

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

.....
DATE
SIGNATURE

Case no.: **58057/2021**

In the matter between:

MBUYISELO BOTHA

APPLICANT

and

THE COMMISSION FOR GENDER EQUALITY

1ST RESPONDENT

TAMARA MATHEBULA N.O.

2ND RESPONDENT

NTHABISENG MOLEKO N.O.

3RD RESPONDENT

NTHABISENG SEPANYA-MOGALE N.O

4TH RESPONDENT

SEDIKO RAKOLOTE N.O.

5TH RESPONDENT

NOMASONTO MAZIBUKO N.O.

6TH RESPONDENT

DIBEELA MOTHUPI N.O.

7TH RESPONDENT

LINDIWE NTULI-TLOUBATLA N.O.

8TH RESPONDENT

OHARA NGOMA-DISEKO N.O.

9TH RESPONDENT

BUSISIWE DEYI N.O.

10TH RESPONDENT

Coram: Dlamini J

Date of hearing: 09 September 2022 - Open Court (9B).

Date of delivery of Judgment: February 2023

This Judgment is deemed to have been delivered electronically by circulation to the parties' representatives via email and same shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

[1] This is a review application brought by the applicant to set aside his suspension from office as a Commissioner by the respondents.

[2] In the amended notice of motion, the applicant seeks the following relief;-

2.1 Declaring the suspension letter issued by the Second Respondent to the applicant on 6 August 2021, and the suspension of the Applicant pursuant thereto, to be unlawful, unconstitutional, invalid and /or void *ab initio*.

2.2 Setting aside and or uplifting the suspension of the Applicant as a Commissioner of the First Respondent

2.3 Interdicting the Respondents from taking any further action against the Applicant until his suspension has been uplifted and/or set aside.

2.4 Granting costs *de bonis propriis* against the Second Respondent in her personal capacity

- 2.5 Declaring the provisions of section 16.1(c)(iii) of the Code of Conduct in the Commissioner's Handbook (which is annexure "TM3" to the respondent's answering affidavit) to be unlawful, unconstitutional, invalid and null and/or void *ab initio*.

LEGISLATIVE BACKGROUND

[3] The Commission for Gender Equality (CGE / the Commission) is established in terms of sections 181(1) (d) and 187 of the Constitution of the Republic of South Africa¹ (the Constitution). The CGE is a so-called Chapter 9 Institution.

[4] The powers and functions of the CGE are set out in section 187 of the Constitution, as follows;

"(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development, and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its function, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation, these include the powers to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality".

[5] The Commissioners to the Commission are appointed by the President in terms of section 193 (4) of the Constitution, on the recommendation of the National Assembly. The section provides thus;-

"(4) The President on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General, and the members of-

¹ Constitution of the Republic of South Africa, 1996.

- (a) the South African Human Rights Commission*
- (b) the Commission for Gender Equality; and*
- (c) the Electoral Commission”*

[6] The removal of a Commissioner is dealt with in sections 194 (1) and (2) of the Constitution as follows;-

“194(1) The Public Protector, the Auditor – General or a member of a Commission may be removed from office only on-

- (a) the ground of misconduct, incapacity, or incompetence;*
- (b) a finding to that effect by a committee of the National Assembly; and*
- (c) the adoption by the Assembly of a resolution calling for that person’s removal from office.*

(2) A resolution of the National Assembly concerning the removal from office of-

- (a) ...*
- (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.”*

BACKGROUND FACTS

[6] The applicant, Mr. Botha, is with effect from 1 August 2019, until 31 May 2024 appointed by the President of the Republic of South Africa as a full-time Commissioner of the first respondent.

[7] The first respondent is the Commission for Gender Equality (the Commission) a Chapter 9 State Institution Supporting Democracy, established in terms of the Constitution.

[8] The second respondent is Tamara Mathebula N.O, a Commissioner and Chairperson of the first respondent, and also cited in her personal capacity. The applicant also seeks an order that the second respondent is liable for costs in her personal capacity.

- [9] The third respondent is Dr. Nthabiseng Moleko N.O, the Deputy Chairperson and a Commissioner of the first respondent who is cited in that capacity.
- [10] The fourth to tenth respondents are all Commissioners of the first respondent.
- [11] In his founding affidavit, the applicant testified that an investigation was conducted into allegations that the applicant had made certain remarks in breach of the respondent's Code of Conduct (the Code) attached to the Commissioner's Handbook (the Handbook)
- [12] Mr. Botha says that on 6 August 2021, he received a letter from the second respondent advising him that he was suspended from his employment as a Commissioner with immediate effect, pending the outcome of the disciplinary action. He avers that he was not issued with a final warning, he was not reprimanded to behave accordingly, and to the applicant's knowledge, the Speaker of the National Assembly has not been requested to commence proceedings to remove the applicant.
- [13] He avers that the second report of the Plenary of the first respondents, which recommended his suspension, was compiled in the absence of his interview and providing the applicant an opportunity to make written representation. He testified that the respondents made a finding that the applicant had made certain utterances, that the applicant is suspended, that the report be shared with the Speaker, and further that disciplinary proceedings be instituted against the applicant.
- [14] Finally, Mr. Botha says that he wrote a letter to the first respondent on 9 August 2021 disputing his suspension and requesting the first respondent to uplift his suspension to no avail. He then engaged the service of his attorneys of record, who wrote a letter on 31 August 2021 to the first respondent challenging the applicant's suspension and calling for the applicant's suspension to be uplifted.

On 2 September 2021, the first respondent replied and refused to uplift the suspension.

[15] Following a lengthy exchange of correspondence between the parties, the first respondent refused to uplift the suspension. The applicant then launched this application.

[16] In its replying affidavit, the first respondent avers that an incident occurred during its Plenary meeting that was held on 20 July 202. The first respondent alleges that during a break from the Plenary meeting, the applicant had a conversation with someone (hereinafter referred to as ("Party A"). The first respondent claims that during the said conversation between the applicant and Party A, 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 Commissioner's Handbook.

[17] It is the case of the first respondent that to regulate its internal affairs and to address misconduct by its Commissioners between the period of the commission of such gross misconduct and the protracted time-lag between the initiation of the investigation into the Commissioners' conduct by a committee of the National Assembly and his suspension by the President, the first respondent says it then adopted the 2013 Commissioner's Handbook ("the Handbook") and the Code of Conduct.

[18] The relevant section 16 (1)(c) of the Code provides that;-

"Plenary will ratify the decision which may be as follows;

- (i) a formal warning*
- (ii) a request to refrain from the prohibited conduct or that the Commissioner conducts himself/herself in a certain manner*
- (iii) a suspension*

(iv) a request to the Office of the Speaker requiring a removal of the Commissioner”

- [19] Following the above-alleged infraction, the first respondent contends that it established a Special Committee to investigate and make recommendations relating to the alleged infraction by the applicant. On 6 August 2021, the first respondent’s Special Committee tabled and presented its final report. The report records amongst other rafts of recommendations, it ordered that the applicant be suspended from all CGE activities with immediate effect, and disciplinary proceedings are instituted against the applicant.
- [20] In sum, the first respondent avers that its Code of Conduct is lawful and valid and that the Code empowers the respondent to suspend the applicant.
- [21] The main issue that falls to be determined is a very narrow one, whether the decision taken by the first respondent to suspend the applicant is unlawful and invalid because, in terms of the Constitution, only the President has the power to suspend the applicant.
- [22] It is so that, except for the current Parliamentary proceedings underway for the removal of the Public Protector, a similar matter has not yet been pronounced on by our Courts. The matter is accordingly novel.
- [23] At the hearing of the matter, the applicant abandoned his claim for an order of costs against the second respondent.
- [24] In argument, before this Court, it was submitted on behalf of the applicant that on a plain reading of section 194(3) (a) of the Constitution, it is clear that only the President has the power to suspend a Commissioner and then too, only once proceedings are underway by a Committee of the National Assembly with the view to removing that Commissioner.

- [25] In the result, so avers the applicant, that the decision taken by the first respondent to suspend the applicant, and the ratification thereof by the Plenary of the first respondent was done in contravention of section 194(3) (a) of the Constitution, and were *ultra vires* beyond their authority therefore unlawful.
- [26] In reply, the first respondent argued that the power of the President to suspend the applicant must be read and interpreted, in light of its historical context and purpose. That the provision is not meant to frustrate the first respondent's obligation to protect the constitutional rights of its fellow Commissioners and staff from harmful acts of another.
- [27] The first respondent further submit that the purpose and the context of the powers of the first respondent to suspend a Commissioner differs and are independent from those of the President. Accordingly, argues the first respondent, it cannot be said that the first respondent has usurped the powers of the President under Section 194(3)(a).
- [28] The first respondent contends that the applicant was suspended by the first respondent in terms of the first respondent's Handbook and Code of Conduct.
- [29] By referring the matter to the President and the Office of the Speaker of Parliament on 16 August 2022, the first respondent submits that its conduct reflects that the first respondent is aware of the powers of the President and the process that needs to ensue in terms of section 194(3)(a) of the Constitution.
- [30] According to the first respondent, the suspension by the President may only be triggered after the commencement of the proceedings against the applicant by the committee of the National Assembly. Whilst the suspension by the first respondent on the other hand is triggered immediately after the misconduct has been committed by the applicant in terms of the respondents' Handbook read together with the Code of Conduct and after the Plenary has adopted the resolution to suspend a Commissioner.

- [31] It is contended further by the first respondent that its Code of Conduct and its suspension provisions are not meant to usurp the powers of the President and Parliament but rather to address a *lacuna* in our law that has practical implications for the integrity and reputation of Chapter 9 institutions.
- [32] Finally, the first respondent submit that the Code of Conduct is lawful and valid and, that it empowers the first respondent to suspend the applicant.
- [33] At this juncture, it is apposite that I must deal with the legislation governing the appointment, suspension, and removal of a Commissioner of a CGE.
- [34] Section 194 (3) of the Constitution provides as follows;-
“*The President –*
 (a) *may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and*
 (b) *must remove a person from office upon adoption by the Assembly of the resolution calling for that person’s removal”.*
- [35] The principle of interpretation of a statute in our law is now well established. In *Firstrand Bank LTD v KJ Foods*,² the Supreme Court of Appeal held that in interpreting terms of contract or legislation as the case may be; the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³ and *Novartis SA (PTY) Ltd v Maphil Trading (PTY) Ltd*⁴ find application. These cases and other earlier ones provide support for the trite proposition that the interpretive process involves considering the words used in the Act in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthermore, as was said in *Endumeni*, “*a sensible meaning is to be preferred to the one that leads to insensible or unbusinesslike results*”, Thus ... the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid

² (734/2015) [2015] ZASCA 50(26 April 2017).

³ (920/2010) [2012] ZASCA 13 (15 March 2012).

⁴ (20229/2014) [2015] ZASCA 111 (3 September 2015)

anomalies. Accordingly, in this instance, the approach in the interpretation of the provisions is one that is in sync with the objects of the Act, which includes '[enabling] the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all relevant stakeholders.

[36] The above principles were enunciated by the Constitutional Court in *Cool Ideas 1186 v Hubbard*⁵ at [2] as follows:-

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely;

- (a) that statutory provisions should always be interpreted purposely.*
- (b) the relevant statutory provision must be properly contextualized; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonable possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principles is closely related to the purposive approach referred to in (a)”.*

[37] Read in its context, my view is 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.

[38] In my view, on a sensible reading of the language of section 194(3)(a) the only interpretation that can be drawn is that the power to suspend a Commissioner only lies in the hands of the President. Further, the powers of the President to suspend a Commissioner are circumscribed, in that the President can only suspend a Commissioner once the impeachment proceedings have been instituted by the National Assembly.

⁵ [2014] ZACC16; 2014 (4) SA 474CC; 2014 (8) BCLR (CC)

[39] Therefore, the interpretation sought by the first respondent leads to insensible results, in that the first respondent have already suspended the applicant in circumstances where firstly, the impeachment proceedings have not been commenced by the National Assembly as required in terms of section 194(3) (a). Second, the President has not suspended the applicant. The upshot is that the power that the first respondent usurped and granted itself in section 16.1 of the Code of Conduct is *ultra vires* and is invalid.

[40] In that regard, I find myself in agreement with the sentiments expressed by the President in a letter addressed to the respondents by him, in which he expressed the view that they (the respondents) do not have the power to suspend, as they did *in casu*, a Commissioner of the CGE. The President reaffirmed his power to suspend any Commissioner, in paragraph two of the said letter, the President advises thus:-

“The CGE's request for the suspension of Commissioner Botha was also considered in line with the provisions of section 194(4) of the Constitution. According to section 194(4) of the Constitution, the President can only suspend a member of a Chapter 9 institution after the start of the proceedings of a Committee of the National Assembly for the removal of that person. It will therefore be premature for the President to suspend Commissioner Botha.”

[41] In light of all the above, it is my considered view that section 194 (3)(a) is concise, clear and unambiguous – it stipulates that the power to suspend a Commissioner lies squarely in the hands of the president.

[42] The first respondent's allegations of the existence of a *lacuna* between the time of the infraction committed by a Commissioner, and institution of the Commissioner's investigation by the National Assembly process, and the suspension by the President, is flawed and is not supported by the evidence and is dismissed. This is so because once an alleged infraction has been committed by a Commissioner, the first respondent can immediately request the Speaker to

initiate the removal proceedings, and once the proceeding commences the respondent can request the President to suspend the relevant Commissioner.

[43] 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 is declared invalid, and unlawful and is set aside.

JUST AND EQUITABLE RELIEF

[44] Having declared the suspension of the applicant to be unlawful, invalid, and unconstitutional, the next question that arises is what is a just and equitable relief that should be ordered by the Court.

[45] Section 172 (1) of the Constitution reads as follows;

“When deciding a constitutional matter within its power, a court-

(a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and

(b) Make any order that is just and equitable, including:

(i) An order limiting the retrospective effect of the declaration of invalidity;

(ii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect”

[46] Advocate *Barnes SC*, on behalf of the applicant, argued that if an order is not granted setting aside the suspension of the applicant and restoring the status quo ante, the applicant will remain on unlawful suspension, with the result that;-

47.1 The applicant will continue to suffer the impairment of his right to dignity, reputation, and credibility and be subjected to ongoing emotional distress.

47.2 That the act of suspending the applicant will cause reputational and institutional damage to CGE. Finally, the applicant contends that an order in which the status quo ante is restored, and in terms of which the respondents are interdicted from continuing unlawful conduct, will assist in ameliorating that negative public perception. The applicant asks that he must be permitted to resume office. I agree.

[48] In rebuttal, the first respondent argues that the Court should find that a just and equitable conclusion is that the order of invalidity of the suspension, should not be followed by setting aside of the applicant's suspension. The first respondent seeks reliance for this submission in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (All Pay II)*⁶ and *Millenium Waste Management v Chairman, Tender Board: Limpopo Province (Millenium Waste)*⁷ and *Mcbride v Minister of Police*.⁸

[49] In *Millenium Waste Management*, the court found that the appellant's tender for the disposal of medical waste had been wrongfully excluded from the process of evaluation but was reluctant to set it aside because to do so would have disrupted an important service and necessitated further expenditure. Also, in *Allpay II*, this case dealt with the award of the tender concerning the distribution of social welfare grants. Having found the award of the tender to be unlawful, nevertheless, the court suspended the order of invalidity on the basis that setting aside the order will have had a negative impact on the vulnerable in our society.

[50] In *Mcbride*, the Minister of Police had suspended and intendant to institute disciplinary action against Mr. Mcbride, the then-head of the Independent Police Investigative Directorate. The Court held that the Minister's decision to suspend Mcbride is invalid and is set aside. However, the Court suspended the order of invalidity for 30 days in order for the National Assembly and the Minister of

⁶ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179.

⁷ *Millennium waste Management v Chairman, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA).

⁸ [2016] ZACC 30

Police, if they so chose, to exercise their powers in terms of the relevant statutory provision.

[51] Before this Court, *Adv Ngcukaitobi SC*, on behalf of the respondents submitted that this Court should follow the principles as expounded in *Millenium*, *AllPay II*, and *Mcbride* and not adjudicate this matter in the abstract and formalistic manner that is unresponsive to context. Further, that this Court should weigh the interest of the first respondent and the affected Commissioners against those of the applicant who, according to the respondents, is the architect of his own misfortune.

[52] The principle of what is just and equitable was eloquently set out by the court In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*,⁹ as follows;-

"I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent"

[53] I have found that, reliance on *Millenium*, *AllPay*, and *Mcbride* in the present instance by the first respondent to be unhelpful. As I have indicated above the first two cases involve tenders that were declared unlawful. These two cases do not involve the suspension of a chapter a Commissioner. *Mcbride* deals with the suspension of the head of IPID and not a Chapter 9 Commissioner.

[54] The purpose of the CGE, amongst others, was created to uphold the values of the Constitution. The first respondent is an organ of state with heightened duties of fairness in litigation. The CGE is required to be a leading light and example in the upholding of the rights of all citizens including its Commissioner. I have taken into account that the suspension of the applicant is unlawful and tramples on the applicant's Constitutional rights to be presumed innocent and the applicant's rights to be subjected to a fair and just disciplinary process.

⁹ 2011 (4) SA 113 (CC)

- [55] Furthermore, not setting aside the impugned suspension will result in judicial overreach, in circumstances where, once the section 194 enquiry is commenced by the National Assembly and the President is then requested to suspend the applicant, the President might exercise his powers and discretion, and elect not to suspend the applicant.
- [56] significantly, the first respondent is not remediless. Instead of engaging in this lengthy litigation, the first respondent should have requested the Speaker to commence the inquiry and thereafter request the President to suspend the applicant. This speedy remedy remains available to the first respondent.
- [57] Taking into account all of the above, I am of the view that it is just and equitable that the impugned suspension of the applicant be and is hereby set aside and is invalid *ab initio*. The first respondent have unlawfully usurped the powers of the President to suspend Commissioner.
- [58] In all the circumstances mentioned above, it is my considered view that the applicant has succeeded to discharge the onus that rested on his shoulders and proved his case for the relief sought.

ORDER

1. The suspension letter issued by the Second Respondent to the Applicant dated 6 August 2021, and the suspension of the Applicant pursuant thereto, is declared unlawful, unconstitutional, invalid, and null and void.
2. The provisions of Section 16.1(c)(iii) of the Code of Conduct in the Commissioner's Handbook of the first respondent are declared unlawful, unconstitutional, invalid, and null and void.
3. Costs are granted against the First Respondent including the costs of two Counsel.

DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 09 September 2022

Delivered: February 2023

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