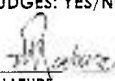




IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
2011-05-03	
DATE	SIGNATURE

03/05/2011
CASE NUMBER: 74629/10

TEBOGO EUGENIA MAFaFO	APPLICANT
VS	
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First RESPONDENT
MAGISTRATE COMMISSION	Second RESPONDENT

JUDGMENT

MABUSE J:

- 1 On 17 December 2010 I dismissed, with costs, the applicant's application and undertook to furnish reasons for the said order on request. On 22 March 2011, the Applicant made a written request for such reasons. These are therefore the reasons for the order that I so made on the aforementioned date.
- 2 The Applicant is a female person who resides at 64 Newark street, Highveld, Centurion. The First Respondent is the Minister of Justice and Constitutional Development. The second respondent is the Magistrate Commission. The applicant has not furnished the further details of the respondents.

3. The applicant brought this application personally and in her own name on an urgent basis. She sought the following order:

1. *"That this application is treated as an urgent application and that the abovementioned Honourable Court in accordance with the provisions of Rule 6 (2) dispense with the normal forms and service.*
2. *Compelling the First Respondent on recommendations of the Second Respondent to re-instate or compensate Applicant in accordance with the order of this Honourable Court, in the matter number 2644A/10.*
3. *Immediate retrospective payment of salaries due to the Applicant from the resignation date (16.01.2009) to the date of final decision of the First Respondent.*
4. *Interest at 15.5% per annum on arrear salaries due to the Applicant pending the final decision of the First Respondent.*
5. *Cost to be paid by the First and Second respondent, jointly and severally the one paying and the other to be absolved.*
6. *Further/ Alternative relief as the Honourable Court may deem fit"*

- [4] Attached to the notice of motion was the applicant's founding affidavit which she used in support of this application. In view of the fact that the genesis of applicant's application is the court order under case number 26440A/10, it is only apposite, in my view, that I set out the terms of said order. A copy the said order is annexed to the said application and marked 'A'. The said order which the court granted on 27 October 2010 reads as follows:

- "1. That the proceedings in which the administrative decision by the first respondent to relived the applicant of her duties as a judicial officer be and is hereby reviewed and set aside.*
- 2. That the proceedings before the second respondent dated 04 December 2004 in which it was resolved to charge the applicant with misconduct summarily be and is reviewed and set aside.*
- 3. That the misconduct investigation conducted by the second respondent against the applicant be and is hereby reviewed and set aside.*
- 4. That the costs of occasioned by any opposition to this application for review be and should be paid by the respondent who oppose it".*

5. **BACKGROUND**

In 1997, the applicant was appointed as a Magistrate in terms of the provisions of the Magistrate Court Act No: 32 of 1994. Due to personal reasons, so contends the applicant, the Chief Magistrate took a administration decision to relief her of her duties as a judicial officer without complying with the provisions of the Promotions of the Administrative Justice Act 3 of 2000("PAJA") and, in addition, by acting outside his course and scope of his authority as a Chief Magistrate.

6. The Second Respondent also took an administrative decision to charge her with misconduct summarily based on the allegations of the Chief Magistrate. Furthermore the Second Respondent conducted and misconduct investigation against the applicant which had no findings or recommendations in contravention with the rules of natural justice.
7. Although, as stated above, the said misconduct investigations were conducted against her had no findings, the Applicant contends that the misconduct investigations were set aside by the Court order referred to in paragraph 4 supra.

8. Although the respondents were served with copies of the said Court order on 28 October 2010, they have failed to comply with it within the ten days after it had been granted. It is unclear from the founding affidavit whether the respondents were supposed to comply with the said court order within ten days of its service. According to the applicant the respondents are not willing to comply with said court order.
9. On 4 December 2010 the Applicant went to the office of the Second Respondent's secretary to establish what its response to the said order was. She was told that, in view of the fact that the court did not order her reinstatement into her former position, there was nothing that the Second Respondent could do in the circumstances.
10. The secretary of Second Respondent was taken aback that the Justice Legal Department seemed to have failed, despite the instructions from the Second Respondent, to oppose the application that led to the said Court order.
11. The applicant contends that, on the following reasons, the application was brought on an urgent basis and it merited to be treated accordingly in that manner:
 - (i) she resigned from her employment on 16 January 2009 after the said Chief Magistrate had taken a decision to relieve her of her duties and has, since then not had any source of income. She could not be admitted as an attorney simply because the Law Society of Northern Province opposed her application for admission on the strength of the submissions made by the said Chief Magistrate that she was not a fit and proper person to be admitted as an attorney. Despite opposition from the said Law Society, she was ultimately admitted.
 - (ii) As a parent she has legal obligations to maintain her children.
 - (iii) She has a domestic worker who had to be paid by 20 December 2010 when she was due to go on leave for Christmas holidays.

- (iv) She also had an uncle who was bedridden and who, because his condition, required 24 hours home care by a nurse who had to be paid by 20 December 2010.
- (v) She had arrears to settle immediately on her mortgage bond instalments.
- (vi) She has other contractual liabilities which she could not fulfil in the past 24 months by reason of the fact that she has no source of income.

In a word, those are the factors that the applicant advanced on the basis of which she claimed that her matter was urgent. Having considered the matter and satisfied myself that the matter, though in my view not urgent, I decided to deal with it speedily.

12. The applicant contends furthermore that the aforementioned Court order was valid and that the respondents have taken no steps to have it set aside. She was of the view that if this court granted her the prayers she sought there would be no prejudice suffered by the respondents. The respondents would, in her view, and if her application is granted, be afforded an opportunity to apply their minds and decide whether or not to compensate her for the remainder of the employment contract up to her age of retirement or reinstate her in the position she occupied before the Chief Magistrate took his decision and before she resigned. She believed that for all intents and purposes she was still a magistrate because the decision of the magistrate has been set aside. No Act of Parliament empowers a Chief Magistrate to relieve a magistrate of her duties as a judicial officer.

13. As I indicated earlier that this application is opposed by the respondents. An affidavit by Abel Daniël Schoeman ("Schoeman"), a major male employed by the Department of Justice and Constitutional Development ("the Department"), acting in this matter in his capacity as a secretary of the Second Respondent was used by both respondents to oppose the application. A verifying affidavit by Therese Bezuidenhout ("Bezuidenhout"), who was employed by the

Department as the Director for Directorate; Law Enforcement, was used in to support Schoeman's affidavit.

14. According to the respondents, the applicant was appointed in 1997 as an additional Magistrate who, in that capacity and at the pleasure of the Chief Magistrate of Pretoria (Chief Magistrate), rotated between civil and criminal courts and was sometimes released to act in the regional courts.
15. On 4 December 2008, the Second Respondent received from the Chief Magistrate serious complaints relating to the conduct and insubordination of the Applicant. These complaints included, among others, disregard for authority, deliberate attempts to bring the judiciary into disrepute and failure or refusal of the Applicant to comply with lawful instructions of a senior magistrate. These complaints were lodged in an extensive affidavit consisting of twenty-eight (28) typed pages. A copy of the aforementioned affidavit is part of the opposing papers.
16. The Ethics Committee of the Second Respondent decided, at its meeting on 4 December 2008, to charge the applicant with misconduct. It conveyed its decision to charge the Applicant with misconduct to the said Chief Magistrate in a letter dated 15 December 2008. In the same letter, the Second Respondent indicated to the Chief Magistrate that it would compile a charge sheet and have it served on the Applicant after its approval.
17. Before a charge could even be served on her, on 15 January 2009, the Applicant tendered a written resignation with effective from 16 January 2009. Although this notice of termination of service by the applicant was short notice the Chief Magistrate accepted it notwithstanding. The said letter reads as follows

"The Chief Magistrate

Private Bag X61

PRETORIA

0001

Dear Sir

TERMINATION OF SERVICE

I would like to take this opportunity to congratulate you on your endeavour of making it possible that you make my working condition and my continued stay in this establishment unbearable and intolerable.

I have since made a verbal and written request on 22 December 2008 to be furnished with copies of the affidavit upon which a charge of misconduct against myself has been preferred. To date you have not complied instead you issued an instruction to the acting senior Magistrate that myself and Ms Ndamase should not be placed on the duty list. This simply means you have declared us, redundant and unfit to perform any judicial work. After taking this drastic step you did not deem it necessary to give us reasons why we should not perform any judicial work.

Today on 15 January you gave me a letter in which you requested met to give reasons for refusal to perform judicial work. This is very strange.

Let me remind you of the provisions of section 33 of the Constitution Act 108/1996.

- (1) Everybody has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

My continuous stay in this establishment will result in more violation of my constitutional rights and will have a negative impact on my health in general.

I cannot tolerate this humiliating degrading and stressful working environment any longer therefore, I resign as a Magistrate. I however intend to pursue the affidavits issue. If need be I will institute legal action to compel you to produce them as soon as possible.

My last working day in this establishment is 16 January 2009.

Thank you

T.E. MAFAFO"

18. The applicant in turn also complained to the Second Respondent about the conduct of the same Chief Magistrate. The Second Respondent resolved to pay attention to the complaint lodged by the Applicant after it would have dealt first with the Chief Magistrate's complaint against her.

19. After her resignation as a Magistrate, the Applicant requested a letter of good standing from the Second Respondent in order for her to enable her to apply for her admission as an attorney. The said letter was a requirement of the law under which she applied for her admission. The letter was issued by the Second Respondent on 5 October 2009. When the said letter was issued it contained, among others, a paragraph that the Ethics Committee of the Second Respondent had taken a resolution to charge the Applicant with misconduct and that she resigned from the service of the Department before a charge sheet could be served on her.

20. Although the Law Society of the Northern Province (sic) opposed her application for her admission as an attorney, the Applicant was eventually admitted. She now practises under the name and style of Mafafo Attorneys and (ADR) Practitioners.

21. During May 2010 the applicant brought a review application in this Court under case number 26440/2010 for the following relief:

"(i) That the administrative decision by the second respondent to relieve her of her duties as a judicial officer(sic) be reviewed and set aside.

- (ii) *That the proceedings before the second respondent (Magistrate Commission) dated 4 December 2008 in which it was resolved to charge her with misconduct be reviewed and set aside.*
- (iii) *That the misconduct investigation conducted by the second respondent (Magistrate Commission) against the applicant be reviewed and set aside”.*

22. In her aforementioned review application, the applicant relied, firstly, on the fact that she tendered her resignation as a Magistrate during January 2009 after numerous attempts to resign; secondly, she attempted, without success, to secure employment in the private and public sector as result of the pending misconduct investigations by the Second Respondent and, thirdly, her rights to work, to earn a living, to practise a profession of her choice, dignity, fair labour practice, good name , reputation , integrity, good health, just administrative action and to be heard and are violated as a result of the pending misconduct investigation by Second Respondent.

23. On 27 October 2010, the Applicant obtained an order she had sought in the said review application. The respondents contend that due to a administrative oversight, it never opposed the Applicant's review application and stated furthermore that it was in the process of seeking legal opinion on the rescission of the order so obtained by the Applicant.

24. It is clear that the Applicant seeks to be reinstated into her former position as a Magistrate on the basis of the order she obtained on 27 October 2010. It is as clear as crystal that the Applicant completely misunderstood the terms and effect of the said order.

25. In the first place, on 20 October 2010 the court did not order that she should be reinstated into her former position as a magistrate. This is so because she never sought such an order in the review application under case number 26440/10. Accordingly the court could not grant her an order she never sought and could therefore not order the respondents to reinstate her. Secondly on her own

admission, the Applicant resigned from her employment as a magistrate on 15 December 2009. Whether or not there were good and valid grounds for her to resign is immaterial as far as the current application was concerned. What is of paramount importance is that she resigned from the service of the Department on 15 January 2009 with effect from 16 January 2009. Accordingly she ceased to be in employ of the Department on 16 January 2009. From 16 January 2009 the applicant had never had any office as a magistrate and the Second Respondent stopped having any control over her. Thirdly and lastly her claims to be reinstated into her former position of a magistrate is not supported by the facts she purports to rely on. The relief she claimed in the said review application was only directed at the decision of the respondents to charge her with misconduct.

16. On her own version, it was contended by the respondents, the Applicant was never subjected to any misconduct inquiry and hearing by the Second Respondent simply because she jumped the gun. Secondly she was never suspended from her duties as a magistrate pending the finalization of the investigation of her fitness to hold an office of a magistrate and thirdly and finally the First Respondent never removed her from her office as a magistrate. In my view the applicant had failed to make a proper case for her reinstatement hence the order that I made on the 17 December 2010.

27. It is indeed so, and I agree with counsel for the respondents, that this matter was not urgent. The applicant had failed to make out a good case for urgency. It will be recalled that the matter was heard on a Friday and that it was the only opposed matter on the roll on that particular day. I perused the papers and had made up my mind that I would hear and dispose of the matter notwithstanding the fact that it was not urgent. It did not appear to be a complex matter, in my view. It was a matter that could be easily disposed on the facts.



P.M. MABUSE
JUDGE OF THE HIGH COURT