

SOUTH AFRICA / JUDGMENT

Mbana and Others v Minister For Higher Education and Training and Others (3359/2014) [2015] ZAECPEHC 27 (16 April 2015)

[2015] ZAECPEHC 27**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

J M Roberson

CASE / FILE NUMBER

3359/2014

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****EASTERN****CAPE LOCAL DIVISION, PORT ELIZABETH****CASE****NO 3359/2014****DATE****HEARD: 05/02/2015****DATE****DELIVERED: 16/04/2015****In****the matter between****JUSTICE****JAMANGILE****MBANA.....1ST****APPLICANT****RIDWAAN****MOEGAMAT****ABDULLAH.....2ND****APPLICANT****FREDERICK****PAUL****DENNIS.....3RD****APPLICANT****and**

THE
MINISTER FOR HIGHER EDUCATION
AND
TRAINING.....1ST
RESPONDENT

THE
DIRECTOR-GENERAL OF THE DEPARTMENT
OF
HIGHER EDUCATION AND
TRAINING.....2ND
RESPONDENT

DIRECTOR: LABOUR RELATIONS, THE
DEPARTMENT
OF HIGHER EDUCATION AND
TRAINING.....3RD
RESPONDENT
CHIEF
DIRECTOR: FINANCIAL PLANNING
AND
CO-OPERATION, DEPARTMENT
OF
HIGHER EDUCATION AND
TRAINING.....4TH
RESPONDENT
THE
NATIONAL EDUCATION HEALTH AND
ALLIED
WORKERS
UNION.....5TH
RESPONDENT
DELOITTE
& TOUCHE
LTD.....6TH
RESPONDENT
THE
EASTCAPE MIDLANDS
COLLEGE.....7TH
RESPONDENT

JUDGMENT

ROBERSON J:-

[1] In this application the applicants seek the following order:

“1. Reviewing and setting aside the decision by the first respondent, alternatively the second respondent, to:

1.1 Appoint an investigation into the affairs of the seventh respondent;

1.2 Appoint the sixth respondent as the investigator;

1.3 Suspend the first applicant on 4 August 2014 from his position as the principal of the seventh respondent;

2. Declaring any report made by the sixth respondent pursuant to its appointment as investigator to be unlawful and invalid;

3. That the first to fifth respondents pay the costs of this application jointly and severally the one paying the others to be absolved and that, in respect of the third and fourth respondents, such costs to be costs de bonis propriis.[1]

[2] The decisions are sought to be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on the basis that they constitute unlawful administrative action.

[3] The application was opposed by the first to fourth respondents.

[4] The first applicant (Mbana) is the principal of the seventh respondent (the college), a public college established by the first

respondent (the Minister) in terms of s 3 (1) of the Continuing Education and Training Act 16 of 2006 (the CET Act). On 4

August 2014 Mbana was suspended by the Minister. The second applicant (Abdullah) is employed at the college as its senior

resources manager. The third applicant (Dennis) is employed at the college as its supply chain manager.

[5] The first, second, third and fourth respondents' titles speak for themselves. The fifth respondent (NEHAWU) is a trade union, some of whose members are employed at the college. The sixth respondent (Deloitte) is a company which was appointed by the second respondent (the DG) to conduct an investigation into the affairs of the college with reference to specific alleged irregularities contained in a report of one Griesel, who was appointed by the DG as the support chief financial officer to the college.

[6] It is useful at the outset to set out the legislative framework within which the college operates. S 3 (2) of the CET Act provides that every public college is a juristic person. S 9 (1) provides that every public college must establish a council, an academic board and a student representative council. S 10 provides that the council must perform the functions which are

necessary to govern the public college. S 13 provides that the principal of a public college is responsible for its management and administration. S 20 provides that the Minister appoints the principal and the vice-principal of the public college in terms of the Public Service Act. Other staff appointments are made by the council.

[7] The CET Act provides for the involvement of the Minister in certain matters pertaining to a public college. S 22 provides that the Minister must fund public colleges and may impose conditions in respect of the allocation of funding. S 23 provides that the Minister must determine norms and standards for the provision of funding. S 25 provides that a council must, in the manner determined by the Minister, keep records of its proceedings, keep complete accounting records, and implement internal audit and risk management systems which are not inferior to the standards contained in the Public Finance Management Act 1 of 1999 (the PFMA). S 25 also provides that the council must annually provide the Minister with a report on the overall management and governance of the college, and an audited statement of income and expenditure.

[8] Most important, as far as the present application is concerned, is s 46 of the CET Act, which provides as follows:

“46 Investigation at public college, and appointment of administrator

(1) The Minister may appoint a person to conduct an investigation at a public college if the council of the college requests the appointment of such a person or if-

(a) circumstances arise at the college that-

(i) involve financial or other maladministration of a serious nature; or

(ii) seriously undermine the effective functioning of the college; and

(b) the council of the college has failed to resolve such circumstances; and

(c) the appointment is in the interests of continuing education and training in an open and democratic society.

(2) The person appointed in terms of subsection (1) must, in terms of the terms of reference specified by the Minister-

(a) within 30 days of his or her appointment, conduct an investigation at the public college in question; and

(b) within 60 days after his or her appointment-

- (i) report in writing to the Minister the findings of his or her investigation; and
- (ii) suggest appropriate measures to resolve the matter.
- (3) The Minister must as soon as practicable furnish a copy of the report referred to in subsection (2) to the council concerned.
- (4) If an audit of the financial records of a public college, or an investigation by the person as contemplated in subsection (1), reveals financial or other maladministration of a serious nature at a public college or the serious undermining of the effective functioning of a public college, the Minister may, after consultation with the council of the public college concerned, if practicable, and despite any other provision of this Act, appoint a person as administrator to take over the authority of the council or the management of the college and such person may perform all the functions relating to governance or management on behalf of the college for a period determined by the Minister, which period may not exceed two years.
- (5) The Minister may extend the period referred to in subsection (4) once for a further period not exceeding six months.
- (6) If an administrator is appointed in terms of subsection (4), the council is deemed to have resigned and the administrator must-
 - (a) take over the authority of the council;
 - (b) perform the council's functions relating to governance; and
 - (c) ensure that a new council is constituted.”
- [9] I should also say at the outset that it is common cause that Deloitte were not appointed in terms of s 46 (1) of the CET Act.

According to the respondents, the decision to appoint Deloitte was taken in terms of the DG's general oversight powers as

accounting officer of the Department of Higher Education and Training (the Department), as provided for in Treasury Regulation 8.4.1 issued in terms of s 76 of the PFMA, which reads as follows:

“8.4 Transfers and subsidies (excluding Division of Revenue grants and other allocations to municipalities) [Section 38(1)(j) of the PFMA] 8.4.1 An accounting officer must maintain appropriate measures to ensure that transfers and subsidies to entities are applied for their intended purposes. Such measures may include –

- (a) regular reporting procedures;
- (b) internal and external audit requirements and, where appropriate, submission of audited statements;

- (c) regular monitoring procedures;
- (d) scheduled or unscheduled inspection visits or reviews of performance; and
- (e) any other control measures deemed necessary.”

[101] A public college is not one of the entities to which the PFMA applies, but s 38 (1) (j) of the PFMA provides, under the heading

“General responsibilities of accounting officers”:

“The accounting officer for a department, trading entity or constitutional institution-

before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems.”

[11] It will be noted that regulation 8.4 relates to s 38 (1) (j) and regulates the responsibilities of the accounting officer in relation to that subsection.

[12] Within that broad outline are a number of issues and grounds of opposition which I list and briefly summarise as follows:

[12.1] Locus standi

This ground relates to Abdullah and Dennis, in that they are not employees of the Department and the Minister and the DG have no power to suspend them.

[12.2] Lis alibi pendens

This ground relates to Mbana, in that he has referred his suspension to the Bargaining Council. Mbana has also requested arbitration.

[12.3] Lack of jurisdiction

This ground relates to Mbana, in that the decision to suspend him is a labour matter and this court has no jurisdiction.

[12.4] Suspension not administrative action

This is linked to the jurisdiction ground above. The applicants’ stance is that the suspension and the decision to appoint Deloitte are inextricably linked components of administrative action, and that if the decision to appoint Deloitte was unlawful, so was Mbana’s suspension.

[12.5] Decision to appoint Deloitte is not administrative action

This ground relates to all three applicants. The dispute here is that according to the respondents the decision does not amount to administrative action because it does not adversely affect the rights of the applicants and does not have a direct external legal effect.

[12.6] S 46 (1) of the CET Act is the only empowering provision for the investigation

This is the applicants' stance but the respondents submit that it is not exclusive and that they are entitled to utilise Treasury

Regulation 8.4.1.

[13] The events leading to the decision to appoint Deloitte to conduct an investigation are largely common cause or not in dispute.

Allegations that NEHAWU instigated it were abandoned once the applicants learned via the answering affidavit that the decision was triggered by Griesel's report.

[14] The deponent to the answering affidavit was the fourth respondent, Mr Zirk Joubert (Joubert). He explained that during 2012 the Minister appointed the South African Institute of Chartered Accountants (SAICA) to place chartered accountants as support chief financial officers at all public colleges. The purpose was to ensure that the colleges had access to qualified financial skills, capacity and knowledge. Griesel was appointed to the college on 1 March 2014 and remained there until 8 May 2014.

[15] During this time Griesel furnished SAICA and the Department with a report in which he recorded that he had found evidence to suggest multiple serious irregularities in the financial governance of the college and was of the view that a forensic investigation should be conducted. Griesel's report was annexed to Joubert's affidavit. It is quite long but it is not necessary for me to go into all its contents. It is sufficient to mention that it contained allegations of suspected irregularities relating to procurement committed by Mbana and Abdullah and recommended their suspension, as well as the suspension of individuals in the procurement department who were involved. Dennis was mentioned as one of a core of staff members working with Abdullah who allegedly was obstructive in relation to human resources and procurement matters. The report also dealt with human resources issues, such as allegations of nepotism, irregular appointments, promotions and salary adjustments. Dennis' appointment was one of those alleged to be irregular. A forensic investigation was recommended in relation to the human resources matters.

[16] Joubert received Griesel's report on 6 May 2014. After analysing the report he discussed it with the DG. The DG was of the view that a general investigation with reference to specific transactions mentioned in the report should be conducted and asked Joubert to identify consultants to conduct the investigation. After following the Department's procurement procedure Joubert recommended that Deloitte be appointed. The DG approved this recommendation and Deloitte were appointed. The references to Griesel, his report and the ultimate decision of the DG were contained in Joubert's affidavit under the general heading:

“An overview of the circumstances that led to the Department appointing the sixth respondent (Deloitte) to conduct an investigation broadly into the affairs of the college and the steps taken by the Department consequent upon receipt of the preliminary report made by Deloitte to the Department”.

- [17] On 29 May 2014 a meeting was held at the college which was attended by Joubert, the DG, the applicants, council members, union members, and members of the Deloitte investigation team. The purpose of the meeting was to discuss “challenges” at the college and to introduce the Deloitte team. Joubert explained to the meeting that the Department had appointed Deloitte and that the investigation would consist of two phases. The first stage would take two weeks during which the Deloitte team would investigate possible irregularities identified. The second phase would be based on the outcome of the first phase. The authority in terms of which the decision was made to conduct an investigation was not disclosed at the meeting.
- [18] According to the applicants, they accepted at this time that the investigation was lawful. Mbana requested the terms of reference of the investigation from Joubert, who informed him that because the investigation was a Departmental decision the terms of reference would not be shared. Thereafter the applicants requested the terms of reference of the investigation from both Deloitte and the Department, only to be met with the same response. One of the requests was from Dennis after the investigators had conducted a credit check on him.
- [19] During the first phase of the investigation members of the Deloitte team produced affidavits from staff members at the college to the effect that Mbana was intimidating them and had instructed them not to co-operate with the investigation. The gist of these affidavits, deposed to during June 2014 and which were included in the record of decision pertaining to Mbana’s suspension, was that if they co-operated with the investigation their jobs would be in jeopardy. These complaints were brought to the attention of the Department’s labour relations unit, and the third respondent Mr John Slater (Slater) prepared a submission to the DG and the Minister that Mbana be placed on precautionary suspension pending the outcome of the investigation and to allow the investigation to continue without interference by Mbana.
- [20] The DG addressed the following memorandum dated 14 July 2014 to the Minister:

*“INTENTION TO SUSPEND: Mr JJ MBANA – THE PRINCIPAL OF EASTCAPE MIDLANDS COLLEGE
TECHNICAL AND VOCATIONAL EDUCATION AND TRAINING*

AIM

1. To request the Minister to:
 - 1.1 note the concerns raised by the Deloitte forensic investigation team and affidavits from Eastcape Midlands Technical and Vocational Education and Training (EMC TVET College) concerned staff (Annexure A); and

1.2 sign a letter of intention to suspend Mr JJ Mbana, the Principal of EMC and request him to provide reasons why the Minister should not suspend him whilst the forensic investigation is being conducted.

BACKGROUND

2. On 3 June 2014, the Department of Higher Education and Training (DHET) appointed Deloitte (an audit firm) to conduct a forensic investigation into various allegations of maladministration, corruption and nepotism at EMC TVET College.
3. The purpose of the forensic investigation is to determine whether the relevant legislation, policies, procedures, guidelines and directives relating to the aforementioned concerns were followed and applied correctly.

DISCUSSION

4. The first phase of the investigation is scoped to focus on the following areas of concern as raised by the South African Institute

of Chartered Accountant (SAICA) Support Chief Financial Officer (SCFO) as well as the respective Unions:

4.1 Nepotism relating to the irregular appointment of staff. It is alleged that Mr R Abdullah, the former SAICA appointee to EMC as the Chief Financial Officer (CFO), facilitated the appointments of “his friends” into various positions at the College without due processes being followed. Mr Abdullah is currently the Senior Human Resource Manager at EMC, a position which does not exist on any organogram of any College.

4.2 The inconsistent and apparent lack of transparency relating to employees salary grading, payments as well as alleged irregular staff salary deductions:

4.2.1 Union subscriptions fees and ongoing deductions of R500.00 from staff salaries which was supposed to be a once off tax deduction during February 2014 when staff received salary back payments; and

4.2.2 Unemployment Insurance Funds (UIF) contributions which were apparently deducted and not paid to the UIF.

4.3 The deliberate or intentional destruction of documentation and information by Mr Abdullah to obstruct investigation into allegations

of corruption against Mr JJ Mbana and himself amongst others.

4.4 The rationale relating the College financial investment in Dwayne Poultry Farm (DPF) and whether the College received value for money from this investment.

5. Mr Salie, the Risk Manger from Deloitte, reported that, Deloitte forensic team received affidavits from staff at the College alleging that Mr Mbana instructed them not to co-operate with the investigation and threatened them with dismissal or not to renew

their employment contracts if they co-operate with the forensic investigation team at the College. The concerned staff requested to remain anonymous due to fear of victimisation by the Principal and his management team.

6. The allegations levelled against Mr Mbana are of a serious nature and warrant that he be placed on suspension in order for him not to interfere or jeopardise the forensic investigations. The proposal to suspend the Principal was also supported by the Chief Directorate: Legal and Legislative Services.
7. As the suspension of an employee constitutes an administrative action, it is required that the employee concerned be given an

opportunity to respond to the intention of suspension before the actual decision to suspend is taken by the Minister as the employer.

The Disciplinary Code and Procedure for Senior Management Service requires an investigation into the misconduct before the charges are finalised.

FINANCIAL IMPLICATIONS

8. The cost relating to the forensic investigation will be borne by the Department.

LEGAL IMPLICATIONS

9. None.

COMMUNICATION IMPLICATIONS

10. A letter will be addressed to Mr JJ Mbana advising him of the Minister's intention to suspend him.

RECOMMENDATION

11. It is recommended that the Minister:

11.1 notes the concerns raised by Deloitte forensic investigation team and affidavits from Eastcape Midlands concerned staff; and

11.2 signs the notice of intention to suspend Mr JJ Mbana."

- [21] Following this memorandum, the Minister sent the following notice of intention to suspend to Mbana:

"NOTICE OF INTENTION TO SUSPEND – YOURSELF

This correspondence serves to inform you of my intention to suspend you from duty whilst the allegations of serious misconduct levelled

against you are being investigated in accordance with the disciplinary code and procedures applicable to members of the Senior

Management Service.

It is alleged that you instructed Eastcape Midlands Technical and Vocational Education and Training College staff not to co-operate

with the forensic investigation and threatened them with dismissal or not to renew their employment contracts if they co-operate with the investigation. The concerned staff are unable to co-operate with the forensic investigators due to these acts of intimidation and fear of possible victimisation.

You are hereby given five (5) working days from the date of receipt of this letter to provide written reasons why I should not place you on precautionary suspension. You can advance your reasons to me through Mr JF Slater , the Director: Labour Relations via fax: 086 714 8326 or email: slater.j@dhet.gov.za.

I will consider the reasons provided by you before taking a decision on this matter.”

[22] According to Slater when he delivered the notice of intention to suspend to Mbana, Mbana threatened him. Mbana denied the threat.

[23] Mbana responded in a lengthy letter in which he asked what the allegations of serious misconduct were and denied that he had

intimidated anyone or instructed them not to co-operate with the investigation. He complained about the withholding of the terms of reference of the “Section 46” investigation and requested a copy of the Minister’s decision to appoint an investigator and a copy of the terms of reference.

[24] A further memorandum was addressed by the DG to the Minister, containing a request to suspend Mbana with immediate effect.

This memorandum included a reference to the alleged threat against Slater. It is relevant to quote two of the paragraphs of the memorandum as follows:

“5. The threats to staff and Departmental official by Mr Mbana are of such a serious nature that it warrants an immediate suspension.

It seems that there is a serious lack of discipline with the Principal as the most senior official in the College. It also

seems clear that he wants to manipulate, interfere and/or jeopardise the forensic investigation. The proposal to suspend the Principal was also supported by the Chief Directorate: Legal and Legislative Services.

6. It is therefore recommended that Mr Mbana be suspended from duty based on the allegations of victimization and his threat to the Department official. This will also allow the forensic investigation to be conducted unhindered.”

[25] The Minister thereafter decided to suspend Mbana. The relevant portions of the letter of suspension are as follows:

“SUSPENSION – YOURSELF

I have taken note of your response to my notice of intention to suspend you from duty and having applied my mind to the contents thereof. It is incorrect of you to contend that the alleged misconduct is not identified whereas in the letter of intention to suspend indicates the unacceptable behaviour, i.e. intimidation, threats and possible victimisation of staff in relation to the forensic investigations.

You have failed to refute the possibility that your continued presence in the college will jeopardise the investigation pertaining to your alleged misconduct and I hereby inform you of your immediate suspension from duty based on the under mentioned allegation(s) of serious misconduct against you.

The firm appointed to do the forensic investigation provided evidence that you intimidated, threatened or victimised members of the staff working in college. These intimidations, threats or victimisation are of a serious nature and warrants precautionary suspension.

My decision is further justified by your threats against a Senior Official of the Department on 21 July 2014 as he was busy with his official duties in serving you with an official notice of intention to suspend.

I emphasize that this suspension is in effect a necessary measure to ensure that the forensic investigation be completed and further that alleged misconduct against you, that relate to your unacceptable behaviour be fully investigated without you jeopardizing it.”

[26] Deloitte presented the first feedback of phase 1 of the investigation and according to Joubert the contents warranted further

investigation into the affairs of the college and the conduct of Mbana. Phase 2 was approved by the DG on 13 August 2014.

[27] Concerned at the lack of terms of reference of the investigation, the applicants sought legal advice. Their attorney wrote to the Minister on 19 September 2013, pointing out that an investigation into the affairs of the college was only permissible in terms of s 46

- (1) of the CET Act and that no terms of reference had been provided. A request was made for a copy of the Minister's decision to appoint an investigator in terms of s 46 (1), the date on which the decision was made, and the terms of reference for the investigation. Before a response was received, Joubert sent an e-mail to Mbana saying:

"Please note that the investigation is initiated by the Director-General as Accounting Officer in terms of the PFMA and not a section 46 investigation as contemplated in the FET Colleges Act[2]. The TOR of the investigation therefore reside with the DHET and will unfortunately not be shared. I would therefore appreciate your assistance in meeting with the forensic team in order to conclude on the investigation."

- [28] The applicants' attorney wrote to the Minister asking him for his comments on this e-mail and on a letter the attorney wrote to the DG. In this letter the attorney pointed out that the PFMA did not apply and that neither the college nor the senior managers fell within its ambit. The investigation was therefore unlawful. The DG's contrary view was invited.

- [29] Joubert responded to this letter and said the following:

"Kindly note that the Director-General as the Accounting Officer of the Department of Higher Education and Training has initiated the investigation at Eastcape Midlands Technical and Vocational Education and Training College in terms of Section 38 (1) (j) of the Public Finance Management Act, (find the attached copy of the written assurance by your client in this regard)."

This written assurance was provided by Mbana as required by s 38 (1) (j) of the PFMA (see para [10] above). He confirmed that the college implemented effective, efficient and transparent financial management and internal control systems.

- [30] Mbana stated that once he, Abdullah and Dennis learned that the investigation was unlawful, they declined to co-operate with the investigation. He stated that his suspension arose directly from the investigation, and that Abdullah and Dennis had been threatened with suspension.

- [31] In dealing with the empowering authority to appoint Deloitte, Joubert said that the Labour Relations Act 66 of 1995 required employers to investigate alleged misconduct and that the Minister is entitled to conduct a pre-hearing investigation during which phase the alleged misconduct is investigated in order to decide whether or not disciplinary action is justified. The Minister as employer, so Joubert stated, is free to appoint an external person or agency, such as Deloitte, to conduct such pre-hearing investigation. According to Joubert this is what happened with regard to the allegations of misconduct against Mbana. He repeated this assertion more than once, saying the following:

"The appointment of Deloitte as an external investigator by the Department is, I submit, with respect, no more than an employer

exercising his/her/its rights over an employee where information comes to hand upon which an employer decides to act by investigating

those allegations further.”

[32] Joubert maintained that Mbana’s suspension was not a consequence of the investigation but resulted from his interference

with the members of the investigating team and particularly from his intimidation of staff members and instructions to them not to co-operate.

[33] With regard to the failure to provide terms of reference of the investigation Joubert said:

“To the extent that the investigation was initially a broad based investigation during the course of such investigations it came to the Department’s attention that there was prima facie evidence to suggest that the first applicant as the principal of the college was party to questionable transactions and certain irregularities pertaining to the financial affairs of the college.

To this end whilst it is so that in the context of a so-called “Section 46 Enquiry” there generally would be terms of reference but where an investigation is established at the instance of either the Director-General or the Minister there is no obligation to communicate the “terms of reference” to the first applicant.”

[34] With regard to the purported reliance on the provisions of the PFMA contained in correspondence, Joubert said the following:

“To the extent that I have made reference to the provisions of the PFMA in correspondence addressed to the first respondent and his attorney I have been advised that my reference to the PFMA is of no moment as the Department through the office of the Minister can mero motu take steps to have the affairs of a public college investigated in circumstances where information is placed before the Minister to cause him concern.”

Insofar as I made reference to the provisions of the PFMA I did so on the basis that the Department has an overall financial interest in the affairs of public colleges, such as the seventh respondent.

As indicated above, the report of Mr Griesel formed the basis of the investigation. My reference to the PFMA is based on the fact that the college has to ensure that it implements effective, efficient and transparent financial management and internal control systems in order for the Department to transfer the subsidy to it. In fact, the first applicant signed and gave assurances to the Director-General that the college is implementing such financial management and internal systems. As proof thereof, I attach hereto a copy of such assurances by the first applicant and signed on 12 February 2014 as annexure “ZJ2”.

Further based on the contents of Mr Griesel’s report, there was concern that transparent financial management and internal control systems were not in place at the college, hence my reference to section 38

(1) (j) of the PFMA.”

[35] Joubert said further that:

“ It appears that the applicants have conflated what they believe could be the only basis upon which the Department, as represented by the Minister and the Director-General, could institute an investigation into the affairs of the college being the provisions of section 46 of FETCA, as opposed to the Department’s position as employer of the first applicant, who is responsible, as its financial and accounting officer, for the financial affairs of the college.”

And further still:

“ there are no legal prescripts that bar the Minister and/or the Director-General, to investigate the financial affairs of the college

where such financial affairs has a bearing on the discharge of the duties and functions of the principal of the college.”

[36] On 13 November 2014 Goosen J, following an urgent application, granted an order interdicting the release of Deloitte’s report, the holding of disciplinary proceedings against Mbana, and other relief. The costs of the urgent application were reserved for determination by the court hearing the main application.

[37] I deal now with the various grounds of opposition

[38] Locus standi

The applicants relied on ss 38 (a) and (d) of the Constitution. These provide:

“Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are –

- (a) anyone acting in their own interest;
- (b)
- (c)
- (d) anyone acting in the public interest; and
- (e)

[39] In *Giant Concerts v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at para [41] Cameron J said the following with regard to own-interest standing (footnotes omitted):

“These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

1. To establish own-interest standing under the Constitution a litigant need not show the same “sufficient, personal and direct interest” that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.
2. This requirement must be generously and broadly interpreted to accord with constitutional goals.
3. The interest must, however, be real and not hypothetical or academic.
4. Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.
5. Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.
6. Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.”

[40] In my view Abdullah and Dennis established sufficiently their standing in terms of s 38 (a). Griesel’s report, which triggered the investigation, contained allegations against both of them and specifically recommended Abdullah’s suspension.

Even though they were not employed by the Department, a report by Deloitte’s implicating them could well have contained a recommendation

to the college’s council that they be suspended or even charged. This is a sufficient potential direct effect of the

constitutional infringement alleged. It is not academic. As it happened they were threatened with suspension and a credit check was conducted on Dennis (these allegations were not denied). Suspension would impact on their employment status and their reputations both within and outside the college.

It is not necessary to deal with standing in terms of s 38 (d).

[41] *Lis alibi pendens*

The respondents’ argument here was that the cause of action, namely suspension, was the same in this court as it is in the Bargaining Council. While in each case Mbana is challenging his suspension, he is doing so on different grounds. In this application he is alleging that his suspension was unlawful administrative action and that it should be reviewed and set aside.

In the Bargaining Council he sought conciliation and has also requested arbitration, on the basis that his suspension was unfair,

as contemplated in the Labour Relations Act. This court and the Bargaining Council are different fora with different powers.

[42] In *Nestle (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) the defence was unsuccessfully raised. The two fora concerned were the Advertising Standards Authority and the Registrar of Trademarks. Nugent AJA (as he then was) stated the following at para [16] and [17]:

“[16] The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally.

[17] There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. In my view, none of those elements is present in this case. Indeed, it is difficult to see how they can exist where the matters in issue have been placed before two quite different tribunals (as in this case), the one operating consensually and the other by force of statute, each having its own peculiar functions, powers and authority. For in such a case each tribunal will, by definition, be inquiring into a ruling upon different matters, and neither will be capable of ruling authoritatively on the issue that falls within the competence of the other.”

[43] The Bargaining Council does not have the power to review and set aside unlawful administrative action. (See *Department of Justice v CCMA and Others* [2004] 4 BLLR 297 (LAC) at para [97].)

[44] It follows that the defence of lis alibi pendens cannot succeed.

[45] Jurisdiction

The respondents contended that the issue of the suspension of Mbana fell within the jurisdiction of the Bargaining Council or the Labour Court. It was submitted on behalf of the applicants that the suspension, as pleaded, was unlawful administrative action, in that it was inextricably linked to and was a consequence of the unlawful decision to appoint Deloitte. This court has jurisdiction to entertain the issue of Mbana’s suspension, as pleaded. (See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para [71].)

[46] Was the suspension administrative action?

The question to be answered here is was the decision to suspend Mbana inextricably linked to the decision to appoint Deloitte to conduct an investigation? Was the position that if the decision was unlawful it followed that the suspension was unlawful? It was submitted on behalf of the applicants that there was a multi-stage process which should be viewed holistically. I was referred to the following passage in the English case of *MacFoy v United Africa Co., Ltd.* [1961] 3 All ER 1969 at 1172I:

“If an act is void, then it is in law a nullity. It is not only bad, it is incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

[47] It was not contended that in isolation the procedure in terms of which Mbana was suspended, was procedurally unfair. Nor was it contended that the Minister was not empowered to invoke the provisions of the disciplinary code and procedures applicable to members of the Senior Management Service or that he failed to follow the correct procedures. The only ground therefore on which the suspension could be reviewed and set aside as unlawful administrative action was if it was founded on and inextricably linked to the alleged unlawful administrative action in the form of the decision to appoint Deloitte.

[48] It is significant that Mbana was not suspended at the start of the investigation in May 2014. It was only after his alleged

intimidation of staff was reported that suspension proceedings were set in motion. While the DG's memoranda to the Minister and the Minister's letters to Mbana contained references to interference with the investigation and the need for the investigation to proceed unimpeded, the focus of the suspension as contained in these documents was intimidation and threats. It was submitted on behalf of the applicants that no unacceptable behaviour would have occurred if there had been no investigation.

I cannot accept that submission as supportive of the applicants' contentions. An unlawful administrative act does not mean that persons subjected to it can freely commit what independently viewed amounts to serious misconduct. In my view the labour relations procedure adopted by the Minister, the timing of the suspension and the reasons for suspension stated in the various documents, indicate that Mbana was not suspended as a result of the investigation but as a result of his alleged misconduct in intimidating and threatening staff members.

[49] There is a link between the suspension and the investigation, in the sense that the alleged intimidation and threats arose during the investigation, and related to the investigation. The alleged misconduct was also discovered during the course of the

investigation. However, it does not appear from Joubert's affidavit that the Deloitte staff members who produced the

affidavits from staff members recommended that Mbana be suspended. The Department's labour relations unit acted on the affidavits and took the matter up with the DG who in turn communicated with the Minister.

[50] I am consequently unable to find that the suspension was but one stage in a multi-stage administrative process and that it was inextricably linked to the investigation. This is not a case where to regard the two decisions as unrelated and independent 'would be to put form above substance' and where there was only one decision to be made. (See *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at paras [137] and [138].) Two separate decisions were made in terms of ostensibly separate enabling powers. It follows that the decision to suspend Mbana is not capable of being reviewed and set aside on the basis on which the applicants rely.

[51] Was the decision to appoint Deloitte to conduct an investigation into the affairs of the college administrative action?

The submission here on behalf of the respondents was that the decision to appoint Deloitte to conduct the investigation did not adversely affect the rights of any of the applicants, and did not have a direct external legal effect. These grounds were taken from the definition of administrative action contained in s 1 of PAJA.

[52] In *JDJ Properties CC and Another v Umgeni Local Municipality and Another* 2013 (2) SA 395 (SCA) these same two elements of the definition of administrative action in the PAJA were in dispute. The appellants had sought to review and set aside the first respondent's decision to approve building plans of a property to be erected in close proximity to the premises on which they conducted their businesses. I quote fairly extensively from the judgment of Plasket AJA from para [13] onwards because it deals with, and refers to authorities dealing with, the interpretation of PAJA within the context of s 33 of the Constitution. Footnotes are omitted.

"[13] In order to interpret the definition of administrative action in the PAJA one must begin with section 33 of the Constitution.

Because the PAJA is intended to give effect to the fundamental right to just administrative action, it must be interpreted consistently

with section 33 and effect must be given to the purpose of section 33, namely, the creation of "a coherent and overarching system for the review of all administrative action". In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* O'Regan J held that because the purpose of the PAJA was to give effect to section 33, "matters relating to the interpretation and application of PAJA will of course be constitutional matters". This means that the PAJA should be interpreted generously and purposively and that austere formalism in its interpretation should be avoided.

[14] In *Sokhela and others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and others* Wallis J summarised the proper approach to be taken when he said:

"In my view, the intention of the Constitution was to draw together the disparate threads of our administrative law, and the circumstances in which the power of judicial review was available, under the umbrella of a single, broad concept of administrative action. In accordance with the generous construction to be afforded constitutionally guaranteed rights, conduct that attracted the power of judicial review under our previous dispensation will ordinarily be regarded as constituting administrative action under the present constitutional dispensation. There will of course be exceptions arising from differences in the structure of government and the status of differing levels of government . . . but, in general, it seems to me that, where the power of judicial review was available under our previous dispensation, the courts will be slow to construe that conduct as falling outside the ambit of administrative action under the Constitution and PAJA."

[15] In *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* Nugent JA made the point that while the precise ambit of administrative action has always been hard to define, "[t]he cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it with a palisade of qualifications". At its core, however, is the "idea of action (a decision) 'of an administrative nature' taken by a public body or functionary". While indications of what is intended may be derived from the qualifications to the definition, the term: ". . . also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s 33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity."

[16] After summarising the import of the more important cases on what constituted administrative action in terms of section 24 of the interim Constitution and section 33 of the final Constitution, he concluded that administrative action is:

". . . in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

[17] Nugent JA approached the interpretation of the two elements of the definition with which this case is concerned – that rights must be adversely affected, and that the action must have a direct, external legal effect – on the basis that in ascribing a meaning to them that is consistent with the way in which section 33 was interpreted their literal meaning could not have been intended:

"For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that

administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

[18] In my view, the approval of the building plans in this case has such an effect. As De Jesus has stated, the consequence will be an increase in traffic using the road where both the second appellant's and first respondent's businesses are located, with an increase in congestion. Because of the small amount of parking authorised by the first respondent, it would inevitably follow that the free parking provided by the second appellant to its customers would be used by customers shopping at the second respondent's development.

[19] It was held by the court below that as the second appellant's and the second respondent's client bases differed, and the latter's client base would be poor people using public transport, these concerns were groundless. I do not agree with this conclusion. The fact that the second respondent's client base will, in the court below's words, mainly comprise of "the rural poor" will mean that transport will be necessary to convey them from their homes to the shopping complex. The vehicles concerned will increase traffic congestion in the area concerned and will need somewhere to park. The second appellant's parking area is nearby and convenient. It is probable that attempts will be made to use it and the appellants will have to take steps to protect their right to reserve the parking for their customers.

[20] The court below categorised these consequences as trivial inconveniences which were insufficiently serious to qualify as an

adverse effect on rights having a direct, external legal effect. In so doing, it approached the issue in a narrow, legalistic manner

rather than purposively and in accordance with the interpretation of these requirements favoured by Nugent JA in *Grey's Marine*. It erred in this respect. In my view, the decision to approve the building plans had the capacity to affect the rights of the appellants and others living and doing business in the area concerned, and would impact directly on them. That being so, all of the elements of administrative action for purposes of the PAJA are present and the decision to approve the building plans is therefore an administrative action."

[53] In *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC) at para [60] Froneman J referred to the *Grey's Marine* judgment[3] stating:

"Fourth, in Grey's Marine it was stated, with reference to the phrase "adversely affect the rights of any person" in section 1 of PAJA, that what "was probably intended [was] rather to convey that administrative action is action that has the capacity to affect legal rights."

(Froneman J's emphasis)

- [54] In my view, if one applies these principles to the present case, the decision to appoint Deloittes to conduct the investigation had the capacity to affect the applicants' rights and would impact directly on them. Griesel's report, which triggered the investigation, implicated all three applicants and the investigation was set in motion for the purpose of investigating the alleged irregularities he mentioned in his report. One does not know the terms of reference of the investigation, but findings and recommendations could have been made which were adverse to the applicants, causing damage to their reputations and affecting their employment status, and which might expose them to disciplinary action or any other type of action. The credit check on Dennis reveals apparently wide powers on the part of the investigators, and had the capacity to impact on his right to privacy. In the absence of terms of reference one does not know who would have access to the Deloittes report when released, but its contents may have been read by any number of persons, including the council of the college.
- [55] It was submitted on behalf of the respondents that the investigation in itself did not affect the applicants' rights and that if, following the Deloittes report, there was a decision taken which affected their rights, they would have the opportunity to seek adequate redress to protect their rights. In my view this submission overlooks the authorities which refer to the capacity of administrative action to affect rights. In *Oosthuizen's Transport and Others v MEC, Road Traffic Matters, Mpumalanga and Others* 2008 (2) SA 570 (TPD) the court was concerned with an investigation conducted at the instance of the MEC in terms of s 50
- (3) (b) of the National Road Traffic Act 93 of 1996 into the activities of the applicants. The report of the investigation team contained a recommendation that the applicants' operator cards be suspended for three months. It was common cause that the applicants had the right to be heard by the MEC before the MEC made a decision consequent on the recommendation. The decision of the investigation team to recommend suspension was held to be administrative action. At para [25] of the judgment Fabricius AJ (as he then was) said:
- "Even a preliminary decision can have serious consequences especially where it lays 'the necessary foundation for a possible decision' which may have grave results."*

- [56] One of the authorities to which Fabricius AJ referred was the English case of *Re Pergamon Press Ltd* [1970] 3 All ER 535 which concerned the procedures in an investigative enquiry conducted by inspectors in terms of the Companies Act. At 539 Lord Denning said:

"It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. . . . They are not even quasi judicial for they decide nothing; they determine nothing. They only investigate and report. They sit in private. . . . But this should not lead us to minimize the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they ruin reputations or careers; their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions. . . . Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly."

[57] I think that this passage is particularly apposite in the present matter, in relation to the capacity of the decision to appoint

Deloitte to affect the rights of the applicants. The conclusions and recommendations resulting from the investigation could lay the foundation for a possible decision “which may have grave results” for the applicants.

[59] In support of their argument, the respondents referred to *Competition Commission of SA v Telkom Ltd and another* [2010] 2 All SA 433 (SCA). In that matter the Competition Commission had referred a complaint against Telkom to the Competition Tribunal in terms of s 50

(2) (a) of the Competition Act 89 1998. At para [10] of the judgment Malan JA said the following:

“Care must be taken here not to conflate two different aspects of the definition of administrative action in PAJA, namely, the requirement

that the decision be one of an administrative nature and the separate requirement that it must have the capacity to affect legal rights. I consider that Telkom has failed to establish both requirements. As to the second of these although the complaint referral indeed affects Telkom in the sense that it may be obliged to give evidence under oath, be subject to a hearing before the Tribunal, and be required to submit its business affairs and documentation to public scrutiny it cannot be said that its rights have been affected or that the action complained of had that capacity.”

[60] In my view the present matter is distinguishable. The referral of a complaint yet to be adjudicated upon by the Competition Tribunal is different from a forensic investigation which may make adverse findings against persons and recommend a course of action by the party which has commissioned the investigation. Such party could well act on such findings and recommendations.

[61] The respondents also referred to *Mzamba Taxi Owners’ Association and Another v Bizana Taxi Association and Others* 2006

(2) SA 155 (SCA). This case involved an agreement voluntarily concluded between two taxi associations in terms of which one association agreed to the use of its taxi rank facility by members of the other association. The agreement had been endorsed by provincial taxi registrars.

This was the administrative action sought to be reviewed. The court agreed with the reasoning of the court a quo when it said that the agreement did not affect the appellants’ (another taxi association and one of its members) rights because the agreement was one between the two associations in terms of which one association shared its half share of a taxi rank with the other association’s

members.

[62] In my view the present matter is distinguishable. It does not involve an agreement between two private parties: it involves a decision by a State official to authorise a forensic investigation.

[63] I therefore find that the decision to appoint Deloitte to conduct an investigation into the affairs of the college amounted to administrative action.

[64] Was this administrative action lawful if the Minister did not act in terms of s 46 (1) of the CET Act and s 38 of the PFMA was not

relied upon?

It bears repeating that the respondents have disavowed authority in terms of the CET Act or the PFMA. However submissions were made which suggested that the respondents were not completely abandoning reliance on the PFMA. Reference was made to the judgment in *Sgananda Consulting (Pty) Ltd v Mnambithi FET College and Others*

[2014] ZAKZPHC 28 (20 May 2014) which concerned an application to set aside the award of a tender by the first respondent, a college for further education. It was submitted that this case was authority that the PFMA applied to the college. I do not read that judgment as going as far as was submitted. At para [2] the court said:

“[The college] works on strict budgetary controls and applies the provisions of the Public Finance Management Act, 1999.]”

In my view this is not a statement that the PFMA applies to public colleges. The other reference to the PFMA in the judgment (at para [18] (c)) was in relation to the fourth and fifth respondents, the governing body of a high school and the chairperson of the governing body, where it was stated that they were constrained by the provisions of the PFMA and were required to follow a public procurement process. This authority therefore does not in my view assist the respondents.

[65] What is left is Treasury regulation 8.4.1 As was submitted on behalf of the applicants, it could not have been the intention of the legislature to create the s 46 (1) mechanism available to the Minister but still allow reliance on a Treasury regulation. Treasury regulation 8.4.1 was issued in terms of the PFMA the authority of which has been disclaimed by the respondents. In any event, the regulation does not envisage the type of investigation which was set in motion, which did not only concern financial matters but human resources matters such as nepotism and irregular appointments. This is borne out by the memorandum to the Minister referred to in para

[20] above, in which the scope of the investigation was described. In my view none of the measures mentioned in regulation 8.4.1 can be equated to a forensic investigation on the scale on which Deloitte were appointed. S 46 (1) was, to use counsel’s words, “tailor made” for the circumstances which had been reported upon by Griesel.

It provides not only for an investigation into financial matters but other serious maladministration or circumstances which undermine the effective functioning of the college. The lack of authority in ordering the investigation is in my view underscored by the respondents' vacillation on the reason for appointing Deloitte. On the one hand they said it was a preliminary investigation in terms of the Labour Relations Act and on the other it was an investigation into the affairs of the college, relying on regulation 8.4.1 and the DG's responsibility as accounting officer to ensure proper financial management. This vacillation points to arbitrariness. Effectively the respondents pointed to no empowering provision which authorised the appointment of Deloitte. This conclusion is in my view strengthened by Joubert himself when he said that no legal prescripts barred such investigation.

[65] In my view, in the circumstances, there was no other provision other than s 46 (1) of the CET Act. S 46 (1) was not invoked and it follows that the DG's decision to appoint Deloitte to conduct an investigation into the affairs of the college was not authorised by any empowering provision.

[66] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC) the following was said at para [58]:

"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

[67] In the present matter the DG exercised a power which was not conferred upon him in that he was not authorised in terms of the PFMA or Treasury regulation 8.4.1 or any other empowering provision to take a decision to appoint Deloitte to conduct an investigation into the affairs of the college. The applicants therefore established a ground of review in terms of s 6 (2) (a) (i) of PAJA.

The decision to appoint Deloitte to conduct the investigation should therefore be set aside and the report of Deloitte should be declared unlawful.

[68] Costs

In my view the respective parties have been more or less equally successful. The decision to appoint Deloitte and the suspension of Mbana were the major points of dispute and formed the substance of the hearing. I think too that the resolution of each dispute was of substantially equal importance to the parties. A further factor which influences my decision on costs is my finding that separate and distinct procedures were followed in reaching the decisions sought to be reviewed and set aside. In that case an appropriate costs order would be that the parties bear their own costs.

[69] The following order will issue:

[69.1] The decision of the second respondent to appoint an investigation into the affairs of the seventh respondent is reviewed and set aside.

[69.2] The decision of the second respondent to appoint the sixth respondent to conduct the investigation into the affairs of the seventh respondent is reviewed and set aside.

[69.3] It is declared that the report of the sixth respondent consequent upon its investigation into the affairs of the seventh respondent is unlawful.

[69.4] The parties are to pay their own costs of the application and the urgent application for interim relief.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv SC Rorke, SC and Adv PN Kroon, instructed by McWilliams & Elliott Incorporated, Port Elizabeth

For the Respondents: Adv N W Gqamana SC and Adv GJ Gajjar, instructed by the State Attorney, Port Elizabeth

[1] This special costs order was not pursued.

[2] The title of Act 16 of 2006 was previously the Further Education and Training Colleges Act

[3]

[2005] ZASCA 43; 2005

(6) SA 313 (SCA)

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