# IN THE HIGH COURT OF SOUTH AFRICA

## (GAUTENG DIVISION, PRETORIA)

Case Number: 82287/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

11/12/18

DATE SIGNATURE

In the matter between:

| | |
|---|---|
| THOMAS SWABIHI MOYANE | APPLICANT |
| And | |
| PRESIDENT CYRIL RAMAPHOSA | 1ST RESPONDENT |
| MINISTER PRAVIN GORDHAN | 2ND RESPONDENT |
| JUDGE ROBERT NUGENT N.O | 3RD RESPONDENT |
| ADVOCATE AZHAR BHAM SC N.O | 4TH RESPONDENT |
| PROFESSOR MICHAEL KATZ N.O | 5TH RESPONDENT |
| ADVOCATE MABONGI MASILO N.O | 6TH RESPONDENT |
| MR VUYO KAHLA N.O | 7TH RESPONDENT |
| MINISTER TITO MBOWENI | 8TH RESPONDENT |

## JUDGMENT

**Fabricius J,**

[1] The Applicant herein was the Commissioner for the South African Revenue Services ("SARS"), and as such appointed for a five year term, from 29 September 2014 to 29 September 2019. On 19 March 2018, the First Respondent, the President of the Republic, issued a letter suspending him as Commissioner with immediate effect, pending the institution of disciplinary proceedings against him. In such letter, the President emphasized a number of important considerations, which in my view are also relevant to the present proceedings:

1. The work of the South African Revenue Service is critical to the fulfilment of the Government's commitment to eradicate poverty, create jobs, build infrastructure

necessary for the safety and health of the South African people, and provide them with services;

3. Developments at SARS under his leadership, have resulted in a deterioration in public confidence in the institution, and in public finances being compromised. For the sake of the country, and the economy, this situation could not be allowed to continue, or worsen;

3. It is in the public interest to restore the credibility of SARS without delay;

4. The President has lost confidence in his ability to lead SARS, as his obligation to be responsible for the performance of SARS and its functions impact on the public purse, and therefore the well-being of the nation as a whole. This is an exceptional circumstance that requires urgent and immediate action;

5. The circumstances are not ordinary, and protecting SARS and by corollary the public interest, must be the President's primary concern, and therefore, the disrepute into which he had brought SARS and the Government as a whole, and the risk to the National Revenue Fund were enormous;

6. Applicant had not been willing to acknowledge his failures, or the magnitude of the consequences of his actions.

[2] The conditions pertaining to such suspension were provided to Applicant which, amongst others, included the full payment of his salary.

[3] On 23 May 2018, the President announced the appointment of the Fourth Respondent as Chair of a disciplinary enquiry to be held. On the same day, the President also announced the appointment of the SARS Commission, to be chaired by the Third Respondent sitting with a number of assessors. The Applicant raised a number of objections to both processes, whilst the hearing before the Third Respondent continued. On 7 September, a letter was sent to Applicant indicating an intention to send an interim report to the President, in which he would recommend an immediate removal of the Applicant from Office. Applicant in turn, demanded that Third Respondent refrain from

making the said recommendation, which demand the Third Respondent refused.

[4] On 1 October 2018, the Applicant issued an application in the Constitutional Court. He approached the Court, according to the Founding Affidavit, in terms of the provisions of s. 167 (4) (e) of the ***Constitution***, which states that only the Constitutional Court may decide that the President had failed to fulfil constitutional obligations. He stated that the President had violated s. 83, 84 and 87 of the ***Constitution***, which sections deal with the obligations and powers and functions of the President.

[5] As an alternative to his reliance on the exclusive jurisdiction referred to in s. 167 (4) (e) of the ***Constitution***, he relied on the "direct access" procedure contained in ***Rule 18*** of the ***Rules*** of the Constitutional Court, by stating that the matter was inherently urgent and was of such great importance, that it might have a severe economic impact which could literally touch every

inhabitant in South Africa. Also, the matter raised a number of inter-connected constitutional rights and values, which would ultimately have to be decided by the Constitutional Court itself, after a normal process starting in the High Court, and the Supreme Court of Appeal. He stated that although the facts were complex, the factual matrix lying at the core of the application was largely premised on common cause facts.

[5] In that application, the Applicant sought the following relief: (the President being the First Respondent, and the Second to Seventh Respondents were the same as in the present proceedings).

"1. Declaring the conduct and/or decisions of the first respondent (as captured in his letter dated 8 August 2018) to be unlawful, invalid, unconstitutional, in violation of the constitutional obligations of the President and/or in breach of his oath of office;

2. Setting aside the said conduct and/or decisions of the President;

3. Directing the first respondent to suspend or stay one or both of the inquiries respectively chaired by the third and fourth respondents;

4. Declaring the impugned involvement and participation of the second respondent in any one or both of the relevant inquiries to be unlawful, irrational, unconstitutional and in breach of sections 1, 9, 96(2)(b) and/or 195 of the Constitution and/or the principle of legality;

5. Reviewing and setting aside;

5.1 the ruling issued by the third respondent on 2 July 2018; and

5.2 the conduct and/or actions of the third respondent, as contained in his letter dated 7 September 2018 (unlawfully threatening to recommend the removal of the applicant from office);

6 Reviewing and setting aside the ruling(s) issued by the fourth respondent on:

6.1 8 August 2018; and/or, if necessary

6.2 10 September 2018 (to continue with the disciplinary inquiry);

7. Costs of opposition on the punitive scale and/or personal basis,

where applicable."

[7] It will be noted that prayers 1, 2 and 3 of this Notice of Motion, involve decisions and/or conduct of the First Respondent, prayer 4 deals with the involvement and participation of the Second Respondent, prayer 5 deals only with the conduct and rulings of the Third Respondent on 2 July 2018, and 7 September 2018, whilst prayer 6 deals with rulings of the Fourth Respondent on 8 August and 10 September 2018.

[8] On 4 October 2018, the Fourth Respondent granted an application staying the proceedings before him, pending the outcome of the application to the Constitutional Court. Fourth Respondent also filed a Notice to Abide by the decision in the Constitutional Court, whilst the Third Respondent filed a Notice of Opposition on 11 October 2018.

[9] On 12 October 2018, the President invited the Applicant to make representations in respect of the recommendations contained in the interim report, including that the Applicant be removed from his post as Commissioner. Certain representations were indeed made on 26 October 2018, and on 1 November 2018, the President delivered a letter notifying the Applicant of his removal from Office.

[10] On 2 November, the President filed an Answering Affidavit in the Constitutional Court application. He stated amongst others that it was in the national interest that Applicant be removed, and repeated what he had said in the suspension letter that I have referred to. In sharp contrast to those interests, the only interest that Applicant had demonstrated in his application (and I may add in these proceedings as a whole), was a personal, financial interest. In effect, he wants to be reinstated as Commissioner, albeit on suspension with full benefits. The President also emphasized in that Answering Affidavit, as in the proceedings before me, that he had exercised

an executive function and that keeping in mind the principle of separation of powers, a Court should be loath to deal with matters which are quintessentially matters of policy, and the functioning of the Executive. I will return to these considerations.

[11] After the President refused to retract the termination of employment, the Applicant issued an urgent application in this Court on 13 November 2018.

[12] The termination letter of 1 November 2018, states that the President had considered the interim report of the Third Respondent, its annexures, as well as the Applicant's representations of 26 October. For the sake of clarity, I deem it appropriate to quote the whole of this letter inasmuch as it is relevant to the rationality argument that I will deal with hereunder.

"TERMINATION OF SERVICE

I refer to the representations made by your legal representative in a letter dated 26 October 2018 on the recommendations in the interim report of the Commission of

Inquiry into Tax Administration and Governance by the South African Revenue Service ('the SARS Commission').

I have considered the interim report, its annexures, and your representations dated 26 October 2018.

I established the SARS Commission to enquire into broader systemic issues plaguing SARS.

The interim report paints a deeply concerning picture of the current state of SARS and the reckless mismanagement which characterised your tenure as Commissioner of SARS. Of further, and in many ways greater, concern is your refusal to meaningfully participate in the SARS Commission in order to assist with identifying the root causes of the systemic failures at SARS and ways in which to arrest these.

Your representations to me fail entirely to deal with the substantive issues the report raises, especially your role in these challenges or in addressing them. This after your refusal to engage with these issues at the Commission, made plain in the exchanges of correspondence annexed to the interim report and your attorney's confirmation that you instructed him to ignore these requests from the Commission.

The interim report makes clear that there is considerable evidence, which the SARS Commission gathered, indicating that in order to resolve the challenges at SARS, it would be best to terminate your services.

I have therefore decided to accept the recommendation made by the SARS Commission that immediate action is needed in order to forestall any further deterioration of our tax administration system. This in light of the fact that SARS constitutes a fundamental and indispensable pillar of our country's fiscal framework which is central to enabling government to fulfil its socio-economic constitutional obligations and other commitments to its people.

Accordingly, I have decided to terminate, with immediate effect, your appointment as Commissioner of SARS."

[13] After the Applicant issued the urgent application in this Court on 13 November 2018, he filed a Replying Affidavit in the Constitutional Court on 16 November 2018. It is referred to as a "Combined Replying Affidavit" and deals with a number of issues, including those that he said would have to be decided in an application for interim relief, pending the outcome of the main application. Those were whether the good grounds for urgency existed, whether the *status quo ante* his unlawful removal from Office ought to be restored, and/or whether the Third Respondent ought to be interdicted from issuing the final report. Apart from replying to the President's Answering Affidavit, he dealt with a "proposed amendment and conversion of the application in the Constitutional Court to an application in this Court". On 26 November, the Constitutional Court issued its order dated 21 November

2018, which refused the application on the basis that the engagement of the exclusive jurisdiction of that Court had not been established, nor had a basis been laid for direct access. The Applicant therefore proposed that that application be "converted" and that an amended Notice of Motion which was part of the Replying Affidavit, be allowed. Any party wishing to object to the proposed amendment, was required to deliver the objection and the grounds therefor, by 30 November 2018, failing which, the amendment would be effected.

[14] The amended Notice of Motion is in two parts, Part A and Part B.

"1. ...

2. The decision of President Ramaphosa (the first respondent) to accept and/or implement the recommendation of the interim report be temporarily suspended and set aside;

3. President Cyril Ramaphosa:

3.1 is hereby barred and/or interdicted from implementing the remaining recommendation(s) of the SARS Commission;

3.2 is hereby barred and/or interdicted from appointing any person to the position of Commissioner of SARS;

3.3 is hereby barred and/or interdicted from advertising the position of Commissioner of SARS and/or taking any steps directed towards filling the position with any person other than the applicant.

4. Declaring that the status quo which pertained before the service of the removal letter remains in place (ie the applicant is forthwith reinstated as SARS Commissioner and remains suspended with pay);

5. Prohibiting the SARS Commission (the third to seventh respondents) from issuing any further interim and/or final report(s) and/or recommendations;

6. Directing that the Disciplinary Inquiry instituted by President Ramaphosa and chaired by Bham SC (the fourth respondent) remains in place;

7. Further and/or alternative relief;

8. Costs against any opposing respondents including punitive and/or personal costs, where applicable.

PART B

1. Declaring the conduct and/or decisions of the first respondent (as captured in his letter dated 17 August 2018) to be unlawful, invalid, unconstitutional, in violation of the constitutional obligations of the President and/or in breach of his oath of office;

2. Setting aside the said conduct and/or decisions of the President;

3. Directing the first respondent to suspend or stay one or both of the inquiries respectively chaired by the third and fourth respondents;

4. Declaring the impugned involvement and participation of the second respondent in any one or both of the relevant inquiries to be unlawful, irrational, unconstitutional and in breach of sections 1, 9, 96(2)(b) and/or 195 of the Constitution and/or the principle of legality;

5. Reviewing and setting aside;

5.1. the ruling issued by the third respondent on 2 July 2018; and

5.2. the conduct and/or decision of the first respondent to remove the applicant from the office of SARS Commissioner (which conduct is based on the unlawful recommendations of the third, fifth, sixth and seventh respondents)"

6. Reviewing and setting aside the ruling(s) issued by the fourth respondent dated 31 July 2018;

7. Costs of opposition on the punitive scale and/or personal basis, where applicable".

[15] Therefore, at the date of the hearing on 4 December 2018, I had the following before me:

1. The application in the Constitutional Court, by the Applicant, together with an Answering Affidavit of the First Respondent only;

2. The High Court application, which in addition to the above also contained an Answering Affidavit of the Third Respondent.

[16] The Third Respondent also filed a Notice of Objection in terms of Rule 28 (3), in which he objects to the proposed amendment of the Notice of Motion on the following grounds:

"1. First, the applicant initially sought interim relief in these proceedings, pending the outcome of an application for final relief before the Constitutional Court ("the CC application"). The Constitutional Court dismissed the CC application on 26 November 2018. As a result, the interim application lapsed and fell away. There is, at this stage, no application pending before the High Court that the applicant could competently amend.

2 Second, it is not competent for the applicant to "convert" his CC application to an application before this Court, by serving a proposed amended notice of motion.

3 Third, permitting the proposed amendments would undermine the proper ventilation of the matter, in that:

3.1 The interim relief originally sought from this court is now pursued in Part A of the proposed amended notice of motion. The relief

previously pursued in the CC application, is sought in part B of the proposed amended notice of motion.

3.2 The third respondent has an interest in the relief sought in Part B of the proposed amended notice of motion. Prayer 5.1 seeks to review and set aside his ruling of 2 July 2008. Prayer 5.2 seeks to review and set aside the first respondent's decision to remove the applicant from office, based on purported flaws in the third respondent's interim report, and the findings made therein. In addition, the applicant attacks the third respondent's conduct and integrity in his papers in the CC application.

3.3 The third respondent is entitled to an opportunity to respond to the claims made in the CC application. He would have been afforded an opportunity to file answering papers if it had been brought in the High Court, in accordance with the Uniform Rules of Court.

3.4 The process adopted by the applicant has deprived him of that right;

3.4.1 The third respondent was not afforded an opportunity to file answering papers in response to the CC application because Rule 18 of the Constitutional Court Rules permitted him to do so only pursuant to directions from the Chief Justice. The Constitutional Court dismissed the CC application without such directions ever being issued.

3.4.2 The proposed amended notice of motion does not afford the respondents an opportunity to respond to the relief sought therein.

3.4.3 In paragraph 187 of the replying affidavit, the applicant contends that the pleadings in the CC application have closed and that he will oppose any attempt by the third respondent to file papers in response to Part B.

4 Fourth, the applicant claims that no prejudice is entailed by allowing the proposed amendments to be effected because the relief sought in Part B of the

proposed amended notice of motion is the same as that sought in the CC application. That is incorrect:

4.1 Prayer 5.2 of the CC application sought an order reviewing and setting aside the third respondent's letter of 7 September 2018. Prayer 5.2 of Part B seeks to review and set aside the President's removal of the applicant from the office of SARS Commmissioner.

4.2 The applicant sought to amend his relief in the CC application, such that prayer 5.2 sought to review and set aside the President's decision. That amendment was never effected.

4.3 As a result, none of the respondents has had an opportunity to respond to that claim.

5 The proposed amendments to the notice of motion should consequently not be allowed."

[17] Shortly before the hearing, I was presented with a "NOTICE OF (INTERLOCUTORY) APPLICATION FOR THE RECUSAL / WITHDRAWAL

OF COUNSEL". This application sought that Third Respondent's Counsel W. Trengrove SC, be "excused, recused and/or withdrawn from representing the Third Respondent Judge R. Nugent". The Supporting Affidavit was made by Applicant who stated that his objections were based on the fact that Trengrove SC had provided him with a legal opinion in his capacity as Commissioner of SARS. The opinion which he solicited and obtained from Counsel concerned the powers of the Commissioner and the Minister of Finance in the light of the provisions of s. 6 (1) of the ***SARS Act***. The entire application before concerned the decision of the President to remove him from Office in accordance with the powers contained s. (1) of the ***Act***. It was also said that Trengrove SC had represented and advised the President in the process, leading to – and including – the preparation and drafting of the charge sheet against him before the disciplinary enquiry. Accordingly, it was said that Trengrove SC was in an "irredeemable conflict of interest situation", and should therefore not be involved in this matter at all. His involvement in these proceedings would be gravely prejudicial to him and/or the

administration of justice generally, and the integrity of the profession. He also stated that his Counsel had raised this issue with Trengrove SC as a matter of courtesy, but that the latter would not be voluntarily recusing himself. As a result, he had instructed his Attorney to lodge a formal complaint with the Professional Committee of the Johannesburg Society of Advocates.

[18] Mr Trengrove SC provided me with a "Statement of Fact" which reads as follows:

"1 I confirm that I was one of the authors of the opinion at p. 166 of the Constitutional Court papers. As appears from the opinion,

1.1 It was given on 4 February 2016;

1.2 Our client was SARS; and

1.3 The opinion was confined to pure issues of law.

2 I did not for the purposes of the opinion meet with Mr Moyane or communicate with him in any way.

**My advice to the President:**

3 I advised the President on procedural matters relating to the disciplinary proceedings against Mr Moyane before Bham SC. I was not responsible for the conduct of those proceedings and never advised on the substance of the charges against Mr Moyane.

4 I understand that, after publication of the SARS Commission's interim report, the President met with Judge Nugent to discuss the interim report and its implications. At Judge Nugent's suggestion, I thereafter met with the President to collate to him my views on the implications of the interim report".

[18] This statement of fact was not challenged by anyone, and in any event there is no reason at all to doubt the veracity thereof.

[19] Mr Mphofu SC, in his argument on this topic, referred me to certain Rules of the General Council of the Bar, which he said were applicable. It is not necessary to deal with these Rules, but it is clear in the present context that they mainly deal with confidential information, which may have been

disclosed to Counsel and which would preclude him from acting against th party who had provided such confidential information. Ms Goodman, wh argued this point on behalf of Trengrove SC, submitted that the following were in fact the crucial considerations:

1. In assessing whether a legal representative is conflicted, a distinction must be drawn between the duties that he owes to his existing client, and those owed to a former client;

2. A legal representative owes his current client a fiduciary duty to act in their best interests. That duty precludes the legal representative from acting simultaneously for two clients with conflicting interests, because he cannot properly serve both of their interests at the same time.

   See: ***Wishart and Others v Blieden N.O and Others 2013 (6) SA 59 (KZP) at par. 37.***

3. A fiduciary duty exists only while the relationship which gave rise to the duty remains in place. A lawyer's fiduciary duties to his client terminates when their professional relationship comes to an end.

See: ***Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd [2014] 4 ALLSA 241 (GJ) at par. 76.***

Thereafter, the legal representative has no further obligation to defend or advance the interest of his former client. Because he owes no fiduciary duty the former client, there can be no conflict of interest acting against that client;

4. There is consequently no absolute rule that precludes a legal representative from acting against a former client.

See: ***Netcare Hospitals*** *supra* at par. 82.

5. The only duty that survives the termination of the legal representative's mandate, is the duty to preserve the confidentiality of information imparted to him through his professional relationship with a former client;

See: ***Robinson v Van Hulsteyn Feltham and Ford 1925 AD 12 at 21 to 22.***

6. A Court will restrain a lawyer from acting against a former client where there is a significant risk of disclosure, or misuse of information which belongs to the former client. The test is not the same as that which applies to the recusal of Judicial Officers, where a perceived conflict will suffice.

7. In order to obtain a ruling that a former representative is precluded from acting against him or her, the client must show that:

   a. The Applicant had a previous Attorney-client contract with the Respondent and confidential information of the Applicant was imparted and received in confidence as a result of that contract;

   b. The information remains confidential;

   c. The information is relevant to the matter at hand; and

   d. The interests of the present client of the Respondent are adverse to that of the former client.

   See: ***Wishart supra*** at par. 39 (cited with approval in ***Netcare supra*** at par. 89).

8. Evidence must be put up to meet each of these requirements.

[20] A Court will not likely disqualify a legal representative because the effect of doing so would be to deprive the current client of his right to freely choose his own Counsel. A client whose legal representative is disqualified loses not

just time and money, but also the benefit of Counsel's specialized knowledge of the case.

[21] On that basis it was contended that Applicant had not established any factual grounds for disqualifying Mr Trengrove SC from acting for Judge Nugent in this matter. The opinion was given to SARS and not to Mr Moyane personally. As such, no fiduciary duties were owed to Mr Moyane, and Mr Trengrove SC in any event confirmed that he had not even met him, or communicated with him in any way. Furthermore, the opinion was given on 4 February 2016, and there was no continuing relationship in-between that. Also, Trengrove SC did not receive any confidential information from Mr Moyane in the present context, or at all. The opinion did not even engage with any factual questions.

[22] Given the facts, the only fiduciary duties owed to anyone in the present matter were by Trengrove SC to the President and the Judge. Neither of

them has objected to his participation in these proceedings. Accordingly, there was no basis for the objection.

[23] Having considered the abovementioned arguments at length in the context of an urgent application, I dismissed it, and the matter proceeded.

[24] At the commencement of the actual hearing, I ruled that I would not make any further interim or interlocutory or other orders, but consider all submissions as a whole, and would thereafter decide whether or not the Applicant was entitled to any relief. I also conveyed my general approach to the amendment of the Notice of Motion topic that is in line with what was said by Matlanga J in ***Eke v Parsons 2016 (3) SA 37 (CC) at par. 40***, where the following appears: "Under our constitutional dispensation the object of Court Rules is twofold. The first is to ensure a fair trial or hearing. The second is to secure the inexpensive and expeditious completion of litigation and to further the administration of justice". The Superior Courts in South

Africa have such inherent jurisdiction and in terms of this power the High Court has always been able to regulate its own proceedings for a number of good reasons, including catering for circumstances not adequately covered by the ***Uniform Rules***, and generally ensuring the efficient administration of the Courts' judicial functions. Obviously, and in addition, any prejudice caused by such amendment must ultimately be considered and in that context the competing interests of the relevant parties must exercise one's mind. With those considerations in mind, I asked Applicant's Counsel to proceed with his argument on the basis that the Amended Notice of Motion was properly before me, but that I would make a final ruling on all relevant topics and requirements in my judgment.

[25] I also said that from my perspective on the one hand, but also generally speaking, on the other hand, considerations of the balance of convenience would usually be decisive in applications seeking interim relief, pending the outcome of the main proceedings. Mr Mpofu SC on behalf of Applicant, had

no problem with that proposition, and by-and-large, his argument proceeded on that basis. He submitted that the application was urgent in that the interim relief sought was appropriate and could not realistically be obtained in due course. It was also in the interest of justice that the matter be heard. He made a number of submissions regarding the *prima facie* right that needed to be shown, and referred to a "cluster of rights" in this context, and referred to his written Heads of Argument in this context where the following startling submission appears: "This application deals with some of the most egregious violations of human rights by the State against a single human being ever witnessed during the dawn of democracy". I say that this submission is startling to say the least, inasmuch as it is really common cause that the *status quo ante* that Applicant seeks in these proceedings is solely concerned with the financial implications of his dismissal by the President. I may add that both the Third Respondent and the President was entitled to treat Applicant's complaints as mere bombast designed to obscure the fact that he failed to furnish any version in opposition to the evidence against

him. It was furthermore confirmed in the written Heads of Argument, that the Applicant took no issue with:

1. The President's powers to appoint the disciplinary enquiry and the SARS Commission;

2. The President's powers to suspend the SARS Commissioner;

3. The President's power or entitlement to remove the Applicant from Office; nor

4. The President's power to appoint the SARS Commissioner. These powers are certainly contained within the ambit of the provisions of s. 6 (1) of the *SARS Act.*

In the context of the above proper concession, it was stated that this case concerned the manner in which the President exercised those powers in the present case, which were not rationally connected to the empowering provisions, not authorized by law, and therefore constitutionally invalid and void.

[26] In the context of the present application where the Applicant seeks interim relief, the relevant requirements have been referred to on numerous occasions in every conceivable Court, and in particular in ***Setlogelo v Setlogelo 1914 AD at 221***, as later refined in ***Webster v Mitchell 1948 (1) SA 1186 W***, and in the context of the exercise of statutory powers in ***Gool v Minister of Justice and Another 1955 (2) SA 682 (C)***. In the context of the exercise of statutory powers, a further requirement was added by the Constitutional court in: ***National Treasury and Others v Opposition to Urban Alliance and Others 2012 (6) SA 223 (CC)***.

[27] What needs to be established is a prima facie right even if it is open to some doubt, a reasonable apprehension of irreparable and imminent harm to the right, if an interdict is not granted, the balance of convenience must favour the grant of the interdict, and the Applicant must have no other reasonable remedy. In the context of the exercise of a statutory power, it was held by the Constitutional Court that when the balance of convenience enquiry was

held, a Court must carefully probe whether, and to which extent, the restraining order will probably intrude into the exclusive terrain of another branch of Government. That enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A Court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases after a careful consideration of separation of powers harm. (See par. [47]). This means that when it evaluates where the balance of convenience rests, a Court must recognize that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive, such as in the present matter. It must assess carefully how and to what extent its interdict will disrupt such executive functions conferred by law, and thus whether the restraining order will implicate the tenant of division of powers. While a Court has the power to grant a restraining order of that kind, it does not readily do so, except when a

proper and strong case has been made out for the relief and then, even so, only in the clearest of cases.

[28] I may immediately say that in my opinion, considerations of where the balance of convenience lies is decisive herein, having regard to the mentioned considerations and the executive functions of the First Respondent.

[29] In First Respondent's Answering Affidavit in the Constitutional Court application, the President offered the following cogent and justifiable and rational considerations:

1. An order preventing him from appointing a successor to Applicant would have dire consequences for SARS and the country as a whole, in that it would severely hamper any initiatives designed to bring stability to SARS. The urgent appointment of Applicant's successor is a non-negotiable prerequisite for the process of the recovery at SARS to begin. An order

preventing the SARS Commission from handing down its report would also be harmful to the interest of the country as a whole. The systemic challenges within SARS present a serious threat to Government being able to fulfil its socio-economic constitutional obligations and other commitments to the people of this country. It is absolutely critical that the systemic issues plaguing SARS be dealt with expeditiously and decisively. In sharp contrast to these considerations, Applicant only relies on his loss of salary as a result of his removal from the position of SARS Commissioner. This is clearly and manifestly over-shadowed by compelling national interest at stake. Furthermore, in the absence of unlawfulness, fraud or corruption, this Court should not likely intrude on the terrain of the Executive.

I agree with these considerations. Similar as they are to those considered in ***Annex Distribution (Pty) Ltd and Others v Bank of Baroda 2018 (1) SA 562 GP at par. 41*** thereof. The efficiency of SARS is of crucial importance to the functioning of our economy, which is already constrained by a number of international factors, but also by local factors such as the insufficiency of a

capital required for industrial and social development projects, amongst many others. A Court must, and can, also take notice of the fact that South Africa is staring at a fiscal cliff – the expenditure is higher than the income, growth is low, investment is plunging and poverty is rife. The President was entitled – and obliged to take the national interest into account and the role of the Revenue Services. Whether he obtained the relevant facts existing at SARS via a Commission, or via any other reliable source is really irrelevant.

[30] Mr Mpofu SC also argued that the prospects of success in the main application were good, and that it would be highly unlikely that in those proceedings, the Court would not uphold any single one of 10 different rights relied upon, some allegedly emanating from the ***Bill of Rights*** contained in the ***Constitution***, others from the common law and yet others from certain contractual provisions between Applicant and SARS. He was nevertheless of the opinion that the balance of convenience favoured the very narrow interests of Applicant. Having regard to the national interest, I can just say

that the mere repetition of this submission is in itself sufficient to destroy its credibility. One can barely contend that it is seriously made in the present context, or at all.

[31] Applicant also sought a special costs order against the President and the Third Respondent. It was said that the President had acted prematurely, unlawfully and irrationally by accepting and implementing the interim report of the Third Respondent. It was submitted that the President's conduct in this context did not merely constitute an error of judgment, but "rather displays a flagrant disregard of Constitution norms and is grossly negligent and demonstrates a reckless misconception of his duties", to quote from Applicant's Counsel's written Heads of Argument. On the present facts, this is an astounding submission. It ignores all the evidence presented to Third Respondent, the failure of Applicant to himself give evidence in those proceedings, and the considerations relating to the efficient functioning of the Revenue Services in the economy. If this is Applicant's attitude it displays an

astounding lack of insight into what is required for any leadership role in SARS. There is no basis at all for a cost order against the First Respondent, let alone on a punitive basis.

[32] As far as the Third Respondent was concerned, it was submitted that a punitive cost order should also be issued against him on a number of grounds. It was allegedly unheard of for a supposedly impartial appointee to even oppose an application such as the present one. It was also contended that the Third Respondent was unnecessarily hostile and combative. Not only that, but Third Respondent was also biased. No cogent reason was tendered why this was so or why that perception could even reasonably exist. I will deal with these allegations in more detail when I deal with the Third Respondent's application to strike out averments made in the Replying Affidavit, which are either irrelevant or scandalous or both. As far as the proposed amendment of the Notice of Motion was concerned, this was nothing but a technicality or clerical amendment to formally bring Bundle B

(the application before the Constitutional Court) to this Court in preparation for Part B of the intended amended Notice of Motion. Not a single word had been altered therein, I was told, and certainly there was no new cause of action introduced by the purported amendment.

[33] **First Respondent's argument**:

Apart from the considerations relating to the balance of convenience which I have partially dealt with above, the application was opposed on the basis of a lack of urgency, the absence of any *prima facie* right, no well-grounded fear of irreparable harm, and the presence of alternative remedies in due course. Particular emphasis was placed on the decision in the Constitutional Court in ***Masetlha v President of the Republic of South Africa and Others 2008 (1) SA 566 CC***. Mr Trengrove SC on behalf of the Third Respondent also placed heavy emphasis thereon. It is not in issue that the President, in the context of the provisions of s. 91 of the ***SARS Act***, exercises and executive power. It is the power to appoint and remove a Commissioner

Such action is only reviewable on narrow grounds. Procedural fairness is not a requirement in that context, but in any event, it is clear that the Applicant was invited on a number of occasions to partake in the proceedings before Third Respondent, but preferred not to do so on grounds which in my view hold no water whatsoever. With reference to the minority judgment of Ngcobo J in ***Masethla supra*** at par. [180], and the later judgment in ***Albutt v Centre for the Study of Violence and Reconciliation 2013 (3) SA 293 (CC)***, Mr Mpofu SC had argued that the President's executive power to dismiss Applicant was, apart from considerations of rationality, also constrained by the requirement of procedural fairness. The latter case concerned the President's powers to grant pardon under s. 84 (2) (j) of the ***Constitution***. The question was whether victims of human rights violations were entitled to make representations as part of the reconciliation process which had begun with the Truth and Reconciliation Commission. On that basis, and in accordance with the principles and criteria that inspired the TRC process, it was held (in par. [69]) that the exclusion of victims from participating in the

special dispensation process was irrational. The decision clearly does not apply to other categories of pardon. (Par. [75]). It is certainly not authority for the proposition that the ***Masethla*** decision (at par. 78) has been expanded upon so as to require procedural fairness in all instances of the exercise of the executive or statutory power irrespective of the facts. As for the power to appoint and dismiss a Commissioner as per the provisions of s. 6 (1) of the ***SARS Act*** is concerned, procedural fairness is not a requirement. It is in my opinion clear that the executive functions of the President can only be constrained through the principle of legality and rationality. There is no doubt that executive decisions must be rationally related to the purpose for which the power was given, and this scarcely needs repetition. Any reliance by Applicant on contractual principles is also particularly misplaced in the present proceedings. It is also clear, having regard to the decision in ***Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC) at par. [89]***, that not only was the President entitled to have regard to the report of the Third

Respondent, but that he was indeed obliged to do so, because of its very nature. He was certainly not obliged to take any other steps to ascertain whether the findings and recommendations by Third Respondent were factually correct, but was in my view only obliged and entitled to apply the "red wine test", i.e. to consider it quietly and conscientiously and thereafter to take the necessary remedial steps. It is clear that the President did, and there is no reason for any other finding. There is no doubt that this report contained "brightly flashing red lights warning of impending danger", by way of comparison to the Gingwala Commission Report, which was the subject matter in the so-called ***Simelane*** judgment. Indeed, the President would have been acting irrationally if he had not acted upon the interim report of Third Respondent. I also agree with Ms Pillay's contention that apart from any other considerations, which I have dealt with or will deal with, the matter is not inherently urgent from the Applicant's point of view. He merely relies on personal financial interests and conflates those with the national interests. I agree that the rehabilitation of SARS must commence without delay, and

that the President has a duty to do so in the national interest. The prospects of Applicant showing otherwise are poor, if they at all exist. In my view they do not exist at all. It is so that Applicant listed a number of rights allegedly emanating from the Constitution, but then fails to set out how these rights and interests have been violated. This is indeed so. The mere allegation that constitutional rights are infringed does not render the matter urgent. See: ***Hotz and Others v University of Cape Town 2018 (1) SA 369 (CC) at par. 15.*** In any event, Applicant has not set forth at all, or explicitly, why he claims he cannot be afforded substantial redress at a hearing in due course. This is an absolute requirement in urgent applications.

See: ***Luna Meubels Vervaardigers (Edms) Bpk v Makin 1977 (4) SA 135 (W) at 137F - H.*** It is normally a factor which would justify the striking off the Roll of the whole application. It is clear that from early September 2018, Applicant was invited to make representations which he declined, and on 12 October 2018, the interim report was handed to him. On 1 November he was

advised that he would be removed as SARS Commissioner. Despite that, no urgent interim relief was sought. No explanation was tendered for that delay.

[34] Added to the above, is the failure by Applicant to adduce any facts which would demonstrate *prima facie* right to an order reinstating him in the position as Commissioner of SARS, preventing the President from appointing a new Commissioner and preventing the Commission from handing down its final report. Instead, bland and vague reliance was made on un-established constitutional rights without any indication of how all of those rights would apply in the present matter.

[35] No Court challenge was ever made to challenge the establishment of the Commission, to challenge its terms of reference, or to challenge its recommendations. In the absence of any order setting aside such, the recommendations remain valid and there is certainly no legal impediment to the President acting on them. It is clear that a decision, be it administrative

or executive in nature, continues to have legal effect until it has been reviewed and set aside by a Court in proceedings for judicial review.

See: ***Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)***, and ***MEC for Health Eastern Cape v Kirland Investment (Pty) Ltd 2014 (3) SA 481 (CC)***.

It is clear from these decisions that no decision grounded in the ***Constitution*** or law may be disregarded without recourse to a Court of law.

[36] The primary relief that Applicant seeks is reinstatement. He has not demonstrated and cannot demonstrate such a right. It is a discretionary remedy even in Employment Law, which does not even apply on the present facts. However, even if Applicant was able to demonstrate that his contract of employment was terminated unlawfully, an order for reinstatement would not automatically follow in instances where it is firstly discretionary, and secondly, where a special relationship of trust exists between the employer and employee. In the present matter a special relationship of trust must exist

between the President and the Commissioner of SARS. The President must implicitly trust the particular Commissioner that he will properly, conscientiously and lawfully carry out the functions assigned to him under the provisions of s. 9 of the ***SARS Act***. It is clear in the present instance, that this relationship has broken down irretrievably. The President has lost all confidence in the Applicant and justifiably so. The reasons emanate clearly from the Third Respondent's interim report. There is however another important reason: Applicant has attacked the integrity and dignity of the President on a number of occasions, and such attacks, given the present context, and the President's actions, are particularly reprehensible. It is clear that the Applicant has no respect for neither the institution of the Office of the President, nor the First Respondent personally. He has accused the President of abdicating his powers to administer. He alleged that the President violated his oath of Office. He avers that the President has waged a co-ordinated assault on his constitutional right. He submits that all the President's actions were part of a "pre-rehearsed script". He says that the

President was motivated by ulterior and improper motives. At the same time however, as I have said, he has ignored the quagmire that SARS had sunken into under his leadership. He offers no explanation, gives no evidence, refuses to co-operate in any respectable and meaningful way, and seeks to undermine and defame at every possible opportunity. I will refer to this topic again when I deal with the question of an appropriate cost order.

[37] Quite apart from all of the abovementioned considerations, it is abundantly clear that Applicant indeed has ample alternative remedies, and I would suggest the most obvious one would be to institute a trial action where he himself could give the appropriate evidence and be subject to cross-examination.

[38] I have already dealt with most of the considerations in the context of the weighing up of the balance of convenience. Selfish personal interest cannot be weighed up against the national interests, and the stability of the Revenue

Services in the context of the South African economy as a whole. In my opinion the President has acted rationally, lawfully and fairly. There are no facts to show otherwise. I need scarcely say that this is certainly not a case where I should grant any relief at all, be it on an interim basis or otherwise. The common cause facts certainly establish no basis for any relief at all, and the repetition of gratuitous insults hurled against the President and the Third Respondent, do not establish any cause of action worthwhile of attention. I therefore agree with Ms Pillay SC's conclusion that the case made out by Applicant is deeply flawed. It is not a proper case, nor a strong one, let alone the "clearest of cases".

[39] **Third Respondent's argument**:

Apart from the objections to the Amended Notice of Motion application, the Third Respondent also heavily relies on the relevant *dicta* in the ***Masetlha*** case that I have already referred to. The Applicant seeks only very limited relief against the Third Respondent, namely an order interdicting him and his

assistants to the SARS Commission from issuing any further reports or recommendations pending the outcome of the Constitutional Court application. That, as we know, has already been refused. The Commission's terms of reference require it to issue a final report by 30 November, which date has been extended to mid-December 2018. The application papers do not disclose any basis for precluding the Commission from doing so, nor is any reason readily apparent since the report and recommendations have no legal effect. They merely provide information and advice to the President, who then decides whether to act upon them after a proper consideration thereof. Applicant has certainly not alleged any *prima facie* right that requires the final report to be withheld, and no irreparable harm to him would in any event ensue if it is not. Without a cause of action therefore, the interim relief sought against the Commission cannot be competently granted. I agree with that submission. It is also correct that Applicant seeks to interdict the delivery of the Commission's final report in order to safeguard his position as Commissioner. The Commission has however already found him to be totally

unsuitable for that role, and he has been removed by the President. He has therefore no legal interest at all in whatever other findings or recommendations the SARS Commission may make in its final report. The interim relief sought against the Commission is pursued pending the outcome of the Constitutional Court application. This has been dismissed. The basis for interim relief thus fell away in any event. Furthermore, Applicant has attempted to cure this defect by filing a proposed Amended Notice of Motion together with his Replying Affidavit. Part A of the Notice of Motion continues to seek the interim relief applied for in these proceedings. Part B however, seeks to amend and revive the relief previously sought in the Constitutional Court application. The proposed amendment should not be allowed according to Mr Trengrove SC on the grounds stated in the Notice of Objection. Of importance is that the Amended Notice of Motion does not afford the Respondent an opportunity to answer the allegations in Part B of the intended amendment. It would therefore be highly prejudicial to permit the amendment and to allow Part B to proceed in those circumstances. The

result is that as there is no proper pending application for final relief before any Court, no interim order can competently be made. Furthermore, the interim order sought against the SARS Commission is in any event wholly unrelated to the relief pursuant against it in the Constitutional Court application and Part B of the proposed Amended Notice of Motion. Applicant has not applied to set aside the establishment of the Commission auditing interdicted from performing its functions. It remains entitled and obliged to complete its investigation to render its report. The interim relief is unrelated to the final order, and is unnecessary to secure Applicant's rights. It is thus clear that Applicant has not made out any case for interim relief against the Third Respondent or the SARS Commission.

[40] Mr Trengrove also aligned himself with the considerations as to the lack of urgency that I have already referred to to a large extent. It scarcely bears repeating that it cannot be in the public interest or the national interest for SARS to be burdened by the return of Office of a Commissioner who is on

suspension, who has only a limited term of Office remaining and in whom the President has lost all confidence. It is telling that Applicant himself, has at no stage claimed that such an order would serve the interests of SARS or the public.

[41] I have read the interim report of the Commission and insofar as it is necessary, I must say that I agree with its conclusions that led the President to ultimately dismiss the Applicant. In particularly I agree with its summary and I agree with the absolute need to remedy this disaster on an urgent basis. I agree with Mr Trengrove's submission that at the end of the day, and quite apart from all of the abovementioned considerations, there is absolutely no realistic prospect that the Applicant will obtain any relief in the so-called main proceedings. The total lack of prospects of success is of course another consideration when the balance of convenience is considered.

[42] It is not necessary to deal with any other submissions made by Counsel on behalf of the First and Third Respondents, although I have carefully considered them all. It is my view that the application for interim relief, such as it is, must be dismissed, and is dismissed, for all of the following reasons:

1. The application is not urgent inasmuch as Applicant has failed to show that the *prima facie* rights that he relies upon are of such a nature that, if not protected by an interim order now, irreparable harm would result to them, which harm cannot be reasonably addressed in the future;

2. There is no cause of action pleaded that could sustain the grant of interdictory relief against the release of the final report of the Third Respondent;

3. Applicant has no legal interest in the content of the final report;

4. Interim relief was sought pending the determination of the Constitutional Court application which has now been dismissed. In the absence of a proper pending application for final relief, interim relief cannot be granted. The "Conversion" application prejudices the mentioned Respondents. In

appropriate cases this Court would however have the power to condone strict compliance with any particular Rule. The decision of ***Eke*** *supra*, makes this clear.

5. The interim relief sought against the Third Respondent is unrelated to any of the final relief sought in the Constitutional Court application. It is unnecessary to preserve Applicant's rights in the Constitutional Court application;

6. There is no affidavit by the Second Respondent before me;

7. Applicant has failed to establish a prima facie right to set aside Third Respondent's ruling of 2 July 2018, or the President's acceptance of the SARS Commission's recommendation since:

    a. The Commission was lawfully established and acted within its terms of reference;

    b. The interim report was lawfully issued;

    c. The President was empowered to remove Applicant in terms of s. 6 of the ***SARS Act*** and did so lawfully and rationally;

d. Applicant's employment contract with SARS provided no impediment to the President's removal of him from Office; and

e. Applicant was afforded an opportunity to be heard by both the Commission and the President, which he spurned with disdain;

8. Applicant has alternative remedies available to safeguard his rights such as they are and does not require interim relief.

9. To do so Applicant will not suffer any irreparable harm if any interim relief is refused; and

10. The balance of convenience overwhelmingly favours the refusal of interim relief in order that the Commission complete its investigations and report its findings to the President, and that the President can proceed to appoint a new Commissioner to SARS.

11. The national interest far outweighs the narrow financial interests of Applicant.

[43] **The Striking-out application on behalf of Third Respondent**:

An application was brought to strike out certain of the allegations made by Applicant against the Third Respondent on the basis that they were either scandalous and irrelevant, or on the basis that they impermissibly raise a cause of action in the Replying Affidavit. The following paragraphs were sought to be struck out: paragraphs 29.4, 49 and 50, 55 to 61, 64 to 65 and 179.1, as well as the words relating to alleged bias contained in par. 198. In my view the objections are well-founded and the application to strike out these paragraphs succeeds with costs.

[44] **Costs of the application**:

I have already mentioned that the Applicant seeks punitive costs orders against the First and Third Respondents, and also in their personal capacity. First and Third Respondents seek an order that I dismiss the application with costs on an Attorney and client scale. The accepted principle is that a Court, in constitutional litigation, should not make an order against an applicant who acts *bona fide* to preserve his constitutional rights, or to uphold the Rule of

law in any given context. That is the so-called "Bio Watch principle" which emanates from ***Bio Watch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC) at paras. [58] and [59].***

In ***Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)***, the following was said in the present context at par. [138], when an award of costs is considered, which is within the discretion of the Court: "It is a discretion that must be exercised judicially having regard to all relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolent or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts

and circumstances of the case". This principle has been applied throughout constitutional litigation and I will apply it in these proceedings. It is clear from my judgment that the conduct of the Applicant in these proceedings is particularly reprehensible. It is vexatious and abusive. Both the Office of the President and the Third Respondent have been attacked, insulted and defamed without any reasonable cause. Allegations impugning their integrity and character have been made regardless of the objective facts. Insults have been hurled at every conceivable opportunity. No reasonable or lawful grounds exist for such unwarranted attacks on the integrity of the First and Third Respondents. No cause of action has been made out for interim relief and the whole of the application is an abuse of the process of this Court. I cannot think of a single reason of why this application should be classified as a *bona fide* attempt to secure or safeguard the Applicant's constitutional, common law or contractual rights. I have set out the relevant considerations in my judgment and on the facts of the matter before me, there is in my view no reason whatsoever why I should not make a cost order against the

Applicant. Not only is a cost order appropriate in this instance, but on the punitive scale of Attorney and client for the reasons that I have already mentioned. It is time that litigants realize that they cannot lightly make abusive allegations in Court affidavits under the mantle of safeguarding their constitutional rights, on the assumption that Court cost orders would not be granted against them. In my opinion, the facts of the matter before me clearly show that a punitive cost order against the Applicant is justified. His behaviour throughout these proceedings is abominable.

[45] Under all of the abovementioned circumstances, the following order is made, having cumulatively considered all defects in the Applicant's application, and all of the considerations relating to urgency and the lack of substantiation of the requirements for urgent interim relief:

**The application is dismissed with costs including the costs of two Counsel, and on the Attorney and client scale.**

**JUDGE H.J FABRICIUS**

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 82287/2018

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Instructed by: Mkhabela Huntley Attorneys Inc

Date of Hearing: 4 December 2018

Date of Judgment: 11 December 2018 at 10:00