

‘Sentence First! Verdict Afterwards!’ A Look at the Alice in Wonderland world of Disciplinary Actions in the Public Service

In Lewis Carroll's classic tale, Alice in Wonderland, the bad tempered Queen of Hearts rants, 'Off with their heads!' When the King of Hearts gently suggests that perhaps there should be a trial first, she yells, 'Sentence first! Verdict afterwards'. Alas, this attitude is not just in the whimsical world of Victorian children's fantasy tales, it thoroughly permeates the very fibres of South African governmental disciplinary processes: The method used to effect a sentence before a verdict, is the system of 'precautionary suspension' of officials. This has been honed into a widely used weapon in the obscene battles over patronage, position and power that make a mockery of the words 'public service'¹.

The Process

Suspension is an effective weapon in internal power struggles because 'suspenders' do not need to provide any evidence before suspending officials and blighting careers. On the other hand, 'suspensees' have no recourse except through enduring a protracted (and often flawed or blatantly rigged), disciplinary process, unless they are in a position to initiate expensive court actions.

Laura Grant writing in the *Mail & Guardian*² suggests that government officials on suspension live the proverbial 'Life of Riley': earning fat salaries for months, or even years, on end, without having to do any work and without embarrassing action having to be taken against them. She quotes Michael Cardo, an opposition MP: 'Suspension on full pay [is a] creeping phenomenon in the public service'.

According to the Public Service *Senior Management Service Handbook*, an official may be suspended, or transferred, on full pay if there is a suspicion, or even a mere allegation, that a serious offence has been committed and the employer believes that the continued presence of the accused in the workplace may jeopardise an investigation or 'endanger the well being or safety of any person or state property'. A caveat is added: 'A suspension or transfer of this kind is a **precautionary measure that does not constitute a judgment and must be on full pay**³. The regulations do require the 'suspender' to notify the 'suspensee' of the intention to suspend and the latter has the right to make representations before the suspension order is implemented. This is an exercise in futility and I am not aware of any occasion when such a representation has persuaded the 'suspender' not to suspend the targeted official.

The act of suspending a person accomplishes two objectives: Firstly, the 'suspensee' is removed from circulation; and secondly, the name and reputation of the targeted person is blackened by the insinuation that 'there is no smoke without a fire'. Modern



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public service suspension orders are reminiscent of the 'banning' orders imposed by the apartheid government on activists: suspension is imposed by executive fiat, not by judicial process; contact with whole categories of people (colleagues and officials), is restricted or prohibited; movements are restricted ('suspendees' are strictly forbidden from entering official premises) and all access to official communication apparatus is terminated. Humiliation is also heaped on the 'suspendees' with their official ID cards being seized, their offices searched and security guards frog-marching them out of the building in front of gawking staff and even the public.

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Despite the official reasons for a 'precautionary' suspension, there is a strong tendency to equate suspension with guilt in the minds of some officials responsible for the impartial administration of the legal prescripts. There was an instance at the National Archives where the suspension of two officials, suspected of involvement in irregularities relating to a film festival, was requested so that an investigation could take place without hindrance. The Human Resources section of the Department of Arts and Culture, opposed this on the grounds that it would make the persons to be investigated 'look guilty'. An admission of the Realpolitik behind suspensions if ever

there was one! However, when a suspension suits a political agenda it is implemented with vigour and alacrity.

This leads to consideration of a serious legal and structural problem which Peter Franks has described as the '...lack of a clear definition between political and administrative affairs', resulting in '...tensions and/or collusion between ministers and their directors general'⁴. Ivor Chipkin echoes the same theme, stressing that ministers rather than directors general, control the appointment of officials (Chipkin, 2012: 9). These are not simply isolated comments by academics; the *National Development Plan*, overseen and driven by then Minister Trevor Manuel (backed up by current Deputy President Cyril Ramaphosa), acknowledged that there is an urgent need to stabilise the relationships between politicians and top public service managers:

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The government planning blueprint, the *Medium Term Strategic Framework*, warns of a need to 'bring greater predictability and stability to the management of the political administrative interface' and recommends the appointment of a sort of super director general in the Presidency with equivalents in provincial premiers' offices⁶. This is a blast from the past, harking back to the structures of the Tricameral Parliament and even earlier, when the Commission for Administration (now the toothless Public Service Commission), cast a beady eye over the national government and when the four provincial secretaries held sway over all departments of their administrations: roads, schools, hospitals, etc.

It is also clear that the current epidemic of corruption has its origins in conditions inherited from the pre-1994 bureaucracies⁷. In addition, there are legal and structural inconsistencies distorting decision-making processes, chief among these being the



instability at the political/administrative interface which in itself has a corrupting effect. The legal and structural issues engender an atmosphere of fear and uncertainty which makes public servants hesitate to take decisions that they are legally empowered and duty bound to take, but which may be unpopular with their political principals.

This 'turbulence' must be understood in the broader political context. Susan Booysen describes the public service as riddled with 'political factionalism and contestation for positions, corruption and deficient state capacity'⁸. There are economic as well as political advantages to be gained from jobs in the public service: Firstly, there is the ability to earn a salary ranging from the adequate to the very generous and secondly, there is the potential to influence the awarding of government tenders.

The Public Affairs Research Institutes's study of procurement practices describes the public service as an 'open' bureaucracy where politicians retain substantial, lawful discretion over the appointment, promotion and even dismissal of public servants. Politicians can place their own associates in office and collude with them in non-compliant behaviour. The consequences are that, by blurring lines of accountability and impairing correct lines of control, political and personal appointments can negatively affect discipline at all levels of the organisation (Burnette *et al*, 2014: 47).

This often leads to near paralysis, buck passing and the most superficial and cursory attention being paid to major issues (if they are not completely avoided), despite the number of retreats, *lekgotlas*, *bosberaads* and strategic planning sessions, that consume

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vast amounts of management time. The results are well bullet-pointed, template-populated, PowerPoint presentations tabled as outcomes-based strategic plans and masquerading as deep analysis. All this cogitation and the digestion of many buffet lunches, enables managers to avoid being in the office where they are required to manage and take decisions. Those officials who are prepared to take decisions, are often the ones targeted for suspension and other types of victimisation.

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The Cases

The list of victims is lengthy and varied. To name but a few: Glynnis Breytenbach, now an MP; Johan Booysen, an embattled cop in KwaZulu-Natal; Vusi Pikoli, former National Director of Public Prosecutions; Robert McBride, of the Independent Police Investigative Directorate; Anwar Dramat and Shadrack Sibiya of the Hawks. These are the names that have garnered most

media attention. Suspended investigators and prosecutors attract more publicity than officials in less glamorous positions, but there are also many victims in other parts of the public service. In the Eastern Cape there is Farieda Cassojee in the Department of Social Development (now reinstated after years of legal struggles).

In her case, Cassojee was suspended and also faced criminal charges, existing in a netherworld until her case finally made it to court where the charges were promptly withdrawn. There is the current case of Professor Thidziambi Phendla at the University of Venda which suggests that the tactics of suspension and the parallel process of laying spurious criminal charges to get rid of unwanted individuals are spreading beyond the confines of the public service⁹.

In Cape Town the head and deputy head of the Parliamentary Protection Services, Zelda Holtzman and Motlatsi Mokgatla, are on suspension. The reasons given for their suspension are 'very broad and generic' and 'insiders' believe that Holtzman and Mokgatla have been suspended because they objected to the Secretary of Parliament using a blue light on his new car and because they questioned the recruitment of members of the SAPS into the Parliamentary Protection Services; remember the 'waiters' who manhandled the EFF members out of the National Assembly¹⁰? Then there is the particular case of the Department of Arts and Culture.

Lulu Xingwana, during her period as Minister of Arts and Culture, suspended and peremptorily dismissed more than a score of managers and officials. This was brought sharply into focus with the arbitrary suspension and summary dismissal of the official responsible for the arrangements of an art exhibition at Constitution Hill. This matter was very publicly aired because Xingwana stormed out of the Opening, displaying rampant homophobic emotions and declaring that the exhibition was 'pornographic'¹¹. Back in the Department she thundered that the official had 'embarrassed' her and he had to go! A laundry list of the most trifling bureaucratic glitches was trumped up as a charge sheet and the unfortunate deputy director was out on his ear. Fortunately, he was reinstated after Xingwana was reshuffled out of the Department.

Xingwana continued in this vein after she became Minister for Women, Children and People with Disability. In this latter department, she sought external legal advice on how to suspend and dismiss officials without even having to follow disciplinary procedures. One official was fired on returning from sick leave, the disciplinary hearing having taken place while she was in hospital¹².



A further blunt instrument is the use by departments of legal representation at disciplinary hearings when the intent behind such hearings is the quick and inexpensive disposal of the matter in terms of the prescribed procedures. In order to level the playing field, the 'suspendee' is forced, at his/her own expense, to get legal representation. Not only is this prohibitively expensive but it delays the proceedings way beyond the prescribed time-frames.

Added to this is the appointment of outside and often ill-equipped presiding officers at internal disciplinary hearings so that the desired outcomes are achieved. The relevant regulations allow for the selection of outside presiding officers/chairpersons at internal hearings¹³, which is the norm, rather than the exception. In many cases, unregulated 'labour practitioners', lacking legal knowledge and experience, but paid by departments, preside over hearings. The result is a travesty of the intent of the Labour Relations Act and the Public Service Act and a violation of the constitutional rights of the 'suspendee'.

General Johan Booysen's case is a topical example. The initial allegations against him were horrifying – murder, robbery and racketeering. Booysen was suspended for over eighteen months before facing an internal disciplinary hearing presided over by Adv Nazeer Cassim. He was completely exonerated at the hearing and the High Court in Durban threw out the criminal charges against him¹⁴. According to the media Booysen has been suspended again, this time with fraud as the potential charge. The media claims that the incident relates to a typing error on a reimbursement form, not even signed by Booysen¹⁵. The truth is still to be determined, but the tactic is clear and commonly used in numerous other cases: suspend the unwanted individual so that s/he is out of the way, then look for charges.

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The 'suspensees' do not lead cushy lives on full salaries while investigators scabble around in the official equivalent of their underwear drawers. They face mounting legal expenses, to be paid out of those 'full' salaries and find it increasingly difficult to maintain clean credit records and undertake routine banking and commercial transactions. They cannot find outside employment without resigning, which would effectively concede the cases against them and deprive them of their pension entitlements. It is a Kafka-esque world!

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A minister should **not** play a role in internal departmental disciplinary processes. These are the responsibility of a director general. Furthermore, in disciplinary cases involving deputy directors and lower ranks, a minister is the appeal authority against decisions of a director general. Therefore, a minister (or his/her acolytes), demanding a 'prosecution' is not only acting ultra vires but is contaminating the objectivity of any likely appeal.

Ministerial advisers

Ministerial advisers have no legal authority over public servants whatsoever, nor should they be able to meddle in administrative matters. The *Ministerial Handbook* is categorical:

There shall be no relationship of authority between the special adviser and the Head of Department concerned. The Special Adviser shall direct his/her inputs to the Executing Authority and refrain from interfering in the management and administration of the department, which in law is the function and responsibility of the Director General. (Annexure F, para 7)

However, there are many cases where ministerial advisers interfere directly in departmental matters because of the grey areas between a minister's and a director general's spheres of responsibility. Lulu Xingwana's then special adviser at Arts and Culture publicly stated that he did not care whether or not there were cases against certain officials: they had to be suspended, hounded until they lost their cars and houses and then dismissed without pension! In one case he even demanded to sit in on an internal disciplinary hearing and departmental legal representatives were hard pressed to stop him. This is a prime example of such grey areas where ministers and their representatives act as though they are above the law.

Another highly publicised case was that of the National Director of Public Prosecutions, Vusi Pikoli. He contends that he was suspended by President Thabo Mbeki to prevent the prosecution of Jackie Selebi, the then Commissioner of Police. Various official reasons were made public, *inter alia*, that Pikoli had erred in granting immunity to organised crime figures in order to get bigger fish and that his relationship of trust with Justice Minister, Brigitte Mabandla, had broken down. The latter was the ostensible reason for his suspension and the eventual enquiry was into his fitness to hold office. Many of the details cited as reasons for the breakdown, dated back two or three years prior to Pikoli's suspension and had not troubled Minister Mabandla or President Mbeki until reasons needed to be founded to sustain the decision to get rid of him¹⁶.

The breakdown in the relationship of trust is the fallback position when no other charges can be dredged up. Ivan Israelstam has warned, 'Never fire an employee in a fit of rage, it will come back to bite you', because '...emotionally motivated and

unreasoned suspensions' are unfair labour practices¹⁷. It is a dangerous, shallow and ill-defined position for the 'suspender', provided that the 'suspensee' has the funds, the emotional and legal support and the simple 'chutzpah' to fight back.

Back to the Queen of Hearts: The decision is made to get rid of somebody (Off with his head!), the 'suspensee' is then suspended and effectively got rid of (Sentence First!), the disciplinary hearing is secondary because the 'suspensee' is already out (Verdict afterwards!). The disciplinary process is then dragged out to impose maximum psychological, emotional and financial pressure. Pikoli gives a vivid description of the strain he and his family endured and summed it up as similar to a second initiation with the concomitant uncertainty, pain and life-learning experience¹⁸.

Conclusion

The abuse goes on and will continue for as long as the grey areas around the delineation between ministerial and administrative responsibilities and power persist. This is also true of the complete lack of accountability for the gross wasteful and fruitless expenditure incurred by the individuals abusing the suspension system for whatever purpose. Such abuse is a blunt instrument, wielded without thought of the consequences, to achieve nefarious purposes and without consideration for the good of the state to which, in theory at least, the public service is dedicated.

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NOTES

- 1 I must state that this article focuses on the abuse of the disciplinary procedures in the public service, not on the proper application thereof.
- 2 M&G, July 31 to August 6, 2015
- 3 SMS Handbook, Chapter 7, 6 – my emphasis
- 4 Franks, 2014: 49
- 5 NDP, 2013: 408
- 6 MTSF, 2014 – 2019: 32
- 7 Chipkin & Meny-Gibert, 2012: 102 – 112
- 8 Booyesen, 2011: 358
- 9 Nkosi, M&G: October 9 to 15, 2015
- 10 Heard, *The Witness*: September 9, 2015
- 11 Van Wyk, M&G: March 5, 2010
- 12 Bailey, *Sunday Independent*: January 13, 2013
- 13 SMS Handbook, Chapter 7, 2.7 (3)(b), 6
- 14 Broughton, *IoL*, 2014
- 15 Mashego & Harper, *news24*: August 12, 2015
- 16 Pikoli & Weiner, 2013: 255 – 279
- 17 Pretoria News: September 16, 2015
- 18 Pikoli & Weiner: 284.

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