

MBUYISELO BOTHA v THE COMMISSION FOR GENDER EQUALITY AND OTHERS

LEGAL SUMMARY

Review- Suspension of a commissioner- Misconduct – Unlawful and Invalid

The applicant, a commissioner of the first respondent, appointed in terms of section 193 (4) of the Constitution, was suspended with immediate effect by the respondent on allegations of misconduct, pending the outcome of the disciplinary action. It was alleged that he the applicant was heard making disparaging remarks against some of the respondents, the third, fourth, and sixth respondents.

The first respondent avers that the alleged derogatory remarks by the applicant were in breach of the applicant's terms and conditions of office and in breach of the Constitution, the CGE Act, and various other legislation including the first respondent's Code which forms part of the Commission's Handbook. Further, the first respondent's powers were different and independent from those of the president in section 194 (3). Therefore its action was lawful and valid as it was taken in terms of the Code of Conduct as provided for in the Handbook.

The main issue that fell to be determined was, whether the decision taken by the first respondent to suspend the applicant was unlawful and invalid because, in terms of the Constitution, only the President has the power to suspend the applicant.

The court held that it was of the view that section 194(3) (a) sought to insulate the Commissioners of Chapter 9 institutions from potential arbitrary conduct of the executive and government. The clear intention was to ensure that the Commissioners execute their functions of oversight without any concern that they might be suspended and removed without due process.

Consequently, the first respondent's power to suspend any Commissioner as contained in its Code of Conduct and the subsequent purported letter of suspension of the applicant dated 6 August 2021 was declared invalid, and unlawful and was set aside.

The court held that the respondent was not without remedy. If it wished to suspend the applicant, it could still request the speaker of the national assembly to begin the process in terms of section 194 (3) and request the president to suspend the applicant. In the circumstances of this case a just and equitable relief was that the impugned suspension of the applicant be set aside and declared invalid *ab initio*. The first respondent was found to have unlawfully usurped the powers of the President to suspend Commissioner.