IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 7655/2020P

In the matter between:

ZIPHATHE MBONENI CIBANE	**FIRST APPLICANT**
NONHLANHLA PAMELA HLONGWA	**SECOND APPLICANT**
and	
PREMIER OF THE PROVINCE OF KWAZULU-NATAL	**FIRST RESPONDENT**
DIRECTOR GENERAL OF THE OFFICE OF THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL	**SECOND RESPONDENT**
MEC FOR FINANCE KWAZULU-NATAL	**THIRD RESPONDENT**
INTEGRITY FORENSIC SOLUTIONS	**FOURTH RESPONDENT**
THE DEPUTY DIRECTOR GENERAL OF THE KWAZULU-NATAL TREASURY (HEAD OF INVESTIGATION)	**FIFTH RESPONDENT**
ADVOCATE JOE NXUSANI SC N.O.	**SIXTH RESPONDENT**

JUDGMENT

P C BEZUIDENHOUT J:

[1] The Applicants who were both employed in the office of the Premier of KwaZulu-Natal were suspended from their positions as The Chief Financial Officer and The Senior Manager Supply Chain Management on 17 January 2020 and which was extended on 23 March 2020. They are seeking that their suspension be reviewed and set aside and further that a forensic report prepared by Fourth Respondent and the adverse findings in the report be reviewed and set aside. Further that First and Second Respondents be ordered to pay the costs of the application. The application is opposed by First and Second Respondent as well as by Third and Fifth Respondent and also by Fourth Respondent.

[2] It was submitted on behalf of Applicants by Mr Pammenter SC that their suspension was not procedurally fair. Nothing was told to them until 16 January 2020 and the letters of suspension were extended on 20 January 2020. They were not told what the allegations were against them and the reason for their suspension. It was submitted that Second Respondent has no power to extend the suspension period. It was further submitted that the *audi alterim partem* Rule was not applied and that the Chair of the disciplinary hearing decided on a further postponement.

[3] Further the argument that due to the covid-19 epidemic there was a so called die's non period which was applied until August 2020 has no legal basis. It was submitted that the function of the executive was outsourced and the function was performed by Fourth Respondent and should have been done by First and Second Respondent. The accounting officer has an obligation to do an investigation. As Fourth Respondent performed a public function PAJA must be applied. A fair procedure as required by section 33(1) of The Constitution was necessary and if it was a legality review then this had to be done. I was referred to National Director of Public Prosecutions & Others v Freedom Under Law 2014 (4) SA 298 (SCA).

[4] It was further submitted that natural justice had to be applied and the *audi alterim partem* Rule had to be applied. There was no procedural fairness and the report was done without any input from Applicants and without applying the *audi alterim parten* Rule. It was submitted that Applicants have been prejudiced and that the relief which was being sought accordingly had to be granted.

[5] It was submitted on behalf of First and Second Respondent that the disciplinary hearing was not finalised, Applicants did not set the matter down again and have accordingly abandoned it.

[6] It was submitted that the matter before the Bargaining Council was still pending. The relief which is now being sought is the same as that which was sought at the Bargaining Council. The matter of the Bargaining Council must first be brought to conclusion. First Applicant gave evidence and the matter is partly heard. There was no unlawfulness and therefore nothing to declare the suspension unlawful. First Applicant contends that it is unware of the reasons for the suspension but it is set out in the suspension letter. There was compliance with clause 2.7.2 (c) of the disciplinary code. He was charged criminally and the bail conditions make it difficult for him to go back to work. The Interpretation Act does not apply but the Public Service Act applies which refers to court days. Applicants' suspension was extended. The report by Fourth Respondent is to be tested at the disciplinary hearing. Costs should follow the result.

[7] Mr. Dickson SC on behalf of Third and Fifth Respondents submitted that no relief was sought against them but that Applicants implicate Third and Fifth Respondents and that as the matter is argued on the papers the Plascon-Evans Rule must be applied. The investigation was commenced by Treasury as appears at page 450 and 451 of the papers. The case against Third and Fifth Respondents is speculation and that the two

Respondents have been brought to court on hearsay and that Applicants should pay their costs.

[8] Ms Gabriel SC who appeared on behalf of Fourth Respondent submitted it fulfilled its mandate and did not interview Applicants. No hearing was held and Fourth Respondent was known to Second Respondent. It is also submitted that the Plascon-Evans Rule should be applied and that Fourth Respondent was contracted by Treasury to conduct the investigation. It was submitted that it was not raised in the founding affidavit that Fourth Respondent was an agent of the State, and that PAJA therefore applied. It was submitted that it was a legality issue and that PAJA was not applicable. It is a disciplinary process where natural justice applies and the *audi alterim partem* Rule would apply in the disciplinary process. It was submitted once again that costs should be awarded against Applicants.

[9] It was submitted that the application to strike out was served on Appellants on 12 October 2022. That there was no opposing affidavit and that on the papers it is unopposed. The replying affidavit was replete with scandalous and vexatious and irrelevant matter. These were all raised in reply for the first time. The relief sought in this application should thus be granted.

[10] It was submitted by Applicants that most of the paragraphs came from the answering affidavit. That there is no prejudice to Fourth Respondent and no new matters were raised as they all arose from the answering affidavit. There is no new matter which was raised in reply. Fourth Respondent referred to Applicants as hostile and accordingly the replies were justified.

[11] It appears from the papers that a report was first compiled in 2017. For reasons which will become apparent Applicants were not consulted when the report was

compiled by Fourth Respondent. That thereafter there had been discussions between Applicants and Second Respondent and that on the 20 January 2020 both Applicants were suspended. By then they had not seen a report and the sixty day period within which they had to be charged in terms of section 2.7.2(c) of the Disciplinary Code had expired but they were not allowed to return to work. It was extended for a further period of sixty days and they were charged criminally on 30 November 2021.

[12] On behalf of Fourth Respondent it was contended that various documents were required and they could not be obtained from the Office of the Premier and it is set out at length what process was followed to attempt to find these documents. It is not necessary to refer to all of this as it is not relevant to the issue which has to be decided herein. It does however explain that First Applicant was hostile towards the representatives of Fourth Respondent and therefore the interviews did not continue and further that as it was a whistle blowers who reported the matter and who feared for their safety it was decided not to further interview Applicants but it was suggested that a disciplinary hearing be held where Applicants could test the evidence which was to be presented. It sets out in the affidavit that as appears from the report there was extensive contraventions of the Public Forensic Management Act. The penultimate report was handed to the personal assistant of the Deputy Director General of the Department on 18 April 2017.

[13] Second Respondent in her answering affidavit refers to the fact that Applicants were charged with the contravention of various requirements of the Public Finance Management Act as well as the Supply Chain Management Regulations. Further that criminal charges were laid against Appellants and that they are out on bail. The criminal trial has not yet been finalised.

[14] It is contended that it was a precautionary suspension and it was challenged before a Commissioner at the General Public Service Centre Bargaining Council. The

first hearing was on 7 September 2020 where First Applicant testified, was cross-examined and the matter then adjourned. This matter is still pending and has not been withdrawn by Applicants. The relief which Applicants are seeking now are the same as that which is sought in those proceedings. It is submitted that Applicants cannot abandon the course of action that they decided on then merely decide on a different course of action.

[15] It is further submitted that the decision to suspend Applicants and prosecute them at a disciplinary hearing was not administrative action. If it was an unfair labour practice they should have proceeded in terms of the Labour Relations Act.

[16] Applicants were placed on precautionary suspension which Second Respondent was entitled to do. In respect of the extension letter it is submitted that the covid-19 epidemic affected everyone at the time and there were different lock-downs from 27 March 2020. It is further submitted that the Public Service Act applies and it excluded Saturdays, Sundays and public holidays. The sixty day period would have lapsed on 16 April 2020. It was only during lock-down level 2 that the public service sector returned to work on 18 August 2020 and that period should therefore be regarded as dies non. The sixty day period, as appears in clause 2.7 of Resolution 1 of 2003 was therefore interrupted between 27 March 2020 and 18 August 2020. If it is calculated in that manner the sixty day period would only have ended on 5 September 2020. On 6 August 2020 the disciplinary hearing against Applicants commenced. She only received the report on 16 August 2018 and requested a meeting with the Premier at the time. The Premier at the time required a full investigation report into how the draft report was leaked to the press. She then had to wait for the investigation before she could act on the recommendations of the forensic investigation report. During December 2019 opinion from council was received that the disciplinary proceedings could be instituted against Applicants. As they were on leave they were placed on precautionary suspension on their return to work during January 2020. It is submitted that there is no obligation on an employer to given an employee an opportunity to make

representations prior to a precautionary suspension. Applicants should have challenged their suspension if they so wished within the provisions of the Labour Relations Act. The Chairperson of the disciplinary hearing acted within his rights to extend the suspension period. The subsequent Chairperson also on various occasions extended the suspension period.

[17] Although there was no relief sought against Third and Fifth Respondent an affidavit was filed on their behalf by one Ndumiso Artwil Mkhomu who stated in the affidavit that Applicant sought to impune and taint the role of the internal audit section headed by one Mataung. There had previously been an application and they are relying on the same allegations in this application. He confirms that Fourth Respondent was procured to do a forensic investigation and that once completed it would be handed to the Hawks. It sets out that when the executive summary of the report was delivered it was done in the presentation of the said Mataung and was handed to the South African Police Services.

[18] In the replying affidavit of Applicants they admit that the arbitration hearing was adjourned in 2020 and that it has not yet again been set down even though First Applicant did testify therein. They contend that in the arbitration the relief sought is an unfair labour practice due to their suspension and what they now seek is that the decision to suspend them be set aside. They persist that they do not have to proceed in the Labour Court. The replying affidavit of Applicants are very lengthy namely 93 pages and deals once again with each of the averments which were made in the answering affidavit and it is not necessary to deal with all these averments again.

[19] The issues to be decided are whether the suspension of First and Second Applicants can be set aside because the *audi alterem partem* principle had not been applied before they were suspended. Secondly whether the disciplinary proceedings had to be brought within a period of sixty days. They also seek to set aside the adverse

finding which appear in the forensic report as the *audi alterem partem* principle was not adhered to. The decision to accept the findings in the report had to therefore be set aside.

[20] It therefore is apparent that the main complaint by Applicants is that the *audi alterim partem* principle was not applied in their case. They were suspended without having been given a hearing and secondly that the forensic report was also brought out without having given them an opportunity to be heard. Therefore they expressed the view that the report contains allegations which are adverse to them and that it is as a result thereof was flawed and therefore their suspension and the institution of disciplinary proceedings and criminal proceedings are also flawed.

[21] First and Second Respondents contends that *lis pen dens* applies as Applicants sought to have their suspension set aside in the General Public Sector Bargaining Council which is still pending. Further that an application to quash the charges in the disciplinary hearing is pending in the Labour Court. The further relief sought is to have their suspension set aside in the Bargaining Council is the same relief which is being sought in this application.

[22] The disciplinary hearing is not administrative action and accordingly PAJA does not apply. It is further submitted that the sixty day period only came into operation again on 18 August 2020 after the government departments returned to work under level 2. It is accordingly submitted that the period from 27 March 2020 to 18 August 2020 shall be treated as dies non. Further that the suspension was precautionary and that any prejudice which Applicants may suffer, could be addressed at the disciplinary hearing. Criminal proceedings have been laid, commenced and Applicants are on bail and accordingly in that forum these issues can also be addressed. It was further submitted that if it is a precautionary suspension then it is not necessary to first obtain submissions in that regard from Applicants as it is pending investigation. In Long v

South African Breweries (Pty) Ltd & Others (2019) 6 BLLR 515 (CC). The labour court held that there is no requirement that an employee be given an opportunity to make representations where a suspension is precautionary. It was held by the Constitutional Court at para 24 that an employer is not required to given an employee an opportunity to make representations prior to a precautionary suspension.

[23] On behalf of Third and Fifth Respondents it was submitted that it should have been under the MEC for Finance which is Third Respondent. The head of the internal audit unit had nothing to do with the report of Fourth Respondent. The reply of Gugu Kheswa should be disregarded and that the Plascon-Evans principle should be applied.

[24] Fourth Respondent is the party who complied the report on the instructions of the department and it is a forensic report and is not a decision as defined in PAJA as no administrative action was taken. No decision to suspend was made by Fourth Respondent. The investigative process does not constitute administrative action. In Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC) it was held at paragraph 64 when the conduct of the State as employer had no direct consequences for other citizens, it did not amount to administrative action.

[25] Further that in the reply Applicants set out various vexatious, irrelevant and unfair matter and that the application by Fourth Respondent to have it struck out has not been opposed and that it should accordingly be granted.

[26] In Caesarstone SDot-Yam Ltd. v World of Marble and Granite 2000 CC& Others 2013 (6) SA 499 SCA it was held in paragraph 2:

> "As it name indicates, a plea of lis alibi pen dens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The

> policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may have reached differing conclusions. It is a plea that has been recognised by our courts for over a hundred years."

The issues in the Bargaining Council and Labour court are the same as that in this application. The matters in the Bargaining Council and Labour court are still pending as they have either not been finalised or withdrawn. This Applicants admit but they contend that it is different because there is a suspension there that they are opposing where in this matter the report on which the decision to suspend was made is challenged. In my view it is the same relief which is being sought in the present matter as that which is being sought in the Bargaining Council and that this in actual fact is admitted by Applicants. There is accordingly the same lis still pending in other forums.

[27] The application to quash the charges in the disciplinary hearing is before the Labour Court and to have the suspension uplifted. This is the right forum and should have been pursued in that court. There is therefore the same lis pending and no basis for this Court to deal with the issues in paragraphs (a) and (b) of the Notice of Motion.

[28] Fourth Respondent was contracted by the department to conduct an investigation. As set out above it is alleged that there was no cooperation from Applicants and further that the report was then handed over to the department and that they then made the further decisions. The report was not a decision in terms of PAJA and was not administrative action. It was a contract to investigate and report which was handed over to First to Third Respondents and the decision to suspend was then made by them. The decision to suspend was not made by Fourth Respondent.

[29] In the said report by Fourth Respondent it refers to various irregularities which it sets out are serious and which need to be addressed. In Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC) at para 38 it was held:

> "Detecting a reasonable possibility of a fraudulent misrepresentation of facts as in this case, could hardly be said to constitute an administrative action. It is what the organ of state decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect."

Accordingly as already stated Fourth Respondent was contracted to compile the report and by compiling the report, making findings therein was not administrative action but it could be that administrative action was taken by the parties who made the decision.

[30] There is accordingly no basis to review and set aside the findings in the report of Fourth Respondent. The relief in paragraph (c) of the Notice of Motion can therefore not be amended.

[31] As set out above this matter was to be decided on the papers The decision of Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 93) SA 623 AD at 634 E to 635 C is therefore applicable. This principle is so trite that it is not necessary to repeat it.

[32] In the present case there was a decision after the report had been obtained that Applicants be charged disciplinary. This process commenced and was adjourned on various occasions. Applicants make much of the fact that according to them it did not

commence within the sixty day period which is required in terms of the Disciplinary Code.

[33] I am in agreement with the submission made on behalf of Fourth Respondent that the cases to which Applicants have referred as support for the view that it falls under PAJA does not assist Applicants and are distinguishable. If it is not reviewable in terms of PAJA it can be considered if it is a legality review. However in my view what remains is that the report which was compiled by Fourth Respondent does not constitute administrative action as it was a report complied for the department as an investigation and therefore did not constitute administrative action.

[34] As is common cause Applicants have been charged disciplinary and criminal charges have also been laid against them. They have appeared in court and have been released on bail. Both these avenues have not yet been finalised and accordingly Applicants would have an opportunity in both these proceedings to present their case and to set out what they suggest is inappropriate or incorrect findings. These hearings will be based on the findings which are contained in the report of Fourth Respondent and Applicants would be given a full opportunity at both these hearings to dispute these findings and to disprove them if they so wish.

[35] In summary therefore according to what has been set out above and having regard to the case law the relief which is sought in paragraph (a) and (b) of the notice of motion are lis pen dens in that there are proceedings before other institutions. Further that the fact that the period was extended was bought about by the state of disaster and in my view that indeed, although it may not be correctly terms dies non, was indeed a period within which the courts did not function properly due to the state of disaster and therefore did not prejudice Applicants.

[36] The findings and remarks etc. which are contained in the forensic report by the Fourth Respondent is not reviewable in terms of PAJA as set above and further it is not prejudicial to Applicants as they have full opportunity in the disciplinary hearing and in the criminal proceedings to challenge any of the findings which are contained therein which was done on contract to the department.

[37] The decision to accept the adverse findings in the report cannot be reviewed and set aside as Respondents instituted disciplinary proceedings resulting therefrom and reported it to the South African Police Services. They were entitled to accept the report and the findings therein and Applicants, as I have already set out above, will have the right to challenge what is contained in the report in the two hearings which they are involved in at present. Whether the report is prejudicial to them is a fact which will be determined at both the disciplinary hearing and the criminal trial. There is no basis at this stage to find that it is prejudicial and that it must be set aside.

[38] The further issue that arises is the application to strike out which was brought by Fourth Respondent. It sets out in the notice of motion of Fourth Respondent's application to strike out that various words and sentences etc. must be struck out as set out in the notice of motion and it refers to various such words and sentences findings etc. which span approximately 45 pages. It is therefore inappropriate to deal with them at this stage. All these issues which Fourth Respondent requires to be struck out appears to originate from the replying affidavit of Applicants. Applicants have not filed any opposing affidavit to this application which was served on them on 12 October 2022 and it is therefore unopposed. It is dealt with in the heads of argument of Fourth Respondent and it is submitted that it is replete with scandalous, vexatious and irrelevant statements. These were all raised for the first time in reply and that accordingly it needs to be dismissed.

[39] It was conceded by Applicants that they did not file any heads of argument or any affidavit with regard to the application to strike out. It was submitted by them that they could respond to the allegations of Fourth Respondent. It was submitted that the report is compromised and that there is no prejudice to Fourth Respondent as no new matter is raised and arises mainly from the affidavit. There is no new matter that was raised in reply.

[40] Without any affidavit from Applicants thereto and also not having filed a notice to oppose it nor any heads of argument it is difficult to determine from the submissions which were made without any reference to any documentation on what basis Applicants were opposing the said relief. It would therefore appear to me that Fourth Respondent in the circumstances had made out a case for the relief as set out in the notice of motion of Fourth Respondent in terms of Rule 6(15).

[41] The relief which Applicants have sought as set out above has not been shown to be issues which firstly fall under PAJA but the report could not be reviewed, that the matter was lis pen dens and also that a lot of the matter had to be struck out. Although no relief was sought against Third and Fifth Respondents, Applicants saw it fit to join them in these proceedings and accordingly I can see no reason why in these circumstances the issue of costs should not follow the result.

The following order is made:

1. The application by Applicants is therefore dismissed with costs such costs to include the costs of senior counsel where so employed.
2. An order is granted in terms of the Notice of Motion of Fourth Respondent's Application in terms of Rule 6 (15) and Applicants are jointly and severally ordered to pay Fourth Respondent's costs.

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P C BEZUIDENHOUT J.

JUDGMENT RESERVED:	**4 NOVEMBER 2022**
JUDGMENT HANDED DOWN:	**10 MARCH 2023**
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