IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: **990/2024**

In the matter between:

HEAD OF DEPARTMENT: FREE STATE PROVINCIAL TREASURY Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE

(MEC): FREE STATE PROVINCIAL GOVERNMENT First Respondent

PUBLIC SERVICE COMMISSION (PSC) Second Respondent

PREMIER OF THE FREE STATE Third Respondent

CORAM: HEFER AJ

HEARD ON: 29 FEBRUARY 2024

DELIVERED ON: 19 MARCH 2024

[1] The Applicant is the HOD of the Department of Provincial Treasury and the Accounting Officer of the Department (the Department) in terms of Section 36(1) of the Public Finance Management Act 1 of 1999 (**"PFMA"**).

[2] The Department advertised the position of Director: Fiscal Policy on 26 August 2022 and the closing date was 9 September 2022.

[3] The First Respondent appointed a selection committee for the selection of a suitable candidate for the post. The committee was tasked with shortlisting and interviewing candidates for the advertised position of Director: Fiscal Policy.

[4] The selection committee interviewed the candidates on 29 November 2022 and 1 December 2022 respectively. The interview process consisted of three parts, namely: oral interviews, practical tests and psychometric assessments.

[5] During a meeting on 19 January 2023, the selection committee recommended a certain Mr Lebone for appointment into the position of Director: Fiscal Policy.

[6] Immediately after the decision of the selection committee, Ms Botes, Chief Financial Officer, (CFO)] a direct reportee of the Applicant, telephoned the Applicant. According to the Applicant, Ms Botes, as CFO reports directly to her and they regularly have meetings and discussions which ordinarily cover general management of the Department.

[7] During this telephonic conversation, Ms Botes informed the Applicant that the selection committee recommended a male candidate over a female candidate. The Applicant immediately thereafter contacted the Chief Director: Corporate Services, Mr Sithole, to solicit advice as to what to do with the information received from Ms Botes.

[8] It is important to mention at this stage that the Employment Equity Stats of the Department were skewed in favour of black males, according to the Applicant. The Department was at that stage not meeting it's Employment Equity Stats in respect of black females at senior management services level.

[9] As HOD the Applicant is responsible for Employment Equity Within the Department. According to the Applicant it is for that reason that she sought the advise of Mr Sithole when she was informed that a male candidate had been recommended.

[10] The Chief Director advised the Applicant to intervene immediately as the selection committee might have taken a misstep by not taking into account the Employment Equity ("**EE**") targets of the Department. The Applicant accepted the advice from the Chief Director.

[11] After phoning two other members of the selection committee she eventually spoke to the Chairperson of the selection committee, Mr Mabilo. The Applicant raised a concern that the selection committee has taken a misstep when it did not consider the EE targets of the Department when they made the recommendation.

[12] Mr Mabilo then agreed with the Applicant and on his own, without any instructions from the Applicant, reconvened the selection committee on 20 January 2023. On this date, the selection committee changed its decision of recommending Mr Lebone and decided to recommend a female candidate, Ms Moduka.

[13] On 6 April 2023, the Provincial Commissioner of the Second Respondent sent a letter to the Premier of the Free State, being the Third Respondent, informing him about an anonymous complaint received against the Applicant.

[14] It appears that this anonymous complaint was received by the Second Respondent on 3 April 2023 in which complaint it was alleged that:

(i) The Applicant illegally intercepted the recruitment process during the filling of the post of Director: Fiscal Policy;

(ii) The CFO, Ms Botes, colluded with the Applicant by telling the Applicant that the selection panel had recommended a candidate that the HOD did not prefer and the Applicant then immediately called two other panel members and instructed them to reconvene a panel meeting and reconsider their decision;

(iii) The panel then reconsidered and changed their initial recommendation due to pressure from the HOD; and

(iv) The CFO is buying favours from the HOD because she does not have the required academic qualifications for the post of CFO.

[15] In the same letter to the Premier, the Second Respondent indicated that it had decided to conduct an investigation into the complaint and accordingly, Adv MC Mokoena, has been designated to investigate the complaint.

[16] This anonymous complaint was then forwarded to the Applicant.

[17] The Applicant then addressed a letter to the Second Respondent in which the Applicant *inter alia* sought clarity as to the allegations in the complaint which were, according to the Applicant, vague and made it difficult for her to respond to.

[18] The Applicant sought the requested clarity to be provided within 10 days. The Second Respondent responded to this letter and then stated that Second Respondent is empowered by Section 196(4)(f)(i) of the Constitution to investigate the application of personnel and public administration within the public service. In the same letter, Second Respondent also said:

> *"Once the investigations are concluded, the PSC will provide the affected parties with an opportunity to make comments on its findings."*

[19] The Applicant then responded to the Second Respondent's letter in which letter the Applicant dealt with the non-compliance of certain rules on conducting investigations, promulgated in terms of the Public Service Commission Act 1997.

[20] In response to this letter, the Second Respondent then responded by way of a further letter in which the Second Respondent merely referred to Section 196(4)(f)(i) of the Constitution.

[21] According to the Applicant, she approached the offices of the Third Respondent for advice but to no avail. The Applicant then further wrote a letter to the National Chairperson of the Second Respondent, but no response was forthcoming.

[22] During August 2023, according to the Applicant, other witnesses were summoned by the Second Respondent to appear for the purpose of being questioned in respect of the allegations levelled against the Applicant. According to the Applicant, a different process was followed with this in that

they were provided with written questions and they responded to the written questions by way of affidavit.

[23] However, according to the Applicant, this approach was not made available to the Applicant on 20 September 2023 when she appeared before the Second Respondent. On this date she allegedly wished to be legally represented during the questioning process. However, according to the Applicant, the Second Respondent refused and merely stated that the Applicant's legal representatives were only to be observers.

[24] The Applicant then decided not to participate in the inquiry any further.

[25] In a report by the investigating committee headed by Adv Mokoena, dated 24 November 2023, the committee made certain recommendations which read as follows:

> *"8.1 The MEC for Provincial Treasury must declare the process to fill the post of Director: Fiscal Policy a flawed process, regard it null and void, and re-advertise the post.*
>
> *8.2 The MEC must subject Ms JH Botes to disciplinary action, for disclosing the confidential information to an unauthorised person.*
>
> *8.3 The MEC must subject Mr TM Mabilo to disciplinary action, for allowing the HOD to unlawfully interfere with and intercept a recruitment and selection process he was entrusted to chair.*
>
> *8.4 The MEC must also subject MS Mokotso to disciplinary action, for failing to advise the selection committee against accepting and implementing an advice which are unprocedurally and irregularly given to Mr Mabilo by the HOD.*

8.5 The Premier, as the EA responsible for a career incidence of HODs in the Province, must take disciplinary action against the HOD, Ms MA Sesing, for unlawfully interfering with and intercepting the recruitment and selection process to fill the post of Director: Fiscal Policy at the Department.

8.6 …"

[26] This report also contains a finding in respect of the Applicant, which finding reads as follows:

"The evidence before the PSC has shown that the HOD, Mrs MA Sesing, unlawfully interfered with and intercepted the recruitment and selection process in question".

[27] In a letter dated 13 February 2024, addressed to the Applicant, the First Respondent then informed Applicant that she has accepted the recommendation by the commission as far as it applies to her (the MEC) and therefore declared and instructed as follows:

"(i) The process to fill the post of Director: Fiscal Policy is flawed, therefore is declared null and void;

(ii) The said post must be re-advertised and be filled in accordance with the prescribed requirements for filling all vacancies in the public service."

[28] The Applicant then approached the Court on an urgent basis for *inter alia* relief in the following terms:

(a) To interdict and restrain the First Respondent from implementing any of the recommendations contained in the report issued by the Second Respondent against the Applicant as the Second Respondent's report is unlawful, irrational, invalid and offends the legality principle;

(b) To interdict and restrain the First Respondent from implementing any of the recommendations contained in the report issued by the Second Respondent against the Applicant as the report is reviewable in terms of the Promotion of Justice Act 3 of 2000 (PAJA) read with Section 33(1) of the Constitution of the Republic of South Africa;

(c) To interdict and restrain the First Respondent from implementing any of the recommendations contained in the report issued by the Second Respondent against the Applicant as the report contravenes the rules on conducting any investigations by the Second Respondent;

(d) To interdict and restrain any official of the First Respondent from implementing the recommendations contained in the report issued by the Second Respondent against the Applicant;

(e) To declare any action taken by the First Respondent in connection with or for the purposes of implementing the recommendations contained in the report issued by the Second Respondent as unlawful;

(f) To declare that the First Respondent is not empowered by the Public Service Act 103 of 1994 especially Section 7(3)(b) read with Chapter 7, Clause 2.8, SMS Handbook, to take any disciplinary action against the employees of the Department, namely TM Mabilo, Ms JH Botes and Mr M Nokotso; and

(g) To declare that the First Respondent is not an employer of Ms JH Botes, Mr TM Mabilo and Ms Nokotso.

[29] During argument in Court, it was conceded by Mr *Molotsi* appearing on behalf of the Applicant, that the relief sought in (e), (f) and (g) above is not viable at this stage being an application for an interim interdict, with immediate effect. Therefore, this judgment will only deal with urgency as well as the relief sought as contained in paragraphs (a), (b), (c) and (d) above.

[30] I pause to mention at this stage that after hearing argument by counsel on behalf of all the parties, during preparation of the judgment, I came across certain passages as contained in two judgments referred to by Mr *Snyman*, appearing on behalf of the Second Respondent, which I regarded to have a bearing in my finding in the matter and which has not been canvassed during the hearing. Because I deemed it fair and in the interest of justice that each party should have the opportunity to address me in this regard, I requested counsel on behalf of all parties before Court, to file additional Heads of Argument to address these aspects, which has been done and for which I wish to extent my appreciation.

Urgency:

[31] In motivation for approaching the Court on an urgent basis, the Applicant first of all referred to the fact that she received the report of the Second Respondent on the 6th of February 2024 from the Director General within the office of the Third Respondent.

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[32] She then consulted with her legal representatives on 7 February 2024 and instructed her legal representatives to proceed with a review application to set aside the report. The review application was to be launched in the normal course of business. According to the Applicant, on the 7th of February 2024 she was not aware that the First Respondent intended to implement the recommendations of the report.

[33] According to the Applicant, she only became aware of the fact that the First Respondent intended to implement the recommendations arising from the report on the 13th of February 2024.

[34] She then immediately thereafter consulted with her legal representatives on the 14th of February 2024. Counsel then completed drafting the present application on 19 February 2024 and the application was issued and served on 20 February 2024 to be heard on the 29th of February 2024.

[35] The Applicant then continues and refers to the test for urgency in that the Applicant must show that she will not obtain substantial redress in due course. In support of this contention, the Applicant submits that she will not obtain substantial redress in due course based on the following considerations:

(a) If the application is heard in the normal course, which will be in a few months, by that time the First Respondent would have implemented the recommendations of the allegedly flawed report. As things stands, according to the Applicant, the First Respondent has indicated that she will implement the recommendations;

(b) By that time she will be severely prejudiced according to the Applicant;

(c) Every passing minute wherein the flawed report is still in existence and its recommendations capable of being followed, creates injustice and high levels on anxiety to her. Her dignity and reputation are affected by this unlawful report of the Second Respondent;

(d) The unlawfulness of this report is perpetuated every day and the unlawfulness is continuing every single day;

(e) The Applicant's role as the HOD of the Department is under a microscope every single day because of this legally flawed report;

(f) The Third Respondent has already received the report and has asked her for her side of the story in respect of the allegations contained in the report;

(g) The Third Respondent is her employer and at this stage she does not know what the Third Respondent might do after receiving her side of the story in respect of the recommendations related to him.

[36] The Applicant further submits that she has a reasonable prospect of success in the review application because the report of the Second Respondent is unlawful, and she was denied an administration action which is lawful, reasonable and procedurally fair.

[37] Although upon consideration of the recommendations by the investigating committee, it appears that such recommendations do not affect the Applicant

directly, I do find that such recommendations might have an impact on the actions and rights of the Applicant whereas the acceptance of the recommendation of the Commission by the First Respondent and the subsequent declaration and instruction by the First Respondent in regards to the process being flawed and being declared null and void, by implication because of the actions of the Applicant, may impact on the Applicant.

[38] This does not however mean that the Applicant has met the substantial redress requirement. In this regard, I wish to refer to a judgment of Moshoana J in the Gauteng Provincial Division in the matter of **Ithala SOC Ltd v South African Reserve Bank Prudential Authority and Others**[1]. In this matter, the Court held the following:

> *"[7] Since urgency has been attacked, it behoves this court to determine that issue first. A cardinal allegation to make in compliance with rule 6(12)(a) of the Uniform Rules is whether an applicant shall be accorded substantial redress in due course or not. What is required is not only a redress, but a substantial one. A substantial redress is one that is real and tangible rather an imaginary one. This court is satisfied that a review is a real and tangible relief available to Ithala in due course. Rule 6(12) only advances an applicant to go ahead of the queue, but does not entitle the applicant to a relief sought. Since hearing the matter as one of urgency, involves an exercise of judicious discretion, given the view I take at the end; I prefer to take a pragmatic*

[1] 2022 JDR 3291 GP

approach. If I were to take a robust approach, I would instantaneously strike this matter of the urgent roll. The approach I intend taking is that disposing of the application instead of kicking the can further down the road and trouble another justice of this Court with a similar application some other day."

[39] For the same reasons, I will also entertain this application as one of urgency.

Merits:

[40] The relief which the Applicant seeks, is to be granted pending the determination of the review proceedings which is already before Court as Part B of the Notice of Motion.

[41] What the Applicant envisage is a review and setting aside of the report by the Second Respondent in due course.

[42] As already indicated, this Court can not at this stage, as part of an interim order with immediate effect, pronounce on the lawfulness of actions by the First Respondent in connection with the implementation of the recommendations as contained in the report. I can also not as part of an interim interdict pronounce on the powers of the First Respondent to take any disciplinary action against the relevant employees in the Department, nor can I make an order to the effect that First Respondent is not the employer of such individuals.

[43] At best for the Applicant, this Court can only interdict the implementation of the recommendations by the investigating committee and this can only be done once the Applicant has fulfilled the trite **Setlogelo**-principles in respect of an

interim interdict, namely the existence of a *prima facie* right, though open to same doubt apprehension of irreparable harm, the balance of convenience that favours the Applicant and no alternative remedy.[2]

[44] In respect of a *prima facie* right, the Applicant relies on the provisions of Section 3(3), 5(3) and 6(2)(b) of the Promotion of Access to Information Act 20 of 2000 and Section 33(1) of the Constitution of South Africa, Act 108 of 1996.

[45] In short, it is the Applicant's contention that whereas the requirements of these sections, *inte ralia* had not been met in respect of the investigation by Second Respondent, the Applicant is entitled to have the report reviewed and set aside.

[46] In this regard, Mr *Molotsi*, on behalf of the Applicant, referred me to the matter of **National Treasury v Opposition to Urban Tolling Alliance[3]** (the OUTA-matter).

[47] At paragraph 50 of the judgment, Moseneke DCJ said the following:

> *"[49] Second, there is a conceptual difficulty with the High Court's holding that the applicants have shown a prima facie right to have the decision reviewed and set aside as formulated in prayers 1 and 2. The right to approach a Court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair and in turn PAJA regulates the review of administrative action'.*

[2] Setlogelo v Setlogelo 1914 AD 221
[3] 2012 (6) SA 223 (CC)

[50] Under the Setlogelo - test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative action. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicant should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm."

[48] In the **Ithala**-matter (*supra*), Mosoane J said as follows:

"Ithala contends that it bears a clear and prima facie right to review a decision and its right to do so are established by the common law as statutory law. It is long settled that the right of review does not gain an applicant a right to an interim relief."

At paragraph 14 the learned judge continues as follows:

"It is perspicuous that Ithala has a similar protection in due course by way of a review application. Should a review be successful, Ithala will continue to enjoy the protection until its position is regularised to enable it to function lawfully as a bank or a mutual bank. On its own version, reaching such a lawful destination is not an impossibility or beyond reach. Therefore, at this stage, this Court is not faced with any irreparable harm deserving of legal protection by way of an interdict."[4]

[49] The same principle is applicable in respect of the Applicant before Court. Not only, on her own version, may the report by the investigating committee be set reviewed and aside but the Applicant will also have the opportunity to state her

[4] p. 9, par. [12] and [14].

case at the disciplinary hearing, if the Premier decides to accept the recommendation and proceed with disciplinary action against the Applicant.

[50] In the latter regard, it must also be borne in mind that the First nor the Third Respondents are under no obligation to accept any of the recommendations by the Second Respondent. Furthermore, the findings by investigating committee are in its nature *prima facie* findings. They can still be challenged in subsequent proceedings and in particular disciplinary action. *"Objectively, it is beyond doubt that if the recommendation in respect of the disciplinary proceedings were to be implemented, the implementation thereof will take place in terms of processes that would afford applicant an opportunity to present her case"*.[5]

[51] Mr *Molotsi*, in his Additional Heads of Argument, argued that the approach taken by the Court in the **Ithala**-matter, is contrary to the view taken by the Constitutional Court in the **OUTA**-matter, whereas the Constitutional Court has not held that the review application constitutes similar protection. However, in the **Ithala**-matter, the Court was dealing with the irreparable harm requisite and not the *prima facie* right requisite in particular, as the Constitutional Court was dealing with in this instance.

[52] Mr *Molotsi* further referred me to the matter of **EFF v Pravin J Gordhan**[6]. This is a judgment of the Constitutional Court.

[53] However, in preparation of my judgment herein, I have also considered the judgment in the Court *a quo* in the matter of **Gordhan v The Public Protector**[7]. In that matter, the Court had to consider whether interim relief should be

[5]National Treasury and another v Kuhakeli2016 (2) SA 507 (SCA) at p. 516, par. [26]
[6] 2020 ZACC 10.
[7] 2019 JDR 1328 GP.

granted in respect of certain directives (as opposed to recommendations) by the then Public Prosecutor, to amongst others, the President of the country, in taking certain remedial steps against Minister Parvin Gordhan, such steps to include *inter alia* to be disciplined by the President, appear before the Parliamentary Ethics Committee and a criminal investigation seemingly by the Commissioner of Police himself which, according to the Court, indeed had serious consequences to Mr Gordhan. The Court held that not granting interim relief towards Minister Gordhan pending the outcome of the review report in which he was maligned as being untruthful and a spy, would impact his political career and personal circumstances. In view thereof, Minister Gordhan would have suffered irreparable harm had the interim relief not be granted.

[54] In this regard, Jafta J said the following in the Constitutional Court judgment:

> *"As the first judgment observes, the enforcement of the remedial action before the review is determined would be prejudicial to the applicant for review. It would mean that he has to be punished in terms of the remedial action which he had successfully demonstrated as like to be set aside as not meeting the requirements of the Constitution and the relevant legislation."*[8]

[55] However the facts in regard to the current Applicant before Court can be distinguished from the facts in the **Gordhan**-matter as will be shown in what follows and which results on a final analysis, in the application being fatally flawed in the following respects:

[8] Par. [116].

[56] In the report by the Second Respondent, the first and main recommendation is that the First Respondent *"must declare the process to fill the post of Director: Fiscal Policy, a flawed process, regard it as null and void and re-advertise the post"*.

[57] At the stage when the application was launched, that recommendation has already been accepted by the First Respondent. The First Respondent has already declared the process to be flawed. That declaration stands.

[58] Regard must then be taken to certain allegations pertaining to the apprehension of irreparable harm made by the Applicant. The Applicant contends amongst others as follows:

> *"Given the litany of unlawfulness and unreasonableness mentioned above, a day which passes when this report has not been set aside or the First Respondent is not interdicted from implementing recommendations in the report, constitutes irreparable harm to me. …. The recommendation of this unlawful report hangs over my head every minute and poses a threat to my powers as Head of the Department and dignity as a human being. My dignity was affected by illegally unsound finding that I have acted unlawfully by intercepting and interfering with the recruitment and selection process during the filling of the post of Director: Fiscal Policy. …. I cannot afford to have my dignity and reputation destroyed by the unlawful report which hangs over my head. … If the application is heard in the normal course, which will be in a few months, by that time the First Respondent would have implemented the recommendations of this legally flawed report. As things stands, the First Respondent has indicated that she will implement the recommendations … every passing minute wherein the flawed report is still in existence and its recommendations capable of being followed, create injustice and high levels on anxiety to me. My dignity and*

reputation are affected by this unlawful report of the Second Respondent …. The unlawfulness of this report is perpetuated every single day. The unlawfulness is continuing every single day. … My role as the HOD of the Department is under a microscope every single day because of this legally flawed report. …. I accordingly need an interim relief now and not later, if I have waited longer, it will be too late to receive substantial redress."

[59] Unfortunately for the Applicant however, the declaration by the Second Respondent to the effect that the process is already held to be flawed, may have already affected the reputation and integrity of the Applicant. That is in the past and will continue. Even if the interim relief which is sought by the Applicant is granted, it will not have the effect that the Applicant is trying to achieve and motivated by the Applicant herself.

[60] The Applicant's contention that the First Respondent has indicated that she will implement the remainder of the recommendations, is not correct. The MEC in her letter expressly stated that her role in terms of the recommendations of the commission is limited only to declare the process to fill the post of Director: Fiscal Policy at the Department, a flawed process and regard it as null and void, which she has done.

[61] The only process which the Applicant seeks to interdict at this stage, is the potential disciplinary action to be taken by the Premier against her which might result in certain sanctions. However, these disciplinary proceedings as well as the review proceedings, constitute alternative remedies for purposes of an interim interdict. As expressed in the **Kubukeli**-matter, there is no reason to doubt that if the recommendation in respect of disciplinary proceedings were to

be implemented, the implementation would take place in terms of processes which will afford the Applicant a full opportunity to present her case.

[62] Whereas the Applicant has not satisfied the alternative remedy as well as irreparable harm requisite as formulated in the **Setlogelo**-matter, she cannot succeed with her application before Court.

[63] As far as costs is concerned, the cost should follow the results.

[64] Therefore, in respect of Part A of the Notice of Motion I make the following order:

Order

1. Condonation is granted for the non-compliance of the rules in regards to service and notice and the matter is adjudicated on an urgent basis.

2. The application is dismissed with costs.

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J J F HEFER, AJ

Appearances:

On behalf of the Applicant: Adv H Molotsi SC

Instructed by: Rampai Attorneys

	Bloemfontein
On behalf of the First and Third Respondents:	Adv Baloyi-Mere SC
Instructed by:	State Attorney
	Bloemfontein
On behalf of the Second Respondent:	Adv C Snyman
Instructed by:	Phatshaone Henney Attorneys
	Bloemfontein