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2011-05-30

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Dear Ms Sischy

MR S BUTHELEZI: TERMINATION OF SERVICES IN RESPECT OF EMPLOYMENT WITH THE DEPARTMENT OF TRANSPORT, ROADS AND WORKS IN THE GAUTENG PROVINCE

1. Background

1.1 On 19 April 2010, my office wrote as follows to you:

"...

I note ... that you represent Mr S Buthelezi, former Head of Department: Public Transport, Roads and Works in the Gauteng Provincial Government. ... culminating from an investigation that was conducted by the Resolve Group ... his services were terminated on 30 November 2009 after disciplinary action was instituted against him.

In this regard, the following relief was requested on his behalf:

> *'That the Department rescinds the investigation by Harris [Resolve Group] in it's totality, and to do a media release apologizing to Mr Buthelezi for allowing and/or encouraging an investigation which was not reasonable and procedurally fair, and the gross injustice he suffered as a result thereof'.*

....

In order to fully understand the facts of the matter, and before taking a decision on jurisdiction, I would appreciate the furnishing of the following documents and information:

a. ....
....
d. ...."

1.2 In this regard, on page 11 of your original complaint to my office, you indicated as follows:

"Mr. Buthelezi should have received ***administrative action that is lawful, reasonable and procedurally fair. Mr. Buthelezi had the legitimate expectation that both him and Jacobs (sic) would be treated equally and impartially.***"

(Emphasis added)

1.3 On 25 August 2010, the following information was provided to my office:

"5. The relief that our client seeks is that the Harris report and the investigation be rescinded on the following basis:

5.1 As per the parties written agreement .... Paragraph 12 ... refers to Annexure A ..., which states that the Department withdraws ***ALL*** *charges against Buthelezi (sic). This clearly means charges ventilated in the Harris investigation and report which resulted in charges in the subsequent disciplinary proceedings.*

5.2 Paragraph 11.1 of the agreement states that ['']From the termination date neither party shall <u>at any time</u> make adverse, untrue or misleading statements about the other['].

5.3 Paragraph 18.2 states that this agreement cannot be varied deleted or cancelled unless done so in writing and signed by the parties.

5.4 Paragraph 15.1 thereof states that [']Each and all of the payments made and agreed to herein are in full and final settlement of <u>all</u> and <u>any claims</u> which the parties may have against each other whether such claims arise in delict, contract or in terms of any statutory enactment or otherwise['].

6. It is therefore clear that in terms of the parties signed agreement that the Department can no longer rely on the Harris investigation or it's subsequent report. The Department regardless thereof advised the media of it's support thereof and released the contents thereof after signing the agreement.

7. In the alternative thereto the Harris report should be rescinded on the basis that it is substantially and procedurally unfair as set out in our client's previous correspondence and complaints."

2. Salient points brought to my attention

2.1 On 30 September 2008, Mr P Harris of The Resolve Group was provided with the following terms of reference after allegations and counter-allegations were made by Mr Buthelezi and Mr I Jacobs, the former MEC for Transport, Roads and Works in the Gauteng Province, against each other:

"Investigate the veracity of the [following] allegations .... [and] write a report on the outcome of your investigation and ... make appropriate recommendations [regarding]:

1.1 Allegations by the Head of Department, Mr S Buthelezi against MEC Jacobs, contained in the attached e-mail dated 18 September 2008 ([']the e-mail[']);

1.2 Allegations against the officials mentioned in [']the e-mail['];

1.3 Allegations of possible misconduct that may be made by the MEC against Mr Buthelezi[.]"

2.2 After the investigation commenced, submissions were made and exchanged between Mr Buthelezi and Mr Jacobs.

2.3 Whilst pending, Mr Buthelezi objected to the scope of the investigation, to the effect that it should have been limited to the allegations that were made against Mr Jacobs, and not to the allegations that were made by Mr Jacobs against him.

2.4 On 8 June 2009, Mr Harris issued a 367 page report[1] with findings against Mr Buthelezi. In this regard, disciplinary action was recommended. Mr Buthelezi was given an opportunity to respond to the report, which he did, to an extent, on 23 June 2009[2].

2.5 Apart from disagreeing with some of the findings made in the report, Mr Buthelezi raised a concern regarding Mr Harris' failure to investigate all the allegations made against Mr Jacobs.

2.6 On 14 July 2009, Mr Buthelezi was suspended and given notification of an intention to proceed with disciplinary action.

2.7 The disciplinary proceedings never took place, and on 20 November 2009, Mr Buthelezi and the Department entered into a settlement agreement (agreement).

2.8 Some of the following terms and conditions formed the basis of the agreement:

"11. ...
From the Termination Date:

11.1 neither Party shall at any time make any adverse, untrue or misleading statement[s] about ... each other; ...."

"12.1 The announcement of the mutual decision to terminate the employment relationship shall be made by the Department by way of a media release and a circular to employees."

"12.2 The announcement which shall be made by the Department is attached as Annexure ['A']."

"ANNEXURE A[3]

ANNOUNCEMENT

To all staff and media

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[1] Together with 99 annexures.
[2] Mr Buthelezi regarded the response as limited, due to the volume of the report and the complexity of the issues investigated.
[3] Typed presentation of Annexure "A".

Following the suspension of Mr Buthelezi which took place on 14 July 2009 the Department and Mr Buthelezi announce the following:

1. *The Department withdraws all charges against Mr Buthelezi.*

2. *The Department has lifted his suspension.*

3. *The Department and Mr Buthelezi have entered into a mutual agreement in terms of which his employment with the Department will terminate on 30 November 2009.*

MEC: Mr Bheki Nkosi"

"13. The Employee acknowledges and agrees that the terms set forth above include compensation to which he is not otherwise entitled. ...."

"15.1 Each and all of the payments made and agreed to herein are in full and final settlement of all and any claims which the Parties may have against each other whether such claims arise in delict, contract or in terms of any statutory enactment or otherwise."

"17.1 In the event of there being any dispute or difference between the Parties arising out of this Agreement, the dispute or difference shall on written demand by any Party be submitted to arbitration in Johannesburg in accordance with the AFSA rules, which arbitration shall be administered by AFSA. ...."

2.9 On 30 November 2009, the Department issued the following circular to its staff:

".... The Department of Roads and Transport (DRT) has reached a settlement agreement with Mr Sibusiso Buthelezi, the Head of the Department who is currently on suspension. In brief, the terms of the settlement are to the effect that:

- *The Department withdraws all disciplinary charges against Mr Buthelezi;*
- *His employment with the Department terminates on 30 November 2009; and*
- *He will receive a year's salary subject to taxation.*

The above determination was made primarily because:

- *It would have been costly to pursue the matter; and*
- *A forensic audit is currently being conducted in the Department and the outcomes would allow the Department to act thereof (sic).*

Staff members should also note that:

- *The Department will not prevent any law enforcement agency from taking any action against individuals within the Department who may be found to have transgressed the law, including Mr Sibusiso Buthelezi.*
- *The National Treasury is assisting the Department to address maladministration and corruption and certain individuals have already been put on precautionary suspension.*
- *The Department is committed to a clean administration and has already embarked on a process to correct the situation."*

2.10 On 4 December 2009, Mr Buthelezi informed the Department that he was of the view that the context of the circular was wrongful and defamatory, and made with

an intention to defame and injure his reputation. To this end, Mr Buthelezi demanded an apology, a retraction statement and the issuing of a new circular in accordance with the terms agreed upon in Annexure "A". In addition to this, Mr Buthelezi required proof of the statements that were provided to the media, in light of reporting to the following effect:

"Sowetan: . Transport DG dismissed 01 December 2009

Gauteng department of roads and transport director-general Sibusiso Buthelezi has been dismissed for failure to follow proper financial management practices and dereliction of duty.

Buthelezi's contract, which was to expire in 2013, was terminated yesterday. He had allegedly awarded tenders worth more than R500million to friends and relatives. According to an agreement, charges against him would be withdrawn.

- Kingdom Mabuza"

2.11 The Department's response to Mr Buthelezi (*via* its attorneys) was that:

"...
The circular substantially complies with the agreement. We are of the view that our client is entitled to address its members of staff regarding the reasons for the settlement and issues which they should take note of. The circular does not contravene the agreement.

...

Our client will not accede to your client's demand as stated in paragraph 21 of your letter[4]."

3. Remedial action sought

3.1 Mr Buthelezi requires my intervention in obtaining the following remedial action from the Department:

3.1.1 Rescission of its Harris investigation and report, on the suggestion that this was the implicit intention of the agreement, based on the withdrawal of the charges against him and the fact that the agreement was in full and final settlement of all claims between the parties; alternatively

3.1.2 Rescission of the Harris investigation and report on the basis that the investigation conducted around it was substantively and procedurally unfair.

4. Powers to investigate the complaints raised by Mr Buthelezi

4.1 <u>Rescission of the Harris investigation and report on the basis of the right to just administrative action</u>

4.1.1 Mr Buthelezi reasons that during the course of the investigation, he was not afforded administrative action that was lawful, reasonable and procedurally fair, as expounded in section 33 of the Constitution and the Promotion of Administrative

[4] Mr Buthelezi's request, as contained in paragraph 21 of the letter was that the Department print an apology in the relevant newspapers and do a reprint of Annexure "A".

Justice Act, 2000 (PAJA). In his view therefore, the Harris investigation and report should be rescinded, thus rendering it to be of no force and effect.

4.1.2 The right to just administrative action is governed by the following provisions:

4.1.2.1 Section 33 of the Constitution, which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

4.1.2.2 Section 1 of PAJA, which defines administrative action as:

"Any decision taken, or any failure to take a decision, by ... an organ of state, when ... exercising a public power or performing a public function in terms of any legislation; ... which adversely affects the rights of any person and which has a direct, external legal effect, ..."

4.1.2.3 Section 1 of PAJA, which defines a decision as:

"Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to ..., and a reference to a failure to take a decision must be construed accordingly."

4.1.2.4 Section 3(1) of PAJA which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

4.1.3 For all incidences relating to Mr Buthelezi's employment as a former Head of Department and former public servant, he was subject to the provisions of:

4.1.3.1 The Public Service Act, 1994 (Public Service Act);

4.1.3.2 The Public Service Regulations, 2001[5] (Regulations); and

4.1.3.3 Chapter 8 of the SMS Handbook: Employment of Heads of Department[6] (SMS Handbook: Employment of HOD's).

4.1.4 As such, for all issues relating to his suspension, the charges that were brought against him and the Department's intended disciplinary action, he was subject to the provisions of:

4.1.4.1 Resolution 1 of 2003;

4.1.4.2 Schedule 1 of Resolution 1 of 2003: Disciplinary Code and Procedures (Disciplinary Code);

4.1.4.3 Chapter 7 of the SMS Handbook: Misconduct and Incapacity[7] (SMS Handbook: Misconduct);

4.1.4.4 Chapter 8 of the SMS Handbook: Employment of HOD's;

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[5] As promulgated in Government Notice R1 (Government Gazette 21951) of 5 January 2001.
[6] As published by the Department of Public Service and Administration on 1 December 2003.
[7] See above.

4.1.4.5 The Labour Relations Act, 1995 (Labour Relations Act); and

4.1.4.6 Schedule 8 of the Labour Relations Act: Code of Good Practice – Dismissal (Code of Good Practice).

4.1.5 Mr Buthelezi sought to frame a claim pertaining to his dissatisfaction with the investigation (into allegations by Mr Jacobs of insubordination, misconduct and poor performance, leading to his suspension and the institution of disciplinary proceedings against him), not on any of the above provisions, but on the basis of a right to just administrative action in terms of PAJA.

4.1.6 Discussion of the ensuing cases will show whether Mr Buthelezi is afforded the protection of PAJA based on the circumstances of his case.

4.1.6.1 Fredericks & Others v MEC for Education and Training, Eastern Cape & Others 2002 (2) SA 693 (CC) (Fredericks)

(a) *Facts of the case*:

(i) The Eastern Cape Department of Education refused to approve applications for voluntary retrenchment in terms of a collective bargaining agreement. The applicants based their claim on an alleged infringement of their right to equality **and just administrative action**, as enshrined in the Constitution, and approached the High Court to have the decision reviewed and set aside.

(ii) The High Court held that the dispute concerned a collective bargaining agreement, as governed by section 24 of the Labour Relations Act, and in respect of which the Labour Court had exclusive jurisdiction in terms of section 157(1) of the Act in question. In this regard, it was held that on a proper construction of the Labour Relations Act, it did not have jurisdiction to consider the matter.

(iii) Sections 157(1) and (2) of the Labour Relations Act provide as follows:

Section 157(1): *"Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."*

Section 157(2): "*The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-*

(a) employment and labour relations;

(b) ...."

(iv) On appeal to the Constitutional Court, the applicants alleged that the state, in its capacity as an employer, **did not act procedurally fairly in its consideration of their voluntary retrenchment applications**.

(b) *Judgement by O'Regan J*:

(i) In a unanimous judgement, it was held that the High Court did have jurisdiction to entertain the claim, which was founded on a constitutional right to just administrative action and equal treatment.

(ii) The Constitutional Court held that there was no general jurisdiction afforded to the Labour Court in employment matters, and that the High Court's jurisdiction was not ousted by section 157(1) of the Labour Relations Act simply because the dispute was one that fell within the overall sphere of employment relations.

(iii) The Constitutional Court held further that the High Court's jurisdiction would only be ousted in respect of matters that 'are to be determined by the Labour Court' in terms of the Labour Relations Act, that is, matters specifically assigned in terms of the Labour Relations Act that had to be decided and settled by that court.

(iv) According to the Constitutional Court, section 157(2) of the Labour Relations Act had in fact afforded concurrent jurisdiction to both the Labour Court and the High Court to determine disputes concerning alleged infringements of constitutional rights by the state acting in its capacity as an employer.

4.1.6.2 Chirwa v Transnet Limited & Others 2008 (4) SA 367 CC (Chirwa):

(a) *Facts of the case*:

(i) Ms Chirwa, a Human Resources Executive Manager at the Transnet Pension Fund, was required to appear before a disciplinary enquiry on 22 November 2002 on allegations of inadequate performance, incompetence and poor employee relations. She was dismissed on the same date. She referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging unfair dismissal. The dispute could not be resolved, and a certificate was issued to this effect, recommending arbitration in terms of section 191 of the Labour Relations Act. Instead of proceeding with arbitration, she approached the High Court for an order setting aside the disciplinary proceedings and reinstating her to her former position.

(ii) The basis of her argument was that in dismissing her, her employer failed to comply with Items 8 and 9 of the Code of Good Practice, making the decision reviewable in terms of PAJA. The grounds of her application were based on section 188 of the Labour Relations Act (read together with Items 8 and 9 of the Code of Good Practice).

(iii) Ms Chirwa believed that she had two causes of action available to her; one under the Labour Relations Act and the other under the Bill of Rights (read together with PAJA). In this regard, she chose to approach the High Court for relief, believing that the former had concurrent jurisdiction with the Labour Court in respect of her claim.

(iv) The High Court declared her dismissal to be a nullity and made an order for reinstatement. Transnet successfully appealed the decision in the Supreme Court of Appeal. Ms Chirwa subsequently lodged an appeal with the Constitutional Court.

(b) *Judgement by Skweyiya J*:

(i) Skweyiya J (7 judges concurring), in delivering the majority judgement, reasoned that it was unsatisfactory for applicants to approach the High Court to decide review applications in terms of PAJA where the Labour Relations Act already regulated the same issue to be reviewed. He pointed out that the existence of a purpose built employment framework in the form of the Labour Relations Act and associated legislation, inferred that labour processes and forums should take precedence over non purpose-built processes and forums in situations involving employment related matters.

(ii) He argued that litigation in terms of the Labour Relations Act should be seen as the more appropriate route to pursue. He pointed out that Ms Chirwa had expressly relied on the provisions of the Labour Relations Act dealing with unfair dismissals to assert her claim, to this extent, even approaching the CCMA for redress. According to the judgement, when she approached the High Court, **she made it clear that her claim was based on a violation of the provisions of the Labour Relations Act**. It was reasoned that she had access to procedures, institutions and remedies specifically designed to address the alleged procedural unfairness.

(iii) Judge Skweyiya maintained that all employees, including public service employees (with exceptions[8]), were covered by unfair dismissal provisions and dispute resolution mechanisms provided by the Labour Relations Act.

(iv) He found that the High Court did not have concurrent jurisdiction with the Labour Court **in this matter**. Ms Chirwa was directed to follow the route created by the Labour Relations Act in order to exhaust all the remedies that were available to her.

(v) Judge Skweyiya distinguished Fredericks' case on the basis that the **applicants in the latter case expressly disavowed any reliance on the right to fair labour practices as entrenched by section 23(1) of the Constitution, or any of the provisions of the Labour Relations Act**. He maintained that the court in Fredericks' case left open the question whether a dispute arising from the interpretation or

[8] For example, members of the South African National Defence Force.

application of a collective bargaining agreement should be dealt with in terms of the Constitution and PAJA.

(c) *Judgement by Ngcobo J*:

(i) Ngcobo J (6 judges concurring) agreed with the majority that in Ms Chirwa's case, her remedy lay in the Labour Relations Act.

(ii) Going a step further, in assessing whether the employer's power to dismiss amounted to administrative action, he determined that the power involved was the termination of a contract of employment for poor work performance, and that the source of the power was the employment contact between Ms Chirwa and her employer.

(iii) He concluded that the nature of the power involved was therefore contractual.

(iv) To this end, he argued that **the conduct of the employer in terminating the employment contract does not constitute administration**, but that it was more concerned with labour and employment relations. He found in this regard that the employer's conduct therefore did not constitute administrative action in terms of section 33 of the Constitution.

4.1.6.3 Gcaba v Minister of Safety & Others 2010 (1) SA 238 CC (Gcaba):

(a) *Facts of the case*:

(i) Mr Gcaba was appointed as Station Commissioner in Grahamstown in 2003. When the post was subsequently upgraded, he applied, was shortlisted and interviewed therefore. When he was not appointed to the position, he lodged a grievance, but later abandoned the process and elected to refer the matter to the Safety and Security Sectoral Bargaining Council. He later withdrew the dispute and approached the High Court with an application to review the decision not to appoint him.

(ii) The High Court, considering itself bound by Chirwa's case, dismissed the application on the basis that it lacked jurisdiction to entertain the matter as it related to an employment matter.

(iii) Mr Gcaba approached the Constitutional Court with an application for leave to appeal the High Court's judgement (placing reliance on Fredericks' case, to the effect that from the inception, **his claim was couched largely in administrative law terms, and that to this end, he was relying on the right to just administrative action as envisaged by PAJA**).

(iv) The Constitutional Court in Gcaba was thus confronted with differing jurisprudences based on the decisions of Chirwa and Fredericks regarding overlapping constitutional, administrative and labour law provisions and principles.

(v) The Constitutional Court agreed with Judge Skweyiya's distinction of the Chirwa and Fredericks cases on the basis that the latter was not based on an employment contract, but on a constitutional right to administrative justice and equality, whereas the former was a labour relations case placing direct reliance on the Labour Relations Act. The Constitutional Court noted Judge Skweyiya's reasoning that the High Court's jurisdiction will only be ousted in matters which are to be determined by the Labour Court, for example, unfair dismissals.

(vi) The Constitutional Court noted further that the applicants' decision in the Fredericks case not to rely on the Labour Relations Act removed their claim from the purview of labour law and the exclusive jurisdiction of the Labour Court and placed it within the concurrent jurisdiction of the Labour and High Courts. It noted that because Ms Chirwa characterised her claim as a labour matter, she had to follow the specialised framework provided for in the Labour Relations Act, and that to this end, her claim of unfair dismissal was one envisaged by the Labour Relations Act.

(vii) The Constitutional Court identified the following applicable principles and policy considerations which informed the Fredericks and Chirwa cases:

- ❖ The same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often to be pursued in different courts and fora; it is generally accepted that human rights are intrinsically interdependent, indivisible and inseparable and that legislation should not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights.

  But that, however:

- ❖ The Constitution recognises the need for specificity and specialisation in modern and complex societies. In this regard, the legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action and labour relations. To this end, once a set of carefully crafted rules and structures have been created for effective and speedy resolution of disputes and the protection of rights in a particular area of law, it is preferable to use that particular system (as emphasised by Judges Skweyiya and Ncgobo in Chirwa's case). It was noted that if litigants were at liberty to relegate the finely-tuned dispute resolution structures created by the Labour Relations Act, a dual system of law could fester in cases of dismissal of employees, and that in this regard, forum shopping by litigants was not desirable; and

- ❖ In the interests of certainty, equality before the law and the satisfaction of legitimate expectations, a court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters. To this end, a single source of

consistent, authoritative and binding decisions was essential for the development of a stable constitutional jurisprudence. It was reasoned therefore that the Constitutional Court should not, without coherent and compelling reason, deviate from its own previous decisions.

(viii) The Constitutional Court argued that **generally, employment and labour relations issues do not amount to administrative action within the meaning of PAJA**, as recognised by the differing regulatory frameworks provided for in terms of sections 23 and 33 of the Constitution. It was pointed out that section 23 regulates employment relations between the employer and employee and guarantees the right to fair labour practices. Further, that the thrust of section 33 was to regulate the relationship between the state as a bureaucracy and its citizens, and to guarantee the right to lawful, reasonable and procedurally fair administrative action. It was indicated that **section 33 does not regulate the relationship between the state, as an employer, with its employees**. To this end, it was stated that when a grievance is raised by an employee relating to the conduct of the state as employer, and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.

(ix) Similarly to Judge Ngcobo, the Constitutional Court held that the failure to promote and appoint Mr Gcaba did not amount to administrative action, being a quintessential labour relations matter, based on the right to fair labour practices, the impact thereof being felt mainly by Mr Gcaba, with little or no direct consequences for any other citizens.

(x) The Constitutional Court found that **Mr Gcaba's complaint was essentially rooted in the Labour Relations Act, as it was based on the conduct of an employer towards an employee which may have violated the right to fair labour practices**. The Constitutional Court found that it was not administrative action, and that the complaint should have been adjudicated by the Labour Court.

4.1.7 The Labour Relations Amendment Bill, 2010 (Bill)[9] proposes, amongst other things, to bring about an end to what has been described as the 'forum shopping' consequence of section 157(2) of the Labour Relations Act. Clause 11(a) of the Explanatory Memorandum of the Bill provides as follows:

"The jurisdiction of the Labour Court is clarified and expanded. The Labour Court's exclusive jurisdiction is extended to the interpretation of all employment laws, all matters concerning the termination of contracts, constitutional matters arising from employment or labour relations and reviews of administrative actions in terms of any employment law. It is also clarified that, in line with the jurisprudence of the Constitutional Court, the Labour Court will have exclusive jurisdiction for issues of labour law in the public service. These changes will prevent ['']forum shopping['] by parties as well as prevent the emergence of conflicting jurisprudence in the specialist Labour Court and the High Court. (s. 157(a))"

[9] The Bill has been published for public comment and referred to Nedlac for further negotiations.

4.1.8 In terms of the Bill, section 157(1) of the Labour Relations Act will be substituted with the following:

"*Jurisdiction of the Labour Court:*

157(1): "Subject to the Constitution the Labour Court has exclusive jurisdiction in respect of-

(a) a matter that is required to be determined by the Labour Court in terms of this Act or any other employment law;

(b) the interpretation or application of any employment law;

(c) a dispute concerning the termination of a contract of employment;

(d) a constitutional matter arising from employment or labour relations;

(e) subject to section 145, review [of] any administrative action taken in terms of this Act or any employment law;

(f) ...;

...."

4.1.9 Based on the exposition of the case law and the Bill above, it is clear that the right to just administrative action does not apply to the Harris investigation and report and the ensuing disciplinary proceedings that were instituted. The investigation was premised on mutual grievances that Mr Buthelezi and Mr Jacobs had against each other. The investigation ensued, and as a result thereof, recommendations were made for disciplinary action to be taken against Mr Buthelezi. Mr Buthelezi was served with a notice of intention to institute disciplinary proceedings and suspended. All the afore-mentioned actions are employment or labour relations issues that fall to be dealt with in terms of the Public Service and Labour Relations dispensations.

4.2 <u>Mr Buthelezi's employment and labour rights</u>

4.2.1 *Right to fair labour practices*

4.2.1.1 Section 23(1) of the Constitution provides that everyone has the right to fair labour practices.

4.2.1.2 Section 185 of the Labour Relations Act gives effect to the right not to be unfairly dismissed and the right not to be subjected to unfair labour practices.

4.2.1.3 As already indicated, the Department did not proceed with disciplinary action against Mr Buthelezi. The parties, instead, settled the matter on the basis that his services would be terminated against the payment of compensation.

4.2.1.4 At no stage in Mr Buthelezi's request for intervention to my office has any reference been made to an allegation that he may have been subjected to an unfair labour practice. Even if he had done this, the circumstances of his case do

not warrant such a conclusion, based on the restrictive definition of the term, which, according to section 186(2) of the Labour Relations Act means:

"Any unfair act or omission that arises between an employer and employee involving -

(a) unfair conduct by the employer relating to the promotion, demotion, probation ... or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 ..., on account of the employee having made a protected disclosure defined in that Act."

4.2.1.5 The only provision that could have been applicable under the circumstances would have been for Mr Buthelezi to allege being subjected to: *"the unfair suspension of an employee"*. Not only has he not done this, but the circumstances of his case do not warrant a conclusion that he may have been subjected to an unfair labour practice by virtue of an alleged unfair suspension.

4.2.2 *Scope of the investigation*

4.2.2.1 As already indicated, Mr Buthelezi objected to the scope of the investigation[10]. According to him:

"Mr. Peter Harris ... was appointed by the Premier to investigate the allegations contained my e-mail dated 18 September 2008 ...."

4.2.2.2 Mr Buthelezi maintained that:

"... both Premiers believed that the MEC's intention was to investigate whether the allegations in my e-mail dated 18 September 2008 was reasonable and made in my capacity as HOD, or whether it was completely unreasonable spurious and with ulterior motive. On or about the 30th September 2008 Premier Shilowa instructed Mr. Harris to investigate the allegations made by me in my e-mail of 18 September 2008 and the MEC's reply of 22 September 2008. ... Premier Shilowa's [sic] resigned about the same time and Premier Mashatile was appointed. Premier Mashatile's letter dated 30 September 2008 may be deemed confusing as to whether it widens the scope of the investigation as set by Shilowa [sic] in so far as it relates to allegations by the MEC against me."

4.2.2.3 The only documents that Mr Buthelezi has provided my office with relating to the scope of the investigation are:

(a) A letter dated 30 September 2008 signed by Mr Shilowa where a terms of reference is attached.

[10] According to communications that he sent to the Department on 5 December 2008 and 4 May 2009.

(b) A terms of reference dated 30 September 2008 signed by Mr M Mokoena, the Director-General of the Department at the time. The terms of reference states as follows:

"1. I hereby appoint you to investigate the following:

1.1 Allegations by the Head of Department, Mr S Buthelezi against MEC Jacobs, contained in the attached e-mail dated 18 September 2008 ([']the e-mail[']);

1.2 Allegations against the officials mentioned in [']the e-mail[];

1.3 ***Allegations of possible misconduct that may be made by the MEC against Mr Buthelezi[.]"***

(Emphasis added)

4.2.2.4 Unless Mr Buthelezi can provide me with a differently worded terms of reference, I am unable to draw any other conclusion but that he was also subject to the investigation.

4.2.3 *The nature of an investigation*

4.2.3.1 The Harris investigation operated on principles no less different than the customary preliminary investigation that is used to determine whether or not an employee should be charged by way of a disciplinary process.

4.2.3.2 In this regard, section 17(1)(a) of the Public Service Act[11], Chapter 4, Part VIII D of the Regulations[12], clause 3(b) of Resolution No. 1 of 2003[13], Item 4.1 of the Disciplinary Code[14] and Part 1.2 of the SMS Handbook: Misconduct[15], all provide for the peremptory application of the Labour Relations Act pertaining to issues involving discipline and dismissal.

4.2.3.3 Item 4.1 of the Code of Good Conduct provides as follows:

"Normally, the employer should conduct an investigation ***to determine whether there are grounds for dismissal****. This does not have to be a formal enquiry."*

4.2.3.4 According to Grogan[16], the purpose of the investigation is to establish whether there is a *prima facie* case against the employee being investigated, and normally takes the form of interviews and the gathering of evidence.

4.2.3.5 In the private arbitration of NUM & Others v RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) 2003 24 ILJ 2040 (P), Grogan maintained that employees being investigated are not necessarily entitled to be heard or represented during the investigation.

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[11] Providing that the power to dismiss an employee must be exercised **in accordance with the Labour Relations Act**.
[12] Providing for the Minister of Public Service and Administration to issue directives to establish misconduct and incapacity procedures for members of the Senior Management Service (SMS), **subject to the Labour Relations Act**.
[13] Providing that the amended disciplinary procedure remains applicable to members of the SMS until such time as the Minister of Public Service and Administration issues a directive to cover the disciplinary matters of these members.
[14] Providing that the Code of Good Practice, insofar as it relates to discipline, **constitutes part of the Disciplinary Code**.
[15] Providing that the Chapter must always be read and applied in conjunction with the Public Service Act, the Public Service Regulations, PSCBC Resolutions **and the Labour Relations Act**.
[16] Grogan J *Workplace Law* 10th Edition 235.

4.2.3.6 Even the term: *"unfair labour practice"* makes no reference to the investigation process, starting instead, in section 186(2)(b) of the Labour Relations Act, with suspension, and then moving onto: *"other disciplinary action short of dismissal"*.

4.2.3.7 Finally, section 2.7 of the Disciplinary Code provides that disciplinary proceedings do not replace or seek to imitate court proceedings. This would, by implication, apply all the more strongly to the preliminary investigation. It is therefore believed that Mr Buthelezi goes too far when he suggests that:

"11. We humbly submit that a procedural (sic) fair process insofar (sic) it relates to statements of the parties would have been;

11.1 Mr. Buthelezi be advised to attend to the founding statement together with supporting documents within a certain period.

11.2 Mr. Jacobs to do an answering statement with supporting documents within a certain period.

11.3 Mr Buthelezi to do a replying statement with supporting documents if necessary within a certain period.

11.4 And should Mr Jacobs have new allegations not included in Annexure B that he would do a founding statement and the parties would follow a similar procedure.

.....

12. This however did not occur."

4.3 <u>Rescission of the Harris investigation and report on the basis of the agreement</u>

4.3.1 I am of the view that the agreement concluded between Mr Buthelezi and the Department amounted to one of compromise, based on the following statements:

Mr Buthelezi: *The Letter of Complaint

- *"The Department made it clear to Mr Buthelezi that it would never accept Buthelezi's return to the Department and he eventually agreed to accept termination of employment with compensation".*

Department: *The Settlement Agreement

- *"The Parties have been involved in a dispute and have engaged each other regarding the mutual termination of the Employee's employment relationship and contract of employment."*

- *The Employee acknowledges and agrees that the terms set forth above include compensation to which he is not otherwise entitled. ...."*

*The Circular to Employees

- *"...*
  - *The Department withdraws all disciplinary charges against Mr Buthelezi;*

- *His employment with the Department terminates on 30 November 2009; and*
- *He will receive a year's salary subject to taxation.*

The above determination was made primarily because:
- *It would have been costly to pursue the matter; and*
- *...."*

*The Media Statement

- *"...*
A few months later it became apparent that the disciplinary case against Mr Buthelezi would drag on for a lengthy period and could potentially paralyse the functioning of the department. To avoid this lengthy and expensive process the Department of Roads and Transport in November 2009 reached a settlement with Mr Buthelezi. The settlement terms saw Buthelezi [sic] leave the department and accept payment of one year of the remaining term of his contract and the department in turn withdrew all charges against him."

4.3.2 In the cases of Karson[17] and Be Bop A Lula[18], the following was said about the nature of compromise agreements respectively:

"It is well settled that the agreement of compromise, also known as transactio, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability ...."

"The institution of compromise (transactio) has been part of our common law since Roman times .... It was an agreement in terms of which the parties to an obligation settled a dispute arising from such obligation. The dispute had to relate to a doubtful issue in respect of which the outcome of litigation was uncertain or not yet finalised."

4.3.3 In the case of Nel v Potgieter 2009 ZAKZDHC 52 the court stated that:

"The significance of the enquiry is that, ... transactio 'whether embodied in a judgement of the court or extra-judicial has the effect of res judicata, and is an absolute defence to an action on the original contract. .... It is settled law that, where a transactio is concluded, the plaintiff can only fall back on the original cause of action if the settlement agreement expressly or by necessary implication reserves the right to do so."

4.3.4 In Be Bop A Lula's case, the court remarked as follows:

"The effect of a compromise is to put an end to the disputed and uncertain prior claim in the same way as if the matter were finally adjudicated upon (res judicata). .... In this regard it must be borne in mind that compromises are to be strictly interpreted in that they exclude anything which was probably not contemplated by the parties at the time they reached the compromise."

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[17] Karson v Minister of Public Works 1996 (1) SA 887 (E).
[18] Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd 2006 (6) SA 379 (C).

4.3.5 Any claims that Mr Buthelezi may have had in respect of the disciplinary proceedings that the Department intended instituting against him are therefore extinguished by virtue of him having entered into the compromise agreement.

4.3.6 The terms of the compromise agreement inform the totality of Mr Buthelezi's rights, and any dissatisfaction that he may have regarding alleged non compliance by the Department with some of the terms thereto fall to be dealt with within the confines of the agreement, and not by reference to rescission of the Harris investigation and report.

4.3.7 To this end, I am unable to pursue with the Department, Mr Buthelezi's claim:

4.3.7.1 *"That the Department rescinds the investigation by Harris in it's totality, and to do a media release apologising to Mr Buthelezi for allowing and/or encouraging an investigation which was not reasonable and procedurally fair ...."*; or

4.3.7.2 On the basis of the assumption that because the Department withdrew all charges against him, this implies that the Harris investigation and report should be treated as non-existent. Nowhere in the settlement agreement has it been stated (either expressly or otherwise) that the Harris investigation and report is withdrawn. What is stated is that: *"The Department withdraws all **charges** against Mr Buthelezi"*. This can only refer to the charges contained in the notice of intention to institute a disciplinary hearing, as the Harris report neither proffered any charges nor was it authorised to do so.

4.4 Outstanding issues pertaining to the matter

4.4.1 Based on the principles enunciated regarding compromise agreements, I am of the view that the Department has:

4.4.1.1 Breached Clause 12.2 of the Settlement Agreement by failing to make the announcement by way of a circular to employees and media release in accordance with the terms agreed upon in Annexure "A" attached to the agreement; and

4.4.1.2 Breached Clause 11.1 of the Settlement Agreement by making adverse statements against Mr Buthelezi when the following was stated in the circular to employees and the media release respectively:

***Circular to employees**

"....
Staff members should also note that:

- *The Department will not prevent any law enforcement agency from taking any action against individuals within the Department who may be found to have transgressed the law, including Mr Sibusiso Buthelezi.*
- *The National Treasury is assisting the Department to address maladministration and corruption and certain individuals have already been put on precautionary suspension.*
- *The Department is committed to a clean administration and has already embarked on a process to correct the situation."*

***Media release**

"...
In respect of the allegations made by the MEC against the head of department the investigation found that the head of department had contravened or failed to comply with key provisions of the Public Finance Management Act (PFMA), Treasury Regulations and Treasury Supply Chain Management Practice Notes which have exposed the department to significant financial risk. Details of these violations are provided in the report (page 363).

....

A few months later it became apparent that the disciplinary case against Mr Buthelezi would drag on for a lengthy period and could potentially paralyse the functioning of the department. To avoid this ... the Department ... in November 2009 reached a settlement with Mr Buthelezi. ....

This settlement did not in any way undermine the Gauteng Provincial Government's resolve to fight corruption and its commitment to clean governance. ....

...."

4.4.2 I intend pursuing this issue with the Department.

4.4.3 Mr Buthelezi must bear in mind however, the likelihood of the latter objecting to such intervention on the basis of Clause 17.1 of the agreement, which provides as follows:

"In the event of there being any dispute or difference between the Parties arising out of this Agreement, the dispute or difference shall on written demand by any Party be submitted to arbitration in Johannesburg in accordance with the AFSA [Arbitration Foundation of South Africa] rules, which arbitration shall be administered by AFSA."

4.4.4 In addition to the afore-going, I intend ascertaining from the Department what transpired regarding its investigation into the outstanding issues raised in the Harris report regarding Mr Jacobs.

4.4.5 Be advised that notwithstanding my intended intervention, Mr Buthelezi is not precluded from obtaining whatever redress he may be entitled *via* the necessary channels regarding his view that the contents of the Circular were:

"... wrongful and defamatory ... [and] made with an intention to defame our client and to injure his reputation."

5. **Further documents and information**

5.1 Before my office approaches the Department, I require the following documents and information:

5.1.1 The complete and dated document by Mr Jacobs titled: "Response to statement by S B Buthelezi" (only 19 pages were provided);

5.1.2 The complete document titled: "Mr Sibusiso Buthelezi's answering statement to the MEC's founding statement (submission)" dated 5 December 2008 (only 5 pages were provided);

5.1.3 Copies of the MEC's statement that was delivered to Mr Buthelezi during October 2008 and his response that Mr Buthelezi received on 15 April 2009;

5.1.4 An indication why the allegations of the Department's non-compliance with some of the terms of the agreement were not pursued, as required, by clause 17.1 of the agreement; and

5.1.5 An indication as to what remedial action Mr Buthelezi seeks based on the issues that will be taken forward with the Department, taking into account that he had previously sought an apology, a retraction statement and the issuing of a new circular [and media release] in accordance with the terms agreed upon in Annexure "A".

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
tah/tah/2069310_b 30/05/2011