IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION BHISHO)

CASE NO: 606/2014

In the matter between:

MTHUNYWA LAWRENCE NGONZO Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL DEPARTMENT OF EDUCATION IN THE PROVINCE OF THE EASTERN CAPE First Respondent

PREMIER OF THE PROVINCE OF THE EASTERN CAPE Second Respondent

MR FUMANI BALOYI Third Respondent

MINISTER OF BASIC EDUCATION Fourth Respondent

JUDGMENT

NDZONDO AJ:

[1] This is a review application in which the applicant sought an order, *inter alia*, reviewing and setting aside the decision of the first respondent to institute disciplinary proceedings against him. Mr Notshe SC appeared for the applicant whilst Mr Van der Riet SC appeared for the first and second respondents.

[2] The applicant is employed by the Department of Education in the Eastern Cape Province (**the Department**) as the Superintendent General. It is common cause that he was suspended from duty by the first respondent on 1 July 2014 and on 20 August 2014 he charged him with misconduct and appointed the third respondent to conduct a disciplinary hearing (the hearing). It is not necessary for present purposes to set out the particulars of the charges against the applicant. At the commencement of the hearing, Mr Notshe objected to the authority of the first respondent to charge the applicant with misconduct and, consequently, the third respondent's authority to hold the hearing. The basis of Mr Notshe's objection was that the first respondent was not the applicant's employer and submitted that in terms of **section 12(1)(b)** of the Public Service Act of 1994, (**the Act**) it was the Premier, the second respondent, who was the applicant's employer.

[3] **Section 12(1)(a) and (b**) read as follows:

"***Appointment of heads of department and career incidents:***

(1) ***Notwithstanding anything to the contrary contained in this Act, but subject to this section and sections 2 (2B) and 32 (2) (b) (i), the appointment and other career incidents of the heads of department and government component shall be dealt with, in the case of –***

(a) ***a head of a national department or national government component, by the President; and***

(b) ***a head of the Office of a Premier, provincial department or provincial government component, by the relevant Premier.***''

[4] He also submitted, and the importance of this will emerge later in this judgment, that if the first respondent was acting in terms of a delegated power to charge the applicant with misconduct, he would abandon the preliminary point and if not, the hearing could not be proceeded with. Mr Maimane, the employer's representative, asked for an adjournment so that he could consult with the officials of **the Department** but before the matter was adjourned, Mr Notshe asked him to come back with the written delegation, if available.

[5] When the proceedings resumed he did not return with it and instead, he vigorously opposed the objection on the grounds that, firstly, the applicant was not employed by the Premier but by the Member of the Executive Council for Education and referred the presiding officer to the contract of employment which, according to him, showed that the employer of the applicant was the **Government of the Republic of South Africa**, represented by Mr Makupula (the present MEC For Education) in his capacity as executing authority of the Department. I shall use the words MEC and first respondent interchangeably in this judgment.

[6] However, Mr Notshe drew their attention to the letter appointing the applicant which reads as follows:

> **"*Kindly be advised that the Premier has approved the appointment of Mr Ngonzo as the Head of the Department of Education with effect from the date of his assumption of duty.*"**

The letter is addressed to the MEC and the employment contract is in terms of **section 12** *supra*. However, Mr Maimane persisted with his argument and submitted that the presiding officer should be guided by the employee's contract of employment.

[7] For the sake of completeness, I must also point that Mr Notshe had raised the question of mediation too, as a dispute resolution mechanism laid down in the service level agreement. I do not intend to deal with this issue as I am the view that it is not relevant for purposes of this judgment. After hearing argument, the presiding officer dismissed the point *in limine* and the matter was then postponed *sine die* so that the applicant could look at the options available to him and report back in due course.

[8] A decision was later taken by the applicant that an application for a review and setting aside of the first respondent's decision be brought before this court and this was communicated to the first and second respondents but they decided to proceed with the hearing and the applicant then launched an

application, on a semi-urgent basis, which consisted of two parts, namely, Part A in which he sought *interim* relief, interdicting the first and third respondents from proceeding with the hearing pending the determination of the review proceedings contemplated in Part B, in which he sought a review and setting aside of the foresaid decision.

[9] The application was opposed by the first respondent only and he stated in the answering affidavit that in his capacity as executing authority of **the Department** and representing the **Government of the Republic of South Africa** and as prescribed in terms of regulation B.2 of part VII of Chapter 1 of the Public Service Regulations published in Government Gazette 21951 of 5 January 2001, he had concluded a contract of employment with the applicant in his capacity as Head of Department and accounting officer for the Department. Furthermore, in his capacity as executing authority of the Department he had concluded a senior management performance agreement with the applicant in his capacity as Head of Department.

[10] He then went on to refer to the relevant provisions of the SMS handbook issued in terms of the Act and its Regulations to justify the decision that he had taken to bring the applicant before the disciplinary hearing and consequently, so he submitted, the applicant was not entitled to the *interim* and final relief sought by him. It is common cause that he did not act on a delegated power for his

decision. In fact he made it clear in paragraph 28 of his affidavit that there was no need for the second respondent to delegate powers to him to discipline the applicant because he had the power to do so.

[11] Part A was argued before the Honorable Acting Deputy Judge President D Van Zyl who came to the conclusion that the first respondent was not the employer of the applicant in terms of **section 12(1)** and consequently he did not have the power to discipline the applicant and accordingly granted the *interim* order and the costs of the application were reserved for determination by the court hearing the application in Part B.

[12] However, in the opposing affidavit in the review application (which was now opposed by both the first and second respondents), the first respondent made a ***volte-face*** and not only admitted that the power to institute the disciplinary enquiry against the applicant vested in the Premier in terms of **section 12** but raised a new defense to say that his authority to do so was authorized by a written delegation of power (the written delegation) issued by the second respondent and dated 21 June 2014 ("MMU'') which reads as follows:

> **"*CLARIFICATION OF DELEGATION OF THE POWER TO MANAGE AND DEAL WITH CAREER INCIDENTS IN TERMS OF SECTION 12 OF THE PUBLIC SERVICE ACT***

You will recall that I delegated the power to manage and deal with career incidents of Heads of department as part of the framework of delegations at the commencement of the term, but the appointment, transfer, amendment of employment contract, and termination of employment was not delegated.

Certain elements in the public service are now questioning whether the power to discipline and to suspend a Head of department is included in the delegation mentioned above.

In order to clarify this position, I wish to state categorically that it has always been my intention, and part of the practice, that the delegation "to manage and deal with career incidents" of Head of department includes the power to institute disciplinary proceedings and to suspend a head of department pending a disciplinary hearing is included in the original delegation, and I hereby confirm such delegation.

As far as the undelegated "termination of employment is concerned", I wish to state that this refers to the act of giving effect to a sanction after the chairperson of a disciplinary hearing pronounced a sanction of a Head of department found guilty of misconduct as envisaged in section 15B(1)of the Public Service Act"

[13] He also referred to a letter dated 15 December 2014 ("MM4") from the second respondent which, according to him, clarified that the power to discipline the applicant had been delegated to him, contents whereof are as follows:

"***ASSIGNMENT AND DELEGATION, POWERS AND FUCTION***

In order to promote the operational effectiveness and efficiency of Provincial Government I am assigning and delegating authority, powers and duties aimed at empowering the Executive Council and the Members of the Executive Council to perform their duties effectively.

Section 133 of the Constitution provides that the members of the Executive Council of a province are responsible for the function of the executive assigned to them by the Premier. Section 238 of the Constitution provides that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed.

The authority, powers and functions contained in the Framework of Assignment and Delegation are therefore assigned and delegated to you subjected to the conditions set out therein. I wish you well with the performance of your powers and functions."

[14] He changed his standpoint after the judgment of the Honorable Van Zyl ADJP. In fact Mr Van der Riet conceded that the failure to rely on the delegated power was an error due to a *bona fide* misunderstanding based on legal advice. This is not convincing as I intend to show hereunder.

[15] First, when the hearing commenced on 29 September 2014, the written delegation had already been assigned to the MEC and it boggles one's mind as

to why Mr Maimane did not rely on it when the point *in limine* was raised challenging the authority of the first respondent to institute the disciplinary proceedings against the applicant. As stated *supra,* he was also called upon to produce it after he had sought an adjournment to consult the relevant officials of the department. He did not do so, but still insisted on his earlier argument, namely, that the power to discipline the applicant vested in the MEC. He was obviously wrong in this regard.

[16] Second, Mr Leukes of the National Department of Education also filed a supporting affidavit alleging that the first respondent was entitled to discipline the applicant. Moreover, the second respondent, who had purportedly delegated the power to the first respondent to do so, did not file any opposing affidavit in the application for *interim* relief but when opposing the review application, neither of them ever alluded to the allegation that this was due to an error or a misunderstanding.

[17] Third, in Part 2 of the notice of motion, the first and third respondents were called upon to dispatch to the Registrar the record of the proceedings sought to be set aside, together with such reasons as they were required by law to give or make and to notify the applicant that they had done so. Again one would have expected them to have furnished the applicant's attorneys with the

written delegation and if they had done so, the probabilities are that the applicant would have abandoned the review.

[18] Fourth, if one has regard to ANNEXURE "MM5", one gets the impression that some officials in the public service including the Heads of Departments had some doubts as to whether the power to discipline /or suspend a Head of Department was included in ANNEXURE "MM4" and the second respondent had to clarify this. Although he refers to *"certain elements''* in the letter, it is not addressed to these "*elements"* but is forwarded specifically to the first respondent and this is done after the court judgment referred to above. In view of my conclusions below, I do not intend to make a finding on whether the written delegation gave the Heads of Departments such powers. In any case this is not an issue that I am called upon to determine in this matter.

[19] The unavoidable conclusion is that the first respondent was either not aware of the existence of the written delegation at the time of the disciplinary hearing and also at the time that he had to oppose the semi-urgent application and felt constrained to approach the Premier for clarification on this issue after the aforesaid judgment hence the turn-around on his part in the review proceedings, or if he was aware thereof, he did not know whether or not it gave him the power to discipline the applicant. Regrettably, neither of the respondents

has explained why the written delegation was never furnished to the applicant's counsel when he requested it or why it was not used to oppose the urgent relief.

[20] I have no doubt that the second respondent could delegate this power and the question that arises is why the first respondent did not rely thereon if he knew about it and rely on a statutory provision both in the answering affidavit and heads of argument, which on a proper reading thereof, did not confer on him the power that he was convinced that he had. He purported to exercise an original power which he did not have and his interpretation of the provisions of **section 12(1)** was found to be flawed by the court and his reliance thereon for his decision was consequently misplaced. His decision was therefore materially influenced by an error of law which renders the decision taken reviewable in terms Section 6 of the Promotion of the Administrative Justice Act 3 of 2000 the relevant provisions of which read as follows:

"***Judicial review of administrative action:***

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(d) the action was materially influenced by an error of law".

[21] The second respondent's affidavit does not take the matter any further. Although he says in his affidavit that before the first respondent decided to institute disciplinary proceedings against the applicant, he had applied his mind fully to the matter and had conveyed to the first respondent that he had approved the institution of disciplinary proceedings against him, this does not find support in the second respondent's affidavit. If he had applied his mind to what was taking place, his failure to file an opposing affidavit in the semi-urgent application without explanation raises more questions than answers.

[22] I am satisfied that this is a reviewable irregularity and the applicant has made out a case for the relief that he seeks in Part 2 of the notice of motion. Mr Notshe had sought a punitive costs order against the respondents. I do not think that in all the circumstances herein that order would be justified.

[23] In the premises, and for reasons set out above, I make an order in the following terms:

(a) The decision of the first respondent to institute disciplinary proceedings against the applicant is hereby reviewed and set aside.

(b) The first respondent is ordered to pay the reserved costs of the applicant's application for interim relief.

(c) The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to absolved.

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M G NDZONDO

ACTING JUDGE OF THE HIGH COURT – BHISHO

For the Applicant:	Adv S V Notshe (SC)
Instructed by:	Dyushu Majebe Attorneys Office Suite 2 4 Kew Road **VINCENT,EAST LONDON** (Ref: Majebe /MAT 062)
For the Respondents:	Adv J G Van der Riet (SC) Maimane Inc. C/o Russell Inc. 10 Rochester Road **VINCENT, EAST LONDON** (Ref: Mrs B D Beetge)
Matter heard on:	08 October 2015
Judgment Delivered on:	10 December 2015