IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable

CASE NO: 2752/2024

In the matter between:

KENNILWORTH ITUMELENG DICHABE APPLICANT

And

FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY FIRST RESPONDENT

FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY SECOND RESPONDENT

THE CHAIRPERSON OF FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY THIRD RESPONDENT

MEMBER OF THE EXECUTIVE COMMITTEE;

ECONOMIC AND SMALL BUSINESS

DEVELOPMENT, TOURISM AND ENVIRONMENTAL

AFFAIRS, FREE STATE FOURTH RESPONDENT

Coram: Ramdeyal AJ

Heard: 5 September 2024

Delivered: This judgment was delivered on 12 September 2024

ORDER

1. It is declared that the fourth respondent, the MEC for Economic and Small Business Development, Tourism and Environmental Affairs, Free State Province, is the relevant executive authority who must initiate an investigation into the matter of alleged financial misconduct by the CEO, the applicant; and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately. The MEC is given 20 days from the date of the order of this court to comply.

2. It is declared that the interdict in respect of the disciplinary proceedings instituted against the applicant on 16 May 2024 and the precautionary suspension remain in force pending the investigations and decision of the MEC.

3. The first, second and third respondents are granted leave to supplement their papers (if necessary) and to approach this court on the same papers duly amplified for the relief that they may require or seek in the event of the MEC failing to comply with para 1 of this order.

4. The first respondent is ordered to pay the costs of this application on an attorney and client scale.

JUDGMENT

Ramdeyal AJ

Introduction

[1] The applicant in this matter is the CEO of the Free State Gambling, Liquor and Tourism Authority, cited as the first and second respondents. The first respondent is the Free State Gambling, Liquor and Tourism Authority, a juristic person and public entity in terms of Schedule 3C of the Public Finance Management Act 1 of 1999 (PFMA). The second respondent is the Free State Gambling and Liquor Board, a board appointed in terms of s 4(3) of the Free State Gambling and Liquor Act 6 of 2010 (the Act) to manage and control the powers and functions of the first respondent. The third respondent is the chairperson of the second respondent while the fourth respondent is the Minister of the Executive Council for the Department of Economic and Small Business Development, Tourism and Environmental Affairs of the Free State Province (the MEC). The fourth respondent does not oppose the application and has filed a notice to abide.[1]

[2] The applicant was called upon by the respondents to attend a disciplinary enquiry in respect of allegations of misconduct against him to be heard on 5 June 2024.[2] The applicant brought an urgent application in Part A of this notice of motion to interdict the respondents from proceeding with the disciplinary enquiry against him, scheduled for 5 June 2024 pending the relief sought in Part B of the notice of motion. The application was granted.

Part B of the Notice of Motion

[3] Part B of the notice of motion is an application to declare that the second respondent does not have the necessary authority to suspend and discipline the

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[1] See Amended Index: Notices at 3-4.
[2] KID10, at 58 of the pleadings.

applicant; that the disciplinary proceedings instituted against the applicant on 16 May 2024 be declared unlawful and set aside; that the applicant, having been placed on precautionary suspension is unlawful and be set aside; and that the first respondent be ordered to pay the costs of this application on an attorney and client scale.

[4] The granted order of court as is relevant to this part of the proceedings is as follows: 'The first, second and third respondents are interdicted from proceeding with the disciplinary hearing against the applicant scheduled for 5 June 2024, pending the finalization of the relief sought in Part B of this application;

and the costs associated with Part A are reserved for determination in Part B.'

[5] The applicant contends that the second respondent does not have the authority to discipline him as he is the Chief Executive Officer (CEO) of the first respondent and a member of the second respondent (the Board). He contends that he was appointed as CEO of the Board by the MEC in terms of s 12(1) of the Act.

Applicant's Contentions

[6] The applicant was placed on precautionary suspension on 17 April 2024 pending the investigations of allegations of misconduct against him and subsequent disciplinary proceedings. He contends that the board does not have the power to suspend him because the CEO is appointed by the MEC, the fourth respondent, and he is an *ex officio* member of the board. Therefore, only the MEC has the power to suspend, discipline and dismiss him or any of the board members as the MEC is the appointing authority. The power to dismiss is the essential corollary of the power to appoint. Hence, the Board unlawfully usurped the power and function of the MEC.

[7] Likewise, even though the Board is the accounting authority, it only has the duty and power assigned to it in terms of s 51*(e)* of the PFMA to take disciplinary steps against the employees of the board, who commit financial misconduct and not the CEO. Furthermore, s 12(1) of the Act states that 'the responsible member must appoint a suitably qualified and experienced person as chief executive officer, after consultation with the board.' His case is therefore that only the CEO has the power assigned to discipline him and not the first and second respondents.

[8] S141 of the Act reads as follows:

'The responsible member may delegate and assign all or part of a power or function of the responsible member in terms of the Act, other than the power to make regulations to the Head of Department or an officer of the department designed by the Head of Department.'

So, according to the applicant, he has been appointed by the CEO. Therefore, only the CEO – not the Board – has the power to discipline and suspend him.

Respondents Contentions

[9] The applicant entered into a written employment agreement with the first respondent (KID1 to the founding affidavit) whilst the fourth respondent represented him in terms of the said employment agreement. The first respondent is a legal persona in terms of the Labour Relations Act and can discipline its employees.

[10] The respondent submits that the applicant is described as an 'employee' in terms of his contract. In terms of s 51 of the PFMA, an accounting authority can take effective and appropriate disciplinary steps against any employee of the public entity who

'(i) contravened or fails to comply with the provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of public entity; or

(iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure.'

[11] As such, the respondent submits that the Board has the powers to discipline its employees including the applicant in terms of his employment agreement and s 12(4)(C) of the Act. Therefore, the MEC is not the only person who has authority to discipline him. The respondent relies on the authority as set out in *Dyasi v Onderstepoort Biological Products LTD and Others*[3] (*Dyasi*) where it was held that the Board can initiate and pursue disciplinary enquiries against the managing director of Onderstepoort Biological Products as the charges were serious and deserved to be the subject matter of disciplinary proceedings and wherein the Board had managerial obligations, accounting authority and employed the applicant, Mr Dyasi.

[12] The respondent submits that the principle of *stare decisis* applies. It is a Labour Court decision but is binding on this court. The position of a managing director and a CEO is of equivalent standing and the managing director in the Labour Court case was accountable to the Board. Therefore, the CEO in this matter should also be accountable to the Board. The respondent contends that *Dyasi* settles the matter of accountability and the CEO in this case is accountable to the Board. *Dyasi* has not been overturned and, therefore, this court is bound by same.

Accountability of a Chief Executive Officer

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[3] *Dyasi v Onderstepoort Biological Products LTD and Others* [2010] ZALC 205; [2011] 7 BLLR 671(LC); (2011) 32 ILJ 1085 (LC).

[13] Accountability is said to be a cornerstone that upholds the integrity and effectiveness of an organization. Indeed accountability is crucial. But an essential question arises: *Who holds the CEO accountable?* In large corporations the board holds the CEO accountable. The board has the authority to hire, review, and, if necessary, terminate the employment of a CEO. The role of managing director in my view differs from a CEO. Both are high-ranking executives; however, they have a number of key differences in their roles. Dyasi's case dealt with a manging director and not a CEO. Section 12(4) of the Act sets out the responsibilities of the chief executive officer of the Free State Liquor and Gambling Board which include: (a) execution of functions and exercise of powers of the chief executive officer specifically contemplated in this Act or any other law; (b) execution of functions and exercise of any power assigned or delegated to him or her by the board; (c) the day to day operations of the Authority, which include reporting on the performance of the Authority, accounting to the board on operational and financial matters and any matter referred to the chief executive officer by the board; (d) appointment of such staff, as may be necessary, to enable the board to exercise and perform its powers and functions under this Act effectively. It accordingly appears that the functions of the CEO in itself calls for a superior person to him to suspend and discipline him.

Relevant Sections of the Act for Consideration

[14] At this stage it is important to analyse the relevant sections of the Free State Gambling and Liquor Act 6 of 2010. Section 4(1) of the Act defines the Free State Gambling and Liquor Authority as a juristic person and an established entity. The board, chief executive officer and administration consists of 'The Authority' as stated in s 4(2). Section 20(1) confers on the Authority the power to conduct any enquiry

falling within its scopes and powers and even to give evidence and produce necessary documentation.[4] With these sections in mind, it is appropriate to examine the relevant legislation.

Legislation

[15] In terms of regulation 33.1.1 of the PFMA, 'if an employee is alleged to have committed financial misconduct, the accounting authority of the public entity must ensure that investigation is conducted into the matter and if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts.'

Regulation 33.1.3 reads as follows:

'If an accounting authority or any of its members, is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately.'

Accordingly, the executive authority is the MEC and not the Board. The Board's power is only limited to employees who are not members of the Board.

[16] In terms of s 10 of the Act which deals with termination of office, '(1) The responsible Member may, after he or she has afforded a member of the board the opportunity to state his or her case, at any time terminate the terms of office of such member if-

(a) there are good reasons for doing so, it is in the best interest of the board and the proper control and regulation of gambling or liquor industries,

(b) he or she is disqualified to remain a member of the board in terms of section 7; or

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[4] See also s 20(2)*(a)* and *(b)*.

(c) he or she has been absent from more than 2 consecutive meetings of the board without the prior leave of the chairperson.'

[17] Section 12(1) states that 'the responsible Member must appoint a suitably qualified and experienced person as chief executive officer, after consultation with the board, subject to subsections 7(1)*(a)*(i), (iii) and 7(1)*(b)*, [it is consultation as in discussion not approval, my emphasis]. The Act furthermore, defines 'responsible Member' as the Member of the Executive Council of the Province and the executive Council means the Executive Council of the Province contemplated in section 125 of the Constitution.

[18] Hence, from the interpretation of these sections, it is apparent that the responsible Member, namely the MEC, has the power to appoint the CEO. The CEO is a member of the Board and s 10(1) makes it clear that the MEC can terminate the term of office of a member.

Case Law

[19] In *Apleni v The President of the RSA and Another*[5] (*Apleni*) it was alleged that in placing the Applicant on precautionary suspension, the Minister exercised a power reserved for the President which had not been delegated to her. According to s 12 of the Public Service Act 103 of 1994 (PSA), the appointment and other career incidents of the Heads of Department shall be dealt with, in the case of a Head of a National Department, by the President. His contract of service between him and the Government of the Republic also makes it clear that his appointment as Head of the Department of Home Affairs is in terms of s 12 of the *Public Service Act of 1994*. The

[5] *Apelleni v President of the Republic of South Africa and Another* [2017] ZAGPPHC 656; [2018]1 All SA 728 (GP) para 11.

Minister is not the Applicant's employer, it was said, and therefore the particular provisions of the Public Service Handbook, which relate to the powers of the 'employer', do not apply to him. The extension of his employment contract was signed by the Minister of Public Service and Administration and the Minister of Home Affairs. In both letters the Ministers state that Cabinet approved the extension of the employment contract. In terms of the Constitution, the President is the Head of Cabinet. Even in respect of the extension of his term of office, the Minister as the Executive Authority only acted after he obtained Cabinet approval for such extension. The only way in which the Minister would have been empowered to suspend him and exercise the power she purported to exercise, was if she had a proper and lawful delegation from the President, which has not occurred. The precautionary suspension was therefore unlawful and the Minister acted *ultra vires.*

[20] At para 22 it was said that in terms of s 84(2)(e) of the Constitution of the Republic, the powers and functions of the President include the making of appointments required by the Constitution and legislation. The Court continued at para 27 and held that, 'in [its] opinion, the purported legislation was in any event rendered ineffective by the repeal of the provisions of s. 38 of the *Public Service Act* for the reasons stated. No delegation in terms of the amended Public Service Act exists. The result is that the Second Respondent, the Minister, had no lawful authority to suspend the Applicant.'

[21] In application of the decision in *Apleni*, it is essential to revert to the Act in this matter, more especially s 141 of the Act which deals with delegation of power; it is apparent that there was no delegation of power by the responsible Member, namely the MEC, to suspend the applicant or to charge him for misconduct or call him to appear before the board to answer to any allegations against him.

[22] In *Masetlha v President of the RSA and Another*,[6] the High Court considered the crucial inquiry to be whether the dismissal of the applicant is an exercise of executive power, particularly because the Constitution and applicable legislative provisions are silent on the dismissal of a head of an intelligence service. The Court found that the power to appoint includes the power to dismiss. The power to dismiss is implicit in s 209(2) of the Constitution and is an executive power in terms of s 85(2)*(e)* of the Constitution.[7] At para 68 the Constitutional Court held that the power to dismiss is necessary in order to exercise the power to appoint. The High Court is right that the power to dismiss a head of the Agency is a necessary power without which the pursuit of national security through intelligence services would fail. Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into s 209(2) of the Constitution. There is no doubt that the power to appoint under s 209(2) of the Constitution and the power under ISA implies a power to dismiss.

Clearly this decision too supports the issue in dispute in the matter of concern, suggesting that the MEC has the power to dismiss the applicant and in my view the binding decision on this court.

The Public Finance Management Act

[6] *Masetlha v President of the RSA and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC).
[7] Ibid para 22.

[23] Section 1 of the PFMA defines an accounting authority as a body or person mentioned in s 49: 'Accounting authorities. — (1) Every public entity must have an authority which must be accountable for the purposes of this Act. (2) If the public entity— (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or (b) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority. (3) The relevant treasury, in exceptional circumstances, may approve or instruct that another functionary of a public entity must be the accounting authority for that public entity.'

[24] It is common cause that the CEO is a member of the board. Section 84 of the PFMA sets out the procedure to be followed when a charge of financial misconduct is alleged. It must be investigated, heard and disposed of in terms of the regulations set out in s 85. Section 85(1) (c) sets out that the Minister must make regulations prescribing the circumstances in which the national treasury or provincial treasury may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct. Treasury Regulation 33.1.3 of the PFMA reads as follows:

'If an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately.'

[25] In conclusion, every public entity must have a board or controlling body. In this case, a Board exists. The Board is the accounting authority for the Free State

Gambling and Liquor Authority.[8] The relevant executive authority can only be the MEC. Even if contended by the respondent that the Free State Gambling Liquor and Tourism authority is the employer in terms of the employment contract, it does not negate the fact that the relevant executive authority is responsible for initiating and investigating disciplinary proceedings against the board or its members. The relevant executive authority is the MEC and therefore is solely responsible for suspending and disciplining the applicant.

Declaratory Relief

[26] The applicant approaches this court in terms of s 21(1) of the Superior Courts Act 10 of 2013 for a declaratory order. An applicant must, firstly, satisfy the court that he has a direct interest in an existing future or contingent right or obligation and secondly that a court should exercise its discretion in his favour having regard to all the circumstances of the matter.[9] What is required is that there should be interested parties upon whom the declaratory order would be binding. In considering whether to grant a declaratory order, a court exercises a discretion with due regard to the circumstances. The absence of an existing dispute is not an absolute bar – a court may decline to grant such an order if it regards the question raised as hypothetical, abstract or academic.[10] I am satisfied that the requirements for a declaratory order in this case are met.

[8] See s 49(2) of the PFMA.

[9] *Reinecke v Incorporated General Insurances Limited* 1974 (2) SA 84 A at 95C; *Cordiant Trading CC v Daimler Chrysler Financial Services* (Pty) Ltd 2005 (6) SA 205 SCA at 213 paras 17-18.

[10] *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* [2023] ZASCA 87.

[27] The fourth respondent, the MEC, has not opposed the application but chose to abide by the decision of the court. There are serious allegations against the applicant in respect of gross negligence and misconduct which, ultimately, forms part of a separate enquiry. It is not for this court to determine the veracity of it. The dispute that arose is whether the board had powers to discipline and suspend the applicant; this Court found that the MEC is the correct person responsible for suspension and discipline.

[28] The MEC now has a duty to initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately in terms of s 33.1.3 of the PFMA. Whilst it is incumbent on the MEC to attend to this task, the serious allegations against the applicant cannot go unfounded if the MEC does not comply as the interests of justice warrants that the allegations be investigated.

[29] I see no reason to penalise the respondents with a punitive cost order as requested by counsel for the applicant. The award of costs is in any event in the discretion of the Court.

[30] In the circumstances, I make the following order:

1. It is declared that the fourth respondent, the MEC for Economic and Small Business Development, Tourism and Environmental Affairs, Free State Province, is the relevant executive authority who must initiate an investigation into the matter of alleged financial misconduct by the CEO, the applicant; and if the allegations are confirmed,

must ensure that appropriate disciplinary proceedings are initiated immediately. The MEC is given 20 days from the date of the order of this court to comply.

2. It is declared that the interdict in respect of the disciplinary proceedings instituted against the applicant on 16 May 2024 and the precautionary suspension remain in force pending the investigations and decision of the MEC.

3. The first, second and third respondents are granted leave to supplement their papers (if necessary) and to approach this court on the same papers duly amplified for the relief that they may require or seek in the event of the MEC failing to comply with para 1 of this order.

4. The first respondent is ordered to pay the costs of this application on an attorney and client scale.

Appearances

[redacted]

T RAMDEYAL, AJ

APPEARANCES:

On behalf of the Applicant	Adv. Mphela
Instructed by:	Rampai Attorneys
	BLOEMFONTEIN
On behalf of the Respondent	Adv. Jonase
Instructed by:	State Attorneys
	BLOEMFONTEIN