



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

OF INTEREST

Case no: 218/2022

In the matter between:

NTOMBIZANDILE MBUDE

Applicant

and

PREMIER OF THE EASTERN CAPE

First respondent

**MEMBER OF THE EXECUTIVE COMMITTEE
DEPARTMENT OF BASIC EDUCATION,
EASTERN CAPE**

Second respondent

**DEPARTMENT OF PUBLIC WORKS AND
INFRASTRUCTURE EASTERN CAPE
PROVINCE**

Third respondent

JUDGMENT

Govindjee J

Background

[1] The applicant is the suspended Head of Department of Basic Education ('the department') in the province. She entered into a fixed-term contract of employment with the Premier on 1 June 2021 and is employed in terms of s 12 of the Public Service Act, 1994 until 31 May 2026.

[2] The applicant received a letter from the Premier's office on 23 March 2022, seeking explanation on the following:

- a) Why the Learner Teacher Support Material ('LTSM') had not been fully delivered to schools, against the backdrop of the Eastern Cape Division of the High Court, Makhanda, in *Khula Community Development Project v The Head of Department, Eastern Cape Department of Education and Others* ('*Khula*'), having instructed the applicant to ensure delivery of the LTSM to all public schools in the province by 31 March 2022;¹
- b) Reports that some schools had not been supplied with stationery;
- c) Criticism, ridicule and embarrassment caused to the Eastern Cape provincial government for failure to pay Education Assistants ('EAs');
- d) The withholding of the last instalment of the Education Infrastructure Grant, amounting to approximately R205 million.

[3] The Premier requested a detailed report on what had led to these failures, and the steps that had been taken by the applicant to prevent their occurrence, by 28 March 2022.² The applicant responded on that date, annexing three reports:

- a) Report 1 – Report on payment of EAs and General School Assistants ('GSAs');
- b) Report 2 – Report on the LTSM delivery;
- c) Report 3 – Report on the withholding of infrastructure allocation by the National Department of Education.

¹ See *Khula Community Development Project v The Head of Department, Eastern Cape Department of Education and Others* (Eastern Cape Division of the High Court, Makhanda) (unreported, case number 611/2022) ('*Khula*').

² Pp 49-50 of the index. It might be added that on 25 March 2022, the applicant deposed to an explanatory affidavit in the *Khula* matter, included in the papers. This followed a court order compelling the department and the applicant to ensure delivery of the LTSM to all public schools by 31 March 2022. That affidavit included the applicant's explanations for the non-delivery of stationery to certain schools.

[4] On 30 March 2022, the Premier gave the applicant notice of his intention to suspend her and to institute an investigation into her failure to ensure delivery of LTSM, payment of EAs and in relation to expenditure of the infrastructure budget, in the following terms:³

‘... I have noted the responses you provided and studied the annexures thereto ... As I perused and considered your responses, it became apparent that your explanations did not respond to the points raised in my letter ... I have been clear in my communication in meetings of the Executive Council, in which you participate as an invitee, that any under-expenditure resulting in allocated budgets / conditional grants being taken away from our Province is unacceptable and will have consequences for those responsible ... Given the above, I hereby wish to express my intention to investigate the matters documented in my letter of 23 March 2022 further to determine whether there is a case of misconduct, negligence and / or poor performance that you may have to respond to ... In order to conduct the aforementioned investigation unhindered, I am considering placing you on precautionary suspension whilst the investigation is being conducted ... Please submit to me by end of business (16h30) on Monday, 4 April 2022 reasons, if any, why I may not place you on precautionary suspension pending the finalisation of investigation.’

[5] The applicant questions the reasons for the Premier’s non-acceptance of her responses. It is suggested that the Premier ought to have explained any insufficiency or inadequacy of the report that had been provided to him.⁴ The applicant had complied with the court order in *Khula* by 31 March 2022.⁵ She responded in writing to the Premier on 4 April 2022, again referencing the three reports already mentioned.⁶ In that correspondence, the applicant noted that:

‘It is difficult to understand the assertion that my 76 paged response does not address the questions asked ... In my response I have fully explained the challenges regarding the LTSM, as well as where the Department is currently and therefore in my view, my presence cannot jeopardise any investigation on a matter that is near completion and a matter that was out of my hands ... We are at 100% delivery of stationery and 97% for textbooks ... (On the issue of EAs and GSAs) We have covered all payments except the last run that Treasury

³ Pp120-121 of the index.

⁴ P 22 of the index, paras 35, 36 of the founding affidavit.

⁵ The MEC, Eastern Cape Department of Basic Education and the Government of the Eastern Cape Province were both cited as respondents in that matter: p 242 of the index. That matter dealt mainly with textbooks and stationery and not with the other matters that formed the basis of the Premier’s correspondence to the applicant: p 242 of the index.

⁶ Pp 128-129 of the index.

withheld for March 2022. The non-payment of EAs as well as the current status together with how in future this matter is going to be dealt with. Again, on this matter it is my view that at the point where it is, it is resolved. I also do not see how a suspension would add any value in relation to the non-expenditure of infrastructure budget, as I have again detailed that this money was not in the department's coffers but was withheld by the National Department of Basic Education ... (On the third issue) The devoting of the R205 million for infrastructure is explained in detail on the main report ... and I had taken all the steps to circumvent this as outlined in detail in the report I sent you on 28 March 2022. We are on 97% expenditure on the infrastructure grant ... as reported at EXCO. Had Treasury not withheld our upload, we would have been on 100% expenditure ...'

[6] The applicant requested a meeting with the Premier to discuss these matters, suggesting that the issues were rooted in events of the past. She advised the Premier that her presence would not jeopardise any investigation into the alleged misconduct and conveyed her view that she had been singled out for blame. The Premier nevertheless decided to suspend the applicant with full pay on 5 April 2022. He expressed the reason for this to be 'as a precautionary measure pending investigations at the Department of Education'. The Premier's letter explains the basis for his approach as follows:⁷

'In order to ascertain the veracity of the allegations made, it is important that an investigator be allowed untrammelled access to all documents and personnel ... The personnel must be free to co-operate with the investigator, without actual or perceived fear of reprisal ... Suspension is not a punitive measure, and I do not seek to punish you in any way ... I have considered your written representations, and I am not convinced that your continued presence in the department will not hinder the investigation ...'

[7] The applicant launched an urgent application to declare her suspension to be unconstitutional, unlawful and invalid, based on the Premier's alleged abuse of his powers. The applicant disavows reliance on the Labour Relations Act, 1995 ('the LRA'), and seeks final declaratory relief based on the doctrine of legality and an alleged abuse of power on the part of a public official.⁸ As such, the relief sought can

⁷ Pp 132-133 of the index.

⁸ See *Baloyi v Public Protector and Others* 2021 (2) BCLR 101 (CC) at paras 5, 6, 37-50.

only be granted on the facts stated by the Premier, together with any admitted facts in the applicant's affidavits.⁹

Urgency

[8] The approach to adopt when dealing with an urgent application is governed by Uniform Rule 6(12). In terms of that rule, the court has discretionary power to dispense with the forms and service provided for in the rules and to dispose of the matter at such time and place and in such manner and in accordance with such procedure as it deems fit.¹⁰ The first question is whether there must be a departure at all from the usual process.¹¹

[9] The applicant is expected, in the founding affidavit, to 'set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that substantial redress could not be afforded at a hearing in due course'.¹² Put differently, if the matter were to follow its normal course as laid down by the rules, would the applicant be afforded substantial redress. If not, the matter qualifies to be enrolled and heard as an urgent application. If so, the application does not pass the test for urgency. The question as to the absence of 'substantial redress' in an application brought on usual timeframes lies at the heart of the question of urgency.¹³

[10] Urgency is not a matter to be glossed over.¹⁴ An applicant is obliged to go beyond a mere allegation of urgency.¹⁵ Even an allegation of an infringement of

⁹ *Stellenbosch Farmers Winery v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G.

¹⁰ Uniform Rule 6(12)(a).

¹¹ *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) at 136H-137F.

¹² Uniform Rule 6(12)(b). Also see *Kati v MEC, Department of Finance, Eastern Cape Province* (unreported case no. 929/2006) (High Court of South Africa, Bhisho) at 9.

¹³ See *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196.

¹⁴ See *Hultzer v Standard Bank of SA (Pty) Ltd* (1999) 20 ILJ 1806 (LC) at 1809: 'The court will, however, only grant such relief where an applicant is able to persuade the court that extremely cogent grounds for urgency exist.'

¹⁵ *Mokoena v West Rand District Municipality and Others* (unreported case no 39460/19) (High Court of South Africa, Gauteng Local Division, Johannesburg) para 27.

constitutional rights, on its own, does not render a matter urgent.¹⁶ It is an absolute requirement to set forth the reason for claiming that substantial redress would not be possible other than via the urgent application launched.¹⁷

[11] The applicant relies heavily on *Apleni v The President of the Republic of South Africa and Another*¹⁸ in support of her argument on urgency. That case was also brought as an attempt to vindicate the rule of law, it being contended that a Minister had infringed upon the principle of legality in exercising power to suspend without having the authority to do so. The facts are distinguishable in the sense that the applicant in this case concedes that the Premier has the power, in law, to suspend her, but challenges the manner in which that power was exercised.¹⁹ Nevertheless, many of the other arguments relating to the potential negative effect of the suspension on service delivery and critical projects appear to be borrowed from the case made out in *Apleni v The President of the Republic of South Africa and Another*.²⁰

[12] The applicant also relies on abuse of power by a public official, 'which abuse may impact upon the rule of law and may have a detrimental impact upon the public purse' to argue for the granting of urgent relief.²¹ Reference is made to ss 1 and 237 of the Constitution, and the applicant explains her actions upon receipt of the letter of suspension and the advice she received.²² Under the heading of 'urgency', the applicant avers that the Premier has failed to respect the employment agreement and that her suspension has 'already been prejudicial to me as it is a topical matter in the public domain and it continues to affect my professional reputation and standing negatively'. Authority to support the point that suspensions may have a

¹⁶ *Moyane v Ramaphosa and Others* [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP). Also see *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) para 15.

¹⁷ In the context of an unlawful suspension, this may include some explanation as to why the remedies provided for in the LRA would not provide adequate redress in due course: *Mokoena v West Rand District Municipality and Others* supra para 32.

¹⁸ *Apleni v The President of the Republic of South Africa and Another* [2018] 1 All SA 728 (GP) para 7: 'The point of law is that the Second Respondent has no power to suspend him from his position as Director-General. Only the First Respondent (referring to the President) can do so ...'

¹⁹ Para 15 of the founding affidavit, p 17 of the index. Also see *Mokoena v West Rand District Municipality and Others* supra para 31.

²⁰ *Apleni v The President of the Republic of South Africa and Another* supra fn 18 para 9.

²¹ Para 77 of the founding affidavit, p 32 of the index.

²² Pp 33-37 of the index, including reference to an attempt to settle the matter.

detrimental impact and prejudice reputation, advancement, job security and fulfilment is also cited.

[13] The applicant deals separately with the notion of 'no substantial redress in due course'.²³ Much of what follows relates to her responsibilities as head of department and the important projects and matters that impact on its functioning. This includes the applicant's role as supervisor to senior managers in the department. There is also a suggestion that it would be inappropriate for an acting appointee to take over functions when that person would not have the necessary background knowledge or institutional memory, so that the department will not obtain 'value for money' if the applicant is suspended.

[14] The submission in the applicant's heads that the Premier has not made an averment to the effect that the matter is not urgent, or may be taken to have accepted the issue because a dismissal of the matter is requested, is wholly fanciful.²⁴ The Premier, in his answering papers, notes that the suspension is on full pay, so that the applicant will suffer little or no personal prejudice warranting the matter being treated as urgent. The applicant is criticised for not making any genuine substantiation of the allegation of an abuse of power. It is pointed out that there is also no evidence of the department suffering any financial loss during the period of suspension. In addition, the submission is that the professional reputation and standing of the applicant cannot, on its own, justify the urgency with which the matter was launched.

[15] As Mr Kroon SC, for the Premier, pointed out, many of these arguments have previously been the subject of judicial pronouncement. In *Ntabankulu Local Municipality v South African Municipal Workers Retirement Fund and Others*,²⁵ Lowe J noted that it was for the applicant to demonstrate *inter alia* that it would suffer real

²³ Paras 104-109 of the founding affidavit, pp 37-40 of the index.

²⁴ I might add that in a number of the older cases cited in the footnotes to follow, courts have dismissed applications based on lack of urgency, or gone on to deal with the merits even where there is a lack of urgency, when the appropriate remedy is to strike a non-urgent matter from the roll. In any event, that the Premier may have requested the matter's dismissal rather than a striking is peripheral, the final outcome of the application resting in the hands of the court.

²⁵ *Ntabankulu Local Municipality v South African Municipal Workers Retirement Fund and Others* (Unreported case no 1052/2021) (Eastern Cape Division, Grahamstown) para 26.

loss or damage were it to rely on normal procedure. In *Association of Mineworkers and Construction Union and Others v Northam Platinum and Another*,²⁶ it was held that the court must be particularly circumspect in determining whether urgency has been established in cases where final relief is sought, so that the applicant is expected to make out an even better case of urgency.²⁷ Courts are generally slow to interfere where an employer exercises a discretion to place an employee on a precautionary suspension for reasons of good administration and with a view to investigating misconduct.²⁸

[16] In *Zwakala v Port St John Municipality and Others*,²⁹ the court analysed urgency on the basis of reputation and integrity of a public figure and possible irreparable damage, as follows:

‘The difficulty I have is that almost every suspension by reason of the investigation of allegations of misconduct would cause this type of prejudice. This does not make the matter urgent in the sense described above. Furthermore, urgency can surely not be created by “rumour mongering” and “unfounded allegations of embezzlement” ... (others) must know, or ought to know, that a suspension pending further investigation is nothing more than that. Such further investigations may establish impropriety on the applicant’s part. On the other hand they may not.’

[17] Similarly, in *Mangena v Nelson Mandela Metropolitan Municipality and Another*,³⁰ Sandi J rejected a suggestion that a suspended employee’s dignity had been affected on the basis that the code of conduct and disciplinary procedure that formed part of his contract of employment made provision for this.³¹ In this court in

²⁶ *Association of Mineworkers and Construction Union and Others v Northam Platinum and Another* 2016 (37) ILJ 2840 (LC) para 23. Also see *Gallocher v Social Housing Regulatory Authority and Another* (2019) 40 ILJ 2732 (LC) paras 11-19.

²⁷ Also see *Tshaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) para 11.

²⁸ *Mabilo v Mpumalanga Provincial Government and Others* (1999) 20 ILJ 1818 (LC) para 24.

²⁹ *Zwakala v Port St John Municipality and Others* 2000 (21) ILJ 1881 (LC) at 1883 F-G.

³⁰ *Mangena v Nelson Mandela Metropolitan Municipality and Another* (unreported case no. 3655/2004) (High Court of South Africa, South Eastern Cape Local Division) para 41.

³¹ *Cf Mogothle v The Premier of the North West Province and Another* (unreported case no J 2622/08) (Labour Court) para 47, dealing with the personal and social consequences of suspension other than deprivation of remuneration, and the link between the freedom to engage in productive work and the right to dignity. The authority relied upon for that linkage is *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA), a case dealing with a vulnerable category of persons, namely asylum seekers.

Mabentsela v The Premier of the Eastern Cape Province NO and Others,³² Sangoni J considered and rejected the suggestion that the department and province would be detrimentally impacted by a suspension because a new manager might have less knowledge of its affairs and difficulties.³³

[18] The Constitutional Court has accepted that where a suspension is on full pay, ‘cognisable prejudice will be ameliorated’.³⁴ The reason for this is that a precautionary suspension is a special kind of pause pending a further enquiry.³⁵ It must also be noted that, in addition to being on full pay, the applicant will have the benefit of at least the commencement of a disciplinary hearing within 60 days from the date of suspension, if in fact the investigation reveals that such a hearing is warranted.³⁶

Analysis

[19] The applicant is entitled to elect to pursue recourse in this court, irrespective of whatever other causes of action may be available to her in due course. It is of no consequence that these other causes of action have not been invoked to date.³⁷ Given the nature of the relief sought, which is final in nature, the court must be particularly circumspect. The notion of ‘absence of substantial redress’ is not equivalent to the irreparable harm that is required before the granting of interim relief. It has been held to be something less.³⁸ The facts of each case will determine whether the applicant has made out a case demonstrating that substantial redress

³² *Mabentsela v The Premier of the Eastern Cape Province NO and Others* (unreported case no. 142/06) (High Court of South Africa, Bhisho) paras 19-20.

³³ The principle set out in *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G was applicable given that the second respondent disputed the allegation, so that the version of the second respondent prevailed.

³⁴ *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) para 25.

³⁵ *Magashule v Ramaphosa and Others* [2021] 3 All SA 887 (GJ) para 113.

³⁶ Para 2.7(2)(c) of the SMS Handbook. See *MEC for Education, North West Province Government v Gradwell* (2012) 33 ILJ 2033 (LAC) (‘Gradwell’) para 44. Cf *Mogothle v The Premier of the North West Province and Another* (unreported case no J 2622/08) (Labour Court) para 47, dealing with an instance of ‘indefinite leave’, suggesting an indefinite period of suspension.

³⁷ *Mogothle v The Premier of the North West Province and Another* [2009] ZALC 1; 2009 (30) ILJ 605 (LC) para 48.

³⁸ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 para 7.

would not be obtained in the ordinary course. That ‘substantial redress’ must relate to the applicant herself.³⁹

[20] In the present instance, the submissions about the impact on the applicant’s dignity, standing and professional reputation fits that enquiry neatly. In other words, the question is whether a successful application brought in the ordinary course will afford the applicant substantial redress in protecting her dignity, standing and professional reputation, bearing in mind the role that she occupied. By contrast, the arguments relating to the applicant’s supervisory role within the department, the loss to the department and public purse caused by her suspension and the difficulties that a stand-in will encounter are less clearly related to the question of whether the *applicant* could obtain substantial redress at a hearing in due course.

[21] The comments of the court in *Zwakala v Port St John Municipality and Others*,⁴⁰ quoted above, are apposite in respect of the link between urgency, the applicant’s reputation and human dignity. On its own this cannot satisfy the requirements for urgency. Courts have noted that high earning employees with means are inclined to seek to jump the queue and have their cases argued on an urgent basis, impacting on the important principle of equality of employees before the law. That practice has been deprecated:⁴¹

‘The reasons advanced by the applicant why urgent relief is sought relates to his reputation. This can hardly be a basis to approach this Court for relief on an urgent basis. All employees who get dismissed or suspended and believe that they are innocent, their reputations are tarnished by their dismissals or suspensions. They will eventually get an opportunity to be heard where the employer should justify the charges against them. Should they fail to do so, such employees will be reinstated with no loss of benefits. I accept that some damage to their reputations would have been done. This Court however is not in the business of ensuring that an employee’s reputation should not be tarnished. If so, it will open the floodgates and this Court will be inundated with many such applications.’

³⁹ Rule 6(12)(b).

⁴⁰ *Zwakala v Port St John Municipality and Others* supra fn 29 at 1883 F-G.

⁴¹ *Mosiane v Tlokwe City Council* [2009] 8 BLLR 772 (LC) para 17.

[22] The applicant's claims of urgency fall under this rubric. There appears to be nothing exceptional about the impact of the suspension on the applicant's reputation or dignity, on its own, to warrant the matter being treated as urgent. It might be added that the applicant has been on suspension for approximately three weeks already. Even an order declaring the suspension to be unlawful and uplifting the suspension so that the applicant was able to resume her duties would not remove the stain of the pending investigation and the possible future institution of disciplinary proceedings.

[23] I also have misgivings about the averment that the impact of the applicant's suspension on the department, its employees and work warrants the matter being considered urgent. On my reading the 'substantial redress' that the applicant claims will be lost must relate to her own position. I might add that, on the Premier's version, which must be accepted in the case of a factual dispute on the papers, the acting head of department is suitably qualified to take over the work. This is confirmed by the second respondent, who explains that the acting incumbent is amply qualified to act as head of the Department, having been a former Member of the Executive Council ('MEC') who has also acted as head of department of the Department of Public Works and Infrastructure as well as the Department of Health in the province. This provides strong support to the conclusion that there is no proper basis for the submission that the applicant's suspension as a public servant, leaving aside her own personal interests, will cause such prejudice to the department to justify this urgent application on the timeframes it has been brought.

[24] It is the argument that the Premier has abused his power, when coupled with considerations of the consequences of the relief not being granted and the relevance of the relief sought if it is not granted immediately, that tilt the scale.⁴² There is no reason why the declaration of unconstitutionality, unlawfulness and invalidity claimed in the notice of motion would become irrelevant if granted in the ordinary course. But the consequences of the prayer for the applicant's suspension to be lifted, to enable her to perform her duties, would undeniably be frustrated by court proceedings

⁴² *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27 para 8, cited with approval in *Rokwil Civils (Pty) Ltd and Others v Le Seuer NO and Others* [2020] ZAKZDHC 61 para 17.

coupled to the ordinary timeframes. By that time the suspension would in any event have had to be lifted (or possibly extended by a presiding officer of a disciplinary hearing) because of the 60-day time limitation provided for in the SMS Handbook. This suggests that substantial redress would not be afforded to the applicant at a hearing in due course.⁴³

[25] I might add that this is certainly not to suggest that all cases of alleged unlawful suspension are likely to merit an urgent application of this nature. As a matter of general principle, the LRA-prescribed dispute-resolution processes will be followed and only in exceptional and compelling urgent circumstances will this type of application be permitted.⁴⁴ The seriousness of the allegations levelled against the Premier make the expeditious resolution of the underlying dispute in this matter important and heighten the sense of urgency. In *Apleni v The President of the Republic of South Africa and Another*, the court concluded that:⁴⁵

‘Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the rule of law, and may have a detrimental impact upon the public purse, the relevant relief sought *ought normally be urgently considered*.’ (Own emphasis)

[26] I have also had the benefit of full consideration of the papers and detailed argument presented by senior counsel for both the litigating parties. In all these circumstances, this does not seem to be an appropriate case to non-suit the applicant based on non-compliance with the rules on urgency, despite the tight timeframes afforded to the Premier to respond to the application.⁴⁶

⁴³ This line of reasoning finds some support in *Mogothle v Premier of the North West Province and Another supra* fn 37 para 47, where Van Niekerk J, with reference to *Minister of Home Affairs and Others v Watchenuka and Another supra* fn 31, highlighted the non-pecuniary consequences of suspension for an applicant, including the link between the freedom to engage in productive work and its relationship with the right to dignity.

⁴⁴ See *Gallocher v Social Housing Regulatory Authority and Another* (2019) 40 ILJ 2732 (LC) para 3, citing *Booyesen v Minister of Safety and Security and Others* (2011) 32 ILJ 112 (LAC) para 54.

⁴⁵ *Apleni v The President of the Republic of South Africa and Another supra* fn 20 para 10.

⁴⁶ For reasons that become apparent, there is no need to consider the Premier’s second preliminary point, that the dispute about a suspension is quintessentially a labour-related matter, so that it does not amount to administrative action and / or the exercise of public power, in any detail.

The applicant's submission on the merits

[27] The applicant contended in her founding affidavit that there was no valid reason for her suspension and that it was unclear whether her suspension was based on incapacity or misconduct, so that she had been treated prejudicially, her professional reputation and standing being negatively affected. As alluded to, the applicant also argued that it was improper for an acting head of department to be appointed in her stead, given service delivery challenges and her own prior knowledge of projects and institutional memory. It was submitted that there was a higher duty on the Premier to explain the suspension, ostensibly on the basis that the applicant in fact reported to the second respondent, and given the reports that had been provided to him. The suspension was, it was submitted, baseless and resulted in the department not receiving value for the salary it would still have to pay to the applicant whilst the investigation proceeded.

[28] The applicant concedes that the Premier has the power, in law, to suspend her,⁴⁷ but argues that those powers have been exercised in a manner that is unconstitutional, unlawful and invalid. The argument is that 'the Premier is abusing his powers in his capacity as my executive authority in failing to observe the lawful processes in having effected my suspension'.⁴⁸ The crux of the matter is whether the applicant was lawfully suspended on 5 April 2022, or whether her suspension was in fact unlawful, unconstitutional and invalid. The applicant also suggests that her employment agreement has been breached, seeking an order of specific performance on the part of the Premier prior to suspension, although the applicant did not pursue that angle during argument.

The legal position

[29] There is a clear difference between an employee's dismissal and suspension. In the latter instance, the employee is only temporarily prohibited from rendering

⁴⁷ S 12(1)(b) of the Act. The Premier confirms that he has not delegated the power to suspend a head of department to the second respondent: p 183 of the index.

⁴⁸ P 18 of the index, para 20 of the founding affidavit.

services to the employer, usually pending an investigation, whilst otherwise continuing to be an employee entitled to payment. The parties agree that precautionary suspensions in this context are governed by the Senior Management Service (SMS) Handbook ('the SMS Handbook'), which applies to senior management in the public service.⁴⁹ Paragraph 18.1 of the SMS Handbook provides that the suspension of heads of department must be dealt with in terms of chapter 7 of the SMS Handbook, including para 2.7(2) which provides as follows:

'(2) *Precautionary suspension or transfer*

(a) The employer may suspend or transfer a member on full pay if –

- The member is alleged to have committed a serious offence; and
- The employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the wellbeing or safety of any person or state property.

(b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgment and must be on full pay.

(c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement.'

[30] In *MEC for Education, North West Provincial Government v Gradwell* ('*Gradwell*'),⁵⁰ the Labour Appeal Court considered this paragraph of the SMS Handbook in the context of an application for urgent relief. Murphy AJA noted that the requirement of para 2.7(2) is that 'the employer should believe (reasonably) that the presence of the employee 'might jeopardise any investigation'. The court *a quo* had erred by setting the test too high and requiring a decision to conduct an investigation 'before suspension is contemplated'. The Labour Appeal Court held that the wording of para 2.7(2) does not unequivocally require the employer to take a conclusive decision to investigate before the power can be lawfully exercised. It is enough that *any* (current or future) investigation might be jeopardised.⁵¹ The use of

⁴⁹ See *Gradwell* supra fn 36 para 5. As that judgment explains, the terms and conditions of the senior management of the public service, from the level of director upwards, are not regulated by collective bargaining, but are determined by the Minister for the Department of Public Service and Administration by means of subordinate legislation issued in terms of the Public Service Regulations, 2001, which determinations are referred to and known as the 'SMS Handbook'. The ministerial determinations in respect of misconduct proceedings are contained in chapters 7 and 8 of the SMS Handbook.

⁵⁰ *Gradwell* supra fn 36 para 24.

⁵¹ *Gradwell* ibid para 25.

the word 'any' intimates that if an investigation is within contemplation the precondition will be met. The court added the following:⁵²

'Aside from that, the judge erred in his approach to determine the lawfulness of a suspension in terms of para 2.7(2). His choice not to consider the serious allegations against the respondent was mistaken. As a general rule, a decision regarding the lawfulness of a suspension in terms of para 2.7(2) will call for a preliminary finding on the allegations of serious misconduct as well as a determination of the employer's belief that the continued presence of the employee at the workplace might jeopardise any investigation etc. The justifiability of a suspension invariably rests on the existence of a prima facie reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible meaningfully to engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable.'

[31] In applying the facts of that matter to this test, the court accepted that the MEC's case that the respondent's presence at the workplace '*might* jeopardise any investigation' was both 'logical and justifiable in the light of the seriousness of the alleged misconduct'.⁵³

[32] The Constitutional Court has since held, in *Long v South African Breweries (Pty) Ltd and Others* ('*Long*'), that a pre-suspension inquiry is unnecessary when employees are suspended pending the outcome of an inquiry.⁵⁴ Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.⁵⁵ This is because suspensions imposed as precautionary measures are not considered to be the same as a disciplinary step. It is self-evident that *Long* was not concerned with a case of a senior manager in the public service. It must also be highlighted that *Long* involved an appeal against a decision of the Labour Court, *South African Breweries (Pty) Ltd v Long* ('*SAB*'), that dealt with the principles of unfair suspension as a possible unfair

⁵² *Gradwell* ibid paras 28, 30-31.

⁵³ *Gradwell* ibid para 30.

⁵⁴ *Long v South African Breweries (Pty) Ltd and Others* ('*Long*') [2018] ZACC 7.

⁵⁵ *Long* ibid para 24.

labour practice in terms of the LRA.⁵⁶ The Constitutional Court's comments in supporting the decision of the Labour Court must be read in the context of the question of fairness of a suspension:⁵⁷

'In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted ... Generally where the suspension is on full pay, cognisable prejudice will be ameliorated.'

[33] Notwithstanding that decision, it is *Gradwell* that clarifies the proper approach to determine the lawfulness of a suspension in terms of para 2.7(2) of the SMS Handbook.⁵⁸ That test involves the existence of a prima facie reason to believe that the employee committed serious misconduct. Only once this has been established objectively will consideration be given to the justifiability of denying access, and the two dimensions of the test are, in this sense, inter-related.

Application to the facts

[34] The Premier's concerns appear to stem mainly from proceedings launched in *Khula*, resulting in a court order compelling the department and the applicant to ensure delivery of LTSM to all public schools by 31 March 2022. The detailed report requested from the applicant on 23 March 2022 raised that issue, coupled with queries about stationery supply to schools, the non-payment of EAs and the withholding of the last instalment of the Education Infrastructure Grant. The correspondence reflects that the Premier expected the applicant to explain what

⁵⁶ *South African Breweries (Pty) Ltd v Long and Others* ('SAB') [2017] ZALCPE 36 paras 53, 54. The court supported authority that held that the key aspect in determining the fairness of the suspension is whether the employer had, based on the nature of the allegations, formed a view that the allegations were so serious as to warrant a suspension. It found that for a precautionary suspension to be fair, it must be directly linked to a pending investigation or process, whether related to misconduct, incapacity or operational requirements. The court found that it was not necessary for the employer to substantiate the misconduct or complaints against the employee at this stage. 'All that is required is a reasonable belief on the part of the employer that it exists, even if such belief may be subjective.'

⁵⁷ Para 25 (references omitted). The Labour Court added that the suspension must serve to protect the integrity of the investigation or process, or mitigate risks to the employer whilst such an investigation or process is ongoing: *SAB* *ibid* para 53 *et seq.*

⁵⁸ *Gradwell* *supra* fn 36 para 28.

steps she had taken to prevent these occurrences. The response received took the form of a letter coupled with three annexed reports, which were perused and considered. The Premier formed the view that the explanations contained in the letter and the reports were unresponsive to the thrust of the concerns that had been raised. Under-expenditure was highlighted as being unacceptable. The Premier explained his intention to institute an investigation to determine whether the applicant should face a case of 'misconduct, negligence and / or poor performance' and that the applicant may be placed on precautionary suspension pending the completion of the investigation.⁵⁹ The applicant was given an opportunity to provide reasons why this should not occur. Her response returned to the reports she had already provided and she argued that her presence could not jeopardise any investigation. On her own version, textbook delivery was at that point at 97% and, on the issue of EAs and GSAs, 'we have covered all payments except the last run that Treasury withheld for March 2022. The non-payment of EAs as well as the current status together with how in future this matter is going to be dealt with ... we are on 97% expenditure on the infrastructure grant ... Had Treasury not withheld our upload, we would have been on 100% expenditure ...'

[35] The Premier's answering affidavit describes the matters which form the basis of his concerns regarding the applicant as follows:⁶⁰

'Firstly, it is alleged that Dr Mbude made herself guilty of misconduct and in particular negligence which had catastrophic consequences for the Department in that departmental employees did not receive their salaries timeously, learners did not receive stationery and text books timeously and the Department forfeited more than R200 m (received by way of a conditional education infrastructure grant) due to underspending by the Department.'

[36] Her responses were considered to have deflected blame and to have advanced various excuses. She was appointed as the accounting officer and held ultimate

⁵⁹ See p 221 of the index: 'In the notice of intention to suspend I made it abundantly clear that allegations of misconduct including negligence, were being investigated. The suspension letter, which itself refers to the notice of intention to suspend, must clearly be read in this context.' Also see p 222: 'Self-evidently if allegations of misconduct are being investigated then the investigators will determine whether the allegations amount to misconduct or whether, perhaps, they do not rise to that level and may constitute poor performance. However, in this matter, I have made it very clear that the primary allegations which are being investigated are those pertaining to misconduct and negligence.'

⁶⁰ P 186 of the index.

responsibility for the administration of her department. The allegations were very serious, amounting to maladministration, and needed to be thoroughly investigated by an independent investigating team.⁶¹ The Premier proceeded to deal with each of the three main areas of concern. In particular, on his understanding of the facts, the applicant had failed to take the necessary steps to ensure the timeous delivery of textbooks and stationery to schools, which led to the decision in *Khula*. That order made specific reference to failures that amounted to a violation of constitutional rights, and the first and second respondents' plan for delivery in that matter was set aside. That on its own, as far as the Premier was concerned, would constitute misconduct:⁶²

'In particular what will have to be determined is whether Dr Mbude was negligent in allowing the state of affairs to rise. As mentioned above, the Court order appears to make it clear that Dr Mbude has committed misconduct by concluding an unconstitutional agreement to the detriment of learners.'

[37] There can be little doubt that the facts at the Premier's disposal had provided him with prima facie reason to believe that the applicant, the accounting officer of the department, had committed serious misconduct in one form or another. The litigation in *Khula*, and its outcome, certainly provided the scaffold for this view. This preliminary understanding is enough to meet the first leg of the test. Her response, in the form of the letter sent together with the accompanying reports, were considered and did not convince the Premier otherwise.

[38] Terms of reference for an investigation were then crafted by the Director-General. The team contained seven officials from the Department of Treasury and two from the Office of the Premier. It was envisaged that members of the team would be granted access to interview any relevant official of the department. The Premier's view was that it would be untenable for the applicant to remain in office whilst a subordinate managed and coordinated cooperation with the investigating team. This might impact upon the investigation negatively, bearing in mind that the applicant, as accounting officer, would be in a position to influence, interfere and frustrate the

⁶¹ P 187 of the index.

⁶² P 173 of the index.

investigation. Subordinates may also be disinclined to cooperate with the investigation and might fear reprisal.⁶³

[39] These statements clearly evince the Premier's belief that the presence of the applicant in the workplace might jeopardise the investigation to be instituted. That investigation was already within his contemplation when he corresponded with the applicant. Considering the nature, likelihood and, in particular, the seriousness of the alleged misconduct, described above, the Premier's belief was reasonable and this denial of access to the workplace must be justifiable. The second dimension of the test is, as a result, also satisfied. It is also clear that the applicant's precautionary suspension that followed is directly linked to the pending investigation process, which encompasses consideration of possible misconduct and negligence on the part of the applicant.

Remaining issues

[40] The applicant's written responses to the Premier's concerns make no reference to any abuse of power or mala fides on his part. Her challenge on the papers to a breach of contract fails in the absence of reference to any particular term, and was in any event not seriously pursued during argument. Clause 4.5 of the employment contract, referenced in the papers, deals with 'termination of employment', rather than suspension, and states only that 'In the case of incapacity and misconduct, the Employer shall deal with the Employee, in accordance with the relevant labour legislation and any directive issued by the Minister.'

[41] The applicant concedes that the Premier had the power to suspend her. Her close working relationship with the second respondent does not change that position. While it was an MEC who drove the suspension proceedings in *Gradwell*, that cannot mean that any suspension by a Premier, who is authorised to perform this function, should be set aside if the process leading to the suspension has not involved the MEC.⁶⁴ As to the main allegation of abuse of power and unconstitutional conduct,

⁶³ P 197 of the index.

⁶⁴ Such a suggestion is untenable and unsubstantiated by any evidence: see *South African Legal Practice Council v Bobotyana* [2020] 4 All SA 827 (ECG) para 76.

there is simply no factual foundation laid to support these serious allegations. The applicant's contention that the Premier has admitted to not reading and considering the reports she had prepared, so that he could not have applied his mind, is a far-fetched interpretation of one sentence of the Premier's affidavits. The alleged abuse of power is based, in part, on this reading. The applicant's conclusion that the Premier is 'misleading this Court, under oath ...', based on this supposed discrepancy is completely unfounded.

[42] The applicant also made much of the composition and activities of the investigation team to further support her claim of abuse of power. This was a new case made out in reply and stands to be rejected.⁶⁵ A proper application of the applicable test does not require 'any investigation' to take a specific form or conduct its work on a timeline specified to the satisfaction of the person being investigated. As indicated, once the Premier formed the prima facie view that there existed allegations of serious misconduct, the further question to be addressed prior to upholding the suspension is whether he held a reasonable belief that her presence in the workplace might jeopardise 'any investigation' into that misconduct, which has been found to be the case. Should subsequent events demonstrate that the investigation itself has taken a form that is unfair or prejudicial to the applicant, she may be entitled to seek the appropriate relief for that infringement in future. Assessing that matter at this stage is premature. On a proper application of the test, the composition of the investigation team, their terms of reference and manner in which the investigation has commenced is not a basis for finding the suspension to be invalid, unconstitutional or unlawful.

[43] As to the applicant's uncertainty as to the precise reason for her suspension, and whether this was based on misconduct, negligence or poor work performance, the short answer is that the applicable test makes this issue irrelevant for present purposes. The investigation was within the Premier's contemplation at the time of the suspension. He was concerned that her presence might compromise the investigation and that concern was justifiable given the nature, likelihood and seriousness of the alleged misconduct. The requirements of para 2.7 of the SMS

⁶⁵ See para 46 of the founding affidavit, p 27 of the index.

Handbook were accordingly fulfilled. It is uncertain whether the applicant will be charged, and whether any charges will relate to misconduct or negligence. The applicant is clearly aware that investigation of poor work performance typically assumes a different form. Any uncertainties on her part will be clarified in due course and do not aid the notion that her suspension must be set aside.

[44] Applicants contemplating a similar course in future would do well to heed the following remarks of the Labour Appeal Court in *Gradwell*:⁶⁶

'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.'

[45] There is public interest in swift and efficient investigation of allegations of mismanagement or misconduct on the part of high-ranking public servants responsible for service delivery. The applicant was appointed to the crucial position of Head of the Department of Basic Education in the province. Serious issues have been raised regarding the circumstances that resulted in the delay of delivery of textbooks and stationery, the embarrassment caused by the late payment of EAs, the impact of the withholding of the education infrastructure grant for the province, and the associated negative publicity and reputational damage to the Provincial Government. It is understandable that the Premier would not want the investigation instituted to be conducted while the applicant remains in office. The applicant suffers

⁶⁶ *Gradwell* supra para 46.

limited prejudice in consequence. She remains on full pay and her suspension will be for a limited duration. In all these circumstances, the applicant's suspension, far from being a knee-jerk reaction on the part of the Premier, is lawful and valid.

Costs

[46] The Constitutional Court has confirmed that an unsuccessful litigant engaged in constitutional litigation against the state ought not to be ordered to pay costs as a general rule. The rule has, in the context of an attack on a statutory provision, been articulated as follows:⁶⁷

'[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State ... lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.'

[47] In *Affordable Medicines Trust and Others v Minister of Health and Another*,⁶⁸ the Constitutional Court explained that costs should not be awarded against the applicants unless the litigation could be described as 'frivolous' or 'vexatious', or if conduct on the part of the unsuccessful litigant deserved censure in the form of a costs order.⁶⁹ The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.⁷⁰ Further details as to the appropriate balance to be struck, and the basis for this, have been provided by the Constitutional Court in *Biowatch Trust v Registrar Genetic Resources and Others ('Biowatch')*:⁷¹

⁶⁷ *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3 para 30.

⁶⁸ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3 para 138.

⁶⁹ In *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14 ('*Biowatch*') para 24, the Constitutional Court used the term 'manifestly inappropriate' to explain this reason for deviation from the typical rule. In *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 para 18, the Court, in addition to 'frivolous' and 'vexatious', referred to 'improper motives' or where there are other circumstances that make it in the interests of justice to order costs.

⁷⁰ *Ibid.*

⁷¹ *Biowatch supra* fn 69 para 23.

'The rationale for this general rule [that if the government wins, each party should bear its own costs] is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure.'

[48] Importantly, *Biowatch* confirms that courts should not easily find reasons for deviating from the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of 'genuine constitutional import' arise.⁷² It is not enough to merely allude to sections of the Constitution or to simply allege that the litigation is constitutional in nature. The issues must be 'genuine and substantive' and 'truly raise constitutional considerations relevant to the adjudication'.⁷³

[49] The further exceptions have been detailed in *Lawyers for Human Rights v Minister in the Presidency and Others*.⁷⁴ A court must consider the 'character of the litigation and [the litigant's] conduct in pursuit of it', even where the litigant seeks to assert constitutional rights. 'Vexatious' litigation is 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'. It is

⁷² *Biowatch* supra fn 69 para 24.

⁷³ *Biowatch* ibid para 25. Also see *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 para 11: the rule applies in the case of genuine 'constitutional matters' involving organs of state, rather than only in the case where a right in the Bill of Rights is in issue.

⁷⁴ *Lawyers for Human Rights v Minister in the Presidency and Others* supra fn 69.

initiated without probable cause by a person who is not acting in good faith to annoy or embarrass an opponent. Legal action that is not likely to lead to any procedural result is vexatious. A 'frivolous complaint' has no serious purpose or value.⁷⁵ As will be illustrated, however, it is unnecessary to consider these further exceptions in this instance.

[50] The meaning of 'constitutional matters' must include within their purview disputes as to whether any conduct is inconsistent with the Constitution and, as a result, unlawful and invalid.⁷⁶ They must also be of 'genuine constitutional import'. There is Constitutional Court authority for the view that matters that turn only on the facts in the application of established legal principles should not be favoured with this label. As Madlanga J put it in *Mbatha v University of Zululand*:⁷⁷

'... in a scenario where it is clear that the substance of the contest between the parties is purely factual, it cannot be said to raise a constitutional issue purely because an applicant says it does ... a constitutional issue remains one even if it may turn out to be unmeritorious. That is not the same as saying that what in essence is a factual issue may somehow morph into a constitutional issue through the simple facility of clothing it in constitutional garb.'

[51] In *Minister of Safety and Security and Another v Schuster*,⁷⁸ the SCA came to the conclusion that suing the police for damages for wrongful arrest and detention is not the same as testing one's constitutional rights, concluding as follows:

'This case turned solely on the facts ... To apply the "*Biowatch*" principle in such cases would open the floodgates for opportunistic claims which may nevertheless fall short of being categorised as "frivolous" or "vexatious". It would promote risk-free litigation. The potential consequences are deeply disturbing. To deprive the successful appellants, the Minister and the NDPP, and, by extension, the fiscus itself, of costs in the present matter would be unjust and inequitable. It would also lack a rational foundation.'

[52] Considering the character of the present litigation and the issues raised on the papers, I am unconvinced that genuine and substantive matters of constitutional relevance have been in focus. There was no constitutional right that was applicable

⁷⁵ *Lawyers for Human Rights v Minister in the Presidency and Others* ibid para 19.

⁷⁶ *S v Boesak* [2000] ZACC 25 para 14.

⁷⁷ *Mbatha v University of Zululand* [2013] ZACC 43 paras 221, 222.

⁷⁸ *Minister of Safety and Security and Another v Schuster and Another* [2018] ZASCA 112

or invoked. Many of the claims on the papers, including the suggestion of breach of contract, the argument that the MEC should have played a role in the suspension process and the artificial reading of the Premier's consideration of the applicant's responses, were specious and not argued from a constitutional perspective. The applicant's replying papers changed tack and concentrated heavily on the complaints about the shaping of the investigation, linked to the notion of a possible abuse of power. As indicated, application of the appropriate test for considering the validity of a suspension, in terms of the SMS Handbook, makes this irrelevant. *Gradwell* amounts to clear authority and established legal principle that was left unchallenged, to be interpreted and applied to the facts of this matter. The applicant was also obliged to accept the Premier's power to suspend her, the main focus of the dispute being the manner in which this power had been exercised. The remaining arguments advanced, in addition to being far-fetched, cannot be said to have truly raised constitutional considerations relevant to the resolution of the dispute. The sporadic invocation of ss 1 and 237 of the Constitution was perfunctory and without genuine engagement with their substance. There has certainly not been any enrichment of the general body of constitutional jurisprudence, because the matter is in fact not authentically concerned with constitutionality. Finally, the Premier's position, the concerns he held, the approach he had adopted and his reasons for not wanting the applicant to remain at work were all explained in his correspondence, to be reiterated in his answering affidavit. He was met with an unfounded, serious allegation of an abuse of power and a contrived invocation of the Constitution as part of an application claiming urgent final relief.⁷⁹ In all these circumstances, I consider it appropriate to deviate from the *Biowatch* principle.

[53] Both the applicant and the Premier made use of two counsel. Given the strict timeframes, the range of issues canvassed in the papers and the importance of addressing allegations of abuse on the part of the Premier, the use of two counsel is justified. The end result is that the application is dismissed with costs, to include the costs of two counsel where so employed.

⁷⁹ See *Turnbull-Jackson v Hibiscus Court Municipality and Others* [2014] ZACC 24 para 35.

Order

- a. The matter is heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.
- b. The application is dismissed with costs, to include the costs of two counsel where so employed.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:26 April 2022
Delivered:03 May 2022

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