sweep all the irregularities and unlawful conduct he complained of under the carpet. In this regard, it must be considered that the applicant is the CEO of the first respondent and a member of the council, which is about as senior as one can get, and he would be directly responsible to protect the interests of the first respondent. I accept that this is also a consideration that mitigates strongly against proper substantial redress being available in due course. Further, an occupational detriment carries with it an inherent component of urgency, if it exists.

[20] Id at paras 28 – 29.

LABOUR COURT

[18] I am aware of the judgment in *Maqubela v SA Graduates Development Association and Others*[21] where the Court, in what was on face value an application quite similar to the application *in casu*, dismissed the application to uplift a suspension, and held:

> '… it is my view that the applicant exaggerated his importance to the first respondent and in relation to the AGM. Furthermore, whether the AGM is to proceed or not cannot in any manner make the application urgent. The applicant has not persuaded the court that sufficient grounds exist which necessitate a relaxation of the rules and ordinary practice. In my view, as a result of the applicant's sense of self-importance, he created the urgency. Having referred a dispute to the CCMA, he is in a position to obtain substantial relief at a later stage as already indicated. Obviously any substantial relief would be dependent on the merits of his case. …'

However, in my view, and for the reasons fully elaborated on below, this *ratio* in the judgment in *Maqubela supra* is entirely distinguishable on the facts of the application now before me, and cannot apply.

[19] In my judgment, and overall considered, this is a case where justice demands that the application be considered as one of urgency. The nature of the allegations made by the applicant are such that it cannot be left unattended until the matter may one day be considered in the ordinary course. By then it may well be too late. I therefore consider that the requirements of urgency have been satisfied in this case, and I determine that the application be heard as one of urgency.

[20] I will now turn to the merits of the matter, by first setting out the relevant facts.

The relevant facts

[21] Because the applicant is seeking final relief in motion proceedings, any factual disputes between the parties must be determined on the basis of the

[21] (2014) 35 ILJ 2479 (LC) at para 35.

LABOUR COURT

judgment of *Plascon Evans Paints v Van Riebeeck Paints.*[22] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[23] this test was summarized as thus:

> '… it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

[22] Where it comes to what can be considered to be 'admitted facts' in the context of this test, the Court in *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another*[24] said the following:

> 'The appellant approached the Labour Court by way of urgent application. The general rule applicable to the resolution of genuine disputes of fact in applications in which final relief is sought is stated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*, namely that —
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> 'where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted'.

[22] 1984 (3) SA 623 (A) at 634E-635C. See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) at para 32; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) at para 26.
[23] 2009 (3) SA 187 (W) at para 19.
[24] (2016) 37 ILJ 902 (LAC) at para 16.

LABOUR COURT

[23] It is equally clear from the *Plascon Evans* principles as set out above that disputes of fact must be bona fide and real, so as to constitute genuine disputes of fact that must be determined in favour of a respondent. In this respect, and in *SA Football Association v Mangope*[25] the Court held:

> '… A real dispute of fact will not arise therefore if the respondent relies merely on a bare denial of the applicant's allegations or simply puts the applicant to the proof of allegations and in effect indicates no intention to lead evidence disputing the truth of the applicant's allegations. Bare denials will not suffice to give rise to a dispute of fact where the facts averred fall within the knowledge of the denying party and no basis is laid for disputing the veracity or accuracy of the averment. There is accordingly a duty upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his or her client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen, the court may well take a robust approach and grant the applicant relief …'

[24] Applying all the aforesaid principles, it must be said that the respondents' answering affidavit on several occasions comes up short in establishing a genuine factual dispute, to the extent of discounting the applicant's version. A number of essential contentions in the founding affidavit are simply met with bald denials. One example of this is the applicant's case and explanations in the founding affidavit as to what happened in the council meetings in April, May and June 2019. Another example is where the applicant in some detail explained why that which was contained in a tip-off report of Khulile Boqwana ('Boqwana') was false.[26] Several of the pertinent allegations of the applicant regarding events involving Boqwana and council members are met with a statement that the deponent has no knowledge thereof, and the applicant is put to the proof. These failues, as I see it, are such that it cannot cause a factual dispute determined in favour of the respondents in terms of *Plascon Evans*. The respondents must at least engage the applicant and provide some particularity as to the basis for the denials or opposition.[27] What is critical is

[25] (2013) 34 *ILJ* 311 (LAC) at para 12.
[26] This report was the reason given for the applicant's suspension.
[27] Compare *Hudson and Another v SA Airways SOC Ltd* (2015) 36 ILJ 2574 (LAC) at paras 10 – 11.

LABOUR COURT

that all council meetings are formally minuted, and all the respondents had to do is put up these minutes, which they never did. In my view, the following *dictum* from the judgment of the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*[28], properly describes the approach upon which I will decide what constitutes the proper factual matrix that must form the basis of my decision, *in casu*:

> '… Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where, however, a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant.'

[25] The first respondent is an organ of state. It was established in terms of section 7 of the Social Housing Act ('SHA').[29] Its purpose is to support and facilitate the development of social housing throughout the entire country, as a regulatory authority, aimed at low and medium income households. It is also an entity as contemplated schedule 3A of the Public Finance Management Act ('PFMA').[30]

[26] In terms of section 8(1) of the SHA, the first respondent consists of a council appointed in terms of section 9, a chief executive officer (CEO) appointed by the council with approval of the minister who is responsible for the day to day management of the affairs of the first respondent, and a corporate services manager (CSM) appointed by the CEO who is responsible for the financial management of the first respondent. In terms of section 8(2), both the CEO and CSM are executive members of the council of the first respondent as well. In terms of section 10, the CEO appoints the staff of the first respondent.

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[28] 2005 (2) SA 359 (CC) at para 53.
[29] Act 16 of 2008.
[30] Act 1 of 1999. See also section 7(2) of the SHA which makes the PFMA applicable to the first respondent.

LABOUR COURT

[27] In terms of section 9(1) of the SHA, the council shall have a minimum of 7 and a maximum of 12 members. Currently, the council of the first respondent consists of 11 members. The applicant as CEO is an *ex officio* member, as well as the CSM, Ms A Puoane. The chairperson of the council is Mr S Ganda. The remaining 8 members of the council are Mr K Sebata, Ms N Ntshogwana, Mr I Kotsoane, Ms K Kwinana, Adv M Mdludlu, Mr P Ximiya, Mr M Mexenge and Mr I Higgins.

[28] The SHA provides in section 9(5) that the minister may terminate the membership of a council member, but the SHA does not provide for the suspension of a member. In terms of section 9(11), the quorum for any council meeting is 50% plus 1.

[29] The first respondent has also adopted a Charter, with effect from 1 November 2017, which regulates all the functions, powers and duties of the council of the first respondent (referred to in this judgment as 'the Charter'). The Charter is applicable to members of the council, and the various subordinate committee members (clause 1.2). In terms of clause 1.1, the purpose of the Charter was to set out the demarcation of the roles, functions, obligations, rights, responsibilities and powers of the council, the powers delegated to committees, the processes and practices of the council in respect of its duties, functions and responsibilities, and the parameters within which the council will operate and ensure the application of good corporate governance. It is much like the MOI of a private corporation.

[30] Of relevance to the matter at hand, is firstly clause 1.4.5 of the Charter, which provides that council members carry a fiduciary responsibility and owe a duty of care to the first respondent. Next, clause 1.4.11 provides that the council shall ensure that the first respondent complies with all relevant laws, regulations and codes of good business practice. In terms of clause 1.4.13, the responsibility for the day to day management of the first respondent shall vest in the CEO, which in this instance is the applicant. The CEO is

LABOUR COURT

accountable to the council for a variety of operational and policy issues (clause 1.5.3.3).

[31] Clause 1.9 regulates the decision making authority of the council. The council, in terms of this clause has the authority on policy and regulatory matters, which includes to appoint and discharge senior management, and to determine the remunerations and employment conditions of senior management. The authority of the council is exercised at regular council meetings, which must take place on at least a quarterly basis (clause 1.14.1). Special meetings may be called with the approval of the chairperson in order to dispense with urgent matters should the need arise. In line with the SHA itself, the quorum for a council meeting shall be 50% plus 1 (clause 1.14.4).

[32] Clause 1.14.5 reads:

> 'A decision taken or act authorised shall not be invalid merely because:-
> 1.14.5.1. At the time, the decision was taken or the act was authorised there was a casual vacancy on Council; or
> 1.14.5.2 A person not entitled to, sat as Member of Council.'

However, clause 1.14.6 reads:

> 'The decision or act shall be authorised if:-
> 1.14.6.1 By a majority of Council members who were present and who were entitled to sit as members; and
> 1.14.6.2 The Members constituted a quorum.'

[33] The procedure that must be applied where it comes to meetings of the council is regulated by clause 1.15 of the Charter. Clause 1.15.2 requires prior notice of a council meeting of at least 14 days, unless exceptional circumstances dictate otherwise. Also, the notice shall be accompanied by an agenda, unless the chairperson decides, by exercising a discretion based on confidentiality, that it should not be provided. Also, and in terms of clause 1.15.7, a council member may not vote nor be counted in the quorum on any matter in which such member has an interest. Lastly, and in terms of clause

LABOUR COURT

1.15.9, a minute shall be kept of all council meetings and the decisions taken therein.

[34] The first respondent also has its own internal disciplinary code and procedure, applicable to all employees of the first respondent. This disciplinary code and procedure provides, in clause 3.5 thereof, for the suspension of employees on full pay pending the conclusion of a disciplinary investigation. The disciplinary code also provides that an employee will be given the opportunity to motivate why he or she should not be suspended, but the first respondent's management will have the full discretion to decide whether or not to suspend.

[35] Turning then specifically to the applicant, he was appointed as CEO of the first respondent with effect from 1 February 2016, on a 5 year contract ending on 31 January 2021. He is a full time employee of the first respondent, in terms of his contract of employment.

[36] What does appear to be common cause between the parties is that prior to the appointment of the applicant, the first respondent was having difficulties with irregular expenditure and corruption, and the minister did second officials from the ministry to assist the first respondent. It is disputed as to whether the first respondent was placed under actual administration, but nothing turns on this. What is however common cause is that after the appointment of the applicant, there was a marked general improvement in all of the spheres of operation of the first respondent.

[37] According to the applicant, and when he sought to implement a turnaround strategy, he encountered resistance from a long standing senior employee of the first respondent, being Boqwana, the executive for compliance, accreditation and regulation. Boqwana had a close relationship with a number of members on the first respondent's council. Boqwana often defied and opposed the applicant's decisions where it came to operations at the first respondent.

LABOUR COURT

[38] The applicant ultimately resorted to suspending Boqwana pending disciplinary proceedings for misconduct. Boqwana challenged his suspension as an unfair suspension (unfair labour practice) to the CCMA, and this dispute was ultimately set down for arbitration on 24 June 2019. The applicant was to be the principal witnesses for the first respondent in this arbitration, and attorneys had been instructed to attend to the matter.

[39] In addition, the actual disciplinary proceedings against Boqwana took place in 2019, and was presided over by an independent chairperson from Tokiso. The disciplinary hearing concluded on 27 March 2019. The chairperson, in a written finding dated 2 May 2019, recommended the summary dismissal of Boqwana. In short, the reasons given for this finding were that Boqwana made allegations of being victimised and bullied by the applicant when there was no basis for doing so, the conduct of Boqwana was a serious and wilful refusal to comply with reasonable instructions by the applicant and posed a serious and deliberate challenge to his authority, that Boqwana was not willing to work according to the standards laid down by the applicant as CEO, and that the trust relationship had been completely destroyed. The written finding was comprehensive, and fully motivated the conclusions arrived at.

[40] The applicant as CEO is not entitled to discharge a senior member of management, without this being approved by the council. As such, the applicant circulated the disciplinary hearing outcome to all the council members, and consulted the Human Resources and Remuneration Committee (‘HRRC’) of the first respondent. The HRRC endorsed the findings of the independent chairperson.

[41] The next step would be for the disciplinary hearing outcome to be formally tabled before the council for consideration. The applicant on numerous occasions tried to get the chairperson, Ganda, to place this disciplinary finding on the agenda of a council meeting, without success. In particular, the applicant was told the agenda for the meeting on 10 May 2019 was already too long. The applicant tried again for the meeting on 30 May 2019, and was told that there was an earlier resolution that the disciplinary outcome would

LABOUR COURT

only be considered at the next ordinary council meeting, which was only scheduled for 24 July 2019. In a telephone conversation with Ganda on 18 June 2019, the applicant tried to convince Ganda to table the disciplinary outcome at a special council meeting, but Ganda refused. It was clear that Boqwana was being protected.

[42] The protection of Boqwana as aforesaid, has a particular context. Following the suspension of Boqwana, it paved the way for the applicant to in fact receive reports of several incidents of alleged corruption involving Boqwana and two council members, being Moroka and Kwinana. The applicant investigated these allegations, and found substance in it. The applicant then formally reported these irregularities, and commissioned a forensic investigation to be conducted by a third party, Nexus. The applicant also reported his findings in his third quarter fraud and corruption supplementary report of 29 January 2019 to the risk committee and the council. It may be added that Nexus advised on 29 May 2019 that the investigation was 60% complete, and even at that uncompleted stage, it was apparent that there was substance in the corruption allegations.

[43] Because the applicant kept the council appraised of the aforesaid investigation, individual council members were fully aware that some of them were implicated. As a result, the applicant was then targeted by some individual council members (Moroka and Kwinana) with the view of getting him suspended. These actions were fully set out in a formal grievance submitted by the applicant to the council on 24 April 2019 to deal with this conduct, and I do not intend to repeat all of this in this judgment. But of importance to the current matter, the applicant specifically, in his grievance, referred to conduct by Kwinana, who had stated, in front of other staff, that the '*misconduct and insubordination of the CEO*' will be dealt with, and she also made several false allegations against the applicant. The applicant indicated in the grievance that he was being intimidated and victimized by Kwinana. The applicant also referred in his grievance to irregular conduct of Kwinana relating to the Soweto City Project. The applicant's grievance was tabled at a

LABOUR COURT

council meeting on 26 April 2019, but not considered. To date, it has not been dealt with.

[44] In a council meeting held on 10 May 2019, the council secretary, Tshifhiwa Rasiluma ('Rasiluma'), informed the council that *inter alia* Kwinana was directly implicated in the investigation into corruption that was ongoing at the time, and indicated how she was involved. This was done by disseminating to the council a draft affidavit by the applicant made as part of the investigation. It was in fact resolved that the council should recommend to the minister that Kwinana be suspended as a member of the council. Despite this resolution, Ganda ensured it was never implemented.

[45] In contrast to all the above, and at the beginning of April 2019, and despite being the subject of pending disciplinary proceedings at the time (pursuant to which he was ultimately summarily dismissed), Boqwana lodged a 'tip-off' of his own concerning alleged fraudulent and corrupt activities at the first respondent. This tip-off related to a number of service providers in respect of which irregularities are alleged. Not all of these issues raised by Boqwana related to the applicant. But where the applicant was brought into it was where allegations were made about 'false' reporting by 'management' to the council and of payments made on projects that did not meet the contractual conditions. It is also stated that the CEO appointed himself, without the knowledge of the council, as acting executive manager of compliance, accreditation and regulation, which contravened the principle of segregation of duties. It was also stated that executive management is ineffective, and approved polices were not being implemented.

[46] The applicant dealt with this tip-off by Boqwana insofar as it implicated him. He prepared a comprehensive answering report to the council, which he tabled on 10 May 2019, which addressed in detail all the issues raised by Boqwana. This answering report was provided to the council members. The applicant also provided a comprehensive answer to allegations by Boqwana about impropriety on the Little Manhattan Project, being the basis of the most serious allegation by Boqwana referring to the applicant, so as to demonstrate

LABOUR COURT

that there was no substance the allegation. This second report was also provided to all the council members on 27 May 2019. The applicant was given no feedback on any of these reports submitted by him, and it appears they were never even considered

[47] On 18 June 2019, the council members were informed by e-mail by Ganda of a special council meeting to be held on 20 June 2019. The agenda items were reflected as the '*defiance of the CEO and CSM against resolution/instructions of the Council*' and the '*allegations of bullying and harassment made by the Company secretary against the CEO*'.

[48] This special meeting then took place on 20 June 2019. It was attended by all the council members, save for Higgins, who tendered an apology. Despite what is reflected in the meeting agenda, it was indicated when the meeting commenced that the tip-off report by Boqwana would be discussed and considered in the meeting, to which the applicant objected, as it was not on the agenda. The applicant also raised that this could not be discussed without considering the reports he had submitted in answer thereto. The applicant also indicated that the disciplinary outcome recommending the dismissal of Boqwana had not even been discussed and should also be discussed. However, it was indicated that the meeting would proceed to consider the tip-off by Boqwana only, and the dismissal report of Boqwana could not be considered because it was not on the agenda. The applicant and the CSM was instructed to leave the meeting, because they were involved. Two other council members, Ximiya and Mxenge, also left the meeting, leaving only 6 council members remaining in attendance, which included Kwinana.

[49] The Boqwana tip-off was then discussed 'in camera' by these 6 council members, and a resolution was passed that same day that the applicant be suspended. This suspension was never discussed with the HRRC before it was effected or considered. There was no indication in the agenda that the applicant's suspension would even be considered. In the end, the reason given for the suspension had nothing to do with the two items actually

LABOUR COURT

reflected on the agenda of the special meeting of 20 June 2019, but was squarely only based on the tip-off report by Boqwana.

[50] One final factual consideration remains. With the applicant being suspended, he was also instructed not to attend the CCMA case of Boqwana relating to his alleged unfair suspension, which was to take place on 24 June 2019. The first respondent also summarily terminated the mandate of the attorneys instructed to attend to the matter on that date, on behalf of the first respondent. This caused a state of affairs that as a matter of common sense would substantially advance an outcome in favour of Boqwana, and thus facilitate his return to work.

Was the suspension valid / lawful?

[51] The applicant raised a number of reasons why his suspension should be considered to be unlawful. One of these reasons must be immediately disposed of, which the applicant in essence conceded in argument in Court. The issues as to whether the suspension of the first respondent was in compliance with its disciplinary code and/or the applicant was given a fair and proper opportunity to make representations prior to suspension is not an issue that should burden this Court at this stage. These are issues squarely reserved for determination by an arbitrator when deciding an unfair labour practice dispute in terms of the normal dispute resolution processes under the LRA.[31] This issue will thus play no role in my deciding whether the applicant's suspension was unlawful.

[52] The second issue raised is that the council did not have the power to suspend the applicant, and this could only be done by the minister. I disagree. The minister must only approve the appointment of a CEO. If the minister also had to approve the dismissal of the CEO, the SHA would in my view have specifically said so. The fact is that the dismissal of the CEO as a full time employee of the first respondent is a matter best considered, and then decided, by the council in discharging its functions under the SHA. The

[31] See the discussion above.

LABOUR COURT

Charter, in my view, specifically gives it this power. I say this because considering the Charter provides for the power of the council to discharge senior management, then surely, even though suspension is not specifically mentioned, it must contemplate suspension as well. My view in this regard is cemented by the fact that suspension is part of the process that leads of disciplinary action, is provided for the first respondent's disciplinary code, which code the council is ultimately responsible in giving effect to. There is accordingly no substance in the contention that the council did not have the power to suspend the applicant.

[53] The final challenge by the applicant where it comes to the lawfulness of his suspension is aimed at an attack on the validity of the decision to suspend him in the first place. He has argued that the decision to suspend him was only competently taken by 5 of the members of an 11 member council, thus making the decision invalid, because it was inquorate. This would a situation similar to suspensions in the public service where the right to suspend is subject to compliance with a statutory prescribed process, which is then not followed by an employer. In such cases, it is now trite that this is an issue that goes to the very validity of the suspension itself, and has nothing to do with considering the fairness thereof. As said in *Manamela Ida v Department of Co-Operative Governance, Human settlements and Traditional Affairs Limpopo Province and Another*[32]:

> 'A suspension would be unlawful in instances where the right or power of an employer to effect a suspension is prescribed by specific regulation and these regulations are not complied with by the employer. The unlawfulness is founded in the employer not complying with its own rules. … the issue of the lawfulness of the suspension must be based solely on the provisions of the regulatory provisions themselves, as defined therein, and thus only concern the interpretation and application of the actual regulatory provisions in order to assess and determine compliance by the employer.'

[32] (J1886/2013) [2013] ZALCJHB 225 (5 September 2013) at para 20. See also *Matola* (*supra*) at para 28; *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC) at para 20; *Lebu v Maquassi Hills Local Municipality and Others (2)* (2012) 33 ILJ 653 (LC) at para 17.

LABOUR COURT

[54] An example of relevance to the current matter before me can be found in *Mbatha v Ehlanzeni District Municipality and Others*[33] which concerned a delegation of the power to suspend and institute disciplinary proceedings to the mayor, when this power was not capable of being so delegated. The Court said:[34]

> '… My considered opinion is that the power to discipline the municipal manager must reside exclusively in the council. I conclude therefore that this power to discipline a municipal manager is vested in the council alone and is not capable of being delegated to an executive mayor. The purported delegation of disciplinary powers of the council was consequently unlawful for want of legality. …'

[55] Another example is *SA Municipal Workers Union on behalf of Mathabela v Dr J S Moroka Local Municipality*[35] where the Court considered a regulation that a suspension period can only be for 60 days, and held that an extension of suspension beyond that period was invalid, finding as follows in uplifting the suspension:[36]

> 'The applicant was suspended on 23 July 2010 and the enquiry commenced within 60 days thereof, but it was only on 12 October 2010 that the employer asked the chairperson of the enquiry to extend the suspension which he did. Accordingly, the suspension period of 60 days had expired by the time the chairperson made this ruling and he could not have been acting in terms of the powers given him under clause …'

[56] Therefore, and as far as I am concerned, a decision taken at an inquorate meeting of the first respondent's council to suspend the applicant will attract the consequence of it being invalid. In *Onshelf Trading Nine (Proprietary)*

LABOUR COURT

[33] (2008) 29 ILJ 1029 (LC)
[34] Id at para 22
[35] (2011) 32 ILJ 2000 (LC).
[36] Id at para 9. See also *Nyathi v Special Investigating Unit* (2011) 32 ILJ 2991 (LC) at para 27; *Solidarity on behalf of Barkhuizen v Laerskool Schweizer-Reneke and Others* (2019) 40 ILJ 1320 (LC) at paras 27 – 28.

Limited v De Klerk NO and Others[37] the Court dealt with a situation where the councillors present at a council meeting did not constitute a quorum and said:

> '… the meeting at which the decision in question was taken did not constitute a *quorum* and that the decision by the Council was for that reason invalid. It follows that the decision should be set aside …'

Similarly, and in *Ngcwase and Others v Terblanche, NO and Others*[38] the Court dealt with a meeting of a school board that did not constitute a quorum and held:

> '… in view of the fact that the Court *a quo* correctly held that the termination of Phaliso's nominated membership to the Emadlelweni Combined School Committee was unlawful, it necessarily follows that third respondent's replacement of him was unlawful and that third respondent's appointment as a nominated member to fourth respondent school board was also unlawful.'

[57] The consequences of an inquorate meeting on the validity of a decision taken at such meeting was specifically considered by the Labour Court in the decision *Independent Municipal and Allied Trade Union and Another v City of Matlosana Local Municipality and Another*[39] where it was held:

> '… the failure to reach a quorum means that no lawful decisions can be taken. The council is not properly constituted. Section 35(1) of the Structures Act also shows the premium which the legislature places on the quorum requirement. …'

[58] Turning to the facts *in casu*, it was common cause that only 6 council members remained in the special meeting on 20 June 2019 to discuss the applicant's suspension and the reasons for it. On face value, this still constitutes a quorum, being 6 out of 11 members. But the problem comes in where it concerns Kwinana, as one of these members. She, in my view,

[37] [1997] 1 All SA 682 (W) at 689. See also *Transcash SWD (Pty) Ltd v Smith* [1994] 1 All SA 163 (C).
[38] [1977] 4 All SA 214 (A) at 221.
[39] (2014) 35 ILJ 2459 (LC) at para 58.

LABOUR COURT

undoubtedly had a horse in the race. She was the one directly implicated in the allegations of bullying, harassment and victimisation raised by the applicant in his grievance. She was also directly implicated in the investigation concerning allegations of corruption, being spearheaded by the applicant. Good and proper governance dictated that she should not be involved in any decision to suspend the applicant, because her partiality was seriously in question. She had a lot to gain by the suspension of the applicant. The fact that she remained in the meeting and voted on the suspension was irregular, and contrary to the provisions of the Charter.

[59] I believe that the objectives as defined in the Charter of the first respondent contemplated that in a situation such as this, a council member that is in any manner implicated or has an interest in the subject matter of a council decision, should not participate in the decision making relating to that issue. After all, justice and fair play must not only be done, but be seem to be done, in cases such as these. The Charter, as quoted above, specifically provides for the recusal of such a council member from decision making in such cases. In *Blythe v The Phoenix Foundry, Ltd., Wilson & Muir*[40] the Court dealt with a situation where a quorum of two directors was considered sufficient, but these directors would each benefit from a decision regarding a pay increase. The Court held:[41]

> '… that a quorum of directors meant a quorum competent to transact and vote on the business before the board, and therefore that a resolution passed at a meeting of three directors, two of whom were interested in the subject-matter of the resolution, was invalid.'

[60] I thus conclude that Kwanini was prohibited from sitting at the council meeting on 20 June 2019 and bringing out a vote in favour of suspending the applicant. That being the case, there were only 5 members of the council entitled to vote on this, and thus the council meeting was inquorate. Consequently, a valid resolution could not be adopted to suspend the applicant, and the decision taken to suspend him was unlawful.

[40] 1922 WLD 87.
[41] Id at 92.

LABOUR COURT

[61] The respondents tried to overcome this difficulty by seeking to rely on clause 1.14.5, referred to above, which provided that a decision taken by the council shall not be invalid just because a person was not entitled to sit as a member of the council. This argument is in my view contrived, and without merit. This provision cannot serve to remedy a meeting that is inquorate in the first place. This is evident from clause 1.14.6, immediately following on the clause relied on by the respondents, which provides that a decision shall be authorized if a majority of members present were entitled to sit as members, and there was a quorum. It is in my view clear what clause 1.14.5 is actually aimed at. It is intended to provide that decisions of the council cannot be attacked just because a council member was not competent to sit at the meeting, but this is always subject to the proviso that there at least was a proper quorum of other competent members. To ascribe to the argument of the respondents would make a mockery of the requirement to have a quorum, which is not only provided for in the Charter, but specifically prescribed in the SHA itself.

[62] Added to the above, the manner in which the special meeting of 20 June 2019 came about and how the suspension of the applicant even came to be discussed at that meeting, is questionable. It remained completely unexplained by the first respondent why it was necessary to convene an urgent meeting of the council to discuss the applicant, on two days' prior notice, when 14 days' notice is ordinarily required. Considering that the Charter provides that a departure from this prescribed notice period requires 'exceptional circumstances', the respondents should have provided an explanation as to what these exceptional circumstances were, but it did not do so. The Charter also prescribes that the subject matter for discussion at the meeting should be set out in the agenda. The agenda in this case specifically only referred to allegations of refusing to obey council instructions and bullying of the secretary as the topics for discussion at the meeting. There was no mention of the Boqwana tip-off report. But even more importantly, there was never any indication that the actual suspension of the applicant would be discussed. All of these failures fly directly in the face of what the Charter requires for valid and proper decision making by the council. Due to

LABOUR COURT

these failures as well, the applicant's suspension must be considered to be unlawful.

[63] It is also not lost on me that the applicant had been trying, unsuccessfully, to get the issue of the dismissal of Boqwana before the Council since beginning May 2019, despite Boqwana having been properly charged, disciplined, and an external disciplinary enquiry chairperson having recommended his summarily dismissal (which was decision was also supported by the HRRC), but where it came to the applicant, he was swiftly dealt with.

[64] In sum, I am satisfied that the decision taken by the council on 20 June 2019 was irregular, unlawful and thus invalid. The agenda of the meeting on that day, insofar as it concerns the issue of the suspension of the applicant, simply did not include the applicant's suspension based on the Boqwana tip-off report. The extreme short notice was not properly explained, as required. The meeting itself was inquorate in that of the 6 members present in the meeting, only 5 could competently vote in favour of suspending the applicant, when at least 6 votes were needed. Because the decision to suspend the applicant was unlawful, the suspension itself was unlawful, and as such cannot be allowed to stand.

Was the suspension an occupational detriment?

[65] In addition to the above, the applicant has another string to his bow. As touched on above, the applicant has said that he has been visited with an occupational detriment, in that his suspension was motivated by his disclosure of corruption on the part of members of the council and other senior employees of the first respondent. This is a case founded on the Protected Disclosures Act[42] (the 'PDA'), which provides that '*No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure'*.[43] An enquiry into

[42] Act 26 of 2000.
[43] See section 3 of the PDA.

LABOUR COURT

the application or not of the PDA entails the following, as enunciated in *TSB Sugar RSA Ltd (now RCL Food Sugar Ltd) v Dorey*[44] as follows:

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

The applicant bears the *onus* in this enquiry.[45]

[66] Starting with the concept of a 'disclosure', Section 1(1)(i) of the PDA defines the term 'disclosure' as follows:

> '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 one or more of the following:
> *(a)* That a criminal offence has been committed, is being committed or is likely to be committed;
> *(b)* that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
> *(c)* that a miscarriage of justice has occurred, is occurring or is likely to occur;
> *(d)* that the health or safety of an individual has been, is being or is likely to be endangered;
> *(e)* that the environment has been, is being or is likely to be damaged;
> *(f)* unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or

[44] (2019) 40 ILJ 1224 (LAC) at para 56. See also *Nxumalo v Minister of Correctional Services and Others* (2016) 37 ILJ 177 (LC) at para 14.
[45] *Nxumalo* (*supra*) at para 16.

LABOUR COURT

(g) that any matter referred to in paragraphs *(a)* to *(f)* has been, is being or is likely to be deliberately concealed.'

[67] Did the applicant make such a 'disclosure'? In my view, indeed so. After the applicant suspending Boqwana, it opened the way for information of corrupt activities to come forward, considering that Boqwana was in effect in charge of regulation and compliance. This information concerned corruption on the part of at least two council members, including Kwinana, as well as Boqwana himself. The nature of these activities were set out in a variety of reports submitted by the applicant to the council. Having read these reports, I am satisfied that it contains sufficient particularity as to why the information conveyed therein would competently qualify as a 'disclosure' under both sections 1(1)(i)(b) and 1(1)(i)(c) of the PDA. In simple terms, what the information must be about in the case of the application of the PDA, is described in *Nxumalo*[46] as follows:

> '… Accordingly, it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA.

[68] Next, would the disclosure be a protected disclosure? In deciding this, the Court in *Palace Group Investments (Pty) Ltd and Another v Mackie*[47] gave the following guidance:

> '… not all disclosures are protected in the sense of protecting the employee making the disclosure from being subjected to an occupational detriment by the employer implicated in the disclosure. A protected disclosure is defined as a disclosure made to the persons/bodies mentioned in ss 5, 6, 7, 8 and 9 and made in accordance with the provisions of each of such sections. In terms of s 6, for a disclosure to fall within the ambit of a protected disclosure it must have been made in good faith. It is clear that before other provisions of the

[46] (*supra*) at para 16. In *Lowies v University of Johannesburg* (2013) 34 ILJ 3232 (LC) at para 58 the Court described qualifying information for the purposes of the PDA as '*corrupt or fraudulent activities or misuse of property or mismanagement of funds …*'. See also *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 *ILJ* 1670 (LC) at para 21.
[47] (2014) 35 ILJ 973 (LAC) at para 15.

LABOUR COURT

> PDA can come into play, the disclosure allegedly made must answer to the definition of that term as set out in the definitions section …'

[69] In this instance, it is common cause that the applicant made the reports about corrupt activities to the council, as representatives of his employer, the first respondent, in the course of discharging the duties and obligations imposed on him as CEO by the SHA and the Charter. Because it is thus a disclosure to his employer, section 6(1) of the PDA finds application. In *John v Afrox Oxygen Ltd*[48] the Court said:

> 'In this matter, the appellant made the disclosure only to her employer and, as such, in my view, it is only s 6 of the PDA that is relevant …'

Having so held, the Court then concluded:[49]

> 'In the circumstances, for the disclosures made by the appellant to qualify as protected disclosures as stated earlier, the appellant had to have reason to believe that the information she disclosed, at the very least, tended to show that an impropriety has, is being, or may be committed, or that the respondent has, is failing, or may in the future fail to comply with its legal obligation. Furthermore, that the appellant acted in good faith when she made the disclosures and in doing so followed procedures either prescribed or authorised by the employer …'

[70] *In casu*, there can be little doubt that the applicant had proper reason to believe that impropriety exists in the conduct of certain council members and senior management in the first respondent, which in essence involved corruption. This belief is substantiated by the fact that the applicant appointed independent investigators whom even on a *prima facie* basis confirmed in writing that there was substance to the applicant's concerns that he required

[48] (2018) 39 ILJ 1278 (LAC) at para 22. See also para 24 of the judgment.
[49] Id at para 25. The Court was referring to section 6(1) of the PDA, which reads: '*Any disclosure made in good faith – (a) and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or (b) to the employer of the employee, where there is no procedure as contemplated in paragraph (a) Is a protected disclosure*'.

LABOUR COURT

to be investigated. At the time when the applicant made these reports, there were no complaints of disciplinary proceedings or possible action against him pending, so it simply cannot be said that he did what he did as a result of some of other form of ulterior motive or revenge or retribution against anyone. As said in *TSB Sugar supra*:[50]

> '… The bona fides of the disclosure must be assessed at the time it was made …'

[71] In my view, the applicant made the reports out of what he considered to be his duty under the SHA and the Charter, without any ulterior motive attached to it.[51] Simply put, there was nothing in it for him to make the disclosures, other than doing what he was legally required to do.[52] In this regard, he was actually correct in reporting the impropriety, as there was substance in it.[53] Considering the background of the first respondent being the victim of extensive past corruption and irregularity, and the applicant being appointed as CEO to bring matters back in line, he must allowed to vigorously root out corruption wherever he may find it, without fear or favour. This is what he did. He also did not go about it in a clandestine manner, but properly reported all his activities and findings to the council as required by its own processes. When he was met with harassing and victimizing conduct by *inter alia* Kwinana, he raised a proper grievance in terms of the prescribed process, again highlighting what was legitimate concerns he had. In *Radebe and Another v Premier, Free State Province and Others*[54] the Court gave the following instructive views as to how *bona fides* can be inferred:

> '… A clear indicator of lack of good faith is also where disingenuity is demonstrated by reliance on fabricated information or information known by the employee to be false. The absence of these elements on the other hand is

[50] Id at para 63.
[51] See *SA Municipal Workers Union National Fund v Arbuthnot* 2014) 35 ILJ 2434 (LAC) at para 23
[52] Compare *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 *ILJ* 1670 (LC) at para 21.
[53] Compare *TSB Sugar* (*supra*) at para 102.
[54] (2012) 33 ILJ 2353 (LAC) at para 35.

LABOUR COURT

> a strong indicator that the employee honestly made the disclosure wishing for action to be taken to investigate it.'

The Court concluded:[55]

> 'Simply stated if an employee discloses information in good faith and reasonably believes that the information disclosed shows or tends to show that improprieties were committed or continue to be committed then the disclosure is one that is protected. The requirement of 'reason to believe' cannot be equated to personal knowledge of the information disclosed …'

[72] The language used by the applicant in his reports are not indicative of an employee that has an axe to grind with certain individuals at the first respondent, or the first respondent as employer itself. I am satisfied that the content of the reports made and the language used herein is consistent with an employee that is simply highlighting irregularities and corruption he found, reporting it to the relevant authority in the employer, and tasking an investigation of it. In fact, and in the initial report, the applicant did not even name the possible perpetrators. Even in the grievance the applicant submitted, the applicant did not confrontationally engage with any individual concerned that perpetrated what he considered to be unacceptable conduct towards him. The applicant always played the facts, and not the person. His approach was one seeking intervention by the first respondent as his employer, and asking that steps be taken to resolve the obvious and serious difficulties he was experiencing.[56]

[73] Therefore, I am satisfied that the applicant in this instance made protected disclosures to the first respondent as contemplated by the PDA. The only question that remains is whether the applicant was then visited with an occupational detriment as a result of the same. There is no doubt that the

[55] Id at para 36.
[56] Compare *Motingoe v Head of the Department: Northern Cape Department of Infrastructure and Public Works and Another* (C373/2014) [2014] ZALCCT 71 (12 December 2014) at paras 33 – 34.

LABOUR COURT

applicant's suspension,[57] if there is a proper nexus between that act by the first respondent and the protected disclosure, would constitute an occupational detriment. In *TSB Sugar supra*[58] the Court dealt with this consideration as follows:

> '… The phrase 'on account of' means 'owing to', 'by reason of' or 'because of the fact that'. The phrase is used to introduce the reason or explanation for something — for the purposes of the present discussion, the reason or explanation for the occupational detriment. The word 'partly' means 'not completely', 'not solely', 'not entirely' or 'not fully'. A finding that an employee was subjected to an occupational detriment *on account of* having made a protected disclosure will be based on a conclusion that the sole or predominant reason or explanation for the occupational detriment was the protected disclosure; whereas a finding that an employee was subjected to an occupational detriment *partly on account of* having made a protected disclosure will be to the effect that the protected disclosure was one of more than one reason for the occupational detriment.
>
> Section 3 of the PDA thus casts the net wide. If there is more than one reason for a dismissal, the PDA will be contravened if any one of the reasons for the dismissal is the employee having made a protected disclosure. The wide scope of protection is consistent with the purposes of the PDA which addresses important constitutional values and injunctions regarding clean government and effective public service delivery.'

[74] The Court in *Matlosana Local Municipality supra*[59] gave the following useful guidance in the conducting the enquiry as to whether there was a sufficient nexus between the protected disclosure and the act by the employer against the employee:

> '… Thus, what I am required to establish is the 'proximate cause' of the disciplinary enquiry. It is clear that a disciplinary enquiry against an employee

[57] In *Nxele v National Commissioner: Department of Correctional Services and Others* (2018) 39 ILJ 1799 (LC) at para 25, the Court said: '*… Occupational detriment, in relation to an employee or a worker, means, inter alia, being subjected to any disciplinary action or being dismissed, suspended, demoted, harassed or intimidated*'. See also *Radebe* (*supra*) at para 77.
[58] Id at paras 94 – 95. See also *Lowies* (*supra*) at para 51
[59] Id at para 77. The Court was dealing with a pending disciplinary enquiry.

LABOUR COURT

> need not necessarily be the direct result of a disclosure. I propose that a useful and practical approach is to consider factors such as (i) the timing of the disciplinary enquiry; (ii) the reasons given by the employer for taking the disciplinary steps; (iii) the nature of the disclosure; (iv) and the persons responsible within the employer for taking the decisions to institute charges. …'

[75] Applying the above, there are a number of issues that stand out *in casu*. The first is the whole situation with Boqwana. I accept that Boqwana was a long standing and senior employee of the first respondent, who had a close relationship with certain members of the council, and who was implicated in corruption in the investigations pursued by the applicant. Boqwana was subjected to disciplinary action, his summary dismissal was recommended by an external chairperson and supported by the HRRC. However, it became an impossible task for the applicant to put this recommendation before the council to finally effect such a dismissal. I simply cannot understand why something so clear and obvious could not have been dealt with in any of the several council meetings held since May 2019. The explanation offered in the answering affidavit that some unknown procedures were not followed, and thus it could not be considered, is completely unacceptable. It must be more than pure coincidence that this very same person's purported tip-off then leads to the suspension of the applicant before the dismissal can be effected.

[76] It is highly probable that Boqwana was being protected by members of the council. But the applicant did not relent, he pressed the issue, and it appears that it was at least indicated that the issue of the disciplinary report of Boqwana would be discussed at the general council meeting on 24 July 2019. The only manner to avoid this from ultimately happening is to get rid of the applicant, and his suspension would achieve this objective. My view in this regard is cemented by the fact that the applicant was suspended shortly before the unfair labour practice case of Boqwana about his suspension was set down in the CCMA, coupled with the instruction that the applicant (as the main witness in those proceedings) was not allowed to attend the arbitration and the attorneys attending to the matter being summarily discharged. This is

LABOUR COURT

inexplicable conduct on the part of the first respondent and in my view directly linked to prevent the applicant from dealing with unlawful conduct and corruption.

[77] Similarly, the applicant's complaints as to corruption on the part of Kwinana came before the council on 10 May 2019, and it was resolved that her suspension from the council be recommended to the minister. Again, this resolution was never implemented. The applicant, considering the diligent manner in which he discharged his duties to that point, would no doubt pursue the implementation of this resolution as well. Again, his suspension would be the easiest avenue available to stop this from happening.

[78] What is ironic is that the corruption reports, the applicant's grievance, and the disciplinary finding relating to Boqwana, were never dealt with by the council, despite the applicant's best efforts to secure this. But inexplicably, when Boqwana makes a 'tip-off' implicating the applicant in alleged impropriety, considering that at that point he was a suspended employee subject to a disciplinary process (which properly led to his dismissal), an urgent special council meeting is convened on two days' notice to deal with the applicant. This smacks of *mala fides*. Worse still, the meeting agenda (as discussed above) does not even provide for the discussion of the Boqwana tip-off and suspension of the applicant. And when the Boqwana tip-off is discussed, the comprehensive answers provided by the applicant are in essence ignored. But the icing on the cake must be where the first respondent in the answering affidavit glibly states that it cannot consider the disciplinary outcome report of Boqwana because it was not listed on the agenda, but the council then considered the tip-off report by Boqwana without it being on the agenda.

[79] In the end, the timing of the applicant's suspension must be more than simple coincidence. There is, all considered, no justifiable reason for his suspension considering: (1) what was on the agenda for the meeting on 20 June 2019; (2) the tainted and suspect source (from Boqwana) of the tip off report on which the first respondent ultimately relied to the exclusion of the answers provided by the applicant; and (3) the failure by the first respondent to provide any

LABOUR COURT

reasonable explanation to justify the suspension of the applicant. I accept, as I have said before, that since this suspension was a holding operation suspension pending a disciplinary investigation, there is ordinarily no requirement to provide reason for suspension. But what makes this matter different is that the applicant specifically engaged the defence of a protected disclosure with proper motivation why this applies in this case, and this called for proper engagement by the first respondent to substantiate, with proper particularity, why this was not so.

[80] I am convinced that was it not for the applicant's investigation into corruption on the part of Boqwana and certain members of the first respondent's council (such as Kwinana), and reporting on the same to the council and/or requiring the council to take action on it, he would never have been suspended. There is thus a proper nexus between the protected disclosures by the applicant, and occupational detriment he was visited with in the form of his suspension. The applicant is thus entitled to approach this Court for protection under the PDA, and this would include that his suspension be uplifted.[60]

Alternative remedy and prejudice

[81] The applicant has no alternative remedy available to him in this instance. He cannot approach the CCMA or any of the statutory dispute resolution bodies established under the LRA, where it concerns his suspension being unlawful, as such a case has nothing to do with his rights under the LRA. As I have said above, this matter has nothing to do with the fairness of the suspension, which would have been another fight for another day in the CCMA, if I found that that applicant's suspension was lawful.

[82] Also, the nature of occupational detriments effect on employees is an issue that cries out for urgent intervention by this Court, especially where an

[60] See section 4(1) of the PDA which reads: '*Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may- (a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act No 66 of 1995), for appropriate relief*'.

LABOUR COURT

employee had not been dismissed.[61] There is provision in the LRA for an automatic unfair dismissal claim where an employee is dismissed due to an occupational detriment,[62] but this would not apply in this case. There is no other remedy available to stop the detriment short of dismissal being visited upon an employee, other than by way of immediate intervention by this Court. Insofar as it can be said that the applicant's pending unfair labour practice dispute referred to the CCMA is an alternative remedy, it can even be said that approaching this Court is not competent without such a referral, making the prior referral necessary for this application.[63]

[83] Turning then to prejudice, I accept that this consideration favours the applicant. He would be prejudiced in the conduct of his duties should he be excluded from the workplace without cause or reason. Also, and considering the issue of the occupational detriment, it may well be in the interest of the first respondent to have him back at work discharging his statutory duties and protect the interests of the first respondent against what is at least on face value clear impropriety. Also, the longer this suspension endures, the more difficult it would be for a person fulfilling the kind of functions of the applicant to properly and effectively resume work. The situation is exacerbated by the fact that the first respondent's council let no grass grow under its feet, and almost instantaneously appointed a new acting CEO without even seeking the approval of the minister. The only possible prejudice to the first respondent is having the applicant back at work whilst the investigation into the tip-off by Boqwana is pending. But as I have said, I believe that this report by Boqwana is suspect to say the least, and motivated by ulterior purposes, and should not serve as a basis to prejudice the applicant's return to work. The simple fact is that the applicant has done a proper job until now, and he should be allowed to continue to do so.[64] It is in the interest of the public and the proper statutory

[61] *Motingoe v Head of the Department, Northern Cape Department of Roads and Public Works and Others* (2014) 35 ILJ 2492 (LC) at para 31; *Nowalaza and Others v Office of the Chief Justice and Another* [2017] JOL 38064 (LC) at para 49; *Independent Municipal and Allied Trade Union obo Ngxila-Radebe v Ekurhuleni Metropolitan Municipality and Another* (J1029/2010) [2010] ZALC 289 (1 July 2010) at paras 44 – 45.
[62] See section 187(1)(h) of the LRA.
[63] See *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (2013) 34 ILJ 3314 (LC) at para 47.
[64] Compare *Theron v Minister of Correctional Services and Another* [2008] 5 BLLR 458 (LC) at paras 36 – 41.

LABOUR COURT

functions the first respondent is meant to discharge, that the applicant's suspension be uplifted. As said in *Radebe supra*:[65]

> '… it appears justified to award the appellants full relief that restores the status quo ante between them and their employer which will go a long way towards addressing the humiliation they suffered arising from the occupational detriment they suffered. Such relief is justified in view of the fact that they blew the whistle on what was at face value irregular conduct by their employer and fellow employees. The action taken against them was precipitate and totally unjustified. The full redress proposed is enough to express our displeasure at how the appellants were treated. It should also send a clear message to other employers that this court will not hesitate to come to the aid of employees who blow the whistle on unlawful and irregular conduct.'

Conclusion

[84] In sum, I am satisfied that the applicant has met the requirements necessary in order for him to obtain the relief he seeks. The applicant has a clear right to the relief he seeks, has no alternative remedy available to him, and considerations of prejudice favour him. The applicant's application must thus succeed.

[85] This then only leaves the issue of costs. In terms of Section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the respondent was not successful, I do consider that this was a complex matter and the case advanced by the respondents was at least arguable, considering that the applicant had to establish exceptional circumstances. I also consider that insofar as it may have been scarred by what happened, the trust relationship between the parties must be repaired, and mulching the first respondent with a costs order will not assist in achieving this objective. I am also mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[66] where it comes to costs awards in employment disputes before this Court, and I do not consider there to be

[65] Id at para 41
[66] (2018) 39 ILJ 523 (CC) at para 25.

LABOUR COURT

sufficient reason to depart from this. For all these reasons, I exercise my discretion as to costs in this matter by making no order as to costs.

[86] For all the reasons as set out above, I make the following order:

Order

1. The application is heard as one of urgency.

2. The applicant's suspension by the first respondent on 20 June 2019 is declared to be unlawful and to constitute an occupational detriment.

3. The first respondent is ordered to uplift the applicant's suspension and allow the applicant to resume his duties with immediate effect from date of this order.

4. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court of South Africa

APPEARANCES:

LABOUR COURT

On behalf of the Applicant:	Adv M J Van As
Instructed by;	Docrat Inc Attorneys
On behalf of the Respondents:	Adv T S Madima SC together with Adv I C Mokwena
Instructed by:	Knowles Husain Lindsay Attorneys

LABOUR COURT