IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: 2186/2015

In the matter between

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| **MEDIA 24 (PTY) LTD** | **First Applicant** |
| **TIMES MEDIA GROUP LIMITED** | **Second Applicant** |
| **M&G MEDIA LIMITED** | **Third Applicant** |

And

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| **THE DEPARTMENT OF PUBLIC WORKS** | **First Respondent** |
| **S MAHADEO** | **Second Respondent** |
| **R DHANIRAM** | **Third Respondent** |
| **NPT HLENGWA** | **Fourth Respondent** |
| **BHPN MLOTA** | **Fifth Respondent** |
| **AS CHONCO** | **Sixth Respondent** |
| **TJ WATSON** | **Seventh Respondent** |
| **B DLAMINI** | **Eighth Respondent** |
| **RE NEL** | **Ninth Respondent** |
| **J PARDESI** | **Tenth Respondent** |
| **BV NGUBANE** | **Eleventh Respondent** |
| **DJ RINDEL** | **Twelfth Respondent** |
| **N GOVENDER** | **Thirteenth Respondent** |
| **N MFEKA** | **Fourteenth Respondent** |
| **J GOLDSTONE** | **Fifteenth Respondent** |
| **TS KHUZWAYO** | **Sixteenth Respondent** |
| **JF NICHOLSON** | **Seventeenth Respondent** |
| **J NXUSANI** | **Eighteenth Respondent** |

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Coram: Koen J
Heard: 27 May 2016
Delivered: 10 June 2016

## ORDER

(a) The ruling of the Fourteenth Respondent of 19 November 2014, denying media access to the disciplinary enquiries in respect of the Third and Seventh Respondents on the ground that the chairperson did not have authority to grant such access, is reviewed and set aside;

(b) The rulings of the Seventeenth Respondent of 10 December 2014 and the Fifteenth Respondent of 20 November 2014 denying media access to the disciplinary enquiries presided over by them on the grounds and the facts advanced in those rulings, are reviewed and set aside;

(c) The Thirteenth and Sixteenth Respondents and the Eighteenth Respondent (insofar as the disciplinary enquiry in respect of the Eleventh Respondent is concerned) who have not yet made their rulings on media access, as well as the Fourteenth, Fifteenth and Seventeenth Respondents whose rulings were set aside in terms of paragraphs (a) and (b) above, are directed to issue rulings on media access to the disciplinary proceedings over which they preside within 1 month of the date of this order being brought to their attention;

(d) It is declared that where media access is allowed, the chairperson of each disciplinary enquiry always retains an overall discretion to recall or vary the terms of earlier rulings made regarding such access for good cause shown, to ensure a fair hearing for the employees. Good cause will however not arise from the mere assertion of a generalised right, vague prejudice or any other similar contention, but must in all instances be fact specific and established to the satisfaction of the particular chairperson concerned to be such that the interest of the media to report on the proceedings and the right of the public to be

informed of what transpires at the disciplinary proceedings by the media, necessarily should yield thereto. No exhaustive list of those instances can be provided. The Applicants are directed to ensure that their reporters abide by any interim rulings that may be made by the chairpersons in this regard from time to time.

(e) The Second to Twelfth Respondents jointly and severally, one or more paying the others to be absolved, are directed to pay the costs of this application such costs to include that consequent upon employing senior counsel.

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**J U D G M E N T**

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**KOEN J**

[1] The Applicants, three media houses responsible for the publication of a number of national, regional and community newspapers and magazines and online titles, seek access to various disciplinary proceedings instituted by the First Respondent, the Department of Public Works, against eleven of its employees, the second to twelfth respondents,[1] to enable their reporters to report to the public on those proceedings. Although details of the charges to be proffered against the employees by the First Respondent were not disclosed in the application papers, it is not disputed that the disciplinary proceedings will inquire into the lawfulness or otherwise of the employees' involvement in the processes resulting in, and where applicable their approval of, the R246 million upgrades to the private Nkandla residence of President Jacob Zuma.

[2] The upgrades to the President's residence have received considerable public and media attention since it was first reported on by the Third Applicant

[1] Hereinafter referred to as 'the employees'.

in December 2009. It subsequently also formed the subject of a report by the Public Protector,[2] whose report in turn has been the subject of litigation at all three levels of our superior court judicial hierarchy, culminating in the decision of the Constitutional Court on 31 March 2016 in *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others*.[3]

[3] The upgrades have also formed the subject of *inter alia* a Special Investigating Unit report which ascribes the responsibility for the unauthorised expenditure on the upgrades to employees of the First Respondent. This report was released publicly by the President on 11 September 2014. It identifies the employees concerned by name and asserts that they:

> 'at some stage or the other [as] members of the RBAC that approved certain processes or appointments in respect of the Nkandla upgrades, did not comply with the obligations imposed on them by the aforementioned Codes of Conduct and that they are thus guilty of misconduct.'.

The details of the misconduct are that as members of the RBAC from time to time they either approved a procurement strategy or the appointment of a consultant, contractor or service provider where this was not justifiable or ought not to have been granted.

[4] The Nkandla debacle has also subsequently spawned ancillary litigation which includes an action against the architect on the project, to recover certain alleged overspending or unauthorised expenditure on some of the upgrades on the project supervised by him. That action remains pending although interlocutory applications for access to documents in the possession of the Department have been considered in this division.

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[2] The Public Protector's report, titled 'Secure in Comfort' followed after complaints to her office between December 2011 and 2012. Her report was published on 19 March 2014.

[3] [2016] ZACC 11 (reported as 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC)). The judgment confirmed *inter alia* that 'the remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1) of the Constitution is binding' (see point 3 of the order in the *Economic Freedom Fighters* judgment). Paragraph 10.9.1.4 of the Public Protector's report concluded that 'as the President tacitly accepted the implementation of all measures at his residence and was unduly benefitted… a reasonable part of the expenditure towards the installations that were not identified as security measures …should be borne by him and his family.'

[5] Numerous media reports have been published on the issue and the view has been expressed, rightly or not, that the employees are being made 'scapegoats'. The public interest in the cost of the upgrades from public funds and any irregularities that may have occurred in the process is, accordingly, enormous. The Applicants maintain that the disciplinary proceedings against the employees are in respect of these very concerns of the public.

[6] The Thirteenth to Eighteenth Respondents, all advocates practising in Durban, are the chairpersons, duly appointed by the First Respondent, to conduct the various disciplinary enquiries on its behalf. The Applicants have asserted their rights to access and to report before some of these chairpersons, and rulings have been issued by some.

(a) The Thirteenth Respondent is the chairperson of the enquiry relating to the Second and Fourth Respondents. No ruling on any access by the media to those enquiries has been made by her.

(b) The Fourteenth Respondent is the chairperson of the enquiry relating to the Third and Seventh Respondents. He has ruled that he does not have the authority to permit such access.[4]

(c) The Fifteenth Respondent is the chairperson of the enquiry relating to the Fifth Respondent. He has refused access on what the Applicants termed 'the merits' of that request.

(d) The Sixteenth Respondent is the chairperson of the enquiry relating to the Sixth and Tenth Respondents. No ruling on any access by the media to those enquiries has been made by him.

(e) The Seventeenth Respondent is the chairperson of the enquiry relating to the Eighth and Ninth Respondents. He has refused access on what the Applicants termed 'the merits' of that request for access.

(f) The Eighteenth Respondent is the chairperson of the enquiry relating to the Eleventh and Twelfth Respondents. He has ruled in respect of the proceedings regarding the Twelfth Respondent that

[4] That was the only ruling to that effect, counsel conceding that the reference in paragraph 89.1 of the founding affidavit to 'two rulings that the chairpersons are not authorized to rule on media access …' being erroneous.

the media is entitled to access.[5] No ruling on any access by the media to the enquiry in respect of the Eleventh Respondent appears to have been made by him.

[7] The application takes the form of an administrative review although in parts, it also claims a declaration of rights. The Applicants seek to review the decisions of those chairpersons who have not issued rulings, those who issued rulings refusing media access to the hearings either on the ground that they have no power to permit media access to the hearings, or on the merits that they did not believe that the Applicants had made out a case for access. Simultaneously, the Applicants however seek to uphold the ruling of the Eighteenth Respondent who granted the application for media access in the disciplinary hearing of the Twelfth Respondent, and further seek directions to be taken into account when rulings on access are made by Chairpersons of such enquiries cited in this application.

[8] Specifically, the material parts of the substantive relief claimed in the Notice of Motion are as follows:

> '1. …
> 2. Upholding the ruling of Mr Nxusani[6] of 5 December 2014 granting media access in respect of the disciplinary hearing of Mr Rindel[7];
> 3. Reviewing and setting aside the ruling of Chairperson Mfeka[8] of 19 November 2014, which denied media access on the ground that the chairperson did not have authority to grant access;
> 4. Reviewing and setting aside the rulings of Chairpersons Nicholson[9] of 10 December 2014 and Goldstone[10] of 20 November 2014 which denied media access on the merits; and
> 5. Directing the Chairpersons who have not yet made their rulings on media access as well as those Chairpersons whose rulings were set aside to make a ruling on media access within 10 days of the date of this order and issuing directions to be taken into account when such rulings are made.

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[5] In granting the application for media access in the disciplinary hearing of the Twelfth Respondent holding that it was 'both appropriate and just for the print media to be granted access to the proceedings and to report thereupon in the printed and electronic media.'
[6] The Eighteenth Respondent.
[7] The Twelfth Respondent.
[8] The Fourteenth Respondent.
[9] The Seventeenth Respondent.
[10] The Fifteenth Respondent.

6. Ordering the First Respondent together with any other respondent that opposes the application to pay the costs of this application.'

In argument before me, Ms Gabriel SC, with her Ms Pudifin-Jones, for the Applicants correctly in my view, abandoned the relief claimed in paragraph 2 of the Notice of Motion. The ruling by the Eighteenth Applicant stands as a valid administrative action until challenged.[11] There is no counter application or any other challenge to it. It does not need the imprimatur of this court to have legal validity.

[9] Although the Notice of Motion simply refers to media access without any qualification, the Applicants in their founding affidavit restrict the access claimed to the following:

(a) Up to four (4) reporters at any one time from any of Media 24, Times Media Group and M & G Media Limited will be given access to attend all sessions of the disciplinary hearings against each of the employees;
(b) That the access will be restricted to print media only and not include broadcasting of the proceedings whether by means of television or radio;
(c) The reporters may take notes of proceedings, including the use of personal hand-held recording devices to record parts of the proceedings for purposes of writing and publishing articles in the print media;
(d) The reporters may use electronic devices to, for example, post online stories or comment by way of Twitter during the course of proceedings; and
(e) Photographs may be taken at and inside the venue, provided that once proceedings are in session, no photographs may be taken;
(f) The chairperson of each disciplinary panel retains the overall discretion to manage the proceedings as he or she deems fit in a manner that ensures a fair hearing for the employees, and the

[11] See *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) per Howie P and Nugent JA paras 36 – 40.

Applicants shall abide by rulings made by the chairpersons in this regard.

[10] The First Respondent abides by the decision of this Court. The employees oppose the application. The answering affidavit is deposed to by the Second Respondent. The other employees have filed confirmatory affidavits with the Twelfth Respondent in addition explaining why he initially consented to the media having access but after the matter having been argued and before the Eighteenth Respondent issued his ruling, withdrawing such consent.[12] They agree however that it is necessary for this court to provide certainty with regard to a chairperson's authority to regulate the proceedings before him (or her) and to rule on the competing rights of privacy and the media's right to freedom of expression. None of the Chairpersons of the disciplinary enquiries, the Thirteenth to Eighteenth Respondents, opposes the application.

[11] The issues to be determined are as follows:

(a) Are disciplinary proceedings between an employer such, as the First Respondent and its individual employees an entirely private matter, which the media should not be allowed to report on as a matter of principle?

(b) Do the chairpersons presiding over these enquiries have the power/authority to rule whether the disciplinary proceedings they conduct should be open to the media?[13]

(c) Does the constitutionally entrenched right of freedom of the press outweigh the constitutional rights of the employees to privacy, dignity or any other rights to afford the Applicants the right of access to the disciplinary hearings?[14]

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[12] The Twelfth Respondent ascribes the retraction of his consent to having obtained legal advice to that effect.

[13] Put differently, does the Chairperson have a discretion to grant media access to the disciplinary hearings? The employees maintain that they don't.

[14] Put differently, should the Chairperson's discretion be exercised in favour of granting access to the media? The Applicants maintain that they do, whereas the employees maintain that their rights to privacy, dignity and the confidentiality of their employment contracts prevail.

(d) Allied to the issue in subparagraph (c) above, if the Applicants have such a right, is it qualified in any way and on what terms should the relief claimed be granted?[15]

These issues will be dealt with below, not necessarily *seriatim* but often conjointly as some overlap and cover common ground. Before doing so it is however prudent to recount briefly the constitutional framework within which this application is to be assessed and indeed all legislation, private agreements and conduct must be considered.

[12] Section 16 of the Constitution establishes the right to freedom of expression. It provides that:

> '(1) Everyone has the right to freedom of expression, which includes:
> (a) freedom of the press and other media;
> (b) freedom to receive and impart information or ideas'.

[13] Media organisations, like the Applicants, through their newspapers and online publications, play a very important role in realising these section 16 rights for ordinary South Africans. In *Khumalo and others v Holomisa* the Constitutional Court remarked:[16]

> '[22] The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected.
>
> . . .
>
> [24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the

[15] Some of the restrictions on the access accepted by the Applicants have already been referred to earlier.
[16] 2002 (5) SA 401 (CC) see paras 22 – 24.

media carry out their constitutional mandate will have a significant impact on the development of our democratic society….'[17]
(my underlining).

[14] In *South African National Defence Union v Minister of Defence and another*,[18] the Constitutional Court further said:

'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.'

[15] The right to freedom of expression is not one for the benefit of the media, but rather for the benefit of all citizens. The Supreme Court of Appeal has put it as follows in *Midi Television (Pty) Ltd t/a E TV v Director of Public Prosecutions (Western Cape)*:[19]

'It is important to bear in mind that the constitutional promise of a free press is not one made for the protection of the special interests of the press… The constitutional promise is rather made to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself.'

[16] The principle of open justice – i.e. that justice must not only be done but must be seen to be done – is of equal importance. In *S v Mamabolo (e tv and others intervening)*, the Constitutional Court confirmed that:

'openness seeks to ensure that the citizenry know what is happening … so the people can discuss, endorse, criticize, applaud or castigate the conduct…'[20]

[17] The principles of open justice and accountability permeate every aspect of government conduct and all organs of state, such as the First

[17] See too Democratic Alliance v African National Congress and another 2015 (2) SA 232 (CC) at para 122, and South African National Defence Union v Minister of Defence and another 1999 (4) SA 469 (CC) para 7.
[18] SA National Defence Union v Minister of Defence n17 para 7.
[19] 2007 (5) SA 540 (SCA) para 6.
[20] 2001 (3) SA 404 (CC) para 29. The principle applies equally to the Executive in any constitutional democracy such as ours which subscribes to the values of openness and transparency.

Respondent. [21] Indeed, that is what the Constitution requires. Section 195(1)(g) of the Constitution sets out the basic values and principles governing public administration. It states:

'**195 Basic Values and principles governing public administration**

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) …
(b) …
(c) …
(d) …
(e) …
(f) …
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.'

[18] Section 38[22] of the Public Finance Management Act, 1 of 1999 also seeks to promote open and transparent administration.

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[21] The *Media 24 (Pty) Ltd and another v Menzi Simelane and another* (the 'Simelane Ruling' written by Mr Sias Reynecke, SC; Mr Daniel Berger, SC and Mr Dali Mpofu as the chairpersons of the disciplinary hearing), dealt with below, at para 29 stated: 'in our view, the constitutional imperative of open justice is applicable to disciplinary enquiries of the Bar Council.'

[22] Section 38 of the PFMA provides:

'**38 General responsibilities of accounting officers**

(1) The accounting officer for a department, trading entity or constitutional institution-

(a) must ensure that that department, trading entity or constitutional institution has and maintains-
  (i) effective, efficient and transparent systems of financial and risk management and internal control;
  (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;
  (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
  (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;
(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;
(c) must take effective and appropriate steps to-
  (i) collect all money due to the department, trading entity or constitutional institution;
  (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(d) is responsible for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

(e) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;

(f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who-

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(i) when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with;

(j) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(k) must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(l) must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(m) must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(n) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.'

[19] The Constitutional Court in the opening paragraph of its recent decision in *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others*[23] succinctly encapsulated the effect of the application of the aforesaid principles as follows:

> '…constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.'

[20] The employees however emphasize that their employment relationship with the First Respondent is private and confidential and no business of outsiders. They emphasise that:

(a) a disciplinary enquiry is a private contractual hearing akin to a private commercial arbitration, where the media is not entitled to access;

(b) in terms of the legislative and contractual arrangement which governs the employment relationship between the First Respondent and the employees:

  (i) the discretion afforded to a chairperson at a disciplinary enquiry is limited;

  (ii) the disciplinary code pursuant to which the employees are to be disciplined does not expressly empower the chairperson to grant access or deal with the applicants' application; and

  (iii) a chairperson cannot infer the power to grant access to the media as it does not affect the inherent fairness of the proceedings between the parties to that proceeding; and that

(c) the issue of media access to disciplinary enquiries must be determined as a matter of principle and within the legislative and contractual context of the employment relationship.

[21] In view of those submissions it is necessary to deal firstly with the

[23] See n3 para 1.

contractual and employment relationship between the State represented by the First Respondent and the employees. That relationship is governed by a Public Service Bargaining Collective Agreement promulgated in terms of section 23 of the Labour Relations Act, 66 of 1995 ('LRA').

[22] It is trite law that Bargaining Council agreements should be adhered to. In *Cusa v Tao Wing Metal Industries and others*[24] Ngcobo J said:

> 'Compliance with a bargaining council agreement is crucial not only to the right to bargain collectively through the forum constituted by the Bargaining Council but it is also crucial to the sanctity of collective bargaining agreements.'

The learned judge went on to say in respect of the duties of commissioners at bargaining council level, that:

> '... Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, the commissioner must be guided by at least three considerations. The first is they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'[25]
> (my underlining)

[23] The bargaining council agreement governing the employment relationship sets out the State's power to discipline and the disciplinary procedure to be followed in respect of disciplinary enquiries, to give effect to the requirements of clause 4 of schedule 8 in the Code of Good Practice of the LRA, which provides:

> '4 Fair procedure
>
> (1) Normally, the employer should conduct an investigation to determine whether there are grounds for *dismissal*. This does not need to be a formal enquiry. The employer should notify the *employee* of the allegations using a form and language that the *employee* can reasonably understand. The *employee* should be allowed the opportunity to state a case in response to the allegations. The *employee* should be entitled to a reasonable time to prepare the response and to the assistance of a *trade union representative* or fellow *employee*. After the enquiry, the employer should communicate the decision taken, and preferably

[24] 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) para 56.
[25] *Cusa v Tao Wing Metal* n23 para 65.

furnish the *employee* with written notification of that decision.'

[24] In *casu*, the disciplinary proceedings against the employees are governed by the 'Disciplinary Code and Procedures for the Public Services' ('the Code') which was adopted by the Public Service Co-ordinating Bargaining Council and came into effect on the date on which the Public Service Laws Amendment Act[26] came into effect, namely 1 July 1999. It governs disciplinary proceedings between the First Respondent and its employees.

[25] The Code stipulates the procedure *inter alia* in respect of the appointment of chairpersons by the employer, legal representation, and the leading of evidence. It also grants certain powers to the chairperson. It is however silent on whether the proceedings are to be conducted in private or whether they are open to the public. Nor does it confer on the chairperson of a disciplinary enquiry the express power to deal with an application for media access. Nowhere in the bargaining council agreement or the code is the chairperson afforded a discretion to deal with joinder applications by parties other than the employer and employee.

[26] The employees accordingly argue that the bargaining council agreement cannot be construed so as to imply a power for chairpersons to deal with and grant access to the disciplinary enquiries, as sought by the Applicants. They submit that the powers of the chairperson at a disciplinary enquiry are, subject to the constraints of the bargaining council agreement, similar to those of a commissioner at a bargaining council as described by Ngcobo J above in *Cusa*. They accept that the chairperson of a disciplinary enquiry by necessary implication has the residual power to regulate the proceedings at those enquiries, but contend that such residual discretion is constrained to disputes between the parties and relates to fairness between the parties and does not extend to the issue of media access.

[26] No 86 of 1998.

[27] Like the Code, the Public Service Act,1994[27] also does not expressly provide chairpersons with a discretion to allow media access. Sections 16B(1) and (3) of the Public Services Act provide:

> '(1) Subject to subsection (2), when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:
> (a) In the case of a head of department, the relevant executive authority; and
> (b) in the case of any other employee, the relevant head of department.
>
> …
>
> (3) The Minister shall by regulation make provision for-
> (a) a power for chairpersons of disciplinary hearings to summon employees and other persons as witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and other objects; and
> (b) travel, subsistence and other costs and other fees for witnesses at disciplinary hearings.'

I was advised that the Minister has not published regulations specifying the powers of the chairperson in terms of section 16B(3). However, even if regulations were published these may not deal with applications for access, so as not to be *ultra vires* the enabling legislation.[28] The employees, with the reference to these provisions, however contend that a chairperson's only power in terms of the Public Service Act, is as set out in section 16B(1) – namely to pronounce a sanction in respect of an employee found guilty of misconduct. That, the employees accepted, would necessarily imply all things ancillary, necessary or incidental to that power, but they contend that it would not include the power to grant access to the media.

[28] The employees argue further that a disciplinary enquiry is designed to be an investigation into whether misconduct occurred and, consequent upon that finding, whether the misconduct warrants the termination of the employment relationship. They argue that a disciplinary enquiry is voluntary in that it can be dispensed with. The investigation culminates in a decision to dismiss or not, which is a contractual power even despite the fact that the

[27] See Proclamation 103 published in *GG* 15791 of 3 June 1994.
[28] It is unnecessary to express any view on that aspect in this judgment.

employer in this matter is the State,[29] it remains the exercise of a contractual power and the decision is binding on the employer. Subsequent to the dismissal, an aggrieved employee may refer the dispute to a Bargaining Council or CCMA where the hearing at the CCMA or Bargaining Council in respect of the dismissal subsequent to the disciplinary enquiry, is a hearing *de novo* and public. [30]

[29] Specifically, they proceed from the premise that a disciplinary enquiry fits all of the hallmarks of an arbitration as described by Smalberger ADP in *Total Support Management (Pty) Ltd and another v Diversified Health Systems (South Africa) (Pty) Ltd and another*, [31] where, in reference to arbitrations in terms of the Arbitration Act, 42 of 1965 he held that:

> 'Arbitration does not fall within the purview of 'administrative action'. It arises through the exercise of private rather than public powers. This follows from arbitrations' distinctive attributes, with particular emphasis on the following. First, the arbitration proceeds from an agreement between the parties who consented to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, the arbitration is a process by which rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time the arbitrator is appointed.'

In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another*[32]

> '[197] Some of the advantages of arbitration lie in its flexibility, ... its cost effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellant arbitral body). ...
>
> [198] The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-State process. It must accordingly be distinguished from arbitration proceedings before the Commissioner for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act, 66 of 1995, which are neither consensual, in that respondents

[29] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA).
[30] Sidumo and another v Rustenburg Platinum Mines Ltd and others 2008 (2) SA 24 (CC), para 18.
[31] [2002] ZACA 14 para 24.
[32] 2009 (4) SA 529 (CC) per O'Regan ADCJ para 197 – 198.

> do not have a choice as to whether to participate in the proceedings, nor private. Given these differences the considerations which underlie the analysis of a review of such proceedings are not directly applicable to private arbitrations.'

[30] They therefore argue that a disciplinary enquiry as stipulated by the bargaining council agreement between the parties is more closely akin to that of a private arbitration and is distinguishable from a hearing before the CCMA, proceedings before a court or a tribunal. In conclusion they submit that a disciplinary enquiry is not held before an impartial forum within the meaning of section 34 of the Constitution, that the chairpersons are held beholden to the employer who pays them for their services, is designed to enable an employer to determine contractually to dismiss or not, and it might be a non-State process.

[31] The fundamental flaw in the employees approach set out above is however that the applicable legislation, the Code and employment contract cannot be viewed in isolation. The proper approach to interpreting legislation, Codes and contracts, to the extent that the issue might be one of interpretation, is against the relevant background and the provisions of the Constitution. As was said inter alia in *Natal Joint Municipal Pension Fund v Endumeni Municipality*: [33]

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.…. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'
> (my underlining)

[33] 2012 (4) SA 593 (SCA) para 18.

[32] The facts in *casu* concern an employment relationship where the State is the employer.[34] The First Respondent clearly is an organ of State as defined in section 239 of the Constitution. The chairpersons it has appointed simply represent and step into the shoes of the Department, just as a member of senior management deputized by the First Respondent to preside over a disciplinary, would still represent the First Respondent as a department of the State. As a general rule disciplinary disputes relating to employees of the State might not attract public attention, but that does not mean that because they might be regulated in terms of a contract, they are all private and confidential and the media is not entitled to access. There are also very important competing rights created by the Constitution.

[33] Each case must be viewed against the background of the Constitutional framework, the values enshrined therein and on its own facts.

[34] The parties to the Bargaining Council agreement and the formulation of the Code must all have been aware and must be taken to have been aware of the Constitutional milieu against which they conducted their negotiations and concluded agreements, namely that effect must be given to the provisions of the Constitution, specifically the fundamental rights guaranteed therein as well other legislation enacted to give effect to those rights, for example the Promotion of Access to Information Act, 2 of 2000.

[35] The procurement process which the First Respondent applies must, in terms of section 217 of the Constitution, be one which 'is fair, equitable, transparent, competitive and cost effective.' This can hardly be evaluated by the general public if, for example as has been suggested, some pressure is brought to bear on subordinates in the position of the employees by their employer or someone higher in the Executive hierarchy to adopt and approve a project and expenditure which flout the procurement procedures they are supposed to adhere to, unless reported on fully by the media. If the

[34] This judgment will accordingly deal with that position only and the principles dealt with herein might not necessarily apply to an employment relationship between an individual and a private employer, and not an organ of state.

employees operated devoid from such influence, then the general public should be allowed to hear why eleven employees, some of them occupying very senior positions, collectively all made themselves guilty, seemingly in concert and apparently for no personal financial gain, of transgressions of the Constitution and procurement procedures they were enjoined to observe, comply with and apply.

[36] It is therefore perhaps hardly surprising that none of the legislation, and neither the Code, refers to the power of a chairperson to direct that the media will have access to a particular disciplinary enquiry conducted by or at the behest of the First Respondent. It is a power which the law necessarily implies and/or which the Constitution sanctions where appropriate. Where a disciplinary enquiry takes the form of a structured hearing it is simply an extension of conduct by an organ of state. The issue is how the First Respondent deals with the conduct of its employees where it alleges that its employees acted contrary to the terms of the Constitution and procurement legislation, and whether the enquiry into such conduct should be open to the public for scrutiny. If it should, then clearly the power to rule in favour of a suitable and appropriate request for access must be implied in the powers the Department (or a representative chairperson appointed by it) has to conduct the disciplinary enquiry and regulate matters as to procedure.

[37] Plainly the discretion contained in that power is not totally unfettered. It must be exercised with due regard to important rights. The issue is not only one of carte blanche reporting on how the First Respondent deals with what it contends are instances of abuse of taxpayers' funds by employees it had considered fit to entrust with that important task. Due regard must also be had to considerations of fairness and preserving the privacy of employees where real threats to that specific right arises. For example, should a particular defence raised by an employee involve a very personal matter restricted to his or her personal life which would not advance the public's right to be informed one iota, but simply serve to embarrass the employee, then reporting thereon should be disallowed. In appropriate instances this might even take the form of the chairperson directing that the particular evidence should not published.

But the right to privacy will not protect the withholding of evidence of dishonesty, greed, undue influence whether by superiors or any outside agency, or whatever other motivation might have contributed to an alleged dereliction of duty. The aforesaid considerations do not constitute an exhaustive list but are merely some examples that come to mind. A complete list of every eventuality that might or might not arise can never be predicted in advance. Each instance must be evaluated on its own facts, having regard to whether what is complained of actually has a sound factual foundation and by weighing up the competing rights and interests.

[38] My aforesaid conclusion is consistent also with the general terms of the Code and the disciplinary procedure contemplated by it. Its terms point to a clear objective of openness and transparency in the disciplinary process. For example clause 2.2 requires that 'Discipline must be applied in a prompt, fair, consistent and progressive manner' and clause 2.8 states that the Code 'constitutes a framework within which departmental policies may be developed to address appropriate circumstances, provided such policies do not deviate from the provisions of the framework'.

The question of media access is one such 'appropriate circumstance', where the 'framework' of the Code needs to be fleshed out with due regard to applicable Constitutional and similar values and objectives.

[39] Notwithstanding the Code being silent on the issue, the legal position in my view is that a discretion whether or not to grant media access vests in the presiding chairperson.

[40] In *Mail & Guardian Ltd and others v Judicial Service Commission and others; e.tv (Pty) Ltd and another v Judicial Service Commission and others*,[35] concerning the issue whether to review and set aside the refusal by the Judicial Service Commission ('JSC') to permit public and media access to disciplinary proceedings against Judge President Hlophe, Malan J held that where the rules governing disciplinary procedures are silent on media and

[35] 2010 (6) BCLR 615 (GSJ).

public access, 'it follows that a discretion is given to the JSC'.[36] I am obviously alive to the distinguishing feature that the employees are not judges whose conduct are being scrutinized, but the case nevertheless provides a valid analogy. Just as with a judge facing a disciplinary enquiry for allegedly transgressing the norms and standard applicable to judicial office, the employees are also accused of failing to comply with basic norms prescribed for them to comply with regards to procurement. The enquiries involve a hearing with the leading of evidence and an opportunity to test that evidence, of the employees in a relationship similar to that of a judge, where in the final analysis they are also paid from State funds. Openness and transparency demand that these issues not be dealt with behind closed doors, as much as the publicity might not be welcomed by the employee, or for that matter witnesses who will be required to give evidence, where the import of their evidence (not necessarily every word and feature of body language as with televised proceedings) would be under the magnifying glass of a concerned citizenry. That is inherent consequence where one is a public servant or any other public office bearer.

[41] Further, this discretion may be exercised lawfully by the chairperson, independent of whether or not consent was granted by the person who is the subject of the proceedings or inquiry. In *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v The Honourable Mr Justice King NO and others*[37] the Court permitted radio broadcasting of the Commission of Inquiry into the Hansie Cronje cricket match-fixing scandal, notwithstanding that:

> 'the representatives of all the other parties, including Cronjé and other members of the South African cricket team, who were potential witnesses at the hearing, conveyed that their clients would be unsettled by live broadcasts or recordings of the proceedings and that they thus objected to the presence of the electronic media.'[38]

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[36] Mail & Guardian v JSC n32 para 15.
[37] [2000] 4 All SA 128 (C); 2000 (4) SA 973 (C) para 6.
[38] In Multichoice (Proprietary) Limited and others v National Prosecuting Authority and another, In Re; S v Pistorius, In Re; Media 24 Limited and others v Director of Public Prosecutions North Gauteng and others 2014 (1) SACR 589 (GP) in which Mlambo JP granted the electronic, broadcast and print media access to the Oscar Pistorius criminal trial, despite Pistorius remaining 'steadfastly opposed to the relief sought by the applicants. He is opposed to any form of coverage sought by the applicants.'

I fully concur with that view. If the exercise of the discretion based on an evaluation of the competing rights (a point to which I shall turn shortly below) of the media and the public and that of the employee (or for that matter any others such as witnesses) require that the media be granted access, then that careful weighing of competing rights cannot be held to ransom of the consent or otherwise of the employee. The consent might be withheld for spurious reasons or for the very reason that the general public might fear, namely some cover up of the true reasons for the unlawful conduct. Plainly, the attitude of the employee to the media being granted access must not be ignored and if there are well founded proven circumstances which might impair specific identified rights of the employee, these must be considered and weighed up against the rights of *inter alia* the media and public to access the hearings. But the employee's consent or absence thereof is not conclusive.

[42] Accepting then that the chairpersons have the power to rule on and permit media access in respect of the disciplinary hearings before them, the question becomes one as to how this discretion should be exercised.

[43] A body of jurisprudence has developed since 1996 which offers very persuasive guidelines to assessing claims to media access to disciplinary proceedings. These relate to enquiries:

(a) under the Magistrate's Courts Act 32 of 1944;
(b) before the Judicial Services Commission;
(c) within the National Prosecuting Authority;
(d) in respect of advocates before constituent bar councils of the General Council of the Bar; and
(e) Commissions generally.

[44] Disciplinary proceedings of the Commission under the Magistrates Act, 90 of 1993. Section 5(5) of the Magistrates Act stipulates that, where a magistrate has been accused of misconduct and on completion of any investigation against the magistrate (in terms of section 6B) and the magistrate is requested to appear in front of the commission to answer to a charge, such meetings against magistrates are required to '… take place in

camera unless the person presiding at a meeting directs otherwise' (in general this is the case for most meetings held by the commission). The default position is therefore one of no access, subject to a discretion allowing access. The exercise of this discretion is subject to judicial oversight. In *Moldenhauer v Du Plessis and others*[39] the Chief Magistrate of Pretoria brought an urgent application against the decision of a committee of the Magistrates' Commission to hold a disciplinary hearing against him *in camera* because he wanted the hearing to take place in public because a one-sided picture regarding his professional conduct was being painted in the press. Motata J in granting the relief claimed stated:

> 'this matter has evoked such public interest that the public is looking forward to it being resolved in the open in a reasoned and rational manner'.

The employees argue that this authority is distinguishable from the facts in *casu* because disciplinary proceedings under the Magistrates Act explicitly make provision for the regulation of media access.[40] I disagree. Once it is accepted that the chairpersons have such a discretion, which I have concluded they have, then the case is instructive as to how such a discretion should be exercised when dealing with matters of public interest and involving employment relationships with the State.

[45] Section 29(3)(a) of the Judicial Service Commission Act 9 of 1994 provides, in respect of disciplinary proceedings against Judges before the Judicial Service Commission, that:

> 'Notwithstanding subsection (1) [which essentially limits the participants in the hearing of the parties concerned], the Tribunal President may, if it is in the public interest and <u>for the purposes of transparency</u>, determine that all or any part of the hearing of a Tribunal must be held in public'.
> (my underlining)

In *e-tv (Pty) Ltd and others v Judicial Services Commission and others*[41] a number of media groups applied to review a decision of the JSC not to allow the public and the media access to the hearing of the complaints against

[39] 2002 (5) SA 781 (T) at 795F.
[40] Section 5(5) of the Magistrates Act, 90 of 1998.
[41] 2010 (1) SA 537 (GSJ).

Judge President Hlophe of the Western Cape High Court, relating to him having allegedly improperly sought to interfere in a pending case against President Zuma before the Constitutional Court. The relevant JSC Rule at that time stated that the JSC was:[42]

> 'entitled to permit the media and the public … to attend any inquiry unless good cause is shown for their exclusion.'

[46] In upholding the review and granting the media access to the hearing, Willis J held that the reasons provided by the JSC for refusing to permit the public access, namely that this was necessary to protect the dignity and stature of judicial offices, did not qualify as 'good cause' and that there would be an erosion of public confidence in the judiciary if the hearing took place in private because it was:[43]

> 'precisely the extraordinary nature of the hearing which makes it imperative that the public has an informed sense not only of what actually happened, but also that consequent upon its findings as to the facts, the JSC makes the decision that is both fair and appropriate.'

The employees argue that the position in relation to the Judicial Service Commission proceedings is distinguishable because the JSC has inherent discretionary power and its proceedings are regulated by the Constitution.[44] That fact does not in my view detract from the principle established. There will be an erosion of public confidence in the public administration if the hearing took place in private.

[47] In *Mail & Guardian Ltd and others v Judicial Service Commission and others*,[45] also referred to earlier, the Court was faced with a review of a subsequent refusal by the JSC to permit the public and media access to further JSC disciplinary proceedings against Judge President Hlophe. In assessing the exercise of the discretion in that case, Malan J in granting

[42] See n38 at 543D.
[43] See n 38 at 547F-G.
[44] See section 178(6) of the Constitution.
[45] See n33.

access to the enquiry remarked that, although it may be necessary to protect confidentiality during the early period of an investigation:[46]

> 'This case has long progressed beyond the stage of a preliminary investigation… The identity of the judge involved is known as are the names of the complainants… The details of the complaint and counter complaint are in the public domain: not only in the media but also in the form of affidavits in the various court proceedings… The public deserves access to the further proceedings.'

In my view, similar sentiments exist in respect of the enquiries into the conduct of the employees in *casu.*

[48] Disciplinary proceedings before the National Prosecuting Authority ('the NPA') may also be open to the public and / or the media in appropriate circumstances. In *Media24 Limited and others v National Director of Public Prosecutions; Electronic Media Network Limited v National Director of Public Prosecutions and another*,[47] two print media houses as well as the television programme *Carte Blanche* sought access to the disciplinary enquiry of Ms Breytenbach, a senior prosecutor who had been suspended by the NPA. In overturning the original decision to refuse the media access, Tolmay J noted that the disciplinary enquiry and the circumstances surrounding it had already enjoyed widespread coverage in the media, and rejected the NPA's argument that witnesses would chose not to cooperate and may refuse to testify, because that allegation was not substantiated. He also rejected the NPA's argument that its proceedings were 'private and internal' arising in respect of an employment relationship, stating:

> '[34] [t]he NPA is, in my view, no ordinary employer. The NPA is a public institution established in terms of the Constitution and has a particular constitutional mandate:
>
> …
>
> [36] the disciplinary proceedings in this matter cannot be described as private or ordinary. Given the allegations of corruption, mismanagement and political interference serious constitutional issues arise, and the public's right to be informed under the circumstances are undeniable.'

[46] See n33 para 12.
[47] [2012] JOL 29172 (GNP).

The employees also sought to distinguish this authority from their position, contending that disciplinary proceedings before the NPA are before an institution expressly recognized by the Constitution. Disciplinary proceedings initiated by the First Respondent are however also proceedings initiated by a state institution and the fact that the disciplinary proceedings are conducted by an independent chairperson does not make them disciplinary proceedings other than that of a State institution.

[49] During 2014 the Johannesburg Bar Council granted access to two media houses,[48] in respect of its disciplinary inquiry into the conduct of an advocate, Mr Menzi Simelane.[49] It weighed up Mr Simelane's constitutional right to have his dignity and privacy respected and protected against the media's right to freedom of expression, and held that:[50]

> '[25] It is certainly in the public interest that the manner in which the Society disciplines its members is not shrouded in secrecy …
>
> [26] For an association that is committed to the maintenance of the rule of law and the administration of justice, it is also in the interests of the Society that it be seen to hold its members to account. To do this, the Society must act transparently when it disciplines its members.'

The panel specifically remarked that:[51]

> 'in our view, the constitutional imperative of open justice is applicable to disciplinary enquiries of the Bar Council'

In assessing Mr Simelane's contentions that the disciplinary proceedings should be closed, the council concluded that:

(a) Mr Simelane is well known in the public, as are the allegations against him, which are in the public domain and a matter of public record;

(b) There is considerable public interest in the Ginwala commission and Mr Simelane's evidence;

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[48] The First and Second Applicants in this application.
[49] No disrespect is intended by referring to the first name of Mr Simelane. It is done purely for recognition purposes.
[50] See Simelane Ruling n21 at paras 25 – 26.
[51] See Simelane Ruling n21 at para 29.

(c) Mr Simelane's allegation that open proceedings would violate his constitutional rights to dignity and privacy could also not be sustained as:

> 'It is not objectively reasonable for a member of the Society to feel insulted by the press reporting on the proceedings of an enquiry by fellow advocates into his or her public conduct. If, in the course of the reporting, the press were to publish defamatory allegations concerning Mr Simelane, he would have the right to sue for damages.'[52]

[50] Regarding commissions of inquiry generally, in *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v The Honourable Mr Justice King NO and others*,[53] the Court permitted radio broadcasting of the proceedings of the Commission into the 'Hansie Cronje cricket match-fixing scandal', holding that the chairperson's justification for disallowing such access, namely that he did not wish witnesses to be inhibited in giving their testimony, was not substantiated, but in any event was not a sufficient interest to outweigh the importance of freedom of expression.

[51] In *Mail & Guardian Media Ltd v Chipu NO and others*, [54] the Constitutional Court struck down section 21(5) of the Refugees Act, 130 of 1998 which imposed a blanket ban on access to Refugee Appeal Board hearings. The Court held that while confidentiality of asylum seeker applications is important, a discretion to allow access better balances the competing interests involved. Pending Parliament's amendment of the Refugees Act, the Refugee Appeal Board was ordered to consider applications for access on a discretionary basis by taking into account whether such access is in the public interest.

[52] The aforesaid precedents which I fully endorse, establish that public interest favours that proceedings, including disciplinary proceedings generally, should be open, that whether or not particular a proceeding should be open to the public requires a weighing up of competing rights, that it is not objectively reasonable for a person to be insulted by the press reporting on proceedings

[52] Simelane Ruling n21 para 36.
[53] See n35.
[54] 2013 (6) SA 367 (CC).

relating to public conduct, that allegations that witnesses would be intimidated or reluctant to testify, or any other grounds offered in opposition to a claim for access, must be substantiated to be sustained, and that in general, where matters are already in the public domain and have already enjoyed widespread coverage in the media, the public deserves[55] access to the further proceedings. No constitutional right is absolute[56] and rights have to be balanced with each other in a facts based setting.

[53] The application of the above principles to the present facts resoundingly favours media access and the public's right to be informed of what transpires in the disciplinary proceedings which have been instituted. The default position is that unless there are demonstrable Constitutional rights and other interests which are properly substantiated and which outweigh the weighty interest which an open and democratic society assures and should assure to its citizenry, access to the media should be allowed. The Applicants, as large established media organisations, which in our country comprise a substantial part of 'the fourth estate', have Constitutional approval, and a mandate, to disseminate the truth and to provide citizens with information in the public interest. They are duty bound, with vigour, courage, integrity and responsibility, to report on the Nkandla upgrades (including the disciplinary proceedings in question) and, absent any cogent evidence of irreparable harm, should not be prevented from doing so.[57]

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[55] In *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) Sachs J held: '[27]… The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion.'

[56] In *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) at para 67 Ackermann J held: 'The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to abstract individualistic approach. The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community'…

And then in para 77: 'This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.'

[57] Khumalo v Holomisa n16 para 22.

[54] As in the *Mail & Guardian Ltd and Others v Judicial Service Commission and others*,[58] the allegations which form the subject of the disciplinary proceedings (including the identity of the employees who are accused of alleged improper conduct) are already largely in the public domain. The very public nature of the Nkandla upgrades demands that the public are given the full facts in order to make informed choices, including whether or not the disciplinary hearings instigated against the employees are properly founded.

[55] The public interest is heightened by the fact that the disciplinary proceedings concern the alleged wrongful expenditure of public funds by public servants acting in the public sphere. The employees are not simply ordinary employees in a private context, possibly wasting the funds of their private employer, but state employees, like the advocates employed by the NPA or a magistrate, whose salaries are paid by the tax payer. Ultimately, they are accountable to the tax payer for their conduct and they must satisfy taxpayers that they have not been responsible for any misappropriation or unauthorised spending of funds.

[56] As against the aforesaid considerations favouring access to the disciplinary proceedings one has to weigh the rights asserted by the employees and prejudice they claim will be occasioned to them by the media reporting on the proceedings, to determine which rights should prevail and to what extent the rights that prevail might have to be limited depending on what is reasonable and justifiable in an open and democratic society based on human dignity, and equality and freedom. Regard must also be had to the nature of the rights, the importance of the purpose of any limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

[58] See n33.

[57] A careful perusal of the answering affidavits reveals that the employees do no more than assert a generalised 'right of privacy'[59] and obliquely the 'right to fair labour practices'[60] and the 'right to dignity'.[61] The allegations lack details and are unsubstantiated, and accordingly are without foundation. Generally an employee does not have the right not to have his or her explanation of his conduct made public, where the exercise of a public power is involved. The right to privacy is 'more intense the closer it moves to the intimate personal sphere of the rights of human beings, and less intense as it moves away from that core'[62]. This means that the right to privacy and also dignity ripple away and become less immediate when they relate to matters over which the public at large have an interest. As was said in *Bernstein v Bester NO*:[63]

> 'As a person moves into communal relations and activity such as business and social interaction, the scope of personal space shrinks accordingly.'

The employees have not asserted that any portion of the proceedings against them is confidential. To the extent that anything confidential might arise during the course of the proceedings, it can be dealt with by appropriate rulings by the chairpersons at that time. The Applicants have undertaken to respect any ruling of the chairpersons relating to closing the proceedings on any particular issue.

[58] It follows from what I have said above that the ruling of the Fourteenth Respondent that he does not have the authority to grant access to the media contrary to the wishes of the First Respondent and the employees in respect of the disciplinary proceedings of the Third and Seventh Respondents, falls to be reviewed and that decision is set aside. The Fourteenth Respondent had

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[59] Section 14 of the Constitution provides that: 'Everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) the privacy of their communications infringed.'
[60] The applicable portion of section 23 of the Constitution provides that: '(1) Everyone has the right to fair labour practices …' The right to fair labour practices has been codified in the Labour Relations Act, specifically the definition of an 'unfair labour practice' as set out in section 186(2), none of which are implicated by the application for access by the media.
[61] Section 10 of the Constitution provides: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'
[62] Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Limited 2001 (1) SA 545 (CC).
[63] See n54 at 789A.

seen the enquiry as a purely private matter between the employer and employee, that not all information in the possession of the First Respondent is required to be made public[64] and that the current jurisprudence available is distinguishable.[65] My finding is that he has such authority.

[59] In the hearing before the Fourteenth Respondent, as in this application,

> '… the employees [have] not given facts or specifics as to how the presence of the press may inhibit their giving of truthful evidence in these proceedings'.

The Fourteenth Respondent concluded that:

> 'I am of the view that this is a consideration that should not be lightly rejected. Should the employees seek to be whistle-blowers on corruption and expose higher officials within the Department, I would not be in support of granting of access where the presence of the press may make this difficult for the employees or make them fearful in doing so.'

[60] Those are not entirely irrelevant considerations. The difficulty however is that at the moment they remain purely speculative, without a proper factual foundation and are unsubstantiated. To exclude media access on such speculative grounds is irrational. If, and should the fear of an impairment of these rights arise in separate enquiries, it will be necessary for the individual chairpersons to assess whether they are *bona fide* and genuine and whether they have a proper factual foundation, and then they must weigh up the considerations at play, and if necessary issue such ruling as to non-publication or possibly even excluding the media from part of the proceedings, in the interests of justice, as may be dictated by the circumstances to arrive at a just and fair conclusion. But a decision to exclude the media completely from the hearings should not be taken lightly.

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[64] He found with reference to inter alia the provisions of the Protection of Personal Information Act 4 of 2013, which is yet to commence, section 16 of the Labour Relations Act 66 of 1995 regarding Disclosure of Information and the right to privacy in section 14 of the Constitution that an employer has a duty to protect the personal information of employees. That is no doubt so, but it is not an absolute right and must yield insofar as reasonable and justifiable.

[65] He distinguished the Breytenbach (*Media24 v NPA* see n45) matter on the basis that the employee had supported the media application for access, and the Simelane Ruling (see n21) council matter as not being legal authority binding upon him. These are relevant observations, but they do not in my view make the principle established having regard to the greater public interest inapplicable.

[61] Before the Fifteenth Respondent, in respect of the enquiry concerning the Fifth Respondent, the employees contended that their 'constitutional rights to dignity, safety and security of the person, and fair hearing will be infringed by the presence of the media at the hearings'. Reference was also made to the right to privacy. No details were however supplied in substantiation of any such anticipated infringement.

[62] It is not quite clear whether the Fifteenth Respondent was persuaded by these arguments.[66] In my view they remained unsubstantiated. The employees however further contended that:

> 'By virtue of the fact that multiple internal hearings are being conducted, evidence disclosed in the media may impact on the other proceedings and the nature of reporting may distort the evidence led in one enquiry and, by virtue of that distortion, lead to complications in other enquiries.'

[63] The Fifteenth Respondent's final conclusion in that respect was that:

> 'In my view the chairperson must seek to reconcile the fundamental rights at issue with his or her obligation that the proceedings are fair. By allowing the media to report on evidence in individual disciplinary enquiries, that reporting may, as a consequence of that reporting, have an effect on other disciplinary enquiries occurring simultaneously.'

[64] No details were provided as to how other disciplinary enquiries occurring simultaneously could be affected. If anything, it is strange that the employees are not all charged in one enquiry, because by having separate enquiries it is possible for one employee to blame another employee whose enquiry proceeds before another chairperson without the First Respondent possibly being able to offer any thing in rebuttal in the first mentioned enquiry other than evidence from a reluctant co-accused in another enquiry. In the absence of evidence as to how these other enquiries may be affected, this ground advanced by the employees also remains speculative and without any

[66] In fairness to him he does state in the concluding paragraph of his ruling that 'In my view, the reasons set out above justify the prohibition on the attendance of reporters at the disciplinary enquiry'. It is not clear whether the aforesaid refers to the argument referred to in the next paragraph of the text of this judgment, or also to these Constitutional rights to which the employees alluded. To the extent that it includes those right, in the absence of details as to how the rights would be impaired, they must yield to the greater rights asserted in the interest of the public.

foundation and certainly do not outweigh the right of the media and public. To exclude the media from the enquiry on that basis is irrational.

[65] The Fifteenth Respondent's ruling disallowing access to the media accordingly also falls to be reviewed and it is set aside.

[66] The Seventeenth Respondent ruled in respect of the disciplinary enquiries relating to the Eighth and Ninth Respondents that the form and procedure to be adopted at a disciplinary hearing are determined by the employer provided it is fair.[67] The ruling continued that 'the cross pollination of evidence is a real risk, which needs careful management so as not to diminish the weight of neither the employer, nor the employee's evidence'. It concluded that 'the limitation of not having reporters present will not thwart the reporting of the hearings because the Applicants may still interview the witnesses after they testified if they so wish, and/or report on the findings of the disciplinary enquiry', and further that 'media presence at the trial may quell the employees' rights to a disciplinary hearing that is both procedurally and substantively fair'.

[67] Again there is no evidential basis laid for concluding that there is a real risk of cross pollination (whatever exactly that may encompass[68]) of evidence, that the weight of evidence will be diminished (if anything it might be enhanced by the fact that it is given in an open forum which will be reported on, as opposed to being largely untested behind closed doors), and in what actual respects it is contended that the hearing will be rendered procedurally and substantively unfair.

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[67] *Slagment (Pty) Ltd v BCAWU and others* (1994) 12 BLLR 1 (AD).

[68] In the ruling by the Eighteenth Respondent in respect of the enquiry regarding the Twelfth Respondent this aspect was also referred to and explained in more detail as follows: 'Mr Rindel will be a witness in all the other disciplinary hearings scheduled against some eleven other employees. If his version were reported he could be cross-examined on what he said before.' That would not in my view constitute prejudice that should be countenanced. No prejudice will be occasioned unless the version testified to is deviated from, otherwise consistent evidence in a prior hearing will simply remain that of an inadmissible prior consistent statement. Employees and government departments should not shy away from an honest and open discussion about alleged financial and other mismanagement.

[68] It is also not an answer to the question as to whether media access should be granted to the actual disciplinary hearings to say that these witnesses could be interviewed again outside the hearing. Witnesses need not agree to an interview, their version during an interview is not tested by cross examination, and unless they are all interviewed, a skewed version of what evidence has been adduced before the disciplinary enquiries will emerge, to the detriment of either the First Respondent or the employees, but certainly to the detriment of the general public to be informed to the fullest extent possible. For these reasons the ruling by the Seventeenth Respondent likewise falls to be reviewed and set aside.

[69] Stripped to their essentials, the disciplinary enquiries concern allegations that public servants collectively have breached legislation governing their employment. These are 'matters of public interest'.[69] The First Respondent is obliged to comply with the Constitution, the Public Service Act and the regulations promulgated thereunder, the Public Finance Management Act and various other legislation that ensure a high standard of professionalism, efficiency, economic and effective use of public resources and the provision of public services. The public is entitled to be informed as to whether the employees have complied with their various obligations.

[70] As regards the form of the order claimed, it seems to me that directing that all the rulings regarding media access are to be made within 10 days might be unduly short, particularly where dates for argument might still have to be arranged, argument has to be heard and reflected upon, before considered rulings are then made. Plainly also however, the finalisation of the disciplinary enquiries have been delayed. They need to be finalized now with expedition. I am of the view that my direction should be that any outstanding rulings and rulings required to be made because earlier rulings have been set aside by this judgment, be made within 1 month of the date of this order being brought to the attention of the chairpersons concerned. That should allow a reasonable time within which to do so.

[69] Media24 Ltd v NPA n45.

[71] I do not intend to make any separate detailed directions as requested in paragraph 5 of the Notice of Motion, save for those set out in my order. The relevant considerations and directions which I believe should govern and guide the exercise of a chairperson's discretion when faced with an application for media access where the State is the employer, where the allegations relate to alleged financial mismanagement of state funds and where the matter is of public interest (such as the Nkandla debacle) hopefully appear from this judgment. Suffice it to summarize the position by stating that in the context of the facts in this matter, the chairpersons, notwithstanding the private contractual employment relationship between the State and each employer, should generally incline in favour of allowing access to the media, unless there are substantiated and established exceptional or personal individual circumstances present (not just general claims or speculation), which outweigh the public interest and the right of the public to be appraised of how the upgrades came to be approved and financed from the public purse.

[72] As regards the costs of this application, the Applicants have been substantially successful. They ask to be awarded the costs of the application and in view of 'the importance of the case and the nature of the proceedings' argue that such costs should include the costs consequent upon the employment of two counsel.

[73] Mr Broster for the employees did not advance any specific arguments on the issue of costs.

[74] I have given consideration as to whether the issues arising were not of such a novel constitutional nature and of significance, to particularly the employees, that this is not an instance where the parties should bear their own respective costs notwithstanding the employees' lack of success. It however seems to me, having reflected carefully on the question, that although the issue might be novel in the context of the facts that it arises, namely employment with the First Respondent and for an alleged dereliction of duties in regard to the Nkandla upgrades, that a sufficiently established

body of judicial precedent has developed in regard to media access to enquiries where there is considerable public interest, that it would be unfair against the Applicants, even though the expectation might be that they are financially stronger, not to be awarded their party and party costs. Although the right they pursued might bring more financial reward from them being able to report on the enquiries, it is a right which they also pursued on behalf of the public. In the exercise of my discretion on costs it seems fair that they should receive their costs.

[75] I am however not persuaded that the award should include the costs of two counsel. Although not a simple matter, it is also not unduly complex and the guiding legal principles are readily available. The employees, who probably had the more difficult argument to advance, were well represented by one counsel only. My award of costs therefore extends to the costs of one counsel, namely senior counsel only.

[76] The order I grant is therefore as follows:

(a) The ruling of the Fourteenth Respondent of 19 November 2014, denying media access to the disciplinary enquiries in respect of the Third and Seventh Respondents on the ground that the chairperson did not have authority to grant such access, is reviewed and set aside;

(b) The rulings of the Seventeenth Respondent of 10 December 2014 and the Fifteenth Respondent of 20 November 2014 denying media access to the disciplinary enquiries presided over by them on the grounds and the facts advanced in those rulings, are reviewed and set aside;

(c) The Thirteenth and Sixteenth Respondents and the Eighteenth Respondent (insofar as the disciplinary enquiry in respect of the Eleventh Respondent is concerned) who have not yet made their rulings on media access, as well as the Fourteenth, Fifteenth and Seventeenth Respondents whose rulings were set aside in terms of paragraphs (a) and (b) above, are directed to issue rulings on media

access to the disciplinary proceedings over which they preside within 1 month of the date of this order being brought to their attention;

(d) It is declared that where media access is allowed, the chairperson of each disciplinary enquiry always retains an overall discretion to recall or vary the terms of earlier rulings made regarding such access for good cause shown, to ensure a fair hearing for the employees. Good cause will however not arise from the mere assertion of a generalised right, vague prejudice or any other similar contention, but must in all instances be fact specific and established to the satisfaction of the particular chairperson concerned to be such that the interest of the media to report on the proceedings and the right of the public to be informed of what transpires at the disciplinary proceedings by the media, necessarily should yield thereto. No exhaustive list of those instances can be provided. The Applicants are directed to ensure that their reporters abide by any interim rulings that may be made by the chairpersons in this regard from time to time.

(e) The Second to Twelfth Respondents jointly and severally, one or more paying the others to be absolved, are directed to pay the costs of this application such costs to include that consequent upon employing senior counsel.

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Koen J

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