IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3952/2022

In the matter between:

MAROELE SAMUEL SERUOE	Applicant
And	
THE SPEAKER, FREE STATE PROVINCIAL LEGISLATURE	First Respondent
M. NGCOSANE	Second Respondent
THE SECRETARY, FREE STATE PROVINCIAL LEGISLATURE	Third Respondent
D.S. QWELANE	Fourth Respondent

CORAM:	MHLAMBI, J *et* DANISO, J
JUDGMENT BY:	DANISO, J
HEARD ON:	17 JULY 2023
DELIVERED ON:	21 SEPTEMBER 2023

[1] The applicant, launched these review proceedings as an employee of the Free State Legislature pursuant to disciplinary proceedings instituted against him in his capacity as a director in the Strategy and Risk Management division for various acts of misconduct including dishonesty, insolence and bringing his office into disrepute.

[2] The review is predicated on the provisions of section 6(2)(b), 6(2)(f)(i) alternatively section 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and it is directed at the decision of the first respondent ("the Speaker") and/or the third respondent ("the Secretary") in terms of which the second and fourth respondents were respectively appointed as chairperson and initiator ("the disciplinary panel") of the applicant's disciplinary inquiry in terms of section 4.1. (c) of the first respondent's Disciplinary Policy and Procedure ("the Disciplinary Policy").[1]

[3] Aggrieved by the appointment of the disciplinary panel, the applicant launched an urgent application in the labour court to stay the disciplinary inquiry pending the outcome of the review application to review and set aside the impugned decision. The applicant was ultimately dismissed.

[4] It is the applicant's contention that the impugned decision is unlawful in that it was made in contravention of section 44 of the Financial Management of Parliament and Provincial Legislatures Act ("The Act")[2] which prohibits the Speaker as a member of parliament from being involved in the process of procurement of goods and services from external service providers and without complying with the required procurement processes as envisaged in Regulation 6 (11) (f)(ii)(aa) of the Act as no bidding processes were undertaken to ensure a fair, transparent and cost effective appointment. The applicant also seeks a declaratory order that section 4.1(c) the Disciplinary Policy is unlawful and invalid on the basis that it contradicts the provisions of section 44 of the Act.

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[1] The copy of the Disciplinary Policy and Procedure is attached on the applicant's founding affidavit as Annexure "MSS2".
[2] Act No, 10 of 2009.

[5] On the other side, the respondent seeks the dismissal of the application on *limine* grounds and on the merits. According to the respondents, the applicant has not complied with the provisions of section 5 and 7 (2)(a) of PAJA by failing to lodge his application and request reasons within ninety (90) days from the date on which he became aware of the impugned decision, he has also failed to exhaust the internal remedies and the decision complained about is not an administrative action but a labour dispute which is actually pending in the labour court thus not reviewable in terms of PAJA. The applicant is simply forum shopping in an attempt to re-litigate an issue which must be finalized in the labour court.

[6] With regard to the merits, the contention is that section 4(1)(c) of the Disciplinary Policy clearly states that it is the Secretary who takes the decision to appoint a disciplinary panel, the role of the Speaker is to approve the appointment. The respondents state that there is no conflict between section 4.1. (c) of the Disciplinary Policy and section 44 of the Act, reason being that section 4.1. (c) of the Disciplinary Policy deals with the employer's disciplinary code whilst section 44 pertains to procurement of goods and services through tender processes.

[7] The applicant countered that there is no merit to the respondents' *in limine* objections. According to the applicant, he was not obliged to request reasons because the reasons for the impugned decision are known. Regarding the alleged failure to exhaust all internal remedies, it is the applicant's case that he did apply for the recusal of the second respondent from the disciplinary inquiry but his application was dismissed. No other internal remedies were available and the respondents have also not pointed out which are those internal remedies the applicant ought to have exhausted; furthermore, the impugned decision constitutes an administrative action susceptible to review as the labour court has no jurisdiction to determine the lawfulness of the decision to appoint a disciplinary panel and the validity of its empowering provision.

[8] I am in agreement with the applicant's contentions. The respondents' reliance on section 5 of PAJA in substantiation of its argument that the application is time barred is unsound as section 5 of PAJA has nothing to do with the late lodgement of review proceedings. It essentially deals with an applicant's right to request reasons for the impugned decision. The relevant subsection states thus:

> *"(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action."*
>
> *(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action."*

[9] Furthermore, as correctly pointed out by the applicant, the provisions of section 5 (1) are amenable therefore requesting reasons for the impugned decision is not a pre-requisite for judicial review proceedings.

[10] Much as section 7 (2) (a) directs that:

> *"...no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."*

It has been pointed out by the Constitutional Court in *Koyabe and Others v Minister for Home Affairs and Others (Lawyers For Human Rights as Amicus Curiae)*[3] that the requirement to exhaust internal remedies is not an absolute hindrance from approaching the court. The court may condone the non-exhaustion taking into consideration the facts of the matter, the nature of administrative action at issue, the availability, effectiveness and adequacy of those internal remedies. It is for the respondents to adduce those facts in this

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[3] **2010 (4) SA 327** (CC) at 328I to 329A.

matter, the respondents have simply fleetingly averred that the applicant has not exhausted internal remedies without stating which internal remedies were available to the applicant for the resolution of the dispute between the parties.

[11] Regarding the applicability of PAJA, section 1 of PAJA describes an administrative action as:

> *"any decision taken, or any failure to take a decision, by-*
>
> *(a) an organ of state when-*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation..."*

[12] It is indisputable that the first respondent as the legislative authority of the government is an organ of state as contemplated in section 239 of the Constitution.[4] The applicant challenges the validity of the empowering provision including the decision making process which culminated in the appointment of the disciplinary panel which conducted his disciplinary hearing. These grounds are provided for in section 6 (2) (b), 6 (2) (f) (i) and 6 (2) (i) of PAJA which respectively provide that: a court or tribunal has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision or if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with or the action itself contravenes a law or is not authorised by the empowering provision. Based on these reasons, I hold that the applicant is in the correct forum.

[13] With regard to the merits of the application, I am not persuaded that there is a conflict between section 4.1. (c) of the Disciplinary Policy and section 44 of the Act. The relevant part of the Disciplinary Policy provides:

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[4] Act No, 108 of 1996.

"The Secretary to the Legislature may, in consultation with the Speaker, appoint a Disciplinary Panel comprising of persons not in the employment of the Free State Legislature to hear disciplinary charges brought against an employee."

[14] Section 44 of the Act bars members of parliament from serving on tender committees. It provides:

"*No Member of Parliament may-*

(a) be a member of a committee evaluating or approving tenders, quotations, contracts or other bids for Parliament;

(b) attend any meeting of such committee as an observer; or

(c) participate in any other way in evaluating or approving tenders, quotations, contracts or other bids for Parliament."

[15] It is trite that when interpreting legislation, the point of departure is the provision itself, read in context and having regard to the purpose of the provision.[5] These are two distinct empowering provisions, section 4.1. (c) of the Disciplinary Policy arises from an employer's disciplinary code germane to a contract of employment. It serves to harmonize the rights of an employer due to work performance from an employee and to protect an employee from arbitrary actions by setting out a guideline concerning what constitutes acts of misconduct, the disciplinary procedures, the appointment of the disciplinary panel including the related sanctions. The regulatory body is the Labour Relations Act,[6] whereas section 44 of the Act regulates an organ of state's financial management to ensure a transparent, cost effective and competitive tender process relating to procurement of goods and services as envisaged in section 217 of the Constitution[7] and the Act.

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[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* **[2012] ZASCA** 13; **2012 (4) SA 593** (SCA) para 18.
[6] Act No, 66 of 1995, schedule 8.
[7] Section 217 provides that:
"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for - (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[16] In view of the afore-going, I am unable to find any inconsistency between section 4.1. (c) of the Disciplinary Policy and section 44 of the Act warranting an order to review and set aside the decision in terms of which the disciplinary panel of the applicant's erstwhile disciplinary inquiry was appointed including a declarator invalidating the provision of section 4.1. (c) of the Disciplinary Policy.

[17] In the circumstances, the application fails. I can find no reason why costs should not follow the result.

[18] The following order is made:

ORDER

(1) The application is dismissed.
(2) The applicant shall pay the costs.

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NS DANISO, J

I concur.

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JJ MHLAMBI, J

APPEARANCES:

Counsel on behalf of Applicant:	Adv. T. du Preez
Instructed by:	Kramer Weihmann INC.
	BLOEMFONTEIN
Counsel on behalf of Respondents:	Adv. S. Motloung
Instructed by:	Qwelane Theron & van Niekerk

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