IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 2024-012921

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

SIGNATURE **DATE:** 10 April 2024

In the matter between:

THULANI MAKHUBELA Applicant

and

RETIRED JUSTICE SISI VIRGINIA KHAMPEPE First Respondent

THE COMMISSION OF ENQUIRY INTO THE USINDISO BUILDING Second Respondent

THE PREMIER OF THE GAUTENG PROVINCE, MR ANDREK (PANYAZA) LESUFI Third Respondent

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JUDGMENT

PULLINGER AJ

[1] On 13 September 2023 the third respondent, acting in terms of section 2(1) of the Provincial Commissioners Act, 1997 read together with section 127(2)(e) of the Constitution, promulgated a notice establishing a commission of enquiry ("**the Commission**") into the circumstances of the deaths of various people at the Usindiso Building in Johannesburg.

[2] The first respondent was appointed by the third respondent as the Chairperson of the Commission and the applicant and Ms B.M. Mabena were appointed as additional members.

[3] In or about October 2023, the Socio-Economic Rights Institute of South Africa ("**SERI**") and the Inner City Federation ("**ICF**") applied for the recusal of the applicant as an additional member of the Commission. The grounds upon which the applicant's recusal was sought is not material to this judgment.

[4] On 20 December 2023 the first respondent granted the application for the applicant's recusal.

[5] The applicant now applies to review and set aside that decision and seeks the removal of Mr Semenya SC as evidence leader. Again, the grounds upon which this relief is claimed, is not material to this judgment.

[6] Mr Semenya was not cited in this application and the prayer for his removal was correctly abandoned prior to the hearing of this matter.

[7] The main point of contention before me was that of the non-joinder of SERI and ICF as necessary parties.

[8] It was argued by Ms Qofa, on behalf of the applicant, that SERI and ICF only sought the recusal of the applicant in respect of Part A of the Commission's work whereas the first respondent's ruling has the effect of recusing the applicant for the entirety of the Commission. It was thus contended that neither SERI nor ICF have any interest in the outcome of the applicant's review. I am unable to agree with this proposition. SERI and ICF, as representatives before the Commission, obtained an order, rightly or wrongly, in the interests of their members, however, they are not before the Court in the review.

[9] It is the most fundamental principle of our rules of natural justice that a person or entity against whom a decision may be given, or whose interests stand to be detrimentally affected by a decision, must be afforded notice thereof and an opportunity to state its case. This is the *audi alteram partem* doctrine.

[10] The origins of this salutary rule are well established. In **Blom**[1] Corbett JA, as he then was, while dealing with the right to *audi alteram partem* in the context of a statute that vested a public official with the power to give a decision adverse to the property or liberty of an individual, said:

> "The maxim *audi alteram partem* pithily expresses a principle of natural justice which is part of our law (see *Perumal and Another v Minister of Public Health and Others* 1950 (1) SA 631 (A) at 640; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) at 261C; *S v Moroka en Andere* 1969 (2) SA 394 (A) at 398B). It has ancient origins. When Nicodemus, the Pharisee, asked:
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> > 'Does our law permit us to pass judgment on a man unless we have first given him a hearing and learned the facts?'

[1] **Attorney-General, Eastern Cape v Blom and Others** 1988 (4) SA 645 (A) at 460 F to I

> he was obviously speaking rhetorically. (See *New English Bible*, John vii.51.) The principle (which for the sake of brevity I shall call 'the audi principle') has been variously formulated by this Court. In *R v Ngwevela* 1954 (1) SA 123 (A) Centlivres CJ referred (at 127F) to
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> > '... the numerous judicial decisions in which it has been held that, when a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual, that individual has a right to be heard before action is taken against him,... unless the statute expressly or by necessary implication indicates the contrary'."

[11] This is undoubtedly why our law of civil procedure requires that an affected party(ies) receive adequate notice of the relief being sought against it in the form of process being served on it.

[12] In **Steinberg**[2] the Rhodesian Appellate Division considered an appeal in a matter concerning the enforcement of a foreign judgment. The Court held, citing English precedent, that failure to give notice to the party against whom relief is sought (notwithstanding the American applicable law) is a breach of the *audi alteram partem* doctrine. Similarly, in **Clegg**[3] this Court held, with reference to the Appellate Division decision in **Amalgamated Engineering,**[4] and in the context of an application for rescission predicated on a want of effective service or notice, that:

> "There are, it is true, cases in which the Court has, on an application without notice and without the issue of a rule *nisi*, granted a final order recognising a foreign trustee. They are collected in *Mars (supra* at 256). It does not appear, however, that in any of those cases the point was argued, and no reasons were given. In *Ex parte Steyn* 1979 (2) SA 309 (O) the Court granted a final order for the recognition of a foreign trustee, but the principle regarding notice was not referred to. I do not regard any of these cases as

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2 **Steinberg v Cosmopolitan National Bank of Chicago** 1973 (3) SA 885 (RA) at

3 **Clegg v Priestly** 1985 (3) SA 950 (W) at 945 F; **Interactive Trading 115 CC and Another v South African Securitisation Programme and Others** 2019 (5) SA 174 (LP) at [7]

4 **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A) at 651

> being authority for a departure from the fundamental principle of our law that the Court will not make a final order that may prejudice the rights of a person without notice to him. Cf *Network Video (Pty) Ltd v Universal City Studios Inc and Others* 1984 (4) SA 379 (C)."

[13] In **Fraind**[5] this Court, again citing English precedent, held that even where a defendant is a fugitive from justice, such a defendant has a right to effective service of process and to defend himself against proceedings brought against him.

[14] In all of the above cited judgments, the *audi alteram partem* doctrine underpinned the rationale.

[15] It thus our law that the *audi alteram partem* doctrine underpins both the requirement of joinder and service, since without joinder and service, any rights that party may have had in the proceedings could be defeated.

[16] It goes without saying that in the absence of SERI and ICF being joined to these proceedings, they are deprived of an opportunity to defend a decision given in their favour, whether that decision is given correctly or not. The position is amply explained by way of analogy. In an application for the review of a tender, an aggrieved tenderer will cite the decision-maker and all other tenderers, especially the successful party. It cannot be said that because the successful tenderer was awarded more than it tendered for, that it has no interest, in the legal sense, in an application to set aside that part of the award which it did not tender for.

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[5] **Fraind v Nothman** 1991 (3) SA 837 (W) at 841 G - I

[17] Now, it is trite that a Court cannot proceed to hear a matter[6] in the absence of a person or entity that has rights which stand to be affected by the decision of the Court.[7]

[18] It is for this reason that I uphold the point on non-joiner and decline to entertain the merits of the review.

[19] Mr Soni SC, on behalf of the second and third respondents, proposed a draft order. In my view, the proposed draft order does not resolve the issue herein. I intend to order the joinder of SERI and ICF and simultaneously provide a framework for the further conduct of this matter.

[20] I will however caution the parties about the manner in which this application was brought. It is noted that:

[20.1] This application was brought by way of urgency. The threshold for urgency is that "*absence of redress in the ordinary course*"[8] exists for the applicant.

[20.2] Ms Qofa attempted to demonstrate, with regard to correspondence, the content of which was not pleaded and the inference to be drawn therefrom not stated, that the abridgement of time periods was commensurate with a degree of urgency. That may well be, and I

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[6] **Bekker v Meyring, Bekker's Executor** (1828 – 1849) 2 Menz 436 approved and applied in **Gordon v Department of health, KwaZulu Natal** 2008 (6) SA 522 (SCA) at [9]

[7] **Henri Viljoen (Pty) Ltd v Awerbach Bros** 1953 (2) SA 151 (O) at 168 – 70; **Amalgamated Engineering** (*supra*)

[8] **Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others** [2023] ZAGPJHC 1162 at [19]

express no view thereon, but aside from this being impermissible,[9] the threshold in Rule 6(12) of the Uniform Rules has not been passed. No case was made out by the applicant as to why this matter ought to have been enrolled before the urgent court at all.

[20.3] This should not be seen as the manner in which an applicant, regardless of the circumstances, ought to approach the Court. Ordinarily an application brought in this manner would be struck from the roll with costs in accordance with the Practice Directives and authorities in this Division. However, given the import of this matter, the public interest in the conclusion of the work of the Commission and the resolution of this impasse which stands in the way thereof, I will make a determination on the joinder point, and if that fails, determine the merits of the review.

[21] In the result, the costs of this application are to be costs in the cause.

[22] In the result, I make the following order:

1. The Socio-Economic Rights Institute of South Africa ("**SERI**") and the Inner City Federation ("**ICF**") are joined as the 4th and 5th respondents respectively.

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[9] **Lipschitz and Swartz, NNO v Markowitz** 1976 (3) SA 772 (W) at 775 H; **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others** 1999 (2) SA 279 (T) at 324 F – H; **Hunter v Financial Sector Conduct Authority and Others** 2018 (6) SA 348 (CC) at [172]

2. The applicant's attorneys are directed to forthwith cause a copy of the papers in this application and a copy of this judgment to be served on SERI and ICF;

3. SERI and ICF are called upon to:

   (i) deliver a notice of intention to oppose this application within one (1) week of service of this application upon them; and

   (ii) should a notice of intention to oppose be delivered, to deliver their answering affidavit, if any, within a further two (2) weeks.

4. The costs of this application are to be costs in the cause.

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A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG 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 12h00 on 10 April 2024.

DATE OF HEARING: **27 MARCH 2024**

DATE OF JUDGMENT: **10 APRIL 2024**

APPEARANCES:

COUNSEL FOR THE APPLICANT:	**D B NTSEBEZA SC**
	M QOFA
	A MABENTSELA
ATTORNEY FOR THE APPLICANT:	**NYAPOSTE INCORPORATED ATTORNEYS**
COUNSEL FOR THE 1st AND 2nd RESPONDENTS:	**V SONI SC**
	B SOCKIWA
ATTORNEY FOR THE 1st AND 2nd RESPONDENTS:	**P H ATTORNEYS**
COUNSEL FOR THE 3rd RESPONDENT:	**T MASEVHE**
ATTORNEY FOR THE 3rd RESPONDENT:	**STATE ATTORNEY**