IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO:C387/20

WESLEY NEUMANN	Applicant
and	
WESTERN CAPE EDUCATION DEPARTMENT	First Respondent
PREMIER OF WESTERN CAPE	Second Respondent
MINISTER OF EDUCATION WESTERN CAPE	Third Respondent
MR BRIAN SCHREUDER	Fourth Respondent
MS HELEN ZILLE	Fifth Respondent
PUBLIC SERVICE COMMISSION	Sixth Respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Respondent

---

FIRST TO FOURTH RESPONDENTS' HEADS OF ARGUMENT

A. INTRODUCTION

1. The applicant seeks relief in these proceedings in two parts:

    1.1. Part A is urgent interim relief in the form of a rule *nisi* that the disciplinary proceedings instituted against him by the first respondent be suspended pending the relief sought in part B.

    1.2. Part B relief seeks (a) the review and setting aside of the decision to extend the fourth respondent's contract as Head of the first respondent; (b) a declarator that the aforesaid appointment is unlawful; and (c) to set

aside the decisions taken by the fourth respondent to initiate the disciplinary proceedings against the applicant.

2. These heads deal with the urgent interdictory relief sought in Part A.

3. As set out by the applicant in his heads of argument:

> *"the basis of the Applicants challenge to the lawfulness and validity of the proceedings relates to the question whether Fourth Respondent had the legal authority to institute disciplinary actions in 2020 against the Applicant".*[1] [emphasis added]

4. The applicant, thus, on the basis of the fourth respondent's alleged lack of authority, asks this Court to suspend the disciplinary hearing now scheduled for 28 October 2020 so that he can review the appointment of the fourth respondent as Head of Department ("HOD") on the principle of legality. He contends further that his disciplinary hearing should be interdicted pending the final determination of the relief sought in part B.[2]

Synopsis of the argument put up in these heads

5. As a matter of fact, the disciplinary proceedings were not initiated by the fourth respondent. The decision under attack in part B, namely to commence the proceedings, issue out the charge sheet and to appoint the chairperson was taken by Mr Faker – Director : Employer Relations ("Director ER") acting in terms

[1] Applicant's HOA para 3.2 (c) p 12.
[2] Notice of motion, paragraph 4.

of lawful standing delegations. This is the respondents' version, which must be accepted.

6. If this is accepted it follows that the court should find that there is no meaningful link between the outcome of proceedings to determine the fourth respondent's authority to act on behalf of the first respondent and the lawfulness of the process followed for the initiation of the disciplinary proceedings against the applicant.

7. The legality review is an ill-disguised attempt to clothe what would otherwise be – at best - a possible procedural unfairness complaint at an arbitration in due course as an urgent and exceptional unlawfulness complaint in an attempt to persuade this Court to intervene in a disciplinary process in circumstances where it would not ordinarily do so.

8. The applicant has failed to meet the strict threshold of showing that the facts of his case demonstrate truly exceptional circumstances in the sense that were the relief sought to be denied a grave injustice would result. The jurisprudence cited below shows that he does not come close to satisfying this test.

9. Further, the application is premature as the disciplinary proceedings have not yet even commenced – and the applicant can raise the head of Department's alleged lack of authority to charge as a defence in the hearing. There are alternative remedies available to the applicant and the applicant has also not shown the presence of likely irreparable harm. Even though his hearing has not even begun, the applicant invites this court to speculate about the harm he could suffer in the form of probable dismissal by a biased chairperson. Not only has the chairperson made no findings, but even if she had, he would still have the right

to an internal appeal followed by an arbitration, before needing to approach the Labour Court.

10. The applicant has also failed to show a clear legal right. Not only has he been unable to link the decision he challenges to the validity of the fourth respondent's contract for purposes of Part A, but in Part B he has little prospect of having that contract set aside. Further, even if he were to succeed (which is unlikely) it does not follow that the decision to charge him would automatically be invalid. It is unlikely that a reviewing court will set aside any or all of the HOD's prior decisions even if his contract was unlawfully extended.[3] This is a case by case enquiry and will be influenced by the disruptive effect on the administrative workings of the department.

11. Were the decision to charge him to be set aside, a fresh charge sheet would be issued (he does not dispute the employer's vires) - the applicant can only delay the inevitable – but he cannot as a matter of law avoid the disciplinary process. On the other hand, it is prejudicial to the respondents to have to delay what is an employer's prerogative, to take disciplinary action, for a number of years while the applicant litigates his legality review.

12. Finally, the urgency is self-created. The applicant waited until the proverbial eleventh hour to launch his application. First respondent was given inordinately little time to respond to the papers before this case was set down for hearing.

---

[3] They would be every likelihood for any decision as to invalidity to have prospective effect only because of the disruptive effect of a retrospective order. So, even if authority was not delegated to Mr Faker as we have argued, it does not follow that setting the HOD's contract the side equals invalidation of the charges in applicant's case. This point is not even addressed in applicant's papers.

This is an abuse of the jurisdiction of the court to urgently interdict disciplinary hearings and the application should be dismissed for this reason alone.

13. There can be no suggestion that this is one of those cases where if the disciplinary hearing goes ahead the grave injustice that would allegedly result is the persecution of a demonstrably innocent employee having to face trumped up charges which are not only procedurally flawed but clearly have no foundation in fact. The rationality of charging a school principal for failing to adhere to an instruction to reopen a school or for writing the kind of insulting public letters sent by the applicant to his employer cannot be contested.

B. RELEVANT FACTUAL BACKGROUND

14. The impact of Covid 19 on schools and the government's response to the Covid -19 pandemic in the education sector are set out in paragraphs 7 to 21 of the Respondents' answering affidavit.[4] This forms the context to the disciplinary proceedings initiated against the applicant.

15. During the 'strict lockdown', from 26 March 2020 to 30 April 2020 all schools were closed.[5] During Alert level 4, on 19 May 2020, the Minister of Basic Education ("the Minister") announced that on 1 June 2020 all schools would re-open for Grades 7 and 12 learners. Other Grades would follow in due course.[6] With the commencement of level 3, on 29 May 2020, the Minister, published a notice[7]

---

4 Answering Affidavit ("AA") record p 96 – 103.

5 AA para 8 record p 97.

6 This was on the advice of the National Coronavirus Command Council ("NCC") which was itself advised by the Minister of Health and his advisory council, consisting of medical experts (AA para 10 record p 96).

7 Reg 4(3) of the COVID of the 29 April 2020 regulations.

giving directions for the staggered re-opening of schools, setting the date for Grade 12 learners to return to school as 1 June 2020.[8]

16. Not all schools in the country were ready to open and the Minister announced in the media on 31 May 2020, that the return of Grades 7 and 12 would be delayed to 8 June 2020. However, the amended date was never gazetted. The third respondent, in consultation with the first respondent, determined that the schools in the Western Cape, which were in their considered opinion ready to re-open lawfully and safely, would open in accordance with the gazetted date of return – 1 June 2020.[9]

17. The decision to re-open the schools met with some resistance for different reasons – the South African Human Rights Commission ("SAHRC") threatened to interdict the Western Cape schools from opening until all the schools were ready to open on 8 June 2020, but this was not pursued and the SAHRC elected to monitor compliance once the schools re-opened.[10] An NGO, One South Africa Movement, challenged the constitutionality and rationality of the re-opening of schools for safety reasons but the Gauteng High Court found the decision to be rational, constitutional and based on solid expert medical advice.[11]

18. The applicant, educators and Grade 12[12] and 7 learners at Heathfield High were required to return on the gazetted date of 1 June 2020.[13] The school failed to re-

---

8 AA para 11-12 record p 98.

9 AA para 13 record p 98-99.

10 AA para 14-16 record p 99-100.

11 One South Africa Movement and Another v President of the Republic of South Africa and Others (24259/2020) [2020] ZAGPPHC 249; [2020] 3 All SA 856 (GP) (1 July 2020) ("One South Africa") quoted at AA para 17 -20 record p 101-103.

12 There are approximately 122 Grade 12 learners. AA para 28 record p 105.

13 AA para 26 record p 102.

open on 1 June 2020. Various officials of the first respondent engaged with the applicant, attempting to persuade him to reopen the school and/or keep it open.[14]

19. During the period that followed, the applicant participated in a campaign against the staggered re-opening of the schools[15] and was one of the authors of a memorandum to the President and the Premier of the Western Cape on 4 July 2020 *inter alia* calling upon them to suspend schooling until 1 September 2020.[16]

20. On the same day, the Heathfield School Governing Body ("SGB"), of which the applicant is a member, wrote to the parents strongly urging: [17]

> *"ALL PARENTS AND GUARDIANS NOT TO SEND THEIR CHILDREN TO SCHOOL UNTIL AFTER THE PEAK OF COVID19 INFECTIONS HAVE BEEN REACHED AND UNTIL INFECTION RATES ARE DECREASING. KEEP YOUR CHILDREN SAFE AND ISOLATED FROM THIS VIRUS"*

21. Towards the end of July 2020, the Head of Department, Mr Schreuder, ("the HOD") received reports, including from a parent, that at Heathfield High Grade 12 learners had not attended school for some time.[18]

22. On 23 July 2020, the President announced that due to rising infections, schools would once again close from 24 July 2020 to 24 August 2020. However, the Grade 12 students were to return on 3 August 2020.[19]

---

14 AA para 28 record p 104.

15 Founding affidavit ("FA") para 24 - 28, record p 16-17. Notably, this was long after the re-opening of schools on 8 June 2020 and unrelated to the Western Cape opening on 1 June and the other provinces on 8 June.

16 FA para 27 record p 17.

17 FA "WN2.2" record p 44.

18 AA para 29 record p 105.

19 AA para 27 record p 104.

23. The HOD addressed correspondence to the applicant on 24 July 2020. The HOD noted that it had been brought to his attention that Grade 12 learners at Heathfield High had not attended school for some time. He pointed out that:[20]

> *"[i]f this is correct, whatever the reason(s) may be, it is unacceptable. Grade 12 is the culmination of the career of every learner. Some reach this milestone by overcoming severe personal and socio-economic obstacles. Consequently, it is the department's responsibility to ensure that each learner, not only in Grade 12, makes a success of his/her school career. The face-to-face engagement of a teacher with learners remains critical in the pedagogical enterprise which this department will protect at all cost."*

24. The HOD reminded the applicant that the Grade 12s had lost teaching time during lockdown and that the remaining teaching time was essential in preparation for their final examinations.

25. In order to ensure that there was no misunderstanding or ambiguity regarding his obligations as principal, the HOD instructed the applicant to:

> *"1) Ensure that every Grade 12 learner and their parents/guardians are informed, in writing, of the requirement that every Grade 12 learner must physically be at school every day of the week, from 3 August 2020, until the start of their final NSC examinations. The only exception is formal school holidays.*
> *2) Ensure that the educators teaching Grade 12 learners are on duty and actively teaching Grade 12s every day of the school week. This includes support educators from other Grades standing in for Grade 12 educators who have been exempted due to a comorbidity.*
> *3) Inform the governing body of the school, in writing, of these instructions and that any instructions or coercion to the contrary fall outside their function of governance and oversight and thus illegal in terms of the South Africa School Act, 1996 (Act 84 of 1996).*

---

[20] FA "WN4" record p 50.

Please submit a copy of the above letters to me by close of business today Friday, 24 July 2020."

26. The applicant was also informed that directives had been received from the Director-General of the Department of Basic Education, which urged Provincial Government to implement disciplinary procedures where educators refused to report for duty.

27. The applicant failed to comply with the 24 July 2020 deadline.

28. On 26 July 2020, he responded to the instruction he had received by addressing an insolent and defamatory open letter to the HOD, copied for good measure to "All media houses" headed "*RE: CAUTIONARY / INTIMIDATION LETTER*". It reads as follows: [21]

> *"I feel compelled to reply to your correspondence dated 24 July 2020.*
> *The reasons for the SGB encouraging their near-adult children to not come to school is because of very VALID SAFETY reasons. Whilst I agree with your sentiments of the socio-economic obstacles (of which I have experience) and also the importance of school culmination this pales in comparison to the safety of our children where death could be the alternative.*
>
> *<u>It is unfortunate that as Head of Education you resorted to pre 1994 methods of issuing instructions in Baasskap manner</u> instead of engaging with the school and the problems that we are presently experiencing so that a solution could have been sought this would as you stated gone far towards the possible success of the learners' academic progress. With your instructions as issued and the inaccuracies therein. I feel aggrieved that my right to be heard – "Audi alteram partem" – has been violated, it is, most unfortunate and line with the ethos of your Department.*

[21] FA "WN5" record p 52.

(1) A letter will be sent to parents requesting that they send their children to school (albeit in unsafe environment) once the Minister of Basic Education gazettes the new dates for the school year as per the Disaster Management Act.
(2) A copy of your instructions as per letter copied and will be presented to the SGB.

History is replete with politicians and bureaucrats who have fought battles to the last drop of somebody else's blood. In this case, it is the blood of our children. I am an educator who is fully committed to supporting the development of children for a better future. I in the future would like nothing more than to teach children safely in schools, so that, they can continue with their learning. There exists a global trend to return children to their schools only when infection rates have stabilized. To deviate from this trend is both unintelligent and reckless. In your letter, you enjoin principals to see themselves as public servants who should remain loyal to the decisions of the cabinet. You clearly do not apply this maxim to yourself when you defy cabinet decision with respect to the duration of the closure of schools. This defiance you have displayed repetitively.

In conclusion, I wish to state that I do not need to be reminded of the very hard fought-for constitutional rights of our children, and the people of South Africa of which I am a ferrous student. I am committed to education as a youthful progressive leader and foresee many positives in our countries education." [emphasis added]

29. The applicant simply ignores this letter in his heads of argument. It is a letter that is openly defiant and insulting. The applicant refers to the race of the HOD hurtfully depicting him as acting in a "*baasskap manner*" and accuses him of having the blood of other people's children on his hands. It was deliberately copied to the media.

30. On 27 July 2020 the HOD responded to the applicant's letter of 26 July 2020.[22] He noted the content of the email and the applicant's *"refusal to carry out* [his] *lawful instruction timeously, as required*." The HOD continued:

> *"[t]he subject line of your email, its content and the tone of your reply is noted and sadly regretted.*
>
> *On this score, you had no premise to engage me in the manner that you did, including disobeying a lawful instruction."*

31. This correspondence further pointed out that the applicant had acted contrary to Schedule 2 of the Disciplinary Code and Procedures for Educators ("the Code") contained in the Employment of Educators Act, 76 of 1998 ("EEA") and that redress would follow.

32. On 31 July 2020 the applicant's attorney addressed a letter to the HOD, noting the intent to take disciplinary action and requesting an opportunity to make representations *"prior to finalizing [his] decision to proceed with disciplinary action*".[23] It was alleged that the applicant had been at school every day "*ready to proceed with teaching and learning as required by the Education Department and the parents/school community*". The applicant's attorney also requested that the HOD meet with the SGB who was of the view that he had "*misinterpreted the situation at Heathfield High School*".

33. The applicant then sent a letter on 2 August 2020 to the parents, guardians and Grade 12 learners in which he now stated that "[i]*nformed by the President's*

---

22 FA "WN6" record p 55.
23 FA "WN7" record p 57.

announcement on 23 July 2020 grade 12 learners are to resume their academic programme tomorrow (Monday, 03 August 2020)".[24] The applicant opined that with only the grade 12's attending school for four weeks the COVID19 safety protocols "*should be manageable*". He therefore urged parents to send their children to school from 3 August 2020. This letter said nothing about the HOD's instruction.

34. On 14 August 2020, the HOD wrote to the applicant's attorney informing him that he did not agree with the contents of his letter dated 31 July 2020.[25] He confirmed that the first respondent intended to take disciplinary steps. The HOD ended by stating that he was open to meeting with the applicant and his attorney, subject to the provisions of the EEA, and that "*we can finalize dates and times in the near future"*. [26] This did not materialise, and on 28 August 2020 the HOD noted that two weeks had elapsed and informed the applicant's attorney, as a matter of courtesy, that the disciplinary process would now be initiated.[27]

35. On 31 August 2020 the applicant's attorney responded, seeking to blame the HOD for the meeting not having taken place, asking whether the first respondent wanted to persist with a formal disciplinary process or pursue an amicable settlement and offering to respond to the HOD's proposed date and time within 24 hours.[28]

---

24 FA "WN5.1" record p 53.
25 FA "WN8" record p 58.
26 This proposed meeting was informal and not suggested because of a legal obligation flowing from disciplinary processes.
27 FA "WN9" record p 59.
28 FA "WN10" record p 60.

36. On 16 September 2020, having discussed the matter with the HOD and after an independent consideration of the evidence, the Director: Employee Relations ("Director: ER"), Mr Faker, independently took the decision to charge the applicant, drafted, signed and issued the notice of disciplinary hearing and charge sheet and caused same to be served on the applicant.[29] The disciplinary hearing was scheduled for 7 October 2020.

37. We deal only with the relevant charges.

    37.1. Charge 2 relates to the failure, on or about 24 July 2020 and as principal of Heathfield High School, to carry out the lawful instruction of the HOD – effectively to take the necessary steps to ensure that the school re-opened – as contained in the letter of the HOD dated 24 July 2020.

    37.2. Charge 3 is being disrespectful towards the HOD, alternatively demonstrated abusive or insolent behaviour towards him. This relates to the applicant's letter of 26 July 2020 in which the applicant accused the HOD, *inter alia*, of "*Baasskap*", having the blood of children on his hands, and acting unintelligently and recklessly.

    37.3. Charge 4 relates to the issuing of the letter of 26 July 2020 to "*all media houses*" by the applicant, thus prejudicing the administration, discipline or efficiency of the WCED;

---

[29] FA "WN13" record p 63-68.

37.4. Charge 5 is that the applicant committed misconduct in that he allegedly encouraged personnel not to report for duty and discouraged the attendance of learners at school via social media platforms.

37.5. Charge 6 is that the applicant prejudiced the administration, discipline or efficiency of the WCED, alternatively displayed disrespect or insolent behaviour towards employees of the WCED, by distributing pictures and/or videos on Facebook.

38. On 16 September 2020, the same day that the charge sheet was served on the applicant, the applicant's attorney wrote to the HOD to follow up on his letter of 31 August 2020.[30] The HOD responded immediately and explained that while he had been open to meeting with the applicant as indicated in his letter of 14 August 2020, he had failed to timeously take up this suggestion, even though he had been the person requesting the meeting. Further, as the applicant was a senior representative of a trade union, the first respondent had in either event consulted with his trade union as it was required to do before instituting disciplinary action. The notice of enquiry had now been issued and the applicant was to direct any further queries to the presiding officer, once appointed.[31]

39. On 23 September 2020, the applicant's attorney wrote to the first respondent raising the issue of the fourth respondent's "*status*" alleging that his appointment did not comply with s16(7) of the Public Service Act 103 of 1994 ("PSA"). This, he argued, rendered the employer's decision to discipline the applicant invalid.

---

30 FA "WN11" record p 61.

31 FA "WN12" record p 62.

The first respondent was requested to withdraw the disciplinary proceedings until such time as the issue of fourth respondent's legal status as HOD had been resolved.[32]

40. On 23 September 2020, the Director: ER responded to the applicant's attorney advising him that the Premier and the first respondent, based on legal advice obtained, were of the view that the appointment of the fourth respondent was regular. In any event, in the absence of the appointment being set aside by a court, it was to be regarded as valid and lawful.[33]

41. The applicant's attorney advised the HOD, on 29 September 2020, that he had instructions from the applicant to approach a court and "*seek a legality review relating to the extension of the Head of Department's employment contract, and the consequent decision taken to institute disciplinary proceedings*" against the applicant. The applicant requested that the disciplinary hearing be suspended by agreement pending his proposed review.[34]

C. URGENCY

42. The Court in **Jiba v Minister: Department of Justice and Constitutional Development and Others** (2010) 31 ILJ 112 (LC) held that:

> *"Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of*

---

32 FA "WN14" record p 74.
33 FA "WN15" record p 75.
34 FA "WN16" record p 76.

urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules."[35]

43. In **Golding v HCI Managerial Services (Pty) Ltd & others** (2015) 36 ILJ 1098 (LC) the Court held that the urgency was self-created because although the applicant knew when the disciplinary was due to commence he gave the respondent less than one day before his application was to be heard to file answering papers, having expended nine days to draft his own papers. It was held that the only reasonable inference to draw was that the applicant had waited until the last minute to use the LC hearing to avoid the enquiry commencing.[36]

44. This Court, in **Association of Mine Workers and Construction Union and others v Northam Platinum Ltd and anothe**r [2016] 11 BLLR 1151 (LC) ("**AMCU v Northam Platinum**") set out the law on self-created urgency in the context of an interdict relating to allegedly unlawful dismissals as follows:

"[25] Also, urgency must not be self created ……as a consequence of the applicant not having brought the application at the first available opportunity.

[26] A final consideration where it comes to urgency is expedition when taking action. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency. In Valerie Collins t/a Waterkloof Farm v Bernickow NO and another the court held:
". . . if the applicants seeks this Court to come to its assistance it must come to the Court at the very first opportunity, it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency." [emphasis added]

---

35 [18].

36 See the useful discussion of most of the relevant cases in Maloka, TC "Interdicting an inhouse disciplinary enquiry with reference to Rabie v Department of Trade and Industry 2018 ZALCJHB 78" Journal for Juridical Science 2018 : 44(2) 1-19 p 5.

45. The Court in **AMCU v Northam Platinum** confirmed that the applicant must set out in his founding affidavit the reasons for the urgent relief. If this is not done adequately the application should be dismissed or struck from the roll. The Court rejected the explanation that a month long "debate" between the applicant's president and counsel as inadequate.[37]

46. The Court said the following about cases where there are allegations of unlawfulness:

> *[33] The substance of the applicants' case on urgency bears out what I consider to be the situation in the aforesaid paragraph. It is a case based squarely on considerations of hardship, sympathy and merits of the case itself. In simple terms, it is said that urgency is established by the alleged unlawfulness of the first respondent's conduct which will cause the individual applicants extreme hardship. In my view, this approach is squarely founded on the kind of "licence" assumed by practitioners following the judgment in SABC, as I have discussed above. The applicants in fact say it in so many words in the founding affidavit. But, and as I have already said, the judgment in SABC does not support such an approach. It is not the "licence" the applicants believe it to be, and the allegations of unlawfulness of the conduct of the first respondent cannot in itself serve to establish urgency.*
>
> *[34] I may mention that in SABC, Lagrange J actually considered the urgency requirements referred, and found that matter was urgent because the unlawfulness of the dismissal was conceded, it was important at a time because the role of the SABC will be in the spotlight in the course of the imminent local elections, and it was of critical importance that the applicants return to work without delay so that they would actually be able to perform their work as journalists in the context of the immanent elections. I add that the application in SABC was brought a few days after the dismissal. The distinctions from the matter in casu are, in my view, clear."* [our emphasis]

[37] [31].

47. Further, the general principle is that financial hardship or loss of income is not, by itself, sufficient basis for urgent relief. [38] In **AMCU v Northam** Platinum the Court said:

> *"The applicants unfortunately made out no such case where it comes to financial hardship. The applicants have simply not shows why their circumstances are exceptional, and would not be capable of being fully addressed in the normal course. I accept that the individual applicants will suffer financial hardship, but there is no demonstration of undue hardship. I thus remain unconvinced that a departure from the normal principle that financial hardship does not substantiate a case of urgency is justified in casu."*[39]

48. The applicant's case for urgency was similarly based only on the date of the hearing. [40] His founding papers claim that the nature of the application is such that it is urgent. The only explanation offered for the delay in bring the application was that he had requested the respondents to suspend the proceedings.[41] He alleges and if he has to wait for the normal Court roll, he will suffer irreparable harm, presumably because he would have been unlawfully charged and subjected to a hearing.[42]

49. When the application was launched, the disciplinary hearing was indeed about to commence so in that sense the application was urgent. However, the urgency was by that stage self-created.

---

38 **Association of Mine Workers and Construction Union and others v Northam Platinum Ltd and another** [2016] 11 BLLR 1151 (LC) ("**AMCU v Northam Platinum**") para 35-37.

39 [37].

40 FA para 49 record p 23.

41 FA para 50 record p 23.

42 FA para 51 record p 23. The respondents were now forced to agree to a postponement of the disciplinary proceedings so that they could file proper papers. They however explicitly reserves the right to argue urgency on the return day.

50. As far back as 27 July 2020 the applicant had been informed that he has acted contrary to the Code and that the first respondent had no alternative but to act.[43] He appointed an attorney and sought the opportunity to make representations to avoid the charges.[44] A month later his attorney was informed that formal disciplinary proceedings would be initiated.[45]

51. The formal charge sheet was delivered on 16 September 2020 with the hearing scheduled to commence on 7 October 2020.[46] The applicant says that he became aware of the report of the PSC on 16 September 2020 (although the report is dated 31 July 2020).[47]

52. On 23 September 2020 the applicant's attorney wrote to the first respondent advising that the fourth respondent did not have the authority to act as HOD, as his appointment was legally flawed, and that the decision allegedly taken by the fourth respondent to initiate disciplinary proceedings was unlawful. Further that:

> "*Should you persist with the unlawful disciplinary proceedings, our client reserves the right to seek relief in an appropriate forum."* [48]

53. On the same day, Mr Faker responded rejecting the position of the applicant and confirming that the proceedings would not be suspended.[49]

---

43 AA para 92 record p 124.
44 FA para 31 record p 18.
45 AA para 93 record p 125.
46 AA para 94 record 125; FA "WN 13" record p 63.
47 FA para 44 record p 21; see also Applicant's HOA para 2.28 p 10.
48 FA "WN 14" record p 74.
49 FA "WN 15" record p 75.

54. The applicant knew from 23 September 2020 that the proceedings would go ahead on 7 October 2020.

55. Instead of taking steps to bring the application immediately and at the very first opportunity, the applicant chose to wait. He even attended a prehearing meeting on 28 September 2020 at which no mention was made of litigation or an interdict. In fact, the applicant asked if he could have legal representation, giving the appearance that he would be attending the hearing on 7 October 2020.[50]

56. Even then, aware that the employer was preparing for the hearing, the applicant decided to write another letter - on 29 September 2020 - now asking the fourth respondent to suspend the hearing by agreement pending a legality review.[51]

57. The applicant delayed the application from 23 September 2020 to 2 October 2020 – some 9 days. Incomplete papers were served electronically on the office of first respondent after the end of working hours on Friday, 2 October 2020, with the matter set down for Tuesday 6 October 2020 – theoretically giving the respondent 3 days to answer. However, a full set of papers was actually only obtained after the hearing on 6 October 2020[52] – meaning there was no opportunity given to the respondents to file answering papers, forcing the respondents to negotiate a postponement.

---

50 AA para 94 record p 125.
51 FA "WN 16" record p 76.
52 AA para 63 record p 116; Order of 6 October 2020 is 'SF1" record p 150.

58. This application was effectively brought with no notice to the respondents or, at best, a few hours' notice and just short of two weeks since it could reasonably have been expected to have been initiated.

59. Further, once the application was postponed – all urgency in the conduct of the litigation on the part of the applicant disappeared. Despite the amendment of the timetable to suit the diary of the applicant's attorney, and to permit him more time to file heads, the replying papers were filed on the night of 21 October 2020 – effectively a week late.[53] Further, the heads of argument were only filed on 23 October 2020, unduly prejudicing the respondents in their preparation for hearing.

60. It is submitted that the application should be dismissed on grounds of self-created urgency alone.

61. We turn now to consider whether the applicant has met the threshold required for the court to entertain his interdict.

D. THE APPLICANT HAS NOT MADE OUT A CASE TO JUSTIFY THE INTERFERENCE IN PROCEEDINGS YET TO COMMENCE

62. **Booysen v Minister of Safety & Security & others** (2011) 32 ILJ 112 (LAC) held that while the Labour Court has jurisdiction to interdict incomplete

[53] The reason given is unacceptable – the attorney was "not well for a few days during the week of 13 to 16 October" Replying affidavit ("RA") record p 204.

disciplinary proceedings, such intervention should only be made in exceptional cases. The LAC said:

> *"[54] To answer the question that was before the court a quo, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive."* [our emphasis]

63. Any uncertainty in the law before this has been removed and the aforestated dictum is now settled law.[54] The applicant, in his heads, agrees that he is required to show exceptional circumstances in order to succeed.[55]

64. In **Jiba v Minister: Department of Justice and Constitutional Development and others** [2009] 10 BLLR 989 (LC) the Court stated that:

> *"[17] In summary: although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters generally best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this Court in review proceedings under section 145."*

---

54 The LAC reiterated this in **City of Cape Town v South African Municipal Workers Union obo Abrahams & others** [2012] 6 BLLR 535 (LAC) where the court declined to reconsider this question as it was settled law. The Court said:
"[16]"In any event, should there have been any doubt about the jurisdiction of the Labour Court to intervene in uncompleted disciplinary proceedings such doubt, as fate would have it, was put to rest by this Court in Booysen v The Minister of Safety and Security & other [quoting para [54]".

55 Applicant's HOA para 5.3 p 17.

65. This paragraph was quoted with approval by the Court in **Ngobeni v PRASA CRES and others** [2016] 8 BLLR 799 (LC) ("Ng**obeni**") at paragraph [13].

66. In **Ngobeni**, Van Niekerk J applied the following principle from Trustees **for the time being of the Bioinformatics Network Trust v Jacobson and others** [2009] 8 BLLR 833 (LC) to incomplete disciplinary proceedings:

> *"[13] "There are at least two reasons why the limited basis for intervention in criminal and civil proceedings watered, extended to and completed arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason - for this court to routinely intervene in completed arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run the course without intervention by this court."*[56]

67. In **Ngobeni** the applicant sought to interdict his disciplinary hearing, on grounds that the chairperson, a well-respected senior counsel, was biased against him because he had chaired another enquiry for the same employer. The interdict was sought pending a review of the chairperson's findings on certain points in *limine*, including declining to recuse himself. In noting that the appointment of the senior counsel in question satisfied any requirement of an independent-minded enquiry, the court characterised the application as a "*abuse of the right to urgent relief that this Court affords in appropriate circumstances*."[57]

---

[56] Significantly, in an amendment inserted by the Labour Relations Amendment Act, 2014 Section 158 (1B) provides that the court may not review any decision or ruling made during conciliation or arbitration before the issue in dispute has been finally determined by the CCMA or bargaining council, unless the court is of the opinion that it is just and equitable.

[57] [18].

68. The Court further stated:

> *[14] …. All of this is indicative of an attempt to use this Court and its processes to frustrate the workplace proceedings already underway. The abuse goes further - what the applicant effectively seeks to do is to bypass the statutory dispute resolution structures in the form of the CCMA and bargaining councils. One of the primary functions of these structures is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move applications on an urgent basis in this Court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute resolution system. The court's proper role is one of supervision over the statutory dispute resolution bodies; it is not a court of first instance in respect of the conduct of a disciplinary hearing, nor is its function to micro-manage discipline in workplaces."*

69. In **Magoda v Director-General of Rural Development and Land Reform and another** [2017] 12 BLLR 1267 (LC) ("**Magoda**") the Court considered an urgent application to suspend disciplinary proceedings until the chairpersons' procedural rulings could be reviewed on the principle of legality. As the employer was the state, it was submitted by the applicant that the decisions were an exercise of public power. We deal with this aspect of **Magoda** below.

70. Before setting out the case law above, the Court in **Magoda** described the rationale of the threshold that the applicant had to meet in order to interdict the proceedings:

> *"[12] In the further alternative, even if a legality review is available to the applicant under section 158(1)(h) despite the existence of an alternative remedy under the LRA, in order to succeed with an application for interim relief at this stage, she would have to establish exceptional circumstances for a review in medias res. This was explained as follows by the old LAC in Zondi:*
>
> > *"There is no universal or absolute test governing the question when a court will interfere in uncompleted proceedings, but one thing is clear from the cases and*

that is that a court will only interfere in medias res in exceptional circumstances, or when there is very good reason to do so. In ordinary circumstances the time to take any proceedings on appeal or review is at the termination thereof. The reasons for this attitude are equally clear. To permit interference in unterminated proceedings delays the continuation and completion of such proceedings. If such termination were to be readily permitted the proceedings might be interrupted at various times, and to deal with reviews or appeals piecemeal is clearly not practicable. In any event, the irregularity, even if it is allowed to stand, will not necessarily affect the result which might otherwise have followed. The tribunal concerned might for example in any event come to a conclusion favourable to the party otherwise affected by the irregularity. Even if the irregularity does in the end lead to a conclusion adverse to the person affected thereby, the time to put it right, as I have already said, is at the termination of proceedings."

[13] Significantly, the court went on to find in Zondi that the commission of a gross irregularity was not, in itself, the basis for a review in medias res. The applicant has to go further and show that the gross irregularity will lead to a miscarriage of justice."

71. The Court concluded:

"In addition to all of the above, the bringing of urgent applications in this Court to interdict part-heard disciplinary enquiries is at odds with the design of the dispute-resolution system under the LRA.

…

With reference to the above, the fact that applications such as this ought to be discouraged for the numerous material reasons mentioned in the authorities, is the context within which the test of exceptional circumstances set in Booysen stands to be applied. Seen thus, the test is <u>clearly a stringent one, which will not be easily met</u>."[58] [emphasis added] [59]

72. The applicant fails to demonstrate the presence of exceptional circumstances.

---

58 [16] and [17].

59 The Court noted that the decision to charge did not constitute an exercise of public power at [9] . A narrow band of cases has found for the presence of exceptional and compelling circumstances. All of these are discussed in the Prof. Maloka article (supra) at p16. One was the Solidarity/SABC case which concerned breach of freedom of expression in the context of a pending election. Another was the McBride case which concerned proceedings against the holder of a significant constitutional office. The third example was Mchuba where the employer had bound itself in contract to pre-dismissal arbitration instead of a disciplinary hearing.

73. The applicant approached the Court for the suspension of the disciplinary proceedings on two grounds.[60]

74. The first ground set out in the founding papers is the "*lawfulness and validity of the disciplinary proceedings*" which the applicant submitted relates to the "*question of whether the Fourth Respondent had the legal authority to institute disciplinary actions*" against him.[61] It was submitted that if he succeeds on review, the disciplinary proceedings would be null and void. The second ground was the "*Fourth Respondent's ulterior motive*" – as he was allegedly the only one facing disciplinary action, the applicant believed that he was being targeted because the fourth respondent wanted him dismissed.[62]

75. In similar vein the applicant further alleged that the Presiding Officer ("PO") was unlikely to be impartial as she was appointed by the fourth respondent and that she was likely to dismiss him because that was what the fourth respondent wanted.[63]

76. The only explicit mention of possible exceptional circumstances is follows:

> *"I submit that my case constitutes exceptional circumstances that warrant a stay of the disciplinary hearing in that there is a pending determination of the relief sought in Part B of the Notice of Motion". [64]*

---

60 FA para 53.1 (a) – (c) and (d) record p 24.

61 FA para 53.1 (a) record p 24.

62 FA para 53.1 (d) record p 24. This is clearly a claim of possible unfairness in the form of alleged selective discipline should the hearing go ahead and should he be dismissed. It cannot conceivably provide a basis for interdictory relief.

63 FA para 53.5 record p 25-6.

64 FA para 55 record p 27.

77. The applicant argues that if a court decides that the decision to institute proceedings was unlawful then, if the hearing continues, it would mean that the applicant would have to continue with a potentially unlawful process.[65]

78. The applicant, in reply, now attempts to retreat on the unfairness based complaints – now emphasising, in the face of what was argued in the answering affidavit, that he is not alleging procedural or substantive unfairness.[66] He also blows hot and cold regarding whether he is indeed alleging that there is bias on the part of the PO. In places he concedes that no relief is sought relating to the bias of the PO[67] and at the same time he still speculates that a PO :

> *"who has an expectation of further appointments is unlikely to do anything which may upset Fourth Respondent, who is a witness and complainant. Justice may not be seen to be done in what would turn out to be an unlawful process".*[68]

79. It is denied that by the respondents that the fourth respondent made the decision to charge the applicant or instituted the disciplinary proceedings – instead, it was made by Mr Faker the first respondent's director of employee relations.[69] This denial must be accepted in light of established principles applicable to opposed motion proceedings.[70]

80. Even were the court were to entertain the hypothetical argument that the HOD was the one who charged the applicant and instituted the disciplinary

---

65 Ibid
66 RA para 58 record p 230.
67 RA para 62 p 232.
68 RA Para 64 record p 233-4.
69 FA para 51 R p 20.
70 **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634I-635D.

proceedings, it would still be an argument not justifying interdictory relief. Technical or *in limine* objections about an invalid or incompetent charge sheet can be raised and argued in front of the appointed presiding officer. So too can any arguments about recusal on the grounds of actual or perceived bias.

81. The applicant is in no different position to an employee who claims that the charge sheet did not comply with the employer's policy or that the incorrect person in the hierarchy drafted and signed the charge sheet. His remedy would to claim procedural unfairness under the Labour Relations Act ("LRA").

82. In **Mohlomi v Ventersdorp / Tlokwe Municiplaity & Another** (2018) 39 ILJ 1096 (LC) the court held that the applicant has the right to raise as a defence at the disciplinary hearing the alleged unlawfulness of her employer's actions, or those of any of the other respondents, a defence that may be upheld.

83. In **Jiba v Minister of Justice and Constitutional Development and others** [2009] 10 BLLR 989 (LC) ("**Jiba**"), the Court noted that:

> *"Secondly, there being no dismissal, the issue of authority to effect a dismissal is prematurely raised - the applicant has the right to raise as a defence at the disciplinary hearing the alleged unlawfulness of her employer's actions, or those of any of the other respondents, a defence that may be upheld. In the event that the applicant is found guilty of any of the charges against her, it remains open for her to contend that only the Minister has the right to make any decision to dismiss her. In this event, the chairperson (should she be persuaded to uphold the applicant's contentions on authority to dismiss) might elect to make only a recommendation to the Minister, based on the evidence led at the hearing. It is not for this Court, in motion proceedings brought on an urgent basis, to*

anticipate events that might equally give substance to the applicant's contentions or not."[71]

84. The approach in **Jiba** was endorsed and followed in **Smith v National Lotteries Commission and another** [2019] JOL 44379 (LC)[72] Ms Smith raised an in *limine* point at her disciplinary enquiry to the effect that the National Lotteries Commission lacked jurisdiction to institute proceedings against her as she was appointed by the Minister. It was on the basis of that ruling of that enquiry that she sought to interdict the proceedings – unsuccessfully.

85. The Court stated that:

"*In essence, as is in the present case, when the applicant requests the Court to pronounce on the lawfulness of the disciplinary proceedings, she is, in reality, asking the Court to circumvent the relevant dispute resolution tribunal".*

86. The alternative remedies available included raising the unlawfulness as a defence in her enquiry. The Court concluded that :

"It is not for this Court to speculate on the outcome of the disciplinary proceedings: save to state that Ms Smith would have a recourse in the comprehensive LRA machinery in the event that she is unlawfully or unfairly dismissed.

Clearly, there are no exceptional circumstances to justify interference with the uncompleted disciplinary proceedings. Put otherwise no grave injustice or a miscarriage of justice may perhaps transpire due to this Court's refusal to intervene."[73]

---

71 [15].

72 The matter went on appeal which was decided on the point of joinder alone.

73 [21] – [22].

87. It would also not be necessary to declare the contract of the fourth respondent unlawful or to set it aside to obtain the necessary relief related to having been charged by someone who lacked authority.[74] The applicant expediently seeks to dress up his procedural unfairness complaint as one of unlawfulness for purposes of bypassing the statutory dispute resolution structures and having his case heard sooner rather than later. [75]

88. This brings us to the second and related point, the application is premature.

E. THE APPLICATION IS PREMATURE

89. Related to the issue of whether the applicant has met the jurisdictional threshold for intervention by the LC at this stage of the dispute, is the fact that the application should be dismissed because it is premature. The applicant's hearing has not yet even commenced. Although we have added this extra heading for convenience this is not really a self-standing point as the `premature application' point; the no `interference except in exceptional circumstances' point; and, the

---

[74] If this is correct then the applicant would also not have sufficient standing in Part B to challenge the validity of the contract. His attempt to latch onto the controversial conclusion in the PSC report is clearly expedient. The PSC itself has expressed no interest in involving itself in his application having filed a notice to abide. The irony would be that the interested party with ostensibly the strongest views on the alleged invalidity of the contract would play no part in a review brought by a party whose only interest in having the contract declared invalid it to secure a possible delay in his disciplinary hearing.

[75] See **Magoda** at paragraphs 5-11. If the disciplinary code was not complied with because the person who issued the charge sheet had no authority to do so the LRA provides a remedy. There is no need or justification for labelling a complaint about procedural fairness is one of the unlawfulness simply to go forum shopping. We have already cited a number of cases above which contained warnings from the bench about the court roll being clogged up by senior public servants or senior employees in state owned enterprises attempting to design cases aimed at jumping the queue so that they don't have to wait to challenge their dismissals in the ordinary course. See most recently the remarks of the court in paragraph 1 of **Raseroka v SA Airways (SOC) Ltd** (2020) 41 ILJ (LC).

'availability of alternative remedies' arguments are all variations on a similar theme.

90. We refer here to the matter of **Mohlomi v Ventersdorp / Tlokwe Municiplaity & Another** (2018) 39 ILJ 1096 (LC) para 15 :

> *"[15] In the present circumstances, there is no dismissal - the applicant has been called to account for her conduct in a disciplinary enquiry; she has not been dismissed. Secondly, there being no dismissal, the issue of authority to effect a dismissal is prematurely raised - the applicant has the right to raise as a defence at the disciplinary hearing the alleged unlawfulness of her employer's actions, or those of any of the other respondents, a defence that may be upheld. In the event that the applicant is found guilty of any of the charges against her, it remains open for her to contend that only the minister has the right to make any decision to dismiss her. In this event, the chairperson (should she be persuaded to uphold the applicant's contentions on authority to dismiss) might elect to make only a recommendation to the minister, based on the evidence led at the hearing. It is not for this court, in motion proceedings brought on an urgent basis, to anticipate events that might equally give substance to the applicant's contentions or not."* [emphasis added].

91. The Court in **Jiba**, where the applicant had not yet been dismissed, similarly found that:

> *"In short: there is no reason why the question of authority to dismiss should be determined by this court in motion proceedings, initiated on an urgent basis, in circumstances where no dismissal is apprehended, and where the chairperson of a disciplinary enquiry (and I would add, a commissioner or arbitrator in unfair dismissal proceedings) have not been seized with the question of authority and have made no ruling on it."*[76]

92. In his founding papers, the applicant suggested the inevitable bias of the PO or any PO appointed by the first respondent supported his seeking an interdict prior

---

[76] [16]. The court in **Smith v National Lotteries Commission and another** [2019] JOL 44379 (LC) "fully concurred" with the sentiments expressed in **Jiba** [20].

to the hearing.[77] When the respondent pointed out the fact that presiding officer are appointed from outside the Department and are usually qualified lawyers, appointed on the basis of availability from a panel, the applicant retreated.[78]

93. Apart from the applicant's baseless speculation about any chair being inevitably biased, there is simply no factual basis on the record able to substantiate a claim that the chairperson would be biased. In this regard we refer to **Ngobeni** (supra) where the Court stated as follows:

> *"[11] The applicant was afforded a right to a hearing before an independent legal practitioner, a senior counsel. There can be no doubt that this appointment more than satisfies any requirement of an independent minded enquiry."* [emphasis added]

94. As suggested by the Court in **Ngobeni,** labour matters do not follow the criminal justice model and eschew the taking of over technical criminal law based points in the way hearings are run and managed.[79] By definition, the idea of rushing to the Labour Court to have a charge sheet set aside or a hearing suspended because "*it is quite possible*"[80] that the chairperson might be biased is at odds with the purpose of the dispute resolution structure.

95. In addition, an allegation about the validity, timing or content of a charge sheet is a complaint about an unfair pre-dismissal procedure.

---

77 FA para 53.5 record p 25-6.

78 The respondent exceeds the PO independence standards required by our law with the so-called institutional bias not regarded as unfair. While it is not required to hire legally trained third parties to chair hearings it does.

79 **Nitrophoska (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others** (C109/2010) [2011] ZALCCT 5; [2011] 8 BLLR 765 (LC) (4 March 2011) at [16] to [17] Ngobeni at [11].

80 RA para 21.4 record p 214.

96. The Code of Good Practice: Dismissal (Schedule 7 to the Labour Relations Act 66 of 1995 ("the LRA") ("the LRC Code") sets out the guidelines for a fair pre-dismissal procedure. In essence, the employee should be given an opportunity to state his case.

97. The usual remedy for a valid complaint about a charge sheet is a subsequent finding about procedural unfairness. In other words, a complaint about the charge sheet must be taken to the PO at the hearing, and then follow the ordinary dispute resolutions process under the LRA, depending on the finding at the hearing. It is thus premature to approach this court for relief in these circumstances.

98. An interdict would not be available to a non-public sector employee on these facts and it should not be available to a public sector employee. The complaint about alleged irregularities in the process by which the charge sheet came to be formulated would, in either event, not sustain any finding in due course to the effect that the disciplinary hearing was procedurally unfair for this reason.

99. Consequently, it would be unacceptable to halt a disciplinary hearing on the basis that were a disciplinary hearing to go ahead there is the possibility that there may later be a finding of procedural unfairness.

100. It also does not assist the applicant to label this set of facts as giving rise to a rationality or legality review in order to avoid the conclusion that the dispute must be determined properly via the application of labour law principles.

F. THE REQUIREMENTS FOR AN INTERDICT HAVE NOT BEEN MET

101. The requirements of an interdict are trite. The Court in **Magoda** set them out in this context as:

> *"In order to succeed with the application for interim relief, the applicant must establish a prima facie right to review the procedural rulings under part B. And in order to establish a prima facie right, the applicant must provide prima facie proof of facts that establish the existence of a right in terms of the substantive law. A strict legal right to interim relief must be established, not simply some moral or equitable right. The applicant would also then have to establish irreparable harm, that the balance of convenience is in her favour, and that there is no adequate alternative remedy."* [our emphasis]

E.1 A clear legal right

102. The decision that the applicant seeks to review is one to "*institute disciplinary action*" against him.[81] He wants the notice of hearing "*issued by the First Respondent and signed by the Fourth Respondent"* dated 16 September 2020 to be declared null and void because the fourth respondent lacked authority to initiate the proceedings.

E.1.1 The decision was not taken by the fourth respondent

103. As we have indicated above, it was not the fourth respondent who decided to institute the proceedings against him and who signed the charge sheet. This is factually incorrect.

---

81 Para (c) NOM p 4.

104. Mr Faker's evidence that he signed the charge sheet and made the decision to institute disciplinary proceedings is met with a bare denial.[82] It is trite that the respondent's version must be accepted in such circumstances. Consequently, the lawfulness or otherwise of the fourth respondent's contract has no legal effect on the authority of Mr Faker to institute disciplinary proceedings and charge the applicant – as he has the lawful delegations to take these actions.[83]

105. The authority to charge employees with misconduct vests in the employer. This power to charge which arises from the common law contract of employment, however, can be circumscribed by statue. In this case, the relevant statute is the Employment of Educators Act 76 of 1998 ("EEA").

106. While the employer is nominally represented by its HOD in terms of the EEA, the relevant department entrusted with the management of discipline does not in law require his decision or signature to initiate misconduct proceedings or to formulate or serve charges.[84] Any official authorised to represent the employer may do so – as is the case with Mr Faker.

107. Section 18(1) of the EEA defines various categories of misconduct. Section 18 (2) provides that if an educator has committed misconduct as contemplated in section 18(1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule Two. Item 3 of Schedule Two provides that the Code of Good Practice in the LRA insofar as it relates to discipline constitutes part of this (EEA) code and

---

82 AA para 51 record p 113; RA para 13 record p 208.

83 AA para 84 record p 122. This is not denied by the applicant see RA record p 216.

84 The power to discipline an educator on account of misconduct vests in the employer terms of section 11(1)(e) of the EEA.

procedure. Item 3 (4) of Schedule Two provides that the formal disciplinary procedure to be followed in any case must be determined by the employer. Item 5 (1) read with (2) provides that the educator must be given written notice at least five working days before the hearing which notice must be given in accordance with form C attached to the schedule. It must contain certain prescribed information. Form C merely requires that the charge sheet must bear the "*signature of representative of employer*." [85] Internal appeals are also not decided by the HOD as the MEC is required to do so in terms of Section 25(1) of the EEA.

108. That senior officials can represent the employer in instituting disciplinary action is essential for the operations of the first respondent, the largest employer in the Western Cape, with its HR department investigating 1 000 misconduct cases a year resulting in 350 to 400 misconduct cases resulting in charges.[86]

109. It is not and cannot be disputed that Mr Faker was the authorised representative of the employer. As it was he who decided to charge the applicant, formulated the charges and instituted the disciplinary proceedings there can be no complaint that the proceedings are tainted by unlawfulness.

110. To the extent that the applicant suggests that a validly appointed HOD was required to be in office for the proceedings against him to be valid, he would have to show not only that the extension of the fourth respondent's contract was invalid but also that the effect thereof would be that the decision to institute

---

85 Item 5 of schedule two deals with a notice of enquiry for misconduct case other than those contemplated in item 4. Item 4 deals with less serious misconduct places not requiring formal notification.

86 Para 82 AA record p 122.

proceedings against him is consequently unlawful and one that should be set aside.

111. Finally, the decision not to withdraw the charges was also one taken by Mr Faker.[87]

112. However, before assessing his case on the merits, he would face another threshold obstacle.

E.1.2 A public law review by a public servant would not be competent in the case of a decision to charge

113. It is submitted that a decision to charge an employee does not bear the hallmarks of an exercise of public power under statute and is equally not susceptible to legality review.

114. Ordinarily the issuance of a charge sheet cannot be challenged by employees and the fact that the employer is a state department is not sufficient to render the decision an exercise of public power.

115. The Court in **Magoda** considered whether the applicant's legality review gave her a strict legal right in terms of substantive law. The Court noted that the pre-requisite of a legality review is the exercise of a public power. In that case, the Court held that the procedural rulings made by the chair (a refusal to postpone and a determination to decide the matter on the evidence that had been led prior to the application for postponement) did not involve the exercise of public

87 FA "WN 15" record p 75.

power. The Court stated that the second respondent was simply performing the role of management in chairing the enquiry.[88]

E.1.3 The applicant's prospects on review are weak – the extension was lawful

116. The attack against the procedure followed by the first respondent in renewing the contract of the fourth respondent rests squarely on the interpretation of section 16 (7) of the Public Service Act 103 of 1994 ("PSA").

117. The relief sought is that the second extension of the contract of employment of the fourth respondent as HOD for the period of 1 April 2020 to 31 March 2021 be declared unlawful and set aside.[89]

118. The applicant alleges in his founding papers that he relies on both the principle of legality and PAJA.[90]

119. The allegations in this regard are that:

> *"62. The disciplinary proceedings instituted by First and Fourth Respondent is unlawful. This is so because it is Fourth Respondent who decided to institute disciplinary proceedings against the Applicant notwithstanding his deficient legal status.*
>
> *63. Fourth Respondent did not have the legal authority to institute legal proceedings because the extension of the employment contract was*

---

88 [9].

89 NOM part B (a) – (b)

90 **SA Municipal Workers Union on behalf of Matola v Mbombela Municipality** (2011) 32 ILJ 2748 (LC) 2011 ILJ p2748 at [20] : "*Since the decisions in Chirwa v Transnet Ltd & others and Gcaba v Minister for Safety & Security & others, a state employee can also no longer enforce a right to fair procedures in disciplinary matters as part of an administrative law right to a fair hearing, which is distinct from that employee's right to fair disciplinary procedures under the LRA*"

unlawful. When his contract was extended in September 2018, the extension did not comply with the Public Service Act.

64. First and Fifth respondent committed a material error of law when they extended the employment contract by not complying with section 16(7) of the Public Service Act of 1994"

120. The applicant simply refers to the Public Service Commission ("PSC") report ("WN17") in support of his submissions.

121. The PSC report is hearsay in this Court insofar as factual findings are made. Further the PSC recommendations are not binding in law – unlike the Public Protector. Essentially the effect is that the applicant is relying on a 'legal opinion' to make out his case. It falls to this Court to determine the law.[91]

122. The crisp point of law is the following:

122.1. The PSA distinguishes between employees employed permanently and those employed temporarily (section 8);

122.2. Permanent employees are employed under a regime with a compulsory retirement age of s65 (section 16 (1));

122.3. Heads of Department may not be permanently employed but may only be appointed for a term not exceeding five years and subject to a prescribed contract. (Section 12(2)).

---

91 **Xulu & Partners Incorporated and another v Department of Agriculture, Forestry and Fisheries and another (Ndudane and another as Intervening Parties)** [2020] JOL 48349 (WCC) at [31]-[34].

123. These contracts expire after a fixed term and not upon any retirement age. They can of course expire long before any incumbent in the position of a HOD reaches what would be the normal retirement age in the case of a permanently appointed public servant.

124. The relevant sub-sections of section 16 (with emphasis added) provide as follows:

> *"16 Retirement and retention of services*
>
> *(1)(a) Subject to the provisions of this section, an officer, other than a member of the services or an educator or a member of the State Security Agency, shall have the right to retire from the public service, and shall be so retired, on the date when he or she attains the age of 65 years: Provided that a person who is an employee on the day immediately before the commencement of the Public Service Amendment Act, 1996, has the right to retire on reaching the retirement age or prescribed retirement date provided for in any other law applicable to him or her on that day.*
>
> *…..*
>
> *(2)(a) Subject to this section and the terms and conditions of a contract contemplated in section 12 (2), an officer who occupies the office of head of department has the right to retire from the public service and he or she shall be so retired at the expiry of the term contemplated in that section, or of any extended term contemplated therein, as the case may be.*
>
> *…..*
>
> *(7) If it is in the public interest to retain an officer, other than a member of the services or an educator or a member of the State Security Agency, in his or her post beyond the age at which he or she is required to be retired in terms of subsection (1), he or she may, with his or her consent and with the approval of the relevant executive authority, be so retained from time to time for further periods which shall not, except with the approval of Parliament granted by resolution, exceed in the aggregate two years."*

125. A plain reading of the statute provides that the head of department employed under a fixed term contract is not a person "*required to be retired in terms of subsection (1)"* at age 65. They fall under a different regime.

126. Section 16(7), we submit, appears to deal with a factual scenario of a permanently employed public servant required to retire at age 65 where the employer, before he reaches that age, being of the view that it would be in the public interest to retain his services for a further period, seeks to extend his employment but requires prior Parliamentary approval in order to do so.

127. The fourth respondent was not only not a permanently employed public servant approaching ordinary retirement age asked to stay on for a further period but he was already past retirement age. If he had been an ordinary public servant and not a head of Department then he had already passed retirement age when the new contract was concluded as he was already aged 67 on 1 April 2019 when the further fixed term contract was commenced. That contract will expire on 31 March 2021.

128. In our view, the reference to "*Parliament*" in section 16(7) is not specified to be a provincial legislature. There is nothing in the PSA to suggest that this would be the case.

129. The decision of the Premier to conclude a new contract without following the procedure contemplated by PSA section 16(7) is correct in law.

130. Finally, until the appointment of the fourth respondent is set aside as unlawful, it exists in fact. It is a common misconception that administrative acts remain valid

in law until set aside by a court, however, the *ratio* in **Oudekraal Estates (Pty) Ltd v The City of Cape Town** 2004 (6) SA 222 (SCA) is more nuanced. An unlawful administrative act is capable of producing legally valid consequences[92] depending on the whether the factual existence of the impugned act, rather than its invalidity, is the cause of the subsequent act. If that is the case, the subsequent act is valid since the legal existence of the first act is not a precondition for the second. Further, there can be no blanket finding that all acts flowing from an invalid act are also invalid – these have to be tested before the court on a case by case basis, and in some case will be preserved in order to avoid administrative disruption.[93]

131. It is submitted that even were the applicant to succeed in setting aside the appointment of the fourth respondent as unlawful – it is highly unlikely that all decisions to initiate disciplinary proceedings taken during the relevant period will be set aside.

132. The applicant thus has no prospect of success on this aspect of his Part B relief.

E.1.4 The relief sought is ineffective – the application cannot stop the applicant from being charged

133. In addition, the argument set out above that a finding on the legality of the extension of the contract may be academic to the actual relief sought by the

92 **Department of Transport and Others v Tasima (Pty) Limited** [2016] ZACC 39 at (87] ff.

93 See **Corruption Watch NPC v President of South Africa and others** 2018 (10) BCLR 1179 (CC) where it was ordered that decisions taken, and acts performed, by Shaun Abrahams as NDPP in his official capacity would not be invalid by reason only of the declaration of invalidity concerning his appointment.

applicant as it should not affect the validity of the process by which the applicant has been charged with misconduct.

134. A case may be dismissed if the judgment will have no practical consequence for the parties. This is based on the principle that courts will not rule on academic issues or merely give legal advice.

135. In the event that the charge sheet is nullified by the Court, there would be nothing to prevent the first respondent from immediately recharging him with the same charges as soon as an acting or permanent replacement was hired to fill the post vacated by the fourth respondent.[94]

136. The applicant does not deny this – merely speculates that "*a lawfully appointed Head of Department would review the alleged misconduct allegations, view them as spurious and determine that they do not warrant disciplinary action*." This again illustrates the lack of a clear right that has been violated or of a grave injustice that would occur if the applicant's interdict is not granted. There is no basis for the Court to intervene in the disciplinary process because an unknown different HOD may possibly in decide that the applicant's conduct does not

---

94 AA para 91 p 122. Applicant cannot dispute this but speculates that it might so that a different HOD could be persuaded that he should not be charged. For this reason the relief he seeks might turn out to be meaningful. It cannot seriously be suggested that this is a legally viable argument. Applicant furnishes no reasons why a different HOD could act differently. For anybody to be permitted to withdraw charges against him they would need to justify why his conduct should be excused. If he indeed had a good basis for explaining away his conduct he would not be so concerned about his prospects in the disciplinary hearing - so much so that he is litigating at great expense to attempt to put those proceedings on hold. The purpose of the litigation appears to be to make the HOD sufficiently fearful that his contract might be set aside so that he and the Department might be induced to instead withdraw the misconduct case against the applicant.

warrant disciplinary action. We deal with this in more detail under irreparable harm below.

E.2 Harm

137. The harm alleged by the applicant is that the continuation of the hearing will result in grave injustice as given his certain dismissal "*he would be without an income for a lengthy period and could face financial ruin, which [he] could [take] years to recover. Should the review be successful, he would have suffered tremendously financially and professionally*."[95]

138. The Labour Court in **Kawalya-Kagwa v Development Bank of Southern Africa** (2017) 38 ILJ 643 (LC) stated as follows:

> *"[15]…However, insofar as a well-grounded apprehension of irreparable harm is concerned, this court has consistently held that, as a general rule, a mere loss of income and benefits does not justify the granting of interim relief (see for example, Democratic Nursing Organisation of SA & another v Director-General, Department of Health & others (2009) 30 ILJ 1845 (LC)). This is not an immutable rule, but it is incumbent on an applicant seeking remuneration by way of urgent interim relief to establish that special circumstances exist that serve to justify that relief. The applicant avers that his continued suspension will infringe his right to dignity. That is no doubt correct, but it is a consequence that affects any employee who is suspended. Insofar as he avers that his financial well-being is prejudiced, the applicant has adduced no evidence (the bald assertion that the bank's conduct has caused him clear and irreparable harm aside) that he is unable to meet his financial commitments or that he has no access to any means necessary to sustain him and his family, that he is in danger of losing his accommodation, that he has no access to health care, that he is unable to service debts, and the like. Put another way, there is nothing in the papers before me to establish the nature and extent of any harm on which he relies or that any harm to him is irreparable."*

---

95 FA para 53.6 record p 26.

139. It is submitted that the applicant has simply not shown that he would suffer any irreparable harm. Any potential harm would be addressed by the remedies that are open to him in terms of the LRA, including if he is ultimately dismissed. The applicant does not provide any detail as to why the remedies provided for in the LRA would not address the injustices that he would allegedly suffer if he was unfairly disciplined.

140. Employees seeking to halt disciplinary hearings relying on other rights, such as their reputations, will fail in the Labour Court because that court lacks jurisdiction to protect people's good names.[96]

141. To the extent that the applicant alleges that he was prejudiced / will be harmed in that he will not have the opportunity to make representations before the decision to charge is taken[97] – he has no right to do so and nor is a different HOD obliged or likely to permit such representations (or even take the decision him or herself). Similarly, the applicant has no right to an opportunity to state his defence on the charge of failure to obey an instruction in a "*round table*" meeting[98] or to make representations in relation to the charges. The latter are better placed in the criminal justice paradigm and do not even constitute procedural irregularities in this setting.

---

96 **Moya v Standard Bank SA Ltd** [2010] JOL 26399 (LC) where the court noted that the employee may be exonerated at the hearing.

97 FA "WN 7" record p 56.

98 RA para 12.2 – 12.3 record p 206.

142. Finally the applicant has to show actual prejudice arising from the procedure followed. A procedural irregularity that does not result in prejudice is not actionable.[99]

143. We have dealt with the principles relating to financial hardship under the sectioned dealing with urgency above.

E.3 Balance of convenience

144. The balance of convenience does not favour the applicant. He opportunistically seeks to use a legality review or a PAJA review to obtain a remedy that would not be open to him at labour law. The Covid epidemic is ongoing and the decisions taken by the National Department and implemented by the first respondent about keeping schools open and properly staffed is of course of great importance. Cases involving disobedience to the instruction to educators to staff educational facilities should not be unreasonably delayed. The prejudice to the community at large arising from educators taking the law into their own hands and deciding whether to come to work or not is self-evident.[100]

145. Any person with a legitimate grievance about the reopening of schools is and was free to approach a competent court. This has in fact already taken place and a carefully considered decision was handed down. It is not the place of school principals to take the law into their own hands to prevent the reopening of schools

---

99 **Jonker v Okhahlamba Municipality & others** [2005] 6 BLLR 564 (LC) at [32].

100 AA para 179 record p 145.

through acts of defiance in breach of their legally enforceable obligations and responsibilities as employees.

146. If the hearing is interdicted pending the finalisation of the review proceedings there could be a delay running into some years - the issues raised could have considerable significance for the public service as whole and any outcome faces the prospects of possible appeals to the LAC and the Constitutional Court.

G. CONCLUSION

147. For the reasons set out above, we submit that the application stands to be dismissed, with costs, such costs to include the costs of two counsel.

Kahanovitz SC
Williams JL
Chambers
26 October 2020