REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

JUDGMENT

Case no: J 662/15

In the matter between:

POPCRU	**First Applicant**
EUBRAHIM JOHN CROUCH	**Second Applicant**
and	
MEC FOR THE DEPARTMENT OF TRANSPORT, SAFETY AND LIAISON: NORTHERN CAPE	**First Respondent**
HEAD OF DEPARTMENT FOR TRANSPORT, SAFETY AND LIAISON: NORTHERN CAPE	**Second Respondent**
THE PREMIER FOR THE NORTHERN CAPE	**Third Respondent**

Heard: **27 May 2015**

Delivered: **27 August 2015**

Summary: (Interdict – urgent – unlawful suspension and disciplinary enquiry –conduct of respondent and costs)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an urgent application, which was launched on 31 March 2015, for the following relief:

1.1 declaring that the second respondent has no authority to institute disciplinary measures against the second applicant when the latter acted As Head of Department.

1.2 Interdicting and restraining the respondents from proceeding with disciplinary action currently in motion against the second applicant.

1.3 Ordering and directing the respondents to uplift the second applicant's suspension.

1.4 Ordering the respondent pay the costs of the application.

It was contested that both the suspension and the disciplinary proceedings were unlawful. On 31 March 2015, the original application was postponed by agreement to admit the filing of answering and replying affidavits, and heads of argument. It was also agreed that the pending disciplinary proceedings be stayed pending the final determination of the matter.

[2] The applicant, Mr E J Crouch ('Crouch') is employed as a director of corporate services in the Department of Transport, Safety and Liaison: Northern Cape. The second respondent is Mr S Jonkers, the Head of Department for Transport Safety and Liaison: Northern Cape ('Jonkers'). The first respondent is Ms M Bartlett, the current MEC Department for

Transport Safety and Liaison: Northern Cape ('Bartlett'). Her predecessor was Mr P Mabilo ('Mabilo').

Background

[3] From 5 December 2012 and 24 January 2013, Crouch was appointed by Mabilo to act as Head of Department ('HOD') whilst Jonkers was on leave. It is a matter of dispute whether or not Jonkers said, on returning to his post, that he would deal harshly with Crouch because of a sworn statement made by Crouch to the Hawks in connection with fraud and corruption charges in the Trifecta case involving the Northern Cape ANC chairperson and MEC for Economic Development.

[4] On 7 March 2013 Crouch was placed on precautionary suspension by Jonkers without being given the opportunity to make representations why he should not be suspended. On 15 March 2013, Mabilo overruled Jonkers and advised Crouch that his suspension was lifted because:

> 1. The Head of Department does not have any authority to suspend or act upon any employee who has been appointed as an acting head of Department.
>
> 2. The head of Department does not have any authority to suspend or act on any employee who was performing his or her duties as an appointed acting head of Department."

[5] The security manager who claimed to act on the instruction of Jonkers refused to give effect to Mabilo's letter instructing Crouch to return to work. This prompted a further letter being issued by Crouch on 2 April 2013, which repeated the content of the previous letter. Once again, Crouch was refused permission to return to work. Jonkers does not address himself directly to the allegations concerning his alleged lack of authority contained in the letter from his superior. Without stating the reasons why the precautionary suspension was not uplifted and in particular why he did not obey the instruction of his superior as conveyed in the letters which were also circulated to him, he claimed:

> "The reason for not lifting the precautionary suspension where (sic) explained in the letter dated 2 April, which was written after the letter referred to by the first applicant."

No copy of this other alleged letter was attached to the answering affidavit. The only other effort to justify the suspension in the answering affidavit is a statement to the following effect:

> "On the issue of uplifting the suspension, by the then MEC, it was not feasible that he could lift the suspension with positive results because there was a concern that Crouch will amongst other concerns, interfere with witnesses and evidence."
>
> (emphasis added)

This represents the only attempt by Jonkers to expressly state why the MEC's instruction was ignored.

[6] On 29 April 2013, Crouch was served with notice to attend a disciplinary enquiry on 7 May 2013. Various objections were raised by his union concerning the charges and at the request of the employer the enquiry was postponed until 7 August 2013. When the enquiry convened on that date, the employer asked for the chairperson to recuse himself. The respondents say that the reason for requesting his refusal was that the chairperson was also chairing hearings involving other officials linked to the matter at hand. The applicants believe the recusal application was a delaying tactic, which the respondents deny. In any event, the chairperson agreed to recuse himself.

[7] A new chairperson was appointed but the matter did not proceed on 18 October 2013 as intended. The applicants claim there was no reason for this postponement and this is not directly disputed by the respondents.

[8] The next date for the hearing to resume was nearly five months later on 9 April 2014, ostensibly due to the unavailability of the chairperson. Again the respondents do not dispute this. The applicant claims that he received an amended charge sheet before this date, but the respondents dispute this claiming that the original charge sheet still stood. Jonkers claims that it was a working document that was not served on Crouch, despite evidence of a covering letter to the applicant indicating that the document of the

amended charges was supplementary to the initial charges received on 29 April 2013. Be that as it may, nothing turns on the alleged variation of the charges for the purposes of determining this application.

[9] However, the general nature of the charges do need to be mentioned. They relate to alleged misconduct committed by him on 15 and 16 January 2013 committed at a time when he was acting as the head of the Department. Firstly, they relate to his alleged approval of the extension termination and new appointments of Service providers without following SCM procedures in contravention of the Public Finance Management Act 01 of 1999 ('the PFMA'). The other charges concern his alleged disclosure of a secret document to the media without the necessary authority or permission and in breach of Minimum Information Security Standard policy. In particular, Crouch was charged with failing to ensure compliance with section 38 (1) (a) (iii) of the PFMA in the appointment of service providers, and in that "as the acting Accounting Officer" he failed to ensure compliance with the SCM procedure.

[10] On 9 April, the enquiry was postponed yet again until 27 October 2014. The reason for that delay according to the respondent is that the applicants had raised a preliminary point and the chairperson had requested time to provide a written ruling.

[11] The applicants alleged that in July 2014, Jonkers also reversed a notch increase that had been approved by Mabilo in 2012 and proceeded to implement deductions of R 11075.78 per month from his salary over a period of 12 months, on the basis that it was wasteful expenditure. In doing so, Jonkers appears to have taken the advice on the question from the Public Service Commission. While the applicants believe this step is another indication of Jonkers's alleged vendetta against him, it is not necessary for the purposes of this application to consider the merits of this ancillary dispute.

[12] At the hearing on 27 October 2014, the applicants raised a point that the charges against Crouch should be withdrawn on the basis of a directive issued by the Premier in 2009 regarding powers and functions of Heads of Department. The chairperson decided to provisionally withdraw the

charges after considering representations from both parties. Although the chairperson did not agree with the argument presented by the applicants, he raised a concern whether the necessary delegated authority had been obtained from the Premier to take action against Crouch. His concern arose from section 3B of the Public Service Act, 1994, which states:

> "3B. Handling of appointment and other career incidents of heads of **department.**—(1) Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents of the heads of department shall be dealt with by, in the case of—
>
> (*a*) a head of a national department or organisational component, the President; and
>
> (*b*) a head of a provincial administration, department or office, the relevant Premier."

In the absence of any delegation of authority provided by the employer issued by the Premier empowering disciplinary action, the arbitrator was not willing to proceed with the enquiry. Accordingly, he provisionally withdrew the charges on 19 November 2014.

[13] The applicant's union, POPCRU, immediately called for the upliftment of Crouch's suspension. Despite the effective withdrawal of charges, Jonkers was unmoved and did not uplift the suspension.

[14] It is common cause that Bartlett wrote to Jonkers on 7 January 2014 about Crouch's case. As with the other important letter of 2 April 2013 it was missing from the documents attached to the answering affidavit of Crouch, although he refers to it as if it were attached to his affidavit as Annexure "TLA3". What is strange is that the reference number is that of an entirely different document and according to the numbering sequence of documents in the answering affidavit the letter of 7 January 2014 should have been Annexure "TLA9".

[15] In reply to the MEC's letter, Jonkers 'took note" of its contents and then proceeded to defend the course of disciplinary action taken against Crouch. Amongst other things he claims in the letter that the investigations had been finalised and the hearing had been postponed on several occasions at the request of the initiator, employees or the chairperson. He

also claimed that a meeting had been scheduled with all the parties to assess the status of finalising the case. Jonkers followed this up with a letter on 23 January 2015 in which he stated:

> "Engagements have been conducted with the role-players (chairperson, employee representative, and the employer representative) regarding the finalisation of the matter.
>
> All the parties were in agreement that the matter must receive urgent attention and must be concluded before or on Friday, 27th of February 2015.
>
> The following dates have been set for the trial: 6, 11 and 12 February 2015.
>
> If the matter is not finalised by Friday, 27th of February 2015; then any other amicable resolutions will be considered for adoption."

[16] In neither of these written communications to his superior did Jonkers convey the chairperson's ruling of 19 November 2014, either directly or indirectly. However, in a letter from POCRU to Jonkers and Bartlett on 26 January 2015, the withdrawal of the charges was mentioned and the union pointed out that there had been no response to its letter calling for the upliftment of his suspension. The union also claimed that the representations made by Jonkers to Bartlett in his letters on 14 and 26th January to the effect that he was engaging with them on the issue had no factual basis.

[17] On 29 January 2015, Bartlett wrote to Jonkers expressing her concern about the claims in POPCRU's letter that he had never engaged with them as he claimed. She also refers to a letter written by herself to Jonkers on 27 January 2015 in which she "requested" Jonkers to reconsider Crouch's suspension taking into account the salary paid to him and the lengthy period of his suspension whilst investigations were finalised contrary to the Public Service coordinating bargaining Council resolution of 2003. Bartlett ended her letter with the following plea and instruction to her subordinate:

> "I believe that you did not reconsider the suspension as I had implored you in my letter, hence your letter dated 23 January 2015 and that you took the decision not uplift the suspension and also failed to furnish me with the

reasons why the suspension is justified since the investigation has been finalised.

If the matter is not finalised by the 27 February 2015 and based on the afore-going, my instruction therefore will be for you to uplift the suspension of Mr Crouch with immediate effect and ensure that he reports for duty on 2 March 2015."

(emphasis added)

[18] However, the enquiry was not convened in February and Jonkers did not comply with Bartlett's instruction to uplift Crouch's suspension. The enquiry was nonetheless scheduled to proceed from the 30 March to 2 April 2015. Acting on advice, the applicants raised their objection relating to Jonkers's lack of authority to take disciplinary action against Crouch as the alleged misconduct in question was committed whilst he was acting in the capacity of head of Department. The chairperson dismissed the objection on 30 March 2015, which led to this application being launched at that point.

[19] The applicants allege that Jonkers was acting on a frolic of his own in pursuing the disciplinary proceedings against Crouch and did not have the necessary powers to do so. Jonkers rejected this allegation and claims to have dealt with the issue elsewhere in his affidavit. However, the most extensive version of Jonkers' response to the allegation that he lacked the necessary authority and his justification for the continuation of the disciplinary proceedings is set out in his answering affidavit as follows:

"5.25 Pursuant to the withdrawal of the charges, the department then realised the following:

5.25.1 Crouch did not plead to the charges.

5.25 .2 The department wanted to cure the defect that was created as a result of the said ruling, which was a lack of authority by the HOD.

5.26 Needless to say the Department did not agree with the ruling that the HOD did not have authority which created the defect. Upon careful consideration and research, the Department saw no defect that needed to be cured by the Department in relation to the authority of thereof by the HOD.

5.27 Furthermore, still on the issue of authority, it was the intention of the department to escalate the lack of authority, if indeed there was a lack of authority by the HOD to the MEC, should there be a need to escalate. Meaning that there was a careful consideration by the Department that if the HOD did not have the said authority, the issue would have been escalated to the MEC, for remedial steps and for MEC's intervention.

5.28 Seeing that the department arrived at the conclusion that HOD had authority to Institute disciplinary proceedings on Crouch, charges were then reinstated on 27 November 2014. The request for a chairperson was done on the same date."

(*sic* – emphasis added*)*

[20] The applicants note that no steps were taken by the respondents to challenge the findings of the chairperson of 19 November 2014. They also point out that there was no further communication from the respondents about the reinstatement of charges following POPCRU's letter of 20 November 2014.

Evaluation

Urgency

[21] Obviously, the question of Jonkers' authority to take disciplinary action against Crouch was a matter that could have been brought to court before the ruling of the chairperson on 19 November 2014. However, that ruling altered the circumstances under which the inquiry might proceed. It was only reasonable to expect that following her ruling no further steps would take place in the absence of the respondents addressing her ruling and either rectifying the alleged lack of authority or setting it aside. Armed as they were with the ruling of 19 November 2014, they would have had good reason to believe that a new chairperson would have taken cognizance of that ruling. In effect, at the time the interdict was launched, Crouch was in a position he had not previously been in when the hearing was convened: he was in possession of a ruling in his favour that, in the absence of steps by the employer to rectify the shortcoming of authority or to decisively set aside that ruling, should have resulted at least in a stay of the disciplinary

proceedings. When the enquiry did resume without the employer having in any way addressed the ruling, the applicants did the correct thing which was to raise the matter first with the newly appointed chairperson when the enquiry sat. When he rejected Crouch's claim based on the previous chairperson's ruling, it left the applicants with little alternative but to approach the court at that point. Had they not done this, they might have been accused of failing to exhaust the most obvious internal remedy and of not giving the chairperson an opportunity to consider the matter first.

[22] In the light of the new circumstances prevailing at the enquiry when it sat on 30 March 2015, following the previous chairperson's ruling, I am satisfied that the timing of the applicants approach to the court should be evaluated in relation to those new circumstances and not in relation to the course of proceedings prior to the chairperson's ruling. Consequently, the applicants were entitled to approach the court on the degree of urgency they did.

Existence of a clear right

[23] It is common cause that Jonkers initiated disciplinary proceedings against Crouch for alleged misconduct committed by him whilst he was acting in Jonkers's post. Crouch's suspension was incidental to those pending proceedings.

[24] The exercise of the power to take disciplinary action, like any other executive power, is one that must be conferred on the functionary by law. In ***POPCRU v Minister of Correctional Services & another***,[1] Steenkamp J approvingly paraphrased the learned author C Hoexter thus:

> "[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

[1] [2011] JOL 27420 (LC).

legitimate when it is lawful. It is the obverse facet of the *ultra vires* doctrine and an aspect of the rule of law."[2]

[25] Molahlehi J also approved of this characterisation of the legal principle in ***Hlabangwe v MEC for Public Works, Roads and Transport (Mpumulanga)*** [J 2170/11 – 24/10/11] and further stated:

"[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 Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others.* The Court 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) ?.

In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution. 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.

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 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."

[26] In this instance, the crisp issue is whether or not Jonkers had the power to take disciplinary steps and suspend Crouch in relation to an alleged misconduct committed by the latter while he temporarily occupied Jonkers's post. Apart from section 3B relied on by the disciplinary enquiry chairperson in his ruling, other pertinent provisions of the Public Service Act are the following:

26.1 Definitions:

" 'executing authority', in relation to—

(a) the Office of the President, means the President acting on his or her own;

(b) the Office of the Deputy President, means the Deputy President;

(c) a department or organisational component within a Cabinet portfolio, means the Minister responsible for such portfolio;

(d) the Office of the Commission, means the Chairperson of the Commission;

(e) the Office of a Premier of a province, means the Premier of that province acting on his or her own; and

(f) a provincial department within an Executive Council portfolio, means the member of such Executive Council responsible for such portfolio;…

'head of a department' or **'head of the department'** means the incumbent of a post mentioned in the second column of Schedule 1 or 2, and includes any officer acting in such post;…"

26.2 Powers of an executing authority –

"3(5) Subject to the provisions of this Act, an executing authority shall have those powers and duties—

regarding the internal organisation of the office or department concerned, including the organisational structure and the transfer of functions within that office or department;

regarding the post establishment of that office or department, including the creation,

grading and abolition of posts and the provision for the employment of persons additional to the fixed establishment where the class of work is of a temporary nature;

regarding the recruitment, appointment, performance management, promotion, transfer, discharge and other career incidents of officers and employees of that office or department, including any other matter which relates to such officers and employees in their individual capacities,

which are entrusted to the executing authority by or under this Act, and such powers and duties shall be exercised or performed by the executing authority in accordance with the provisions of this Act."

(emphasis added)

26.3 Handling of appointments and other career incidents of heads of department –

"3B. Handling of appointment and other career incidents of heads of department.—(1) Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents

of the heads of department shall be dealt with by, in the case of—

(a) a head of a national department or organisational component, the President; and

(b) a head of a provincial administration, department or office, the relevant Premier.

…

(4) The executing authority referred to in paragraph (a) or (b) of subsection (1) may delegate or assign any power or duty to appoint the head referred to in that paragraph, as well as any power or duty regarding the other career incidents of that head, in the case of—

(a) the President, to the Deputy President or a Minister; or

(b) the Premier of a province, to a Member of the relevant Executive Council."

(emphasis added)

26.4 Organisation of the Public Service –

"(b) Subject to the provisions of paragraphs (c) and (d), a head of department shall be responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of State property, and he or she shall perform the functions that may be prescribed."

(emphasis added)

26.5 Power to discharge –

"17. Discharge of officers.—(1) (a) Subject to the provisions of paragraph (b), the power to discharge an officer or employee shall vest in the relevant executing authority, who may delegate that power to an officer, and the said power shall be exercised with due observance of the applicable provisions of the Labour Relations Act, 1995 (Act No. 66 of 1995).

(b) Notwithstanding paragraph (a), the power to discharge an officer, excluding a head of department, in terms of subsection (2) (e), shall be vested in the head of department."

(emphasis added)

[27] Although Jonkers had never articulated any basis in law for his authority to take disciplinary action against Crouch in any of the affidavits filed in this matter, at the hearing of the matter an argument was advanced for the first time by respondents' counsel, *Ms Mabena*, which in part rested on the provisions of the Public Finance Management Act 1 of 1999 (' that PFMA'). The pertinent provisions of the PFMA are:

27.1 Accounting Officers and acting accounting Officers:

"36 Accounting officers

(1) Every department and every constitutional institution must have an accounting officer.

(2) Subject to subsection (3)-

(a) the head of a department must be the accounting officer for the department; and

(b) the chief executive officer of a constitutional institution must be the accounting officer for that institution.

(3) The relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer for-

(a) a department or a constitutional institution; or

(b) a trading entity within a department.

(4) The relevant treasury may at any time withdraw in writing an approval or instruction in terms of subsection (3).

(5) The employment contract of an accounting officer for a department, trading entity or constitutional institution must be in writing and, where possible, include performance standards. The provisions of sections 38 to 42, as may be appropriate, are regarded as forming part of each such contract.

37 Acting accounting officers

When an accounting officer is absent or otherwise unable to perform the functions of accounting officer, or during a vacancy, the functions of accounting officer must be performed by the official acting in the place of that accounting officer."

(emphasis added)

27.2 Responsibilities of an accounting officer –

"38 General responsibilities of accounting officers

(1) The accounting officer for a department, trading entity or constitutional institution-

(a) must ensure that that department, trading entity or constitutional institution has and maintains-

(i) effective, efficient and transparent systems 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;

(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) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(c) must take effective and appropriate steps to-

(i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(d) is responsible for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

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

(f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution 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 department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure; …"

(emphasis added)

[28] The first of the novel arguments advanced on behalf of the respondents was that a Head of Department in terms of the PFMA is always the accounting officer because the definition of an accounting officer does not include an acting accounting officer, unlike in the case of the definition of a Head of Department in the PSA which includes a person acting in the post. Consequently, Jonkers in his uninterrupted capacity as accounting officer was always responsible for taking disciplinary action against any officer, including Crouch, even when he was occupying and performing Jonkers' functions of Head of Department during his leave in December 2012 and January 2013. Furthermore, section 38 (1) (h) of the PFMA required Jonkers to take steps against "any official" committing the misconduct identified in that section.

[29] The first argument is somewhat contrived. It is clear from section 37 that the official acting in the place of the accounting officer is responsible for performing the accounting officer's functions. Importantly, that occurs amongst other occasions when the accounting officer is absent or when a vacancy occurs. There is nothing to suggest that a person acting in the place of the accounting officer has less responsibility and authority when they are acting because the post is vacant or simply because the accounting officer is absent, as was the case in this instance. Accordingly, I am not persuaded that when Crouch was acting in the place of Jonkers as head of Department, he was some sort of lesser form of accounting officer or not truly the accounting officer at that time.

[30] This raises the second question of whether Jonkers nonetheless was entitled on his return to work as the accounting officer to act against his own temporary replacement, who allegedly acted contrary to the PFMA whilst he was the acting Head of Department and thereby the acting Accounting Officer. At this juncture it is important to note that the charges against Crouch relating to alleged contraventions of the PFMA specifically refer to his alleged misconduct in the performance of his duties as an Accounting Officer. Sections 81 to 85 of the PFMA make specific provision for disciplinary proceedings with reference to financial misconduct by accounting officers, viz:

> 81 Financial misconduct by officials in departments and constitutional institutions
>
> (1) An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer willfully or negligently-
>
> (a) fails to comply with a requirement of section 38, 39, 40, 41 or 42; or
>
> (b) makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure.
>
> …
>
> 84 Applicable legal regime for disciplinary proceedings

A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85.

85 Regulations on financial misconduct procedures

(1) The Minister must make regulations prescribing-

(a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the relevant provincial treasury and the Auditor-General, including-

(i) particulars of the alleged financial misconduct; and

(ii) the steps taken in connection with such financial misconduct;

(b) matters relating to the investigation of allegations of financial misconduct;

(c) the circumstances in which the National Treasury or a provincial treasury may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;

(d) the circumstances in which a disciplinary board which hears a charge of financial misconduct must include a person whose name appears on a list of persons with expertise in state finances or public accounting compiled by the National Treasury;

(e) the circumstances in which the findings of a disciplinary board and any sanctions imposed by the board must be reported to the National Treasury, the relevant provincial treasury and the Auditor-General; and

(f) any other matters to the extent necessary to facilitate the object of this Chapter.

(2) A regulation in terms of subsection (1) may-

(a) differentiate between different categories of-

(i) accounting officers;

(ii) accounting authorities;

(iii) officials; and

(iv) institutions to which this Act applies; and

(b) be limited in its application to a particular category of accounting officers, accounting authorities, officials or institutions only."

(emphasis added)

[31] It is clear that in so far as Crouch is being charged with a contravention of the PFMA, it is a contravention specifically relating to his alleged non-compliance with his duties as an acting Accounting Officer under s 38(1)(a)(iii) and not in his capacity as an ordinary official. His status and responsibilities as an acting Accounting Officer at the time, which incidentally the phrasing of the charges against him expressly acknowledge, flowed directly from his appointment as acting Head of Department. Consequently, having regard to the legal regime for disciplinary proceedings prescribed in s84 of the PFMA the essential issue still remains whether it is within the competence of the head of Department to take disciplinary action against the person who acted in his own position in respect of misconduct allegedly committed whilst in that position.

[32] In this regard, it is noteworthy that despite several months having passed since the ruling of the chairperson on 19 November 2014, there is no indication given by the respondents why his finding on the lack of authority to proceed against Crouch was wrong. In his answering affidavit Jonkers never reveals the basis for rejecting the finding. Jonkers most explicit repudiation of the ruling in the answering affidavit is explained simply on the basis that the department adopted the view that it was wrong, without articulating any reasons for that view. It is also noteworthy that he did not mention the ruling to the MEC in his correspondence with her about the progress of the enquiry, when that ruling was obviously one of the most significant developments to date, which he ought to have brought to her attention. His uncertainty about the need for the disciplinary authority to have been delegated is apparent from his equivocal statements about whether delegation of authority was sought. One would reasonably think

that such doubts would at least have been mentioned in his correspondence with the MEC, but they are entirely absent.

[33] The chairperson effectively concluded that disciplinary measures were part of the 'career incidents' of a head of department and that consequently, since such matters fell within the ambit of the Premier's power, in the absence of a delegation of such power to Jonkers, the institution of charges by him was not properly authorised. If one has regard to s 3(5) of the PSA it is clear that matters pertaining to discipline or precautionary suspension would fall within ambit of matters contemplated by the statute as being a career incident. S 3(5) states:

> "(5) Subject to the provisions of this Act, an executing authority shall have those powers and duties—
>
> ….;
>
> (c) regarding the recruitment, appointment, performance management, promotion, transfer, discharge and other career incidents of officers and employees of that office or department, including any other matter which relates to such officers and employees in their individual capacities,
>
> which are entrusted to the executing authority by or under this Act, and such powers and duties shall be exercised or performed by the executing authority in accordance with the provisions of this Act."

(emphasis added)

[34] The PSA separates the management of the career incidents of heads of department from that of the staff below them whom they manage. Subject to a proper delegation of power the responsibility and authority to managed heads of departments resides in the Premier. The definition of a head of department expressly includes someone who acts in that post. That must mean when a disciplinary issue arises in relation to the conduct of an acting head of department that could lead to that person's dismissal the Premier, or a person duly delegated by the Premier, is the person authorised to deal with it. It would be entirely anomalous with this allocation of functions, if the power to initiate disciplinary steps which could lead to dismissal could be exercised by the head of department when the

conduct allegedly giving rise to such action was committed by someone occupying, *albeit* temporarily, a post over which he has no disciplinary remit. The same applies to measures ancillary to such action such as precautionary suspension.

[35] Even though there might have been a delegation of the Premier's powers to Bartlett or Mabilo in terms of s 3B (4) (b) of the PSA, there is certainly no evidence supporting a delegation of such authority to Jonkers. In fact the section does not contemplate any delegation of the Premier's to anyone other than an MEC.

[36] Consequently, everything points to a lack of authority on Jonkers' part to have initiated and driven the disciplinary process as he did, including suspending Crouch contrary to the clear wishes of Mabilo and Bartlett, and I am satisfied that Crouch has demonstrated a clear right to interdict the current pending disciplinary proceedings and to have his suspension uplifted.

Costs

[37] The respondents' answering affidavit's vague and evasive style reveals the paucity of their case and it is difficult to believe that the opposition to the application was carefully considered. There is no reason why the applicants needed to go to such lengths to remedy the situation and they are entitled to their costs. Whether all the respondents should be liable for those costs is another matter as it appears that the initiator and driving force behind the disciplinary measures taken against Crouch is Jonkers. It is particularly disturbing that when he was asked about why the enquiry was dragging on, his response to his superior was misleading and he failed to apprise her of the ruling in November 2014, which was critical to whether the enquiry should proceed or not. It is also of concern that in doggedly persisting with his refusal to uplift Crouch's suspension, he was second guessing his superior's judgment and purporting to exercise an authority which he did not have himself. Whether or not his motives for instituting proceedings against Crouch and for suspending him were *mala fide*, his obstinacy in opposing the application when he was incapable of articulating a substantive basis for doing so in his answering affidavit

appears to have been reckless and does raise the question whether he ought not to bear the applicant's costs, rather than the Province.

[38] Accordingly, the second respondent ought to be given an opportunity to make submissions on why he should not personally be held liable to pay the applicants' costs.

Order

[39] The matter is treated as one of urgency in terms of the Labour court rules.

[40] The second respondent has no authority to institute disciplinary proceedings against the applicant

[41] The respondents must cease the current disciplinary proceedings against the applicant which last convened on 30 March 2015

[42] The respondents must uplift the applicant's suspension within 5 days of the date of this judgment.

[43] Costs are reserved and the second respondent must file written submissions within 10 days of this judgment why he should not be held liable in his personal capacity for the applicants' costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants	Adv. P Nkutha
Instructed by:	Mzuzu Attorneys
For the Respondents	Ms. Mabena
Instructed:	The State Attorney-Kimberly