IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 476/2004

In the matter between:

ANDREW MODISAOTSILE RANTHO	Applicant
and	
THE PREMIER FREE STATE PROVINCE	First Respondent
THE MEC FOR TOURISM ENVIRONMENTAL AND ECONOMIC AFFAIRS, FREE STATE PROVINCE	Second Respondent
THE HOD: THE DEPARTMENT OF TOURISM ENVIRONMENTAL AND ECONOMIC AFFAIRS, FREE STATE PROVINCE	Third Respondent

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CORAM: **VAN DER MERWE, J**

HEARD ON: **26 FEBRUARY 2004**

DELIVERED ON: **18 MARCH 2004**

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[1] The applicant in this matter was employed in the Free State Provincial Department of Tourism, Environmental and Economic Affairs ("the department"). First respondent is the Premier of the Free State Province. Second respondent is the member of the Free State Executive Council responsible for the department ("the MEC"). Third Respondent is the head of the department ("the

HOD").

[2] The date of appointment of applicant does not appear from the papers. However, it is common cause that since at least February 2003, applicant was employed in the department in what is described as a senior management position, to wit Chief Director: Corporate Services. During the beginning of November 2003 the applicant was informed that he would be charged at a disciplinary hearing for allegedly committing certain acts of misconduct. Briefly, the essential elements of these charges are the following: Firstly, that applicant advertised two posts in the department when only one vacancy existed and that he unlawfully appointed a person where no vacancy existed. Secondly, he was charged with deliberate insubordination consisting of incurring of expenses for the department in the amount of R88 223,08 in breach of a notice of the HOD to the effect that no person is allowed to incur expenses on behalf of the department without the approval of the HOD. These expenses related to purchasing of cellphones, a video and radio advertisement and a launch held under the auspices of the department. A further charge related to the placing of an advertisement in two newspapers inviting tenders for the

procurement of computer equipment and software in contravention of the relevant tender and procurement procedures. It is alleged that the HOD had the advertisement withdrawn when it was brought to his attention, but that resulted in fruitless and wasted expenditure in the amount of R10 568,48. Applicant was also charged with unlawfully recommending the upgrading of posts of certain officials in the department and by so doing imposing a financial burden of R190 650,25 for the financial year onto the department. It is alleged that these constituted promotions in contravention of the Public Service Act, 1994. A further charge was one of gross disrespect and gross insubordination based on a letter by applicant to the HOD, the content and tone of which were allegedly intemperate and disrespectful.

[3] On 12 November 2003 a disciplinary hearing in respect of the aforesaid charges took place. This hearing took place in terms of the Disciplinary Code and Procedures for Members of the Senior Management Service ("the disciplinary code"), a copy of which was attached to the papers in this application. There is no dispute as to the applicability of the disciplinary code. This hearing took place in the absence of the applicant despite the fact that notice

thereof was received by the applicant. The hearing took place before an independent chairperson appointed by the HOD in terms of the disciplinary code. After hearing evidence, the applicant was found guilty on 17 November 2003 on all the charges against him. The hearing was then postponed until 19 November 2003 in order to provide the applicant with an opportunity to present evidence and argument in mitigation. Despite notification thereof, the applicant failed to appear at the continued hearing. He was thereafter dismissed with immediate effect on 19 November 2003.

[4] The applicant refused to accept his aforesaid dismissal. The reasons for this attitude included averments to the effect that the alleged actions of misconduct of which he was found guilty, were actions executed under the direct instructions, authorisation and/or approval of the MEC.

[5] As a result, the HOD brought an urgent application on 20 November 2003 in this Court under Case No. 3982/2003 for orders that applicant be prohibited from entering the premises on which the offices of the department are situated as well as that applicant be ordered to hand over the property of the department in his

possession. This application was opposed by the applicant. The MEC filed a separate application essentially for leave to intervene in Case No. 3982/2003 and thereafter to obtain an order that the application of the HOD be dismissed with costs. This application was set down for hearing on 22 January 2004, being also the extended return date of the rule *nisi* issued in Case No. 3982/2003 on 20 November 2003. In the meantime the attorneys for the HOD intimated that on that date, the HOD will move for the discharge of the rule *nisi* and that he tenders to pay the costs of the respondent in the application, that is the present applicant.

[6] On 22 January 2004 the parties met at Court. All except first respondent were represented by their attorneys of record. First respondent was represented by Mr Venter from her office. With the blessing of first respondent but not of the HOD, a written agreement was entered into between the applicant and the MEC in terms of which it was agreed to reinstate the applicant with full benefits as Director: Corporate Services of the department with retrospective effect from 19 November 2003. The agreement of 22 January 2004 also contained the following:

> "This agreement will be submitted by the parties hereto to the PSCBC for confirmation."

It is common cause between the parties that the reference to PSCBC should be understood as reference to the General Public Service Sectorial Bargaining Council ("the bargaining council"). The bargaining council is a bargaining council for the relevant sector of the public service designated in terms of section 37 of the Labour Relations Act, No.66 of 1995. Apparently in order to comply with this last mentioned provision of the written agreement, the proceedings were postponed until 29 January 2004. On 23 January 2004 the following was agreed upon in an addendum to the agreement of 22 January 2004:

> "The parties hereto agree to waive all rights and obligations concerning time limits for declaration, conciliation and arbitration of the dispute."

[7] At a meeting of the bargaining council held on 28 January 2004 chaired by Mr J.B. Mthembu and attended by the State Attorney on behalf of the MEC as well as applicant and his attorney, the aforesaid settlement agreement was recorded and confirmed. On 29 January 2004 the rule *nisi* in Case No. 3982/2003 was accordingly

discharged and the HOD ordered to pay the costs of applicant. On the same date the MEC's application for intervention was withdrawn.

[8] On his return to office, the applicant found that the attitude of the HOD was that the applicant "remains dismissed from the public service" as was stated by the HOD in a circular to all staff members dated 6 February 2004. The circular also contained the following:

> "3. You are instructed to ignore and not implement any instruction from AM Rantho, as his presence is illegal in the department.
>
> 4. Failure to comply with 3 above, will result in misconduct proceedings against staff that follow any instructions from persons not employed by the department."

A letter to the same effect was addressed to the attorneys of applicant on the same date.

[9] As a result the applicant issued the present application on an urgent basis on 11 February 2004, to be heard on 13 February 2004. In

the notice of motion a rule *nisi* was sought calling upon respondents to show cause why the following order should not be made final:

> "3.1 Respondents be interdicted from interfering with applicant's right of access to his office situate in the Department of Tourism, Environmental & Economic Affairs, 34 Markgraaff Street, BLOEMFONTEIN;
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> 3.2 Respondents are restrained from interfering in any manner whatsoever with applicant's right to perform his duties as employee of the said department;
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> 3.3 Respondents are ordered to pay applicant his full remuneration and/or salary for December 2003 and January 2004, immediately and to ensure that all future salary payments are effected on due date;
>
> 3.4 Respondents be ordered to pay the costs of this application."

[10] On 13 February 2004 the matter was postponed in order to provide the HOD the opportunity to oppose the application. It was ordered that paragraphs 3.1 and 3.2 of the notice of motion set out above serve as interim interdict with immediate effect. On 12 February 2004 the MEC filed a notice to abide the decision of the Court in

respect of paragraphs 3.1 to 3.3 of the notice of motion. When the matter was argued on 26 February 2004, counsel appeared on behalf of first respondent and informed me that first respondent also abides the decision of the Court and that the reason therefore is that first respondent is uncertain as to the correct legal position. Although the MEC gave notice to abide, as aforesaid, affidavits by and on behalf of the MEC were filed in response to certain allegations contained in the answering affidavit of the HOD. Counsel acting for applicant and the HOD are agreed that these affidavits be regarded as forming part of the papers in the application. Counsel for the applicant and the HOD are also agreed that the application must decided on the basis that a final order in terms of paragraphs 3.1 to 3.4 of the notion of motion is sought. On behalf of the HOD it was conceded that the matter was one of sufficient urgency to warrant departure from the normal Rules of Court.

[11] The crux of the case for the applicant is that the applicant is entitled to final orders in terms of paragraphs 3.1 to 3.4 of the notice of motion as applicant was reinstated as set out above. The material contentions on behalf of the HOD are that the matter falls

within the exclusive jurisdiction of the Labour Court, but that, in any event, applicant was not validly reinstated. It is not disputed on behalf of the HOD that in the event of a finding that applicant had been validly reinstated, applicant would be entitled to the orders sought. It is convenient in this matter to firstly address the issue of reinstatement.

[12] It is appropriate at this time to refer to certain provisions of the Public Service Act, 1994, as amended. In terms of the definitions contained in section 1 thereof, the MEC is the executing authority in relation to the department. Section 3(5) of the Public Service Act provides as follows:

> "Subject to the provisions of this Act, an executing authority shall have those powers and duties –
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> (a) regarding the internal organisation of the office or department concerned, including the organisational structure and the transfer of functions within that office or department;
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> (b) 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;
>
> (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,
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> 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."

In terms of section 9 the appointment of any person or the promotion or transfer of any officer or employee in the employ of the department shall be made by the relevant executing authority or by an officer(s) to whom the executing authority has delegated his/her power of appointment, promotion or transfer. In terms of section 16 certain categories of officers can retire with the approval of the relevant executing authority. In terms of section 7(3)(b) a head of department is responsible for the efficient management and administration of his/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/she shall perform the functions that may be prescribed.

Sections 17(1)(a) and (b) of the Public Service Act provide as follows:

"(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."

Section 17(2)(e) refers to dismissal on account of misconduct. In terms of the provisions of the Public Service Amendment Act, No.13 of 1996, any person who is an employee as defined in the Public Service Act, is deemed to be an officer as defined in the Act and the provisions of the Public Service Act apply for all purposes to such person as if he/she is an officer as so defined.

[13] It is contended on behalf of the HOD that a dispute arose about an unfair dismissal of applicant within the meaning of sections 186(1) and 188 of the Labour Relations Act and that the dispute had to be dealt with in terms of section 191 of the Labour Relations Act. I agree with these submissions. The contract of employment of applicant was terminated by his employer in terms of section 186(1)(a). At least a substantial portion of the reasons of the applicant for disputing his dismissal was that the reason for his

dismissal was not a fair reason relating to applicant's conduct within the meaning of section 188(1)(a) of the Act. In terms of the disciplinary code the applicant had no right of appeal, his dismissal could not simply be ignored, therefore the dispute could only be dealt with in terms of section 191 of the Labour Relations Act.

[14] It is common cause that the bargaining council had jurisdiction in terms of section 191(1)(a)(i) and that the dispute about the fairness of the dismissal of the applicant was referred to the bargaining council. In terms of section 191(4) the bargaining council was obliged to attempt to resolve the dispute through conciliation. It cannot be doubted that however subject to what is dealt with below, the intention and effect of what happened on 28 January 2004 as set out above, was a resolution of the dispute in question through conciliation under the auspices of the bargaining council that resulted in reinstatement of the applicant.

[15] The main argument on behalf of the HOD, as I understand it, is not that the MEC was precluded from participating in settlement of the dispute in question through conciliation, but that the HOD was a necessary party to any agreement reached through conciliation of

the dispute, in the sense that such agreement could not be validly concluded without the consent of the HOD. Recognising the absence of any express statutory provision in this regard, this argument is based on the proposition that such consent was implicit in the power of dismissal in respect of misconduct in terms of sections 17(1)(b) of the Public Service Act as, so the argument went, this power to dismiss would otherwise effectively be negated. Such implication must, of course, be a necessary one. See in this regard **TAJ PROPERTIES (PTY) LTD v BOBAT 1952 (1) SA 723 (N) at 729E-H**; **THE FIRS INVESTMENTS (PTY) LTD v JOHANNESBURG CITY COUNCIL 1967 (3) SA 549 (W) at 557**.

[16] I am unable to agree with this argument. The applicant was a member of the public service for the Republic of South Africa created in terms of section 197(1) of the Constitution of the Republic of South Africa, No. 108 of 1996. As such the employer of the applicant was the State. See in this regard for instance **JELE v PREMIER OF THE PROVINCE OF KWAZULU-NATAL AND OTHERS [2003] 7 BLLR 73 (LC)** as well as

section 1(1)(a) of the Public Service Amendment Act, No. 13 of 1996. The State as employer in respect of the department naturally has to act through the representation of some official or functionary. The power to dismiss that the HOD relies upon, therefore really is authority to represent the State in dismissing an employee from the department by reason of misconduct. *In casu*, this authority was actually exercised by the chairperson of the disciplinary committee, to which this authority to act as representative of the HOD was delegated in terms of the disciplinary code.

[17] The dispute in question was a dispute between the State as employer and the applicant. Reinstatement was but one of an infinite variety of possible ways of settling this dispute. What the argument on behalf of the HOD actually boils down to, is that the HOD must be a representative, but not necessarily the only representative of the State as employer during proceedings for determination of such dispute arising from the dismissal of an employee in the department. As is the case with any representative of the State as employer, both the MEC and the HOD are duty bound to act in the best interests of the State. The matter can

therefore not be decided upon the basis that the MEC will undermine the interests of the State or of the HOD; it must be accepted that they will work together with a common objective.

[18] On this basis there is no compelling reason or logic why the State as employer in the department must necessarily be represented by the HOD during subsequent settlement through conciliation of a dispute arising from dismissal of an employee on account of misconduct. It can certainly not be said that effect cannot be given to the Public Service Act unless the provision sought to be implied is read into the statute. On the contrary, the implied provision would lead to the peculiar result that the State is represented by both the MEC and the HOD, even though the HOD is in the final instance directly accountable to the MEC. (See **PREMIER, WESTERN CAPE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1999 (3) SA 657 (CC) at 663H**). Another factor militating against the implication of the provision relied upon by the HOD is the vagueness thereof. Does for instance, the obligation that the HOD must be a representative relate to settlement through conciliation only or also at arbitration following

failure to resolve the dispute through conciliation?

[19] It was further submitted on behalf of the HOD that in any event, even if the dispute was validly resolved through conciliation, being a settlement agreement, it has no effect before the settlement agreement is made an award. In this regard reliance was placed on the provisions of section 142A of the Labour Relations Act. This argument is without merit. A settlement agreement in terms of section 142A(2) is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court. In terms of section 191(5) of the Labour Relations Act, the right to arbitration of the dispute by the bargaining council only arises if after conciliation the dispute remains unresolved. As stated above, in this case the dispute was resolved.

[20] Counsel for the HOD conceded that in the event of findings in accordance with the above, the argument that the matter falls within the exclusive jurisdiction of the Labour Court, must fail. In my judgment this concession was correctly made. In terms of section 157(1) of the Labour Relations Act, the jurisdiction of this Court is ousted only in respect of all matters that in terms of the

Labour Relations Act or in terms of any other law are to be determined by the Labour Court. (See also **FEDLIFE ASSURANCE LTD v WOLFAARDT 2002 (1) SA 49 (SCA)** at **60-61 par [25 – 27]** and **FREDERICKS AND OTHERS v MEC FOR EDUCATION AND TRAINING, EASTERN CAPE, AND OTHERS 2002 (2) SA 693 (CC) at 712 – 713 par [38 – 40]**). The dispute in this application was never about the fairness of the dismissal of applicant. That dispute was resolved through conciliation on 28 January 2004, before the application was launched. The essential issues in this case were whether the HOD was a necessary party to the actual resolution of the dispute and whether the settlement agreement was capable of enforcement in the absence of it being made an award. In my view, neither of these are matters to be determined by the Labour Court in terms of the Labour Relations Act or any other law. Nor, assuming that section 158(1)(h) of the Labour Relations Act deals with jurisdiction of the Labour Court as opposed to powers available when it has jurisdiction in terms of section 157, does the judgment in this case entail a review of any decision taken or any act performed by the State in its capacity as employer on such grounds

as are permissible in law.

[21] It appears from the papers and the aforegoing, that at the heart of this matter lies a serious disagreement between the MEC and the HOD. There are also strong indications that this disagreement is not limited to this matter but is born from a lack of mutual trust and good faith between the MEC and the HOD. This is contrary to the letter and spirit of the Constitution, see for instance section 41(1)(h) thereof and cannot go unmentioned. Had it not been for the detrimental effect that delay of the matter may have on the applicant, I would have seriously considered acting in terms of section 41(4) of the Constitution.

[22] For these reasons, in my judgment, the application must succeed with costs, including the costs reserved on 13 February 2004.

[23] I accordingly grant orders in terms of paragraphs 3.1, 3.2, 3.3 and 3.4 of the notice of motion.

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C.H.G. VAN DER MERWE, J

On behalf of Applicant:	Adv. A. Williams istructed by Schoeman, Maree Inc.
On behalf of First Respondent:	Adv. P.U. Fischer instructed by State Attorney
On behalf of Second Respondent:	No appearance
On behalf of Third Respondent:	Adv. P. Zietsman instructed by Israel Sackstein, Matsepe Inc.

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