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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: J 2170/11

In the matter between:

WASENAAR BOESMAN HLABANGWANE	**Applicant**
and	
MEC FOR PUBLIC WORKS, ROADS AND TRANSPORT -MPUMALANGA PROVINCIAL GOVERNNMENT	**1st Respondent**
MINISTER –NATIONAL DEPARTMENT OF PAUBLIC WORKS	**2nd Respondent**
SAM MASINA N.O	**3rd Respondent**
MATTEW KGOPANA MOHLASEDI	**4th Respondent**

Date of hearing: 17 October 2011

Date of judgement: 24 October 2011

Summary: Urgent interdict. Interdicting the provincial government from instituting or proceeding with disciplinary hearing subsequent to the transfer of the employee to another department. Disciplinary proceedings against employees for misconducts committed before the transfer governed by section 14B(4) of the Public Service Act of 1994. Court has jurisdiction to entertain incomplete disciplinary hearings. Court will exercise power to intervene in special circumstances.

JUDGMENT

Molahlehi J

Introduction

1] This is an application in terms of which the applicant on an urgent basis seeks an order interdicting and restraining the third and fourth respondent from proceeeding with the disciplinary inquiry scheduled for the 10 to 11 October 2011. In the main prayer the applicant seeks a final order and a rule nisi in the alternative.

2] The applicant seeks to interdict the disciplinary hearing on the basis that the first and fourth respondents (in the judgement first respondent is used to refer to both) has no authority in instituting the disciplinary hearing in terms of the provissions of the Public Service Act of 1994. The contentioin is that the first respondent lost the authority to directly discipline the applicant after he was transferred to the National Department of Public Works (hereinafter referred to as the national department). In terms of the transfer arrangements the last working day of the applicant was the 30 June 2011. The charges proffered against him by the first respondent were served on him on the 28 July 2011, close to a month after the transfer took efffect.

Backgrouns facts

3] The applicant was prior to his transfer to the national department employed by the first respondent as the General Manager: Professsional and Project Management Service. As indicated above his employment with the First Respondent ended on 30 June 2011 when he took a transfer to the national department. He commensed his employment with the national department on 1 July 2011.

4] The two charges which the first respondent served on the applicant on 28 July 2011, mainly relate to the allegation that the applicant committed misconduct in that he intentionally and negligently recomnmended to the first respondent a deviation from the laid down procedure in the procurement of a Disaster Management Centre for the Mpumalange Province. The second aspect of the charge, which also ovelaps in a sense with the first charge is that, because of the negligent conduct of the applicant in the manner he handled the recomendation of the Disater Management Centre, caused the first responden to incure fruitless expenditure.

5] The applicant says that he was previously charged with the same offenses and was found not guilty by the chairperson at the disciplinnary hearing. And when this matter served before the chaiperson at the diciplinnary hearing on 11 August 2011, the applicant raised a point *in limine* concerning the legality of the diciplinary hearing including the jurisdiction of the chairpeson to entertain the matter. The chairperson dismissed the points raised by the applicant.

6] Mr Mkhari SC, for the respondents argued that the procedure adopted by the applicant was improper in that what he should have done was to have instituted review proceedings against the decision of the of the chairperson of the disciplinnary hearing.The other point raised on behalf of the first respondent is that the Court does not have jurisdiction to entertain the matter.

7] The issue of whether the Labour Court has jurisdiction to entertain the matter in cases involving incomplete disciplinary hearings received attention in *Booysen v SAPS*.[1] In that case Tlaletsi JA writting a unanimous judgement in overuling the decision of the Court a quo, deals with the provisions of sections 157[2] of the Labour Relations Act (the LRA).[3] In addressing the issue of the Labour Court's jurisdiction in incomplete disciplinary hearing the learned judge says:

> "[48] As pointed out above section 157 of the Act should be interpreted in line with the intention of the Legislature as well as the purpose of the Act. It must also be interpreted in line with what was said by the majority of the Court in *Chirwa*, *supra*, that the intention of the Act is to subject all disputes concerning the alleged unfair dismissal of employees and unfair labour practices to the one-stop dispute resolution mechanism provided by the Act which are staffed by women and men who have experience and knowledge of labour and employment related issues. This could be one of the reasons why employment related matters were taken out of the jurisdiction of the High

1 [2011] 1 BLLR 83 (LAC)
2 Section 157 of the LRA reads as follows:
3 66 of 1995.

Court.

[49] In my view, section 157 must also be interpreted as a whole to fully understand the intention of the Legislature. The majority in *Chirwa* held further that the concurrent jurisdiction provided for in section 157 (2) of the Act is meant to extend the jurisdiction of the Labour Court to employment matters that implicate constitutional rights. The implication of this finding is that section 157(2) must be interpreted to have given the Labour Court powers equal to that of the High Court when it comes to employment and labour matters, and not to preserve the High Court's jurisdiction over disputes arising from employment and labour relations and over the constitutionality of administrative act or conduct by the state in its capacity as employer, The following remarks by the author are persuasive;

> 'The Chirwa majority did not venture to suggest how its interpretation of section 157(2) impacted on section 158(g), or to elaborate on the purpose the latter provision may serve if it does not mean what it say – that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer. In the face of that unambiguous and expansive language, it is difficult to fathom why disciplinary action should be excluded, and, if it must, on what grounds. Nor did Chirwa court deal with the scope of the various powers listed in section 158(2)(a). <u>But it is equally difficult to fathom why, if the Labour Court has exclusive jurisdiction over labour and employment disputes, it should not enjoy the same powers in that sphere as were previously exercised by the High Court – including the power to interdict unlawful or unfair disciplinary proceedings in appropriate cases</u>'. (My emphasis).

[50] Failure by the Labour Court to exercise jurisdiction over disciplinary proceedings, which are in fact conducted pursuant to the employment relationship would mean that the employee must approach the High Court to decide a matter which might in future serve before the Labour Court as part for example, of a review application. At that stage the Labour Court may be constrained to consider whether the decision of the High Court was correct or wrong in determining perhaps the fairness or otherwise of the dismissal. To allow such to happen would in my view not be in line with the spirit of the Act and the decisions of the Constitutional Court referred to above.

[51] The court *a quo* held that the judicial oversight of the conduct of disciplinary proceedings while they are in process is costly, time consuming, disruptive and duplication of proceedings. That may well be so. However, judicial intervention may prove to be time saving, and less costly if the process is not proceeded with. It may also prevent costly litigation. The very fact that the Labour Court has the power to issue interdictory relief suggests that the Legislature was aware that the exercise of such power might interfere with the freedom of employer's to contract and the employer's business in deserving cases."

8] As concerning the test to apply in determining whether to intervene in incomplete disciplinary proceedings the learned judge says:

" 54 To answer the question that was before the court *a quo*, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, 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."

9] I align myself fully with the above decision of the Labour Appeal Court, and accordingly find that this Court does have jurisdiction to entartaing the applicant's application.

10] Turning to the key issue, I am of the view that this matter turns on the legality of the power used by the first respondent to institute and seeking to continue with the disciplinary hearing after the applicant took transfer with the national department. [4]

11] It is now well extablished that in our law the priciple of legality is core to the value of our Constitution and fundamental to the maintance of the rule of law. [5] The concept of legality is explained by Steenkamp J in *POPCRU v Minister of Correctional Services & another,*[6] as follows:

> "[15] *Hoexter* explains that the fundamental idea underlying the principle of legality is that the Legislature and executive in every sphere of government are constrained by the principle that it may exercise no power and perform a function beyond that conferred by law. It may only act within the powers lawfully conferred on it and the exercise of public power is only legitimate when it is lawful. It is the obverse facet of the *ultra vires* doctrine and an aspect of the rule of law." (footnotes omitted).

12] The principle that the legislature and the executive may exercise no power or perform any function beyond that provided for in law was approved by the Counstitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others.*[7] The Court

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5 See MEC Department of Education: KwaZulu Natal v Khumalo & Another 2011 (1) BCLR 91 (LC).

6 [2011] JOL 27420 (LC).

7 1998 (12) BCLR 1458 (CC).

further held that the principle of legality was implied within the terms of the interim Constitution. The Court explained further that:

> "[59] There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to "administrative action" the principle of legality is enshrined in section 24(a). <u>In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.</u> Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question." My emphasis.

13] The same approach was followed in *Affordable Medicine Trust & others v Minister of Health & Others*[8] where the Constitutional Court held that:

> "48 Our constitutional democracy is founded on, among other values, the supremacy of the constitution and the rule of law. The very next provision of the Constitution declares that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid. And to give effect to the supremacy of the Constitution, courts must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.
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> 49 The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated

8 2006 (3) SA 247 (CC). See also

by the Constitution. It entails that both the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."

14] Although the case of the applicant in the present matter is not based on Promotion of Administration of Justice Act (PAJA)[9], the principle of legality is applied in the context of it being implicit in the Constitution.

15] In respect of the issue of whether the employment relationship changes in the public service when an employee is transferred from one department to the other, it was correctly pointed out that in the public service there is only one employer who has the right to discipline employees.[10] The employer in the public service is the state. It was on this basis incorrectly contended that the first respondent had the right and the power to discipline the applicant even after his transfer to the national department.

16] The issue of who the employer of the applicant is does not arise in this matter and in fact has no bearing on the core issue to be determined. The applicant as a public servant remains the employee of the state even after his transfer to the national department.

17] In my view the core issue in this matter has to do with the lawfulness or otherwise of the action taken by the first respondent in instituting and proceeding with the disciplinary action after the transfer of the applicant. The other issue to consider if found that the first respondent does not have the power to institute and or continue with the disciplinary hearing after the

9 3 of 2000.

10 Section 213 of the LRA defines public service to mean the national departments, provincial administrations, provincial departments and organisational components contemplated in section 7(2) of the *Public Service Act, 1994."*

transfer is whether there is a basis for this Court to intervene.

18] The question of whether the first respondent has the power to institute and proceed with the disciplinary hearing depends on the interpretation of section 16B (4) of the Public Service Act of 1994 (the PSA). Section 16B (4) of the PSA reads as follows:

> (4) If an employee of a department in this subsection referred to a ' the new department), is alleged to have committed misconduct in a department by whom he she was employed previously (in paragraph(b) referred to as 'the former), the head of the new department-
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> a) may institute or continue disciplinary steps against that employee; and
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> b) shall institute or continue such steps if so requested:
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> i) by the former executive authority if the relevant employee is the head of the department; or
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> ii) by the head of the former department, in the case of any other employee.
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> (5) In order to give effect to sub-section 4, the two relevant departments shall co-operate, which may include exchanging documents and furnishing such written and oral evidence as may be necessary."

19] It is clear from the reading of section 16 B (4) of the PSA that the state does have the right to discipline an employee after the transfer from one department to other. It is also clear from the plain language of section 16 B (4) of the PSA that the legislature had deemed it necessary to regulate disciplinary proceedings against employees who have been transfered from one department to other. In this regard the legislature makes provision for dealing with discipline of an employee who has transferred from one department to the other. The legislature has provided two ways in which disciplinary proceedings against a transferred employee may be instituted or where it has commenced at the time of the transferee may be continued with.

20] In the first instance the head of the new department being the department to which the affected employee would have been transferred to, may institute the disciplinary proceedings concerning misconduct that may have been committed whilst an employee was employed by the former department. The role of the former department is limited to corpora ting by making available relevant information which may include both documents and oral evidence concerning the charges that may have been proffered against such an employee.

21] The other way in terms of which an employee who has taken a transfer may be disciplined concerning offences committed during his employment with the former department is through the request from the head of the former department to the head of the new department to institute or proceed with the disciplinary hearing if they had already commenced at the time of the transfer. Once the request is made the head of the new department is obliged to institute the disciplinary hearing.

22] It is clear from the reading of section 16 B(4) of the PSA that the power of the former department to institute or even to proceed with the disciplinary hearing after the transfer has taken place is taken away. In other words the former department loses the right to continue with disciplinary proceedings when the transfer takes effect.

23] In my view the first respondent in seeking to continue the disciplinary hearing after the transfer of the applicant is exercising the power he or she does not have and thus acting *ultra vires* his or her powers.

24] In the circumstances it would be failing the principles of legality if this Court was not to intervene and stop what is clearly unlawful conduct on the part of the first respondent. It is important to note that the applicant is not challenging the right of the state to discipline him for the misconduct he is alleged to have committed whilst under the authority of the first respondent. In my view failure by the Court to intervene will result in an injustice which belief would not be addressed by any subsequent unfair dismissal remedy. It may well be that if dismissed the applicant may have remedy in the form of unfair dismissal, however this will not in my view address the injustice that he would have suffered as a result of an unlawful conduct of the first respondent.

25] In the circumstances of this case I find that the applicant has shown that exceptional circumstances exist for this Court to intervene and stop the first respondent from subjecting him to unlawful disciplinary proceedings. The first respondent in acting in the manner he /she did as a functionary exceeded his /her statutory powers and thus his/her conduct is invalid under the Constitution. I do not agree with the contention that the unfair dismissal remedy would address the right of the applicant not to be subjected to the use of power which the first respondent does not have.

26] In the premises the following order is made:

1. First and fourth respondents are interdicted from instituting or proceeding with the disciplinary hearing against the applicant.
2. The first and the fourth respondents are to pay the costs of this application the one paying the other to be absolved.

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Molahlehi J

Judge of the Labour Court of South Africa.

Representation

For the Applicant: Mr A Moosam instructed by Bowman Gilfillan Inc

For the Respondent: Mr Mkhari instructed by Werksmans Attorneys.