IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 024114/2024

DATE: 14-03-2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
14 MARCH 2024

SIGNATURE

In the matter between

NOMPUMELELO NENE Applicant

and

NATIONAL LOTTERIES COMMISSION Respondent

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

WILSON, J: The applicant, Ms. Nene, is the first respondent's company secretary.

She was suspended from that role on 18 November 2022. A disciplinary enquiry was instituted against her in February 2023. On 20 November 2023, the latest version of the charge sheet was proffered against her. The disciplinary enquiry is due to lead evidence on 26 March 2024.

That is just over a week from now. Ms Nene now approaches me for relief effectively staying the continuance of that enquiry on that date.

There are a number of proceedings being taken by Ms Nene that form a backdrop to this application.

One of these proceedings is a review of certain adverse findings made against her by the Auditor General, which is pending before the Pretoria High Court. Another is a complaint pending before the Commission on Conciliation, Mediation and Arbitration (CCMA).

During the course of argument, however, it became clear to me that neither of these proceedings are really the basis on which Ms Nene now moves her application.

The sole basis identified by Mr Alcock, who initially appeared for Ms Nene, and again by Ms Nene who gave submissions on her own behalf after Mr Alcock withdrew during replying argument, is that Ms Nene fears that the disciplinary inquiry is so tainted by natural injustice and illegality, that its outcome is a foregone conclusion.

Ms Nene fully expects to be dismissed, and to lose her job and her livelihood as a result of that dismissal. Ms Nene has not yet lost her livelihood, because she continues to be on full pay during the currency of her suspension and the disciplinary enquiry.

But it is the fear that once she is dismissed at some

future date, that she will lose her benefits and her job that animates this application and that loss is in Ms Nene's mind a foregone conclusion.

The test for the Court's intervention in the proceedings of a domestic tribunal of any sort is clear. There must be exceptional circumstances. Those exceptional circumstances, in my view, must be such that the proceedings in which the Court is asked to intervene are so tainted by unfairness or illegality that the applicant should no longer be subjected to them.

In this case, that test overlaps with the operative part of the test for urgency. The operative part of the test for urgency, in this case, is that the applicant will not receive substantial redress if she has to pursue her case in the ordinary course.

It follows that if Ms Nene is correct and the outcome of her disciplinary inquiry is a foregone conclusion, on the basis that the proceedings against her are so tainted by unfairness or illegality that she should not have to subject herself to them, then this matter is urgent, because the continuance of the disciplinary enquiry is a little under two weeks away. And as Ms Nene herself pointed out, there is a lot to do between now and then to prepare herself for it. There is no prospect of her being able to stay the inquiry except through an urgent application.

The sole question before me, then, at least for the purposes of deciding whether or not this matter is urgent, is really whether the case that Ms Nene presses, that the outcome of the enquiry is a foregone conclusion, has any support in the facts that have been pleaded and proved before me.

It is plain to me on the papers that there is no such support for Ms Nene's apprehensions to be found on the facts of this case. There is no basis laid in the founding or replying papers, to suggest that the disciplinary inquiry to which Ms Nene is to be subject, is unfair or unlawful in any respect – let alone a basis on which I could conclude that it is so unfair and so unlawful that I must intervene now to prevent Ms Nene from being subjected to it.

Ms Nene, I think honestly and in good faith, believes that she is being subjected to significant unfairness. In the course of arguing her case in reply, she listed some of what she thought were the irregularities that have been committed by the inquiry. These consist in the main of the inquiry's refusal to accede to her requests for information. Ms Nene also complains of the disciplinary inquiry's dismissal of a number of applications *in limine* that she has brought.

As apprehensive as these events may make Ms Nene feel, they do not in my view rise to the standard

required for me to intervene. There are in other words no exceptional circumstances in this case. There are instead a number of pre-hearing skirmishes in which Ms Nene has been substantially unsuccessful.

There is no basis for me to find that Ms Nene's lack of success in convincing the inquiry of her views, means that evidence cannot be fairly led against her and that she will be prejudiced in any way when the evidence commences on 26 March.

10 For all those reasons it seems to me that this matter cannot be urgent and that it falls to be struck from the roll.

I leave aside the question of whether I have jurisdiction over the claim at all. It seems to me that Ms Nene's claim not having been pleaded in contract deprives the high court of jurisdiction on the merits. But I have assumed, as I believe I am required to do, that I do have jurisdiction and that there is merit in Ms Nene's claim, in order to decide the issue of urgency.

20 However, for the reasons I have given, because there are no exceptional circumstances in this case, there is also no urgency. The matter will be struck from the roll.

I turn to the question of costs. By anybody's reckoning, this litigation has not been well-conducted. The practice directives of this Court have been ignored.

Ms Nene has been permitted by her attorneys to prosecute her case on an urgent basis in the absence of an allegation of any primary facts that could support a claim of urgency.

The respondents have been prejudiced by Ms Nene and by her attorney's insistence that the matter be heard on this week's urgent roll, as opposed to the urgent roll for next week, at which time Ms Nene's urgency, if she had it, would still have been preserved.

In addition, the affidavits in this case, which I can only assume have been settled by Ms Nene's attorneys, make reckless allegations without factual foundation.

Finally, Ms Nene's attorneys did not appear today. Mr Alcock, who was instructed to act on her behalf until he had to withdraw, was left to press the case on his own. He was required on several occasions to take instructions directly from Ms Nene and was ultimately left with no choice in the absence of Ms Nene's attorneys, but to withdraw and allow Ms Nene to press her case in the way she thought best. Taken cumulatively, this conduct is *prima facie* worthy of censure.

Attorneys are not post boxes. They contract with a member of the public on the basis that they will provide legal services. Where those legal services require advocacy, it is the attorney, and not the client, that briefs the advocate and it is the attorney with whom the advocate

has that briefing relationship.

An attorney that allows hyperbolic claims to be made in order to get into urgent court and then abandons their client during the hearing, in circumstances where it must at least have been foreseeable that Ms Nene would want to be fully involved in the argument of the case *prima facie* misconducts themselves.

Ms. Nene's attorney's failure to attend the hearing placed Mr Alcock in an intolerable position.

This conduct calls for an explanation and if it is not explained, it calls for censure. For all those reasons I make the following order –

1. The application is struck from the roll, for want of urgency.

2. The applicant's attorneys are invited to show cause, on affidavit, supplemented, if necessary, by written legal submissions, by no later than 28 March 2024, why they should not bear the costs of this application *de bonis propriis*, on the scale as between attorney and client, including the costs of two counsel.

3. The first respondent may, if so advised, submit affidavits, written legal argument, or both, in response to the material submitted in terms of paragraph 2 above, by no later than 11 April 2024.

……

WILSON, J
JUDGE OF THE HIGH COURT
14 March 2024