

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

Case Number: 22/12774

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED: NO

22 April 2022

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DATE

In the matter between:

MAMODUPI MOHLALA MULAUDZI

Applicant

and

MINISTER OF HUMAN SETTLEMENTS

1st Respondent

PROPERTY PRACTITIONERS REGULATORY AUTHORITY

2nd Respondent

THE BOARD OF THE AUTHORITY

3rd Respondent

STEVEN PIET NGUBENI (CHAIRPERSON)

4th Respondent

SHAHEED PETERS

5th Respondent

PAMELA NONKULULEKO MAKHUBELA

6th Respondent

PAM EATRICE SNYMAN

7th Respondent

NOKULUNGA MAKOPO

8th Respondent

MXOLISI SPHAMANDHLA NENE	9 th Respondent
TERRY KEVIN JOHNSON	10 th Respondent
THUTHUKA SIPHUMEZILE SONGELWA	11 th Respondent
THOKOZANI RADEBE	12 th Respondent
THATO RAMAILI	13 th Respondent
VERUSHKA GILBERT	14 th Respondent
JOHAN VAN DER WALT	15 th Respondent

JUDGMENT[Reasons]

SIWENDU J

Introduction

- [1] This urgent application served before me on 12 April 2022 in terms of Rule 6(12) of the Uniform Rules of Court. The applicant challenged, amongst others, her suspension as the Chief Executive Officer (CEO) of the second respondent as well as the authority of the Board which suspended her. She alleged that the suspension was without notice and she learnt about it from the media following a press release issued by the second respondent. The news of her suspension was devastating and humiliating.
- [2] On 14 April 2022, after a careful consideration of the papers and arguments by all the parties, I dismissed the application with costs and granted an order to this effect, with an undertaking to furnish written reasons for the dismissal. These are the reasons:
- [3] The applicant is an adult female Attorney and the current CEO of the Property Practitioners Regulatory Authority (Authority). The applicant was appointed in this capacity on 1 February 2019. Her appointment was made in terms of the Estate Agency Affairs Act (EAAA), then governing the affairs of the second

respondent before the enactment of the Property Practitioners Act 22 of 2019 (PPA).

- [4] The First Respondent is the Minister of Human Settlements (Minister) and is the Executive Member responsible for the exercise of oversight over the affairs of the second respondent. The Minister's duties include the appointment of the Board of the Authority.
- [5] The Second Respondent is the Property Practitioners Regulatory Authority (Authority). It is established in terms of section 5 of the PPA. The affairs of the Authority are governed under the direction of the Board of directors appointed by the Minister in terms of section 7(1)(a) of the PPA.
- [6] The Third Respondent is the Board of directors of the Authority (the new Board). Before the new Board came into office, there was "*a transitional board*" whose term of office was extended on 5 July 2019 by the previous Minister of Human Settlements, Ms Lindiwe Sisulu, until the PPA came into effect. The new Board was appointed by the Minister on 26 November 2021.
- [7] The Minister, the Authority and the Board resisted the urgent application and filed answering affidavits. The applicant also joined individual Board members as fourth to fifth respondents. In an affidavit deposed to by Mr Ngubeni, the Chairman of the Board of the Authority, he informed the court that even though the fourth to fifteenth respondents noted an intention to oppose the application, they now abide by the court's decision.

Relief

- [8] The applicant sought the following declaratory orders:
 - [8.1] Her precautionary suspension as the CEO of the Authority on 28 March 2022 be declared unlawful, unconstitutional and/or null and void;
 - [8.2] The appointment by the Minister on 26 November 2021 of the members of the Board of the Authority is *ultra vires*;
 - [8.3] The Board of the Authority is improperly and unlawfully constituted, and has no authority to lawfully exercise the powers in terms of the Property Practitioners Act 22 of 2019; and

[8.4] The purported exercise by the Board of any power that the Practitioners Act has confirmed [sic] on the Third Respondent is to be [sic] legally invalid.

[9] Mr Botes (for the applicant) advised me that the challenge of her suspension is premised on the grounds that it violates the principle of legality. The foundation for the illegality is that she was suspended by a Board that was unlawfully constituted in terms of legislation that was not yet in effect. The relief she seeks is premised on section 21(1)(c) of the Superior Courts Act 10 of 2013.

[10] The *ultra vires* and unlawfulness claim pivots on the allegation of an unlawful exercise of the power appointing the Board of the Authority by the Minister. Based on this, the applicant contends that the Board has been improperly constituted and lacks the authority to lawfully exercise any of the powers it purported to exercise under the PPA. In sum: the applicant challenges (1) the exercise of the power by the Minister in appointing the Board of the Authority and in turn (2) impugns the constitution of the Board itself. Given the charge of legal invalidity, she contends that it follows that any decision flowing from the Board is unlawful and void. This includes the Board's decision to place her on a precautionary suspension.

[11] It merits mention that the declaratory relief the applicant seeks on this urgent basis is final in form, substance and effect. The applicant links inextricably, her complaint about the unlawful suspension with the declaration of illegality and invalidity of the appointment of the Board. The final nature of the relief and declaration she seeks has grave consequences for the Authority, the Board and the industry the Authority regulates. Its effect is to put into question and impugn all decisions taken by the Authority and the Board to date. It would leave the institution rudderless.

[12] The position of the Authority and the Board was that if I find against the Minister, and agree that the Board is unlawfully appointed, then I must grant a just and equitable remedy — the effect of which would be to retain the Board in position as the Authority cannot function without a Board. The applicant

opposed this remedial relief. She says that she cannot be accountable to a Board that is unlawfully established and constituted.

Urgency

- [13] The Minister, the Authority and the Board's ground for opposing of the urgency of the application was that the applicant did not challenge the authority and the constitution of the Board at any time until her suspension.
- [14] They contend, amongst others, that on 26 November 2021 at 10h00 —11h00, the applicant was part of a virtual meeting where the Minister informed the outgoing board at the time that Cabinet had approved the appointment of a new Board and thanked the Members. The applicant denies being a party to and participating in this meeting.
- [15] The Minister also claims that on 10 March 2022, after the appointment of the new Board, the applicant was a part of the meeting by the Ministerial briefing team and gave a presentation on the annual performance plan of the Authority. The applicant claims that the fact that she participated at this meeting by the Ministerial briefing team and gave a presentation on 10 March 2022, does not prove that she knew that the appointment of the Board by the Minister was *ultra vires*.
- [16] Even though the question of urgency was vigorously contested by the respondents, on the basis of the applicant's knowledge of the disputed Board appointment, it cannot be denied that the trigger for the events leading to the urgent application was the letter dated 22 March 2022, calling on the applicant to make representations on the intended precautionary suspension followed by her suspension on 28 March 2022. Even if found to be lawful, a suspension of a senior executive of a regulatory body in the position of the applicant is serious and has the potential to harm the institution and her reputation.
- [17] The applicant elevates the question of legality, consequently, the dispute engages questions involving the rule of law. It was argued on her behalf that this is an untenable situation and renders the matter urgent on this basis alone.

[18] The relief sought raises significant questions for all the parties concerned, with public interest implications. Any hint of uncertainty about the exercise of the power by the Minister and the lawfulness of the appointment of the Board, has prejudicial consequences for both the applicant and the respondents. Accordingly, I exercised my discretion and determined that the matter be dealt with as one of urgency.

Final Interdict and the issues for determination.

[19] In view of the final relief sought, the applicant was required to demonstrate a clear right rather than a *prima facie* right and injury and or reasonable apprehension of harm as well as the absence of an adequate alternative remedy if she is not granted protection. The long standing requirements for a final interdict were set out long ago in *Setlogelo v Setlogelo* 1914 AD 221 at 227 where Lord De Villiers CJ stated the requirements for final interdicts as follows:

“So far as the merits are concerned the matter is very clear. The requisites for the right to claim an interdict are well known, a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.”

Given the form and approach the applicant takes, the primary issue is to determine definitively the *ultra vires* complaint.

[20] A second issue sharply raised by the second to fourth respondent was that the applicant brought her complaint before an incorrect forum. Mr Mosam (for the second to fourth respondent) argued that the substance of her application, is a challenge of an unfair labour practice. She challenges the fairness of the process followed in her suspension. That would include, *inter alia*, her not being given sufficient time to respond to the allegations against her, and that the Board is not satisfied with her response to the allegations levelled against her.

[21] In my view, the nub of the issue centres on the challenge of the exercise of the power to appoint the Board by the Minister under the PPA. The applicant made this foundational to her complaint about the unlawfulness of her

suspension. A finding on this problem will be largely dispositive of the application. I say this because in her affidavit the applicant states that:

“39. This application has, at its heart, the *ultra vires* actions of the First Respondent, and her unlawful appointment of the Fourth to Fifteenth Respondents to the Board of Authority of the PPRA, and the unlawful and illegal consequences emanating from any steps and/or actions taken by the Third Respondent as a consequence thereof.

40. I have been advised that I do not have to, in this application, deal with the merits of the allegations levelled against me. I will however demonstrate to the Honourable Court that I have nonetheless, fully and adequately, responded to the allegations levelled against me.”

[22] It was evident from the papers, the Heads of Argument and the submissions made by Mr Botes that the question of illegality and unlawfulness (central to the applicant’s case) was aimed at bringing the dispute within the ambit of the High Court. The applicant relied on *Shezi v SA Police Service and Others*¹ where Van Niekerk J stated as follows:

“The effect of this judgment is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness.”

[23] Mr Botes also relied on the decision in *Botes v City of Johannesburg Property Co SOC Ltd & another*² where the case pleaded by the employee was one of unlawfulness and not unfairness. It endorsed the view expressed in *Shezi v SA Police Service & others* (2021) 42 ILJ 184 (LC) that the effect of the judgment in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC) is that when an applicant alleges that a dismissal or other employer conduct is unlawful (as opposed to unfair), there is no remedy under the Labour Relations Act 66 of 1995 (“LRA”) and the Labour Court has no jurisdiction to make any determination of unlawfulness.

[24] Mr Botes argued that the effect of this and the judgments cited is that had the Applicant approached the Labour Court for the relief which she seeks in this

¹ (2021) 42 ILJ 184 (LC) para 12.

² (2021) 42 ILJ 530 (LC).

application, the Labour Court would have ruled that it does not have jurisdiction to entertain a matter where the issue is the unlawfulness of the suspension and where it is “*not concerned with an attack on the fairness of the suspension*”. [emphasis added]

[25] Consistent with the above approach is that in her founding affidavit, the applicant deals with the merits of her suspension in broad and general terms. She also referred to various annexures not properly pleaded in her affidavit, designed to show that “*many of the allegations were dealt with or are subject to on- going legal process.*” She claims to have responded to the allegations of irregular appointments and irregular pension fund payments levelled against her. In turn, she accused the Board and the Chairman of improper and irregular interference with procurement processes and other irregularities in the conduct of the affairs of the Authority.

[26] At the hearing, I had been of the view that the applicant impermissibly raises a collateral challenge to address a direct and real concern, namely, her suspension. Secondly, it was not clear why the applicant elected to solely pin the dispute about her suspension with a final relief about the lawfulness of the constitution of the Board. Ultimately, as will be evident from the judgment, nothing turns on whether or not the challenge is a collateral one even though I may be of the view that it has the hallmarks of one.

[27] I also add that following a questioning of her approach, there was a belated attempt to recast her relief and the case by amending the relief sought in the Notice of Motion, accompanied with additional heads of argument filed after the urgent court hearing without the leave of the court or agreement which would have afforded all the parties the right to reply. Accordingly, I have adjudicated the case based on the papers filed and argued at the hearing. I now turn to the dispute about the PPA and its enactment to determine whether the appointment was *ultra vires* as alleged.

Commencement of the Property Practitioners Act 22 of 2019 (PPA)

[28] Section 5(1)³ of the PPA makes provision for the establishment of a Property Practitioners Regulatory Authority (PPRA). Section 76 repealed the Estate Agents Affairs Act 1976 (Act 112 of 1976). The common cause facts are that:

- On 19 September 2019 the PPA was assented to and passed by Parliament.
- It reflects that it was published in GG 42746 of 3 October 2019.
- On 14 January 2022, the President of the Republic of South Africa promulgated the PPA, in notice 45735.
- He determined that the PPA would come into operation on 1 February 2022.⁴

Essentially, the operation date of the PPA was deferred by a few weeks from the date of promulgation and only came into operation on 1 February 2022.

[29] On 26 November 2021, after the assent, but before the date of promulgation and operation, the Minister appointed a Board for the Authority.⁵ As already alluded to, the applicant's contention was that the Minister could only appoint Board Members on 26 November 2021 in terms of the EAA Act which was still in operation at that time. Neither the EAA Act nor the new PPA gave her any powers to have appointed the Board on 26 November 2021. As already alluded to, on 26 November 2021, the applicant had been in office for over two years by this time.

Was the Appointment of the Board *Ultra Vires*?

[30] The Minister disputes the allegation of unlawfulness and the violation of the Constitution. She contends that section 7 of the PPA confers to her the power to appoint the Board and she exercised these powers. This exercise was also in the light of the powers and duties of the Board articulated in section 9 of the PPA read with sections 3 and 5 of the PPA.

³ **"5 Establishment of Property Practitioners Regulatory Authority**

(1) There is hereby established a juristic person to be known as the Property Practitioners Regulatory Authority."

⁴ Section 77 of the PPA.

⁵ At paragraph 27 the applicant says "The First Respondent did, *after* the Honourable President of the Republic of South Africa had promulgated the Practitioners Act but before the Practitioners Act came into operation, terminated Transitional Board of the Estate Agency Affairs Board referred to above which was then in office in terms of the EAAB Act."

[31] Mr Nhlapo (for the Minister) contended that the fact that the PPA had not yet come into operation did not preclude her from appointing the Board. He relied on Section 10 and 14 of the Interpretation Act 33 of 1957 (Interpretation Act), contending that it was permissible for the Minister to appoint the Board and she correctly exercised her powers. Section 14 of the Interpretation Act provides:

"Where a law confers a power- (a) to make an appointment; or (b) to make, grant or issue any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws; or (c) to give notices; or (d) to prescribe forms; or (e) to do any other act or thing for the purpose of the law, **that power may unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing in the law into operation at the commencement thereof:** Provided that any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under such power shall not, unless the contrary intention appears in the law or the contrary is necessary for **bringing the law into operation**, come into operation until the law comes into operation".

[32] He argued that Section 14 of the Interpretation Act provides for the exercise of conferred powers between the passing and commencement of a law. The appointment of the Board was necessary for the purpose "*of bringing the PPA into operation*" at the commencement. Mr Botes disputed this interpretation.

[33] In *Doctors for Life International v Speaker of the National Assembly*,⁶ the then Justice Ngcobo pointed to the stages of enactment of legislation from adoption to commencement into law. He notes:

"the three identifiable stages in the law-making process ... : first, the deliberative stage, when Parliament is deliberating on a bill before passing it; second, the Presidential stage, that is, after the bill has been passed by Parliament but while it is under consideration by the President; and third, the period after the President has signed the bill into law but before the enacted law comes into force".

[34] In this instance, what is at issue is the allegation of a premature exercise of powers after the legislation was passed by Parliament, but before it was promulgated and before the operation date.

[35] Mr Nhlapo contended that our courts have dealt with the exercise of power by a Minister before the promulgation and operation date. For example, in *Cats Entertainment CC v Minister of Justice and Others Van der Merwe and Others*

⁶ 2006 (6) SA 416 (CC) para 40.

v Minister of Justice and Others Lucksters CC v Minister of Justice and Others,⁷ acting in terms of the Lotteries and Gambling Board Act 210 of 1993, the Minister invited interested persons to nominate candidates for appointment to the Lotteries and Gambling Board which was to be established in terms of the Act. The court held that it was clear that in terms of section 14 of the Interpretation Act, the powers could only be exercised between the passage of the Act and promulgation in so far as the exercise might be necessary eventually to put the enactment into operation at the date of commencement.

[36] Quoting *R v Magana*,⁸ dealing with the import of Section 14 of the Interpretation Act, the court in *Cats Entertainment* remarked that :

“Some difficulty is perhaps created initially by the use of the phrase ‘bringing the law into operation’, because a statute usually comes into operation at the date of its commencement, and it is usually ‘brought into operation’ when it is officially declared to commence. . . .I do not think that ‘bringing the law into operation’ means only ‘effecting its commencement’; it also includes ‘rendering it operative’ from and after the time it commences. In other words, the whole object of s 14 is to enable the authorised official to take such of the enumerated steps before the enactment commences as are necessary to render it operative immediately it commences...”.

[37] The effect of this decision is that unless there is a contrary intention from the legislation itself, a power or duty contained in any legislation that has been passed, may be exercised or carried out before the date of operation of that legislation provided the exercise of the power or the carrying out of the duty is necessary to bring that legislation into effect.

[38] I have considered the provisions of the PPA which totally repeals the EAA Act. Firstly, I could not discern any limitation or contrary intention that limits the exercise of the powers and functions by the Minister. Secondly, there is no dispute that the decision to appoint the new Board was approved by the Cabinet, exercising its executive authority on the eve of the promulgation and coming into operation of the PPA. The PPA reflects that it had been published

⁷ 1995 (1) SA 869 (T).

⁸ 1961 (2) SA 654 (T) at 655H-656D.

by Parliament in October 2019. The President promulgated the PPA within six weeks after the Cabinet approved the appointment of the new Board. I find the conduct consistent with bringing the PPA into operation. This is borne out by the meetings and presentations held with the Authority and the Ministerial teams. I find there are pragmatic reasons why the Interpretation Act provided for the exercise of the powers.

[39] The argument that on 26 November 2021, the eve of the coming into effect of a new legislation (PPA), a Board could only be appointed under the old EAA Act, which was for all intents and purposes repealed by the PPA, is not pragmatic and lacks merit.

[40] Accordingly, I found the exercise of the power not *ultra vires* and the appointment of the Board legally valid.

[41] The Minister criticizes the applicant's challenge as an opportunistic one and states that the applicant acts solely out of self-interest. She says that given that the applicant was the CEO of the institution, she ought to have brought the legality concerns to the fore earlier rather than to wait for four months before doing so. On the other hand, the applicant says she discovered this when she consulted with her attorneys. This admission opens her to the grounds for the criticism, given her overall role within the institution.

[42] In view of the approach adopted by the applicant, and regardless of the disputed forum, the finding above rendered a determination of any possible unfairness (as opposed to the unlawfulness on which the application was based) of her suspension *non sequitur*. The amended Notice of Motion does not aid her. What is more, this fateful approach created seriously disputed facts raised in her answering affidavit which had not been properly addressed in the founding affidavit.

[43] Accordingly, I dismissed the application with costs including the costs of all counsels representing the respondents for these reasons.

T SIWENDU J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 22 April 2022.

Heard On: 12 April 2022

Reasons On: 22 April 2022

For the Applicant:	Advocate Gys Rautenbach S.C
With him:	Mr Botes Advocate Annelene M van den Heever
For the First Respondent:	Adv SB Nhlapo Adv MJS Langa
Instructed by:	The State Attorney
For the 2 nd to 4 th	
Respondents:	Afzal Mosam SC
With him:	Obakeng Mokgotho and Suhail Mohammed (pupil)
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