

**WILLEM VAN DER MERWE
REGTER/JUDGE**

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... December 2013

**MR E ERASMUS
STATE ATTORNEY, PRETORIA**

e-mail: EErasmus@justice.gov.za

Dear Mr Erasmus

**IN RE: DISCIPLINARY HEARING : MR P B SOOBRAYAN : DIRECTOR GENERAL : DEPARTMENT OF
BASIC EDUCATION**

Please find herewith my account for work done in connection with the abovementioned hearing. Please take note that all my appointments confirmed by the Honourable Minister of Justice and Constitutional Development in terms of the provisions of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001) have so far been done on the salary scale of Deputy Judge President, the scale at which I was remunerated when I was discharged from active service. My Persal number is: 19075154/PG01.

1. Pre-hearing meeting on 28 August 2013: 1½ hrs.
2. Preparation for pre-hearing meeting : studying of Public Service Handbook; Senior Management Service on 27 August 2013: 08h00 - 12h00: 4 hrs.
3. Attending to correspondence from MPI Attorneys on behalf of SADTU on 5 August 2013. Receiving letter considering, contents and reply thereto: 14h00 - 15h00 : 1 hr.
4.
 - 4.1 Telephonic discussion with Mr D C du Toit from State Attorney's Office, Pretoria on 26 July 2013 concerning my appointment as Chairman of disciplinary hearing.
 - 4.2 Received and considered letter from Mr du Toit on 16 August 2013.
 - 4.3 Received and considered letter from Mr E Erasmus from State Attorney's Office, Pretoria on 20 August 2013 re appointment.

4.4 Letter to Mr Erasmus, State Attorney, Pretoria on 20 August 2013 accepting the appointment.

4.5 Received and considered letter from the Honourable Minister of Justice and Constitutional Development on 3 September 2013 regarding remuneration.

Total : 1 hr.

5. Disciplinary hearing on 2 December, 3 December and 4 December 2013.

6. Reading of evidence, oral and documentary (Bundle 1 = 385 pages, Bundle 2 = 129 pages) on 6 December 2013 : 14h00 - 19h00 : 5 hrs.

7. Reading evidence as in paragraph 6 above, plus preparing on legal position on 9 December 2013 :

08h00 - 12h30 : 4½ hrs

13h00 - 18h00 : 5 hrs

19h00 - 21h00 : 2 hrs

Total : 11½ hrs

8. Writing of judgment on 10 December 2013:

07h30 - 10h30 : 3 hrs

11h00 - 13h00 : 2 hrs

13h30 - 18h30 : 5 hrs

Total : 10 hrs

9. Writing judgment, checking oral and documentary evidence and case law on 11 December 2013 :

08h00 - 10h30 : 2½ hrs

11h00 - 13h00 : 2 hrs

13h30 - 18h00 : 4½ hrs

Total : 9 hrs

10. Finalizing judgment for dictation and dictation on 12 December 2013 :

10h00 - 13h00 : 3hrs.

11. Travelling on 28 August, 2, 3 & 4 December 2013, 25km each day : 100kms.

12. Travelling to and from Kempton Park for purposes of typing of the judgment : 120kms.

13. Checking typed judgment for corrections and corrected judgment on 16 December 2013 : 2 hrs

My Persal number is as above. All my travelling was done in motor vehicle with registration number TBR 998 GP, a Toyota Land Cruiser, 4,7 CC. Toll fees were paid from Pretoria to Kempton Park and back.

Please deduct tax and provide me with a tax certificate.

Regards



W J VAN DER MERWE

In my capacity as Chairperson of the disciplinary hearing

Estelle Dick

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TO : JUDGE W J VAN DER MERWE

Typing : RE REPORT : MR P B SOOBRAYAN

16.12.2013:

12h00 – 15h00

R900.00

Total = R900.00

**WILLEM VAN DER MERWE
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... December 2013

THE HONOURABLE MINISTER OF BASIC EDUCATION
MRS A MOTSHEGA, MP
PARLIAMENT, CAPE TOWN

Dear Minister Motshega

IN RE: DISCIPLINARY HEARING : MR P B SOOBRAYAN : DIRECTOR GENERAL : DEPARTMENT OF
BASIC EDUCATION

Please find herewith my findings and reasons therefor in the abovementioned disciplinary hearing.

Kind regards



W J VAN DER MERWE
RETIRED DEPUTY JUDGE PRESIDENT
NORTH GAUTENG
CHAIRPERSON DISCIPLINARY HEARING

REPORT TO THE HONOURABLE MINISTER OF BASIC EDUCATION , THE HONOURABLE A MOTSHEGA, M P OF THE FINDINGS OF THE DISCIPLINARY HEARING CONDUCTED INTO THE CHARGES AGAINST THE DIRECTOR-GENERAL, DEPARTMENT OF BASIC EDUCATION, MR P B SOOBRAYAN

FINDINGS AND THE REASONS THEREFOR

Introduction

1. During August 2013, I was approached by Adv M C Erasmus SC, acting on behalf of the Honourable Minister of Basic Education (hereinafter referred to as "*the Minister*") to chair the disciplinary hearing into the charges that were to be brought against the Director-General of the Department of Basic Education, Mr P B Soobrayan (hereinafter referred to as "*the DG*").
2. The appointment was finalized by my acceptance thereof and the directive by the Honourable Mr of Justice and Constitutional Development, the Honourable Jeff Radebe, MP regarding my remuneration for services rendered.
3. On 28 August 2013, a pre-hearing meeting was held between myself, Adv M C Erasmus SC, representing the Minister, Mr D du Toit, State Attorney, Mr Anton Roskam, attorney representing the DG, the DG himself and Mr C Goosen as pro forma Prosecutor. Mr Goosen was replaced by Adv J de Beer at the hearing itself.
4. The most relevant points agreed upon at this pre-hearing meeting were the following:

- 4.1. Chapter 7 of the Public Service Handbook is applicable for purposes of the disciplinary hearing.
- 4.2. Notwithstanding the provisions of paragraph 2.7(3)(e) of Chapter 7 of the Public Service Handbook, it is agreed that the DG and the Minister shall be represented by legal representatives either in the form of an attorney and Counsel and/or attorney alone.
- 4.3. A pre-hearing conference shall be held at which conference requests relating to documentation and information shall be dealt with.
- 4.4. The time limits laid down in paragraph 2.7 of Chapter 7 of the Public Service Handbook shall not find application and the parties waived compliance therewith.
5. On 19 November 2013, the written charges (which were later amended) were supplied to me.
6. December 2, 3 and 4 2013 were agreed upon as the dates for the hearing.
7. On 27 November 2013, the legal representatives for the DG and the Minister held a pre-hearing meeting with the pro forma Prosecutor. A minute of that meeting was prepared and handed to me. Insofar as may be necessary, I will later herein refer to the contents of the minutes.

8. On 2 December 2013, I received the DG's plea explanation, being the DG's statement referred in paragraph 4 of the minutes of the pre-hearing meeting. Two bundles of documents were also handed to me consisting of:
 - 8.1. Submissions of the DG as well as annexures thereto; and
 - 8.2. Additional documents the parties wished to be included in the bundles.
9. In the bundles of documents, reference was made to an investigation by the Public Protector and a hearing that took place in the Labour Court.
10. Before the hearing started, I enquired from the legal representatives whether the report of the Public Protector and the decision of the Labour Court, which were both outstanding at the time, could have any influence on the outcome of the disciplinary hearing. I was assured that the Public Protector investigated an issue not related to the charges against the DG.
11. I was furthermore informed that the Labour Court hearing was about the legality and enforceability of the Collective Agreement referred to in Charge 1 and not whether, when the DG entered into the agreement, he committed the Department of Basic Education to unauthorized expenditure, alternatively, attempted to do so. It was submitted that depending on the outcome of this disciplinary hearing, the decision of the Labour Court could become relevant.

12. On the day of the hearing, the South African Democratic Teachers Union (“SADTU”) was represented by MPI Attorneys. After having heard all parties concerned, it was agreed that the attorneys could remain in the hearing as observers on behalf of SADTU, but that they would not divulge any information to whomsoever that could be utilized for any media statements or legal action.

The hearing

13. For what is to follow, it is necessary to quote the two charges against the DG in full:

“CHARGE 1

COMMITTING THE DEPARTMENT OF BASIC EDUCATION TO UNAUTHORISED EXPENDITURE, ALTERNATIVELY THE ATTEMPT TO DO SO: SECTION 38(1)(C)(II) OF THE PFMA

1. *On or about 7 April 2011 the Director-General purported to conclude an Agreement on behalf of the Department of Basic Education (“the DBE”) namely Collective Agreement 1 of 2011 in respect of remuneration of markers in the national examinations, a copy of which purported Agreement is annexed hereunto as annexure “DBE1”.*
2. *In order to lawfully bind the DBE to the Collective Agreement the Director-General had to obtain the concurrence of the Minister of Public Service and Administration, the Minister of Finance and the Minister of Basic Education.*
3. *At the time of purporting to enter into the collective Agreement the Director-General did not have the concurrence of any of the Ministers nor did any of the Ministers to date hereof concurred that the Collective Agreement may be entered into.*

4. *By purporting to enter into the Collective Agreement on behalf of the DBE the Director-General breached Section 38(1)(c)(ii) of the Public Finance Management Act, 1 of 1999, in that the Director-General failed to take effective and appropriate steps to prevent the DBE from incurring unauthorised, alternatively irregular expenditure.*
5. *As a result of the Director-General purporting to bind the DBE to the Collective Agreement the South African Democratic Teachers Union and 4 other Unions instituted proceedings in the Labour Court to enforce the provisions of the Collective Agreement.*
6. *The Director-General is therefore charged for failing to comply with his obligations as the Accounting Officer of the DBE by failing to take effective and appropriate steps to prevent unauthorised, alternatively irregular expenditure, further alternatively by failing to comply with his obligations as set out in Section 39(1)(b) and/or by breaching Section 39(2)(a) of the PFMA by failing to take effective and appropriate steps to prevent the DBE from overspending on a Main Division within the Vote.*

CHARGE 2

UNAUTHORISED USE OF EDUCATION LABOUR RELATIONS COUNCIL FUNDS

7. *During or about the period 29 March until 13 April 2012 the Director-General spent the amount of R46,908.00 of the Education Labour Relations Council ("ELRC") funds in order to pay for an airline ticket, motor vehicle hire and accommodation under the pretext that the expenses are work-related expenses, whereas the expenses were incurred by the Director-General for private purposes.*
 8. *By incurring the expenses from the ELRC Fund the Director-General incurred irregular expenditure, alternatively fruitless and wasteful expenditure in breach of Section 38(1)(c)(ii) of the PFMA."*
14. As can be seen from paragraph 4 of Charge 1, it is alleged that the DG breached the provisions of section 38(1)(c)(ii) of the Public Finance Management Act, 1 of 1999 ("the PFMA"). That section provides that the Accounting Officer (the DG in

casu) must take effective and appropriate steps to prevent unauthorized, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct. At the pre-hearing meeting, it was agreed that the DG is not charged with any criminal conduct.

15. The following witnesses testified for the employer:
 - 15.1. Ms Simone Geyer ("*Geyer*"), Chief Director : Education Human Resource Management;
 - 15.2. Mr Paseka Njobe ("*Njobe*"), Manager in the office of the DG;
 - 15.3. Mr Themba Kojane ("*Kojane*"), Deputy Director-General;
 - 15.4. Mr Jeff Moshakga, Chief Financial Officer of the Education Labour Relations Council ("*ELRC*") at the relevant times.
16. The DG testified on his own behalf.
17. As stated earlier, the DG's written plea explanation was handed to me on 2 December 2013. In essence it is a summary of the DG's submissions in response to a letter from the Minister dated 21 June 2013 affording him an opportunity to respond to allegations made against him in a letter from the Public Service Commission ("*PSC*") dated 6 May 2013. The allegations form the basis of the

charges against the DG. His evidence closely followed his plea explanation and the submission referred to.

18. I am not going to summarize the evidence in any detail. Much of the evidence was led to give me the necessary background against which to evaluate the evidence relevant to the charges. The evidence in respect of the charges is in the main common cause. Where there is a conflict between the evidence of witnesses, I will refer thereto. A lot of evidence also stands uncontradicted.

The evidence

19. Geyer has extreme experience in collective bargaining since 1994, both from the side of the employer as well as from the side of labour. At the relevant time, Geyser was the chief negotiator on behalf of the DBE. She was the leader of a team of four officials.
20. Geyer had been working with the DG since 2010.
21. During February 2011, a submission was prepared in respect of an amendment to the conditions of service of markers of papers of examinations at national level. It concerned the increase of the markers fees. The submission was signed by the DG and other officials, *inter alia* Geyer, as well. The Minister approved the new tariffs contained in an annexure to the submission, signed it and forwarded it for publication in the Government Gazette.

22. The Gazette containing the increased tariffs was published on 7 March 2011 (*“the March determination”*).
23. The signing of the submission by the DG was the result of a number of meetings and discussions between *inter alia* the DG and Geyer. They were both aware of the contents of the annexures to the submission which ultimately formed part of the March determination. The figures referred to in the annexures were budgeted for by the DBE.
24. Meanwhile, since 2010, the Trade Unions and the DBE had been negotiating an increase in tariffs for markers of examination papers on national level within the structures of the ELRC in which forum Geyer was the chief negotiator on behalf of the DBE, as stated.
25. On 7 April 2011, the DG signed Collective Agreement 1 of 2011 (*“CA1 of 2011”*) which was the result of extensive bargaining in respect of the increase of fees for the markers.
26. According to both Geyer and the DG, the negotiating team had no mandate other than what is contained in the March Determination and the DG had no mandate to sign any CA other than one containing the tariffs contained in the March Determination.

27. Geyer also testified about a draft CA which contains the same terms and tariffs as the signed CA, save for an amendment of a date. I do not find it necessary to deal in more detail with the draft CA.
28. Fact is that the draft CA as well as the signed CA 1 of 2011 contained tariffs well in excess of what is contained in the March Determination. The figures are therefore outside the ambit of the admitted mandate and what was budgeted for.
29. The DG was not part of the negotiating team and did not attend the negotiations in the ELRC.
30. On 7 April 2011, the DG was in a meeting when Mr Njobe ("Njobe") brought CA 1 of 2011, already signed on behalf of the Unions, to him.
31. Geyer's father was terminally ill for some time. He passed away at the time that negotiations took place in the ELRC. Immediately after CA 1 of 2011 was completed in the ELRC, Geyer left for Port Elizabeth for her father's funeral. It was the evidence of both the DG and Geyer that had she not left at the time when CA 1 of 2011 was taken to the DG for his signature, he would have spoken to her personally or the CA would have been accompanied by a submission. Because the DG could not speak to Geyer and in the absence of a submission, the DG asked Njobe to phone Geyer and to enquire from her whether the tariffs in the CA were the same as in the March Determination and whether he could sign the CA. Njobe called Geyer.

32. During the conversation, Njobe was satisfied that Geyer could discuss the issue with him in spite of her arrival in Port Elizabeth where the funeral was to take place. Njobe conveyed the DG's request to Geyer. She confirmed to him that the tariffs in CA 1 of 2011 were in accordance with the March Determination and that the DG could sign the agreement. All this was confirmed by Geyer in her evidence. She also stated that she did not have a copy of the CA with her when Njobe spoke to her but that she was satisfied that the signed agreement put before the DG could be signed by him as she was present in the negotiations until the agreement was finalized. Geyer stated in her evidence that not only was she present at the negotiations, but she asked Lebepe (to whom reference will be made later herein) whether the schedules annexed to the CA was the same as in the March Determination. Lebepe confirmed that the schedules were the same.
33. Njobe conveyed Geyer's reaction to the DG. The CA was thereafter signed by him.
34. Geyer readily admitted that a CA containing incorrect schedules were signed by the DG due to her mistake and fault. A final written warning was then issued to her stating *inter alia* that she was disciplined because she did not execute due diligence in ensuring that the tariffs contained in CA 1 of 2011 corresponded to the tariffs set out in the March Determination.
35. Mr A N Lebepe to whom reference was made earlier herein, did not testify. A written warning issued to Lebepe forms parts of the DG's submissions. There was

no objection that I be referred to the written warning. Lebepe was at the time Chief Education Specialist : Directorate : Education Human Resources Planning, Provision and Monitoring. Lebepe was part of the negotiation team led by Geyer.

36. Lebepe was disciplined because of the following misconduct:

“The nature of the misconduct is:

Negligent or indolent in the carrying out of your duties attached to your post, as stipulated in the Code of Conduct of Educators. This warning emanates from your failure to ensure that the correctly calculated tariffs for the improvement of markers in National Examinations were attached to the ELRC Collective Agreement No 1 of 2011 that was signed 7 April 2011, placing the department into disrepute.”

37. That Lebepe was guilty of this specific charge is clear from Geyer's evidence. I can therefore understand why Lebepe also pleaded guilty.

38. In answer to the evidence led on behalf of the employer, the DG himself testified. His evidence coincides with that of Geyer and Njobe. The written warning issued to Lebepe also supports the DG's version that he relied on experienced, trust worthy officials to advise and guide him in his decision to sign the CA or not. The DG submitted in his evidence as appears from his submissions (which was confirmed by him) as follows:

“... I was neither grossly negligent when I signed CA 1-2011. It is apparent from that stated above that at the time that I signed CA 1-2011 I

was under the mistaken impression that the tariffs included in the agreement were those contained in the March 2011 determination. In fact, before signing the agreement, I checked that this was the case and I was informed that they were. I respectfully submit that I acted reasonably ... I deny that I signed the collective agreement without a mandate and that I violated the provisions of the Public Finance Management Act, 1999 (Act 1 of 1999) ("PFMA"), as clearly I believed that the agreement was within the mandate budgeted for, namely the March 2011 by determination ...".

39. Later in 2011, the DG and his officials discovered that the tariffs reflected in CA 1 of 2011 did not comply with the figures in the March Determination. The matter was reported to the Minister and attempts were made to solve the problem with the Unions. Evidence by Geyer and the DG referred to a multiplicity of meetings and strategies to solve the dispute. Again, I am not going to deal in detail with all the attempts to solve the problem. In summary, negotiations between the employer and the Unions took place. Addenda to CA 1 of 2011 were drawn and signed. Legal opinions were obtained. When the dispute resolution clause in the CA was not implemented, the matter unsuccessfully went on arbitration.
40. Eventually the DBE withdrew from CA 1 of 2011 and the Unions went to the Labour Court in an attempt to enforce the terms of the agreement. The Labour Court has as yet not delivered judgment.
41. The PSC also investigated the issue and then wrote to the Minister suggesting that steps be taken against the DG.

42. In his submission to the Minister, the DG states as follows:

"... following discovery of the problem, I submit that I acted responsibly in trying to resolve the problem. Initially, I had the co-operation and support of the trade unions that are party to the ELRC, but once their agenda changed, they began to use this issue as another way of motivating their highly emotional and defamatory campaign against me.

The PSC letter of 6 May 2013 appears to have considered certain documents in an arbitration under the auspices of the ELRC (Case No. PSES67-12/13 and I respectfully submit that the PSC has misread the documents that it has referred to, thereby causing it to come to its erroneous conclusions. The letter concludes that I, in my capacity as Director-General, and "acting on behalf of the employer, had entered into the collective agreement ... being ignorant of the publication of the Government Gazette (No 34079)" (emphasis added), which is the March determination. This does not arise from the documents. Rather what arises is that it was the trade unions who claimed that they were ignorant of the 7 March 2011 determination and not me. In fact, as is apparent from that stated above, I was aware of the contents of this Gazette, and laboured under the mistaken impression that the increases specified in CA 1-2011 were aligned to those contained in the 7 March 2011 determination, and accordingly, that there was no contradiction between the contents of CA 1-2011 and the 7 March 2011 determination.

I respectfully submit that had the PSC sought and considered my views before it made this rather dramatic finding, it would probably have clarified its misreading of the documents and therefore not come to the conclusion that I am guilty of gross negligence in the execution of my duties."

43. The DG stated in the submission and in his evidence before me that, in particular, SADTU wanted to get rid of him and the Minister. For that purpose, SADTU did not to settle the dispute amicably and influenced the PSC to suggest disciplinary action against him. In the process, according to the DG, SADTU defamed him and the Minister.
44. I am not called upon to express any opinion on the actions of the PSC or SADTU. They were not before me and I therefore explicitly refrain from commenting on the DG's allegations against them.
45. Once I have discussed the legal position in respect of Charge 1, will I make my findings known.
46. I referred to the contents of Charge 2 earlier herein.
47. Geyer testified about this charge at the end of her cross-examination. She testified that she was the author of an e-mail dated 8 March 2012 sent to Mr Govender, General Secretary of the ELRC, confirming the arrangements for the DG's stay in Natal over the Easter weekend in 2012. She confirmed that the accommodation, car rental and flight arrangements were in line with what the DG was entitled to. Mr Kojane, a Deputy Director-General in the DBE, was present at the meetings that took place over the Easter weekend 2012.
48. It is common cause that a National Educational Summit would have taken place from 29 to 31 March 2012. Had that happened, meetings with Union leaders

would have taken place in the days thereafter leading to the Easter weekend. The summit was however postponed and held from 11 to 13 April 2012.

49. According to the DG and Kojane, planning sessions had to take place before the postponed summit. As Kojane, Govender and the Minister were to be in Kwa-Zulu Natal ("KZN") over the Easter weekend, it was decided by Govender that funds would be made available for the DG to also be present in KZN over that weekend.

50. In his submissions to the Minister, the DG states the following about this charge:

"Mr Govender agreed to take care of travel and accommodation arrangements on my behalf. Mr Govender, in consultation with the department's chief negotiator in the ELRC, Ms Geyer, made the necessary arrangements in line with the class of travel and accommodation generally afforded a Director-General in the public sector. At no stage did the Department or I choose the class of travel or the accommodation.

Planning sessions were held over the course of the Easter weekend attended by Mr Govender, and the Deputy Director General responsible for the planning of the Summit, Themba Kojane, and these sessions contributed greatly to the success of the event.

Therefore, I respectfully submit that I never misused any ELRC funds."

51. Reference was made by the DG during his evidence to a statement by Mr Govender which was also annexed to his submissions to the Minister. No objection was made to the use of this statement with the annexures thereto during this hearing. In summary, Govender's statement and annexures confirm that the

DG would have done *“critical work”* in KZN on behalf of the DBE over the Easter weekend and that all logistical arrangements would have been made by Govender and other staff of the DBE.

52. Govender *inter alia* confirmed that the Chief Financial Officer of the ELRC and Mrs Estelle Posthumus, the ELRC’s logistical officer, were aware of the arrangements for the DG’s visit to KZN over the Easter weekend.

53. Mr Jeff Moshakga is the Chief Financial Officer of the ELRC. The essence of his evidence is as follows:

53.1. He was not consulted about payment of the DG’s expenses to visit KZN over the Easter weekend 2012. In this respect, his evidence contradicts the contents of correspondence.

53.2. Although he paid the service providers, he was concerned that the expenses were not authorized and reported it to the Auditor General who reported as follows:

“ELRC could not provide supporting documentation to verify that this expenditure paid to the service provider related to the business of the ELRC. As a result, we could not confirm the validity of this expenditure.”

- 53.3. The supporting documentation, i.e. the letters annexed to Govender's statement was obtained after the Auditor General's report. Moshakga did not suggest that those documents were not genuine and original.
- 53.4. In respect of the reference to Estelle Posthumus in Govender's letter of 8 March 2012, I ruled that evidence by Moshakga amounted to hearsay evidence which would only be admitted if Posthumus was called as a witness. She was not so called.
54. On the foregoing oral evidence read with the documentary evidence, I must reach my conclusion on the charges against the DG.

Discussion

Legal position

55. Both Counsel referred me in argument to the judgment of the Appellate Division, as it was then known, in the matter of **Howard v Herrigal & Another N O 1991 (2) SA 660**. Although the case deals with the duty of company directors to observe the utmost good faith towards a company and to exercise reasonable skill and diligence in order to safeguard the affairs of the company, the same general test applies equally to an official such as the DG.
56. The pro forma Prosecutor submitted that in respect of Charge 1:

- 56.1. The tariffs in the March Determination were glaringly different from the tariffs contained in CA 1 of 2011. A mere superficial look at the documents would have shown that.
- 56.2. The DG was not entitled to rely on the assurance of Geyer that CA 1 of 2011 was in order and that he could sign it. He should have called for a copy of the March Determination.
- 56.3. In relying on officials of the DBE and not checking the tariffs himself, the DG did not take steps to prevent unauthorized, irregular and fruitless and wasteful expenditure, did not take effective and appropriate steps to prevent unauthorized expenditure and therefore did not take effective and appropriate steps to prevent overspending of the vote of the Department. In this respect, it is common cause that if the agreement is valid and payment is effected, it would amount to overspending for which permission was not obtained from the relevant Ministers. The pro forma Prosecutor submitted that the mere signing of the CA by the DG amounts to overspending.
- 56.4. The CA had such vast financial implications for the Department that the mere assurance of Geyer was not enough for the DG to be satisfied that he could sign the CA.

- 56.5. At the time only one CA was to be signed. The DG can therefore not rely on a heavy burden of work to entitle him to rely on key personnel.
- 56.6. The fact that Geyer and Lebepe were disciplined means that the DG is also guilty of misconduct as alleged.
57. In respect of Charge 2, the pro forma Prosecutor emphasized the fact that the meetings which took place in KZN were in his view informal as no agenda was prepared and no minutes kept. He submitted that the DG was on a paid vacation and therefore liable on Count 2.
58. The attorney for the DG referred in some detail to the following *dictum* in the Howard case (*supra*) at page 674 D – H:

“A director of a company, however, has a duty to observe the utmost good faith towards the company and, in doing so, to exercise reasonable skill and diligence. In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) SA 156 (W), Margo J said at 166D-E:

‘Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof. *Gower (op cit* at 602 *et seq*) refers to the striking contrast between the directors’ heavy duties of loyalty and good faith and their very light obligations of skill and diligence. Nevertheless, a director may not be indifferent or a mere dummy. Nor may he shelter behind culpable ignorance or failure to understand the company’s affairs.’

In other words, a director has an affirmative duty to safeguard and protect the affairs of the company.

In my opinion, it follows that, when the person sought to be held liable under s 424(1) is a director, he may well be a ‘party’ to the reckless or fraudulent conduct of the company’s business even in the absence of some positive steps by him in the carrying out of the company’s business. His supine attitude may, I suppose, even amount to concurrence in that conduct. Whether such

an inference could properly be drawn will depend upon the facts and circumstances of the particular case.”

59. The attorney then summarized the legal position as follows relying on the **Howard** case (*supra*) and the cases referred to therein:

59.1. The question whether a director (and therefore the DG *in casu*) has complied with his duties depends upon the facts and circumstances of each particular case.

59.2. A director need not exhibit a greater degree of skill than may reasonably be expected of a person of that director’s knowledge and ability.

59.3. The Court should always be careful to take into account the fact that after the event the knowledge of hindsight can be misleading and give rise to *unfair criticism*.

59.4. Directors are not expected to be immersed in the details of day-to-day decisions otherwise they would be incapable of taking more abstract, important decisions at board level.

59.5. A director is entitled to rely without verification on the judgment, information and advice of appropriate and suitably qualified officials who have been put in a position of trust for the express purpose of attending to details of management.

- 59.6. If a director did not do so, the business of a company could not go on.
- 59.7. In the absence of grounds of suspicion, directors are justified to trust that those officers will perform all duties and functions honestly and that, having regard to the exigencies of business, the intelligent devolution of labour may properly be left to them.
- 59.8. In complex situations requiring specialist knowledge, a director may be required to seek and rely upon expert professional advice.
- 59.9. It is not necessary for a director to always read the whole of every document that he or she signs. For example, in the case of a lengthy legal document, the director may be excused from doing so, if advised by his attorney that it accurately reflects the board's instruction. However, the director would be negligent if, unadvised, he or she simply signed the document without reading it.
60. Support for the submission in 59.5 above, is to be found in the following *dictum* of Margo J in **Fisheries Development Corporation of SA Ltd v Jorgenson and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others** 1980 (4) SA 156 (WLD) (as it was then known) at 166 B – C:

“In respect of all duties that may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to accept and rely on the judgment, information and advice of the management, unless there are proper reasons for querying such.”

61. Further support for the submission in 59.5 above, as well as 59.6 and 59.7 above, can be found in the judgment of Sir Nathaniel Lindley M R **In re National Bank of Wales. Cory's case** 1899 CA 715 at 723 G – H:

“Was it his [Cory as director of the National Bank of Wales] duty to test the accuracy or completeness of what he was told by the general manager and managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on on principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. We agree that care and prudence do not involve distrust, but for a director acting honestly himself to be held legally liable for negligence in trusting the officers under him not to conceal from him what they ought to report to him appears to us to be laying too heavy a burden on honest business men.”

62. See also 723 I to 724 E :

“ ... the evidence when carefully sifted unquestionably shows that Mr Cory might have found out that he was deceived by the general manager, and that the dividends declared were not in a business sense warranted by the profit made. On the other hand, the evidence shows that, although he was deceived, he neither knew or suspected it. We are not prepared to say that he is guilty of any breach of duty in not discovering that those whom he trusted were misleading him; nor that in point of law he was guilty of any breach of duty in recommending the payment of dividends as and when he did. A director does not warrant the truth of his statements; he is not an insurer. But if he makes misstatements to his shareholders he is liable for the consequences unless he can show that he made them honestly, believing them to be true, and took such care to ascertain the truth as was reasonable at the time. This, we think, Mr Cory did.”

63. See also **Dovey & Others v Cory** 1899 (House of Lords) 724 at 726 where Lord Davey stated the following at 726 F – I:

“He [Cory] adds that the general manager and branch managers were, so far as he knew, men of unquestioned competence and integrity, and that he and his co-directors were compelled by the magnitude of the business and the exigencies of the case generally to rely upon (and he did rely upon) these officials in all ordinary matters relating to the accounts of customers and other questions of detail... I think that Mr Cory was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. I think that he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skills and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel, M.R. in *Hallmark's Case* (16), and by Chitty, J., in *Re Denham & Co.* (14), that directors are not bound to examine entries in the company's books. It is the duty of the general manager and, possibly, the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but Mr Cory was not, in my opinion, guilty of negligence himself in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. This case is no doubt one of some difficulty, but the liquidator has not made out to my satisfaction that Mr Cory wilfully (as that term is explained in the cases) misappropriated the company's funds in payment of dividends.”

64. See also the general discussion of the duties of directors of companies and officers in respect of functions, attention to company's affairs and reliance on others in LAWSA, Vol 4 part 2, page 236 paragraph 139 (first re-issue).

Factual position

65. It is common cause that the DBE deals with a budget running into billions of Rand. It is also common cause that the office of the DG deals with 30 to 40 submissions per day. According to the DG, the submissions amount to between 250 and 300 per month. For that reason, he had to ensure that he surrounds himself with competent people which he did. Normally when he has to sign documents, the role players are present and they can directly report to him. When CA 1 of 2011 was presented to the DG for signature, he arranged for Geyer to be contacted and

her advice obtained. He did receive her advice which permitted him to sign the CA and it was confirmed that it was correct in all respects.

General remarks

66. As stated above, I am not in a position to say whether one or more Unions had anything to do with the complaints against the DG. I can furthermore not say whether the PSC considered submissions to it properly or fully. What I know is that according to the DG, he was not afforded an opportunity to defend himself and explain what, according to him, happened when CA 1 of 2011 was signed.
67. I also referred to the hearing before the Labour Court and its reserved judgment. That matter can have no effect on this enquiry.
68. I was told that the Public Protector investigated matters other than the one I am dealing with. At the time of the hearing, the Public Protector's report was still outstanding. From media reports it appears that it was subsequently made available and that it is recommended that disciplinary steps be taken against the DG. That report appears to deal with matters different from what I am dealing with. It can also have no effect on the outcome of the issues under discussion.
69. I was told that Geyer was the main negotiator in the ELRC, leading a team of which Lebepe was a member, he being responsible for the annexures containing the tariffs. According to the DG, he himself did not partake in labour negotiations

as he was not an expert in that field. He therefore made use of experienced negotiators in labour matters.

70. I know that both Geyer and Lebepe took the blame upon themselves for the unfortunate situation that arose. According to the DG, they are experienced, reliable and trustworthy people. He had no doubt that he could rely on their advice. No attempt was made to discredit either Geyer or Lebepe or the DG's evidence that he could rightly depend on their expertise and advice. If they are not so trustworthy as stated and if they tried to protect the DG by taking responsibility of what happened, that will have to be proved in another forum.

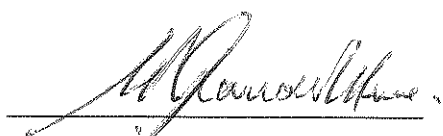
Conclusion

71. In respect of Charge 1, I am satisfied that the DG did not act in breach of his obligations in terms of the Public Finance Management Act, 1 of 1999, as amended.
72. The DG reasonably relied on the advice of officials who erred in not complying with the March Determination as well as in their advice to him that CA 1 of 2011 was in order and that he could sign the agreement.
73. In respect of Count 2, I am satisfied that the expenses were not incurred for private purposes and that the DG similarly did not breach his obligations in terms of the Public Finance Management Act.

Order

74. The DG is found not guilty on Charge 1 as well as not guilty on Charge 2.

SIGNED at PRETORIA this day of December 2013.

A handwritten signature in cursive script, appearing to read 'W J Van der Merwe', is written over a horizontal line.

W J VAN DER MERWE

RETIRED DEPUTY JUDGE PRESIDENT

NORTH GAUTENG

In his capacity as Chairperson of the Disciplinary Hearing.