REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2951/2011

In the matter between:

ANDREW NKABI HLUBI	**First Applicant**
MOLEFI JACOB MOLLO	**Second Applicant**
ARCHIE NHLANHLA MBATHA	**Third Applicant**
and	
UNIVERSAL SERVICE AND ACCESS	
AGENCY OF SOUTH AFRICA (USAASA)	**First Respondent**
MINISTER OF COMMUNICATION	**Second Respondent**
THEMBA PHIRI N.O	**Third Respondent**
SAM VILAKAZI N.O	**Fourth Respondent**

Heard : **17 January 2012**

Delivered : **24 February 2012**

Summary : Leave to appeal. Powers of the Minister of Communication to appoint Executive Caretakers in respect of a Public Entity in terms of section 80 of the Electronic Communications Act 36 of 2005.

REASONS FOR ORDER

AC BASSON J

Introduction

1] This matter came before this Court on an urgent basis on 17 January 2012. The following order was made:

> 1. The application is dismissed with costs including the costs of two senior counsel employed by the Second Respondent and the costs of senior counsel employed by the First, Third and Fourth Respondents.

Parties

2] The first applicant, Mr Hlubi, was employed as the Chief Financial Officer by the first respondent. The second applicant, Mr Mollo, was employed as the Executive Manager Business Development and the third applicant, Mr Mbatha, as the Senior Manager Supply Chain Management. (I will, for purposes of this judgment, refer to the first, second and third applicants jointly as "the applicants").

3] The first respondent is the Universal Service and Access Agency of South Africa ("USAASA"). USAASA is an organ of state whose functions include the promotion of universal access to electronic communications network and broadcasting services as provided for in section 82 of the Electronic Communications Act[1] (hereinafter referred to as "ECA"). USAASA is further a public entity listed in Schedule 3 of the Public Financial Management Act[2] (hereinafter referred to as the "PFMA"). The second respondent is the Minister of Communication. The third

1 No. 36 of 2005
2 No. 1 of 1999

respondent is Mr Phiri who was appointed by the second respondent as the Executive Caretaker of the first respondent. The fourth respondent is Mr Vilakazi who was also appointed by the second respondent as the Executive Caretaker of the first respondent.

4] In essence, the applicants are seeking the following orders:

1. Declaring the appointment of the third and fourth respondents by the second respondent as Executive Caretakers of the first respondent unlawful and null and void for failure to comply with the provisions of the ECA;

2. An order declaring their suspension from work by the Board of the first respondent unlawful and invalid; and

3. An order lifting and/or setting aside their suspension and ordering the respondents to allow them to return to work and an order interdicting and restraining the third respondent from proceeding with the disciplinary proceedings against them scheduled for 26 January 2012.

<u>Brief exposition of the facts</u>

5] The applicants were placed on special leave on 12 September 2011. Shortly thereafter their special leave was withdrawn by the Acting CEO and they were advised that management was considering their suspension pending a forensic investigation into allegations which arose pursuant to an internal audit report. According to the first respondent, management suspended the applicants because it believed that their continued presence at the workplace might jeopardise the investigation. On 6 December 2011 each of the applicants was served with a notice of a disciplinary enquiry. All three applicants were also served with a detailed charge sheet. These charges range from numerous contraventions in the process of awarding tenders to misconduct in respect of irregular and/or unauthorised payments running into millions of rands that were paid to numerous service providers. It is clear from these charges that they are all of an extremely serious nature.

6] The disciplinary hearing was scheduled for 15 December 2011. Advocate Anton Myburg SC was appointed as chairperson for purposes of the hearing. When the disciplinary hearing was about to commence, the applicants launched this present application on an urgent basis.

Summary of the issues before the court

7] In essence, the applicants are contending, firstly that their suspension is not justified and secondly, that they were not afforded an opportunity to be heard prior to their suspension.

8] In respect of the decision to subject them to a disciplinary enquiry, the applicants contend that this was *ultra vires* in that the decision was taken and communicated by the third respondent, whose appointment as Executive Caretaker by the second respondent they contend is unlawful and invalid.

9] It appears from the answering affidavit that the decision to take disciplinary action against the three applicants was taken by the Executive Caretakers (third and fourth respondents) after their appointment by the second respondent on 15 November 2011.

10] Before turning to the merits, it must be pointed out that, although the founding affidavit states that the relief sought is of an interim nature, this is clearly wrong: All the substantive prayers either seek a declaratory order or an interdict of a permanent nature. In the event, the test for final relief applies, which requires the applicants to show (i) a clear right, (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of similar protection by any other ordinary remedy.

Urgency

11] In addition to the aforegoing, the applicants must make out a case for urgency. I am not persuaded that the matter is urgent despite the fact that the parties have reached an understanding in December 2011 that the first respondent would not challenge urgency in relation to the attack on the validity of the appointment of the third and fourth respondents as Executive Caretakers. According to the respondents, this agreement only related to one aspect of this application and that is the issue of authority of the first respondent to charge the applicants. The agreement did not relate to the question of the suspension.

The suspensions

12] In respect of the suspension of the applicants, I am in agreement that this issue is not urgent. I have nonetheless decided to deal with the issue of suspension as it is part and parcel of the entire dispute before the Court. The applicants were placed on special leave on 1 September 2011. According to the applicants, this was the date of their suspension. This issue is therefore, on their own version, not urgent. Apart from the fact that the issue of suspension is not urgent, I am, in any event, not persuaded that there are special circumstances justifying urgent relief in respect of their suspension. The applicants remain on full pay during the course of their suspension pending the disciplinary hearing. The justification put forward by the first respondent for suspending the applicants namely, that their continued presence in the workplace could potentially jeopardise the investigation is reasonable in light of the serious nature of the charges brought against them. I am also not persuaded that the applicants will be materially prejudiced by the suspension and I am particularly not persuaded that they will suffer any irreparable harm as a result of the suspension. In any event, the applicants have an alternative remedy at their disposal. It appears from the papers that the applicants had threatened to approach the Bargaining Council but have apparently decided against same. I am lastly also not persuaded that the applicants were not afforded a fair opportunity to be heard prior to their suspension. They were placed on special leave on 12 September 2011 by the CEO. Their special leave was subsequently cancelled and the applicants were notified that the Acting CEO is considering placing them on suspension. The applicants were then afforded an opportunity to submit representations in writing. They in fact requested an extension until 11 October 2011 to submit their written representations. Having considered the papers, I am satisfied that these representations were considered before taking the decision to suspend them. After these submissions, the applicants were asked to present themselves as a party to the forensic investigation. They, however, left after having waited for about 45 minutes. A further meeting was scheduled for 23 November 2011 but they refused to attend. If the applicants wanted to make further representations, they could have done so during these meetings, but they refused to avail themselves of the opportunity.

13] The complaint that there was no reasonable justification for the suspensions is likewise groundless. The fact that the applicants allege that they have not committed any misconduct, does not render the suspension unreasonable. This is precisely the purpose of a suspension namely to afford an employer an opportunity to investigate whether a disciplinary process is indeed warranted. In the present case, an initial internal audit report indicated that the applicants may be implicated in misconduct. Thereafter a forensic investigation was conducted which culminated in the applicants each having been issued with lengthy charge sheets containing multiple and very serious charges involving tens of millions of rands. I am persuaded that, in these circumstances, the first respondent was justified in suspending the applicants pending the outcome of the disciplinary hearings. In the event, the application in respect of the applicants' suspension is dismissed.

<u>The decision to institute disciplinary proceedings</u>

14] In brief, it is submitted on behalf of the applicants that, because the second respondent is a creature of statute, the lawfulness of the exercise of power by the second respondent must be assessed against the provisions of the ECA. It is submitted that the appointment of the third and fourth respondents by the second respondent is unlawful in that the only power conferred upon the second respondent in terms of section 80 of the ECA is to appoint the Board of the first respondent. According to the applicants, the ECA does not confer any power on the second respondent to appoint or second employees to the first respondent in the capacity of Executive Caretakers. The appointment of the second and third applicants is unlawful and invalid because of the unlawful conduct of the second respondent. Consequently, the decision to institute disciplinary proceedings against the applicants is *ultra vires* and of no legal effect.

15] The Minister explains in her answering affidavit the circumstances that led to the appointment of the two Executive Caretakers. The Chairperson of the Board had resigned and the rest of the Board members have had their terms of office terminated by the Minister after the Parliamentary Committee had passed a vote of no confidence in the Board. The three applicants have been placed on suspension and are facing serious charges of misconduct. Faced with this situation, the Minister appointed the two Executive Caretakers with full executive powers to take whatever executive decisions necessary to ensure that USASSA (the first respondent) executes its mandate. According to the Minister, this is an interim measure to address the serious problems experienced by the first respondent. Furthermore, because the appointment of a new Board and the appointment of new management will take time, the Minister therefore decided to appoint, as an interim measure, the two Executive Caretakers.

16] I will now proceed to briefly evaluate what seems to be the main issue in dispute and that is the power of the Minister to appoint the two Executive Caretakers. The applicants argue that the Minister does not have this power in terms of the ECA. Consequently the Executive Caretakers do not have the authority to institute disciplinary proceedings against the Applicants. The applicants further seem to argue that this power to institute disciplinary proceedings in any event only vests in the CEO.

17] Section 80 of the ECA provides for the appointment of the board by the Minister:

‘80 Continued existence of Universal Service Agency

(1) Despite the repeal of the Telecommunications Act by this Act, the Universal Service Agency established in terms of section 58 (1) of the Telecommunications Act continues to exist as a juristic person in terms of this Act and will henceforth be called the Universal Service and Access Agency of South Africa.

(2) T*he Minister may, by notice in the Gazette, appoint a board of up to seven members to provide oversight of and guidance to the Agency*[3].

(3) A board appointed by the Minister in terms of section 58 (2) of the Telecommunications Act is considered to have been appointed in terms of this Act.'

18] It is clear from section 80(2)[4] of the ECA that the Minister may appoint a Board of up to seven members to provide oversight and guidance to the first respondent. The Board's functions are set out in section 81[5] of the

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3 Court's own emphasis

4 82 Functions of Agency
(1) The Agency must-
(a) strive to promote the goal of universal access and universal service;
(b) encourage, facilitate and offer guidance in respect of any scheme to provide-
(i) universal access or universal service; or

(ii) telecommunication services as part of reconstruction and development projects and programmes contemplated in section 3 (a) of the Reconstruction and Development Programme Fund Act, 1994 (Act 7 of 1994), where such provision will contribute to the attainment of the object of the project or programme in question;

5 ''81 Functions of Board
(1) The Agency's board must exercise the powers conferred, and perform the duties imposed, upon it in accordance with any policy direction issued by the Minister.
(2) The board must-
(a) represent the Agency before the Minister and the Authority;
(b) oversee the functions of the Agency;
(c) prepare and update a strategic plan for the Agency at least once every three years to be used by the Agency in exercising its powers and carrying out its functions;
(d) approve the annual report referred to in section 86 prior to submission to the Minister;
(e) approve the statement of estimated income and expenditures and any adjusted statements referred to in section 84 prior to submission to the Minister;
(f) approve the Chief Executive Officer's (CEO's) recommendations referred to in section 83 (3) (b);
(g) oversee the accounts of the Agency referred to in sections 84, 85 and 91; and
(h) take such other decisions as may be requested by the CEO of the Agency in terms of this Chapter.'

ECA. Once the Board has been appointed, USAASA will in terms of section 83(1)[6] of the ECA, be under the direction and control of the CEO appointed by the Board. Section 83(2)(b), however, makes it clear that the CEO is subject to the direction and oversight of the board in the performance of all financial and administrative functions as well as other work as may arise from the performance of USAASA's functions under the ECA. The CEO employs staff including senior management. In terms of section 83(7) the CEO must manage and direct the activities of USAASA.

19] As already pointed out, because there is currently no CEO to perform the duties in terms of the ECA (as he has been suspended), the executive management of the first respondent has been taken over by the Executive Caretakers. I am in agreement with the submission that, although there is no specific reference in the ECA to the term "Executive Caretakers", there is nothing in law to preclude the Minister from replacing the Board on an interim basis with Executive Caretakers pending the appointment of a new Board. I can also not see why this power of the Minister to appoint a new Board cannot also imply the power to appoint an Executive Caretaker on a temporary basis. In essence these Executive Caretakers function as a replacement Board on

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6 '83 CEO and staff of Agency

(1) The Agency is under the direction and control of the CEO appointed by the Board.

(2) The CEO-

(a) must be a suitably qualified and experienced person;

(b) is subject to the direction and oversight of the board in the performance of all financial and administrative functions as well as other work as may arise from the performance of the Agency's functions under this Act; and

(c) must exercise any powers delegated to him or her by the board.

(3) Without derogating from his or her general powers, duties and functions as set forth in this section, the CEO must-

(a) approve of expenditures from the universal service and access fund;

(b) conduct competitive tenders in terms of section 90 and make recommendations to the board.

(4) The CEO must enter into a performance agreement with the Board. The perfomance agreement must, amongst other things-

(a) set appropriate key performance indicators; and

(b) set measurable perfomance targets.

(5) The CEO must employ a staff, including senior management and such other persons as may be necessary to assist him or her with the performance of the functions of the Agency.

(6) The staff of the Agency is accountable to and must enter into a performance agreement with the CEO.

(7) The CEO must manage and direct the activities of the Agency.'

a temporary basis pending the appointment of a new Board. I can also find no basis, nor is it alleged in the founding papers, that the appointment of the third and fourth respondent was done for an ulterior motive or purpose or that it was made in bad faith or as a result of bias. It is also not alleged, nor can I find any indication thereof, that the decision of the second respondent constitutes an irrational decision and therefore constitutes an abuse of the discretionary power of the Minister.

20] In the event, it is concluded that the appointment of the third and the fourth respondent is implicitly authorised by section 80(2) of the ECA. In the premise, the applicants have failed to make out a case for the order they seek.

Public Finance Management Act

21] There is one further compelling reason why this application should be dismissed. Section 49 of the Public Finance Management Act, No 1 of 1999 (hereinafter referred to as "the PFMA") states that an accounting authority *must* be appointed in the event where a public entity does not have a controlling body. This section reads as follows:

> 'Accounting authorities for public entities (ss 49-55)
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> 49 Accounting authorities
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> (1) Every public entity must have an authority which must be accountable for the purposes of this Act.
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> (2) If the public entity-
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> (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or
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> (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.[7]

(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.'

[21] I am in agreement with Mr. Kennedy that the Executive Caretakers constitute the accounting authority for USAASA as contemplated by section 51 of the PFMA until a more permanent form of a Board is appointed by the Minister to replace the previous Board. The accounting authority referred to in this section will (and has in this case) assume the financial accountability of the public entity and will ensure that it complies with the specific fiduciary duties under section 50 of the PFMA and the general responsibilities under section 51[8] of the PFMA. These duties

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7 Court's emphasis.

8 51 General responsibilities of accounting authorities

(1) An accounting authority for a public entity-

(a) must ensure that the public entity has and maintains-

(i) effective, efficient and transparent system of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) must take effective and appropriate steps to-

(i) collect all revenue due to the public entity concerned; and

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

(c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;

(d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;

(e) must take effective and appropriate disciplinary steps against any employee of the public entity who-

(i) contravenes or fails to comply with a provision of this Act;

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

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

(f) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;

(g) must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it

include taking effective and appropriate disciplinary steps against any employee of the public entity who contravenes or fails to comply with a provision of this Act; commits an act which undermines the financial management and internal control system of the public entity; or makes or permits an irregular expenditure or a fruitless and wasteful expenditure'.[9] Lastly, it could never have been the intention of the legislature to allow for a situation where a public entity functions without an accounting authority. After all, state organs are funded by the taxpayer and are the custodians of valuable assets hence the need for an accounting authority to act with honesty integrity and in the best interest of the public entity. The accounting authority must further take steps to prevent any prejudice to the financial interest of the state. Furthermore, Treasure Regulation 2.1.2 (promulgated under the PFMA by the Minister of Finance) provides that the Chief Financial Officer is directly accountable to the accounting authority. Regulations 4.1.1 and 33.1 oblige an accounting officer to pursue disciplinary proceedings where an official is alleged to have committed financial misconduct (as in this case). Because the third and fourth respondents constitute the accounting authority of USAASA, they not only have the power but indeed have the duty to take disciplinary action against any person alleged to have been involved in financial irregularities or similar irregularities relating to procurement and governance. I am in agreement with Mr. Kennedy that this is precisely what the third and fourth respondents have done upon receipt of the allegations that emerged from the forensic investigations. In fact, had they not done so, they would have been in contravention of their duties in terms of the PFMA.

[22] In conclusion, I can find no reason why costs should not follow the result. The application is therefore dismissed with costs including those consequent upon the employment of two counsels (including the costs of senior counsel) in respect of the second respondent and the costs of senior counsel in respect of the first, third and fourth respondent.

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takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and

(h) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.'

9 Section 51(1)(e) of the PFMA.

AC BASSON J

Judge of the Labour Court

APPEARANCES:

FOR APPLICANT:	Advocate A A Mphahlele
	Instructed by Tracy Sischy Attorneys
FOR FIRST, THIRD AND FOURTH RESPONDENTS:	Advocate P Kennedy SC
FOR SECOND RESPONDENT:	Advocate AT Ncongwane SC
	Advocate Matlejoane
	Instructed by Cheadle Thompson & Haysom Attorneys