



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 22223/23

In the matter between:

NYIKO FLOYD SHIVAMBU

Applicant

and

THE CHAIRPERSONS OF THE JOINT COMMITTEE

ON ETHICS AND MEMBERS INTERESTS

First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL

OF PROVINCES

Third Respondent

THE REGISTRAR OF MEMBERS' INTERESTS

Fourth Respondent

Heard: 13 December 2023

Delivered (electronically): 01 February 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an urgent application in which the applicant seeks an interdict against the respondents. The application is divided into two parts, Part A and Part B. In Part A, the applicant seeks an order to the effect that pending the finalisation of Part B of this application, the decision of the Joint Committee on Ethics and Members' Interests ('the Ethics Committee') to accept the fourth respondent's report and recommendations and the decision of the National Assembly to adopt the report of the Ethics Committee on the complaints against the applicant, be suspended pending the hearing of Part B.

[2] In Part B, the applicant seeks an order that the National Assembly's decision to adopt the report of the Ethics Committee on a complaint preferred against the applicant be reviewed and set aside. The applicant also seeks an order in Part B that the report of the Ethics Committee against the applicant be reviewed and set aside and that the second respondent be directed to refer the complaint to the fourth respondent for proper investigation. This court is only enjoined to decide Part A of the applicant's application.

[3] The applicant's application is premised on the fourth respondent's investigation of two complaints levelled against the applicant. Pursuant to that investigation, the fourth respondent submitted her report to the Ethics Committee which, in turn, compiled a report in which it found that the applicant breached the Code of Ethical Conduct and Disclosure of Members' Interests ('the Ethics Code'). The Ethics Committee submitted its report to the National Assembly with a recommendation to

the house to impose a penalty of a reduction of 9 days salary against the applicant. On 28 November 2023, the National Assembly adopted the Ethics Committee's report and subsequently issued a penalty against the applicant in terms of the recommendations of the Ethics Committee. The implementation date of the penalty was scheduled to take effect on 15 December 2023.

[4] The applicant brought this application urgently, contending that the adoption of the fourth respondent's report by the Ethics Committee and the National Assembly has exposed him and the political party that he represents, the EFF, to immediate and detrimental harm, which will not be reversible by a court order at a hearing in due course. As a result, he sought an order in Part A that the decision by the two parliamentary institutions to accept the fourth respondent's report be suspended.

Background Facts

[5] This case involves two complaints lodged against the applicant by two members of Parliament. On 16 October 2018, Ms Karlsen, a member of Parliament, as she then was, lodged a complaint ('the first complaint') against the applicant with the Ethics Committee. In her complaint, she alleged that the applicant breached the Parliamentary Code of Conduct by not declaring specific interests or benefits that the applicant allegedly received from VBS Mutual Bank through his brother's company, Sgameka Projects.

[6] In addition, Ms Karlsen alleged that the applicant breached the Parliamentary Code by not declaring a financial conflict of interest that arose due to the alleged

benefits or interests when the matters concerning VBS Mutual Bank were discussed and decided by Parliament's Standing Committee on Finance. This complaint was premised on a newspaper article in the Daily Maverick of 11 October 2018 in which it was alleged that the EFF and its Deputy President Floyd Shivambu benefited financially from the VBS Mutual Bank scandal. The said article also alleged that the applicant received about R10 million rand through Sgameka Projects owned by his younger brother, Brian Shivambu, and that the EFF allegedly received R1.3 million through VBS Bank. This complaint alleged that the applicant did not declare his financial interest for 2015, 2016, and 2017 and should have recused himself from the Standing Committee on Finance meetings, which considered the matter.

[7] On 17 October 2018, the fourth respondent, the acting Registrar of members' interests, informed the applicant of the said complaint and invited the applicant to provide her with a written response to Ms Karlsen's allegation within seven working days. The fourth respondent also notified the applicant that if he did not provide the requested written response, the Ethics Committee would investigate the complaint against him.

[8] According to the applicant, when he received the fourth respondent's letter, to his knowledge, the report on which Ms Karlsen's complaint was predicated had been taken on judicial review. On 21 November 2018, the applicant responded to the fourth respondent's office and expressed his discomfort in engaging on a report that he believed was the subject of ongoing legal proceedings. Notwithstanding, he explained to the fourth respondent that he had not received any payments from VBS and, thus,

he did not have any conflict of interest relating to VBS Bank, as alleged in Ms Karlsen's complaint.

[9] The applicant further reiterated that he did not receive any money from VBS Bank or have any conflict arising from VBS-related matters. He appealed to the fourth respondent to await the outcome of the judicial review against the report underpinning Ms Karlsen's complaint. The applicant also invited the fourth respondent to commence with their investigation process should any issue remain unresolved by the judicial review application.

[10] Pursuant thereto, and in response to the applicant's assertions, the fourth respondent consulted with the department at the South African Reserve Bank to confirm whether a judicial review had indeed been filed. The fourth respondent was advised that only Mr Msiza had applied to review a select part of the report pertaining to himself. Upon perusal of Mr Msiza's notice of motion, the fourth respondent avers that she noted that it related only to the adverse finding against Mr Msiza. The fourth respondent subsequently informed the Ethics Committee that the matter that formed the focal point of the complaint before it was not sub-judice. In the interim, Parliament was dissolved shortly before the elections in May 2019, and the investigation into this complaint did not proceed.

[11] Meanwhile, on 17 October 2019, Mr John Steenhuisen, a member of Parliament, also complained to the Ethics Committee ('the second complaint'). Mr Steenhuisen alleged that the applicant breached the Parliamentary Code of Conduct. This complaint (the second complaint) was premised on news reports in the Daily

Maverick dated 6 and 12 October 2019, which alleged that the applicant benefited from payments made by Lawrence Mulaudzi into the account of a company called Grant Azania (Pty) Ltd owned by the applicant's brother, Mr Brian Shivambu, which funds were then utilized to pay expenses related to the applicant's wedding.

[12] The report also alleged that the applicant failed to disclose the receipt of money from Sgameka Projects, Brian Shivambu, in his 2017 and 2018 disclosure of member's interests. In addition, the report alleged that the applicant utilised the savings of vulnerable VBS depositors and municipalities funneled through Sgameka Projects to fund his extravagant lifestyle and political aspirations.

[13] Similarly, on 21 October 2019, the fourth respondent provided the applicant with a copy of Mr Steenhuizen's complaint and again afforded him an opportunity to respond to the allegation within seven working days of receiving the letter, failing which the Ethics Committee would investigate the complaint. In the sixth Parliament, the Ethics Committee decided to revive Ms Karlsen's first complaint, which had laid dormant, and to combine both complaints against the applicant. The Ethics Committee accordingly instructed the fourth respondent to investigate the complaint against the applicant.

[14] On 12 July 2021, the fourth respondent recommended to the Ethics Committee that the provisional liquidators of VBS be subpoenaed in terms of section 14(2)(a) read with section 14(2)(b) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, to provide information to the Ethics Committee which related to the applicant. The Ethics Committee agreed, and the provisional

liquidator of VBS, Mr Anooshkumar Rooplal, subsequently provided an affidavit, which included a bank statement revealing payments to the applicant.

[15] The affidavit by the provisional liquidator revealed that the applicant received a total of R180,000 from Sgameka Projects, computed as follows:

18 August 2017 – R100 000

24 August 2017 – R30 000

26 August 2017 – R50 000

[16] As none of the above-mentioned payments were declared in terms of the Ethics Code, on 17 April 2023, the fourth respondent recommended to the Ethics Committee that a finding be made on the available evidence in terms of the Ethics Code that the applicant breached item 10.1.1.1 of the Ethics Code for failing to comply with the requirements of the provisions for disclosing financial interest in respect of the R180 000 that was paid to him in 2017 by Sgameka Projects (Pty) Ltd.

[17] On 17 April 2023, the Ethics Committee deliberated on the matter and found that the applicant breached the Ethics Code in failing to comply with the requirement to disclose his financial interests. On 25 April 2023, the Ethics Committee's decision was communicated to the applicant by email. The applicant was also notified that the committee intended to deal with the issue of the penalty/sanction at its next meeting, and it afforded the applicant an opportunity to present written representations on this issue.

[18] The applicant averred that neither the fourth respondent nor the Ethics Committee invited him or his brother, Brian Shivambo, to tender any explanation for the three payments. Furthermore, the applicant asserted that the fourth respondent and the Ethics Committee never provided him with the documents they sought to rely on in considering the allegations against him to afford him an opportunity to assess, challenge, or respond to them. The applicant asserted that he was denied participation in the investigation, even though it was against him. According to the applicant, this is the fundamental premise of his application.

[19] The applicant further stated that on 14 June 2023, he wrote to the fourth respondent and explained that he did not receive her letter of 25 April 2023. In response, the fourth respondent forwarded him the said correspondence on the same day. Applicant avers that he was “horrified” to receive this correspondence in which the fourth respondent disclosed to him for the very first-time what information she and the Ethics Committee had relied upon in their investigation against him.

[20] According to the applicant, the correspondence of 25 April 2023 was not an opportunity for him to explain the three payments or to argue why he should not be found guilty of breaching the Ethics Code. Instead, the fourth respondent wrote to inform him that the Ethics Committee had only considered that he did not disclose the three payments from Sgameka Projects, and that the committee had already found him guilty of breaching the Ethics code.

[21] On 19 June 2023, the applicant responded to the fourth respondent's letter and explained that the funds (mentioned above) his brother paid into his bank account

were a personal transaction between him and his brother. The applicant further explained that his brother extended a loan to him. In support of this assertion, his brother deposed an affidavit in which he confirmed that the three payments were made pursuant to a loan he made to the applicant. The applicant asserted that he used the funds that his brother loaned him for payments towards his wedding expenses.

[22] In that correspondence, the applicant appealed to the fourth respondent to place his explanation before the Ethics Committee and to request the Ethics Committee to reconsider its decision against him. Notwithstanding, the fourth respondent and the Ethics Committee did not heed the applicant's request. Instead, on 2 October 2023, the fourth respondent wrote to the applicant and informed him that the Ethics Committee had met and decided to recommend to the National Assembly that a penalty of 9 days reduction in the applicant's salary be imposed. The report of the Ethics Committee was subsequently tabled on 2 October 2023 and was adopted by the National Assembly on 28 November 2023. A penalty of 9 days' salary reduction was authorised against the applicant.

[23] According to the applicant, the conduct of the investigation against him was grossly unfair as he was denied the right to know what allegations he was facing prior to the decision of his alleged guilt. More so, even if the fourth respondent and the Ethics committee were under the impression that the payments were a gift of some kind, the applicant asserted that the Ethics Code equally did not require its disclosure in this case, as the payments were from his brother. From the applicant's point of view, item 9.3.6 of the Ethics Code expressly excludes gifts from a family member from the categories of gifts that should be disclosed.

[24] The applicant thus sought an urgent interim order in this court, which suspends the Ethics Committee's decision to accept the fourth respondent's report and the National Assembly's decision to adopt the Ethics Committee's report against him. Pursuant to the grant of that order, the applicant believes that his political party, the EFF, will enjoy a free and fair opportunity to participate in the elections without the burden of a report that is likely to be set aside on review. Meanwhile, the respondents implored the court to strike the matter from the roll as they submitted that this matter is not urgent, and that this application has no merit.

Submissions by the Parties

[25] At the hearing of this matter, Mr Sangoni, the applicant's Counsel, submitted that the decision taken by the Ethics Committee, which the National Assembly adopted, impacts negatively on the applicant and his political party. Mr Sangoni submitted that the conclusion of the Ethics Committee, which the National Assembly adopted, has a broader impact as it carries a stigma of corruption. Counsel further submitted that this matter is urgent, and that the applicant's cause of action crystallized on 28 November 2023, when the National Assembly adopted the decision of the Ethics Committee.

[26] Mr Sangoni contended that the Ethics Committee and the National Assembly's decision are causing the entrenchment of a false public narrative that the EFF's deputy president is being penalized for failing to disclose VBS funds to parliament. This narrative, the contention proceeded, will have a detrimental and irreversible impact on the applicant and the EFF. Counsel further submitted that the decision of the Ethics

Committee and the National Assembly is unlawful as it is procedurally and substantively unfair. To this end, Counsel contended that the fourth respondent failed to allow the applicant to respond to the allegation that he was found guilty of. The allegation also does not constitute a breach of the Ethics Code.

[27] If the respondents are permitted to uphold and execute the decisions, despite the pending review application, Counsel argued, the decisions will retain their legitimacy and are reasonably likely to influence voters in the imminent national elections. According to Mr Snagoni, the problem with the decision of these bodies transcends the deduction of the applicant's salary. Counsel implored the court to suspend the decision of Parliament pending the review application in Part B of this application.

[28] Mr Jamie, the respondents' Counsel, submitted that there is no urgency in this matter and that the urgency alleged by the applicant is self-created. Mr Jamie submitted that the relief sought by the applicant in this matter is fundamentally misconceived, and the decision of the two bodies of Parliament cannot be suspended as the events have already occurred. When the applicant launched the proceedings on 6 December 2023, it was already impossible to give effect to the relief sought in Part A.

[29] Expanding further on this argument, Mr Jamie asserted that the Ethics Committee had already taken a decision on 2 October 2023 to recommend to the National Assembly that the applicant's salary be docked by 9 days. This was the end of the process for the Ethics Committee, and at which stage it was rendered functus

officio in respect of the applicant. As such, Counsel contended that this court cannot suspend the decision of the Ethics Committee at this stage.

[30] Supplementing the contention above, Counsel contended that the National Assembly decided to adopt the report and the recommendation of the Ethics Committee to dock the applicants' salary by 9 days, on 28 November 2023. At that point, it became functus officio. Given that the National Assembly has already taken the decision, this court cannot suspend the decision of the National Assembly.

[31] The only matter that could be notionally suspended, Counsel argued, was the implementation of the sanction, namely the docking of the applicant's salary for 9 days. However, this differs from the relief the applicant seeks in his notice of motion. Mr Jamie implored the court to strike the matter off the roll with costs for want of urgency or to dismiss the application with costs, including the costs of two Counsel.

Issues to be decided.

[32] From the above discussion, this court is enjoined to determine whether the applicant was correct in bringing this application on an urgent basis as envisaged in Rule 6(12)(b) of the Rules of Court. If the matter is urgent, whether the applicant has made out a case for granting an interdict against the respondents pending the review application in Part B of this application.

Applicable Legal principles and Discussion

[33] As discussed above, Mr Jamie took issue with the urgency of this application. Counsel argued that this matter is not urgent and must be struck from the roll. It is trite that where an application is brought based on urgency, the rules of court permit a court to dispense with the forms and service usually required and dispose of it as it deems fit. (Rule 6(12)(a)). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). See *Commissioner, South African Revenue Services v Hawker Air Services (Pty) LTD* 2006 (4) SA 292 (SCA) para 9. In other words, where the facts indicate that the urgency is self-created, an applicant will not be entertained, and the application will be struck from the roll. (see *W.M.W v S.W* (26912/17) [2023] ZAGPJHC 710 (15 June 2023)).

[34] In terms of Rule 6(12) of the Uniform Rules of Court, an applicant is, in law, required to set out the circumstances which justify the hearing of an application on an urgent basis and the basis on which it contends that it would not obtain substantial redress at a hearing in due course. Thus, Rule 6(12)(b) requires two things of an applicant in an urgent application: firstly, the applicant must explicitly state the circumstances that he avers render the matter urgent and, secondly, why he claims that he would not be afforded substantial redress at a hearing in due course. (*Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *Karino Homeland Distribution (Pty) Ltd v Commissioner for the South African Revenue Service* (21279/2023) [2023] ZAWCHC 329 (27 December 2023)) at para 16.

[35] The applicant's grounds of urgency in this application are set out in paragraphs 61 to 70 of his founding affidavit. In summary, the applicant avers that the National Assembly's action against the applicant for complaints which arose about five years ago comes at a critical time in the country's political space. The applicant contends that politicians and their political parties are campaigning in preparation for the imminent national elections. Furthermore, the adoption of the report by the National Assembly gave rise to an immediate mainstream media and social media tirade against the applicant and the EFF based on findings that the applicant contravened the Ethics Code requirements to disclose the funds.

[36] The applicant further contends that the decision and the penalty which was imposed against the applicant will affect the public perception of the applicant and the EFF and inevitably influence how some people vote in the elections. If the impugned decisions are suspended, their legitimacy will be maintained, and they will not affect the applicant's good name until this court assesses their lawfulness in Part B. To this end, the applicant implored this court to exercise its discretion to hear this matter urgently and grant the relief sought in the notice of motion.

[37] I have considered the submissions of the parties, and I am of the view that this matter is not urgent. If anything, the urgency that the applicant pleaded was self-created. The following reasons bear out this finding. The fourth respondent notified the applicant on 25 April 2023 of the decision made by the Ethics Committee, which found the applicant guilty of contravening the Ethics Code of Conduct. I am mindful that the applicant contended that he did not receive this correspondence. However, on 19 June 2023, the applicant became aware of the Ethics Committee's decision. The

correspondence of 25 April 2023 was brought to his attention. Despite his knowledge of the Ethics Committee's conclusion, the applicant took no action then to challenge the decision in court notwithstanding his allegation that it impacted his reputation and that of his political organisation.

[38] Notably, on 3 October 2023, the applicant's political party released a media statement advising that the applicant intends to take Parliament to court to overturn the Ethics Committee's "irrational and opportunistic conclusion and sanction". Furthermore, on 05 October 2023, the applicant's legal representative wrote a letter to the fourth respondent in which they apprised the fourth respondent of the alleged irregularities that allegedly underpinned the fourth respondent and the Ethics Committee's investigation. In that correspondence, the applicant's legal representative demanded that the applicant be provided with certain documents by 10 October 2023, failing which the applicant would launch urgent proceedings. The applicant's attorney sought an urgent undertaking from the National Assembly that it would suspend all further processes related to the complaint against the applicant by the close of business on 6 October 2023, failing which he would launch urgent court proceedings.

[39] On 11 October 2023, the fourth respondent provided the applicant with all the documents the applicant requested. The fourth respondent also dismissed the applicant's concerns regarding the unfairness of the investigation. Notwithstanding, the applicant took no action to impugn the decision of the Ethics Committee. Instead, the applicant took two months to bring this application on an urgent basis with truncated timelines and on the same grounds set out in the letter of 05 October 2023.

[40] In my view, if the applicant wanted to bring this application urgently, since the decisions of the two Parliamentary institutions allegedly damaged his reputation, the applicant could have done so immediately upon receipt of the registrar's rejection of his plea on 11 October 2023. The applicant filed his urgent application on 06 December 2023, exactly two months after he threatened to institute an urgent court application. His application was predicated on the same grounds enunciated in his correspondence of 05 October 2023.

[41] Crucially, the applicant approached the court on the same allegations as contained in his attorney's letter dated 05 October 2023. As correctly stated by the respondent's Counsel, the urgency was clearly self-created. The applicant was aware of the finding against him at least since 14 June 2023. The applicant did nothing to challenge the decision in court despite various threats made in correspondences as explained above. The decision to approach this court on an urgent basis, based on the same grounds that were in effect three months prior to the institution of the application, was ill-conceived.

[42] Upon perusal of the applicant's application, the only issue that I thought could support his case for urgency was the imminent implementation of the sanction. However, at the hearing of this application, Mr Sangoni informed the court that this was not the basis of the applicant's application. The court was further informed that the applicant is mainly concerned with the damage to his reputation and that of his political organisation. As a result, the applicant believes that he will not be afforded substantial relief at the hearing in due course as the investigation and findings of the

Ethics Committee are detrimental to him and the EFF and will harm their preparations for the coming elections.

[43] This submission, in my view, lacks validity and is unsustainable. It is important to note that the EFF is not a participant in this case. This court cannot be expected to issue an order in favour of or against an individual or organization that is not cited or involved in these proceedings.

[44] Furthermore, the applicant alleges that the foundational premise of his urgent application is that he was allegedly not afforded an opportunity to tender an explanation in respect of the payments received, that he was not provided with the documents relied on for making the finding, and that he was not afforded an opportunity to challenge or respond to the allegations against him. The respondents, conversely, disputed that the applicant was not afforded an opportunity to respond when the investigation was done. The respondents referred the court to the relevant documents forwarded to the applicant's personal email address relating to the investigation of the matter. In my view, the issue pertaining to the alleged non-compliance with the *audi alteram partem* principle is a matter that will be dealt with in Part B of this application.

[45] I am further of the view that the urgency the applicant pleaded in his application is self-created. The applicant knew of the decision of the Ethics Committee in June 2023 and threatened in October 2023 to bring an urgent application but failed to do so. The applicant could not provide a plausible explanation why the application was

filed in December 2023, six months after receiving the decision of the Ethics Committee and two months after initially planning to file this urgent application.

[46] In my view, the matter was brought on an urgent basis in unwarranted circumstances. More so, I am of the view that the applicant will be afforded substantial redress in due course when Part B of the application is heard.

[47] Given all these considerations, this matter falls to be struck off the roll. Furthermore, nothing was presented to warrant a departure from the norm that costs follow the event.

Order

[48] In the result, the following order is granted:

48.1 The application is struck off the roll and the applicant is ordered to pay the costs of this application, including the costs of two Counsel where so employed.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Mr F Sangoni

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For the Respondents: Mr Jamie SC

Mr M Vassen

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