



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

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
<u>22/03/2023</u>	
DATE	SIGNATURE

CASE NO: 43355/2021

In the matter between:

DR DAVID BOIKHUTSO MOTAU

Applicant

And

THE MINISTER OF HEALTH

First Respondent

**PRESIDENT OF THE HEALTH PROFESSIONS
COUNCIL OF SOUTH AFRICA**

Second Respondent

**HEALTH PROFESSIONS COUNCIL OF SOUTH
AFRICA**

Third Respondent

JUDGMENT

MBONGWE J

INTRODUCTION

- [1] The applicant (Dr Motau) had brought an application for the review and setting aside of the decision of the first respondent (the Minister) to suspend him from his newly assumed position for his failure to disclose crucial information that could, in all likelihood, have negatively influenced the decision to appoint him to the position of Registrar / Chief Executive Officer of the third respondent. The minister had concluded that by his failure, Dr Motau had committed an act of misconduct and took the decision to suspend him with full pay pending a disciplinary hearing. Shortly after his receipt of representations from Dr Motau as to why he was not to be suspended, the minister communicated his implementation of the suspension.
- [2] An initial urgent application by Dr Motau to interdict the minister was dismissed. That paved the way for Dr Motau to bring an application for the review and setting aside of the decision to suspend him. The application was heard and dismissed with costs in a judgment of this court dated 15 March 2022. Dr Motau now seeks leave to appeal against that judgment and orders. The application is opposed by the respondents.

REQUIREMENTS FOR GRANTING LEAVE TO APPEAL

- [3] The criteria for granting leave to appeal are contained in the provisions of sections 17(1) and 16(2)(a)(i) of the Superior Courts Act 10 of 2013, ('the Act'). In terms of section 17(1) the court may only grant leave to appeal where it is convinced that:
- (a) the appeal would have a reasonable prospect of success; or
 - (b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting decision on the matter under consideration; or

- (c) the decision on appeal will still have practical effect (section 16(2)(a)(i), and
- (d) where the decision appealed against does not dispose of all the issues in the case, and the appeal would lead to a just and prompt resolution of all the issues between the parties.

[4] In *Zuma v Democratic Alliance* [2021] ZASCA 39 (13 April 2021) the court held that the success of an application for leave to appeal depends on the prospect of the eventual success of the appeal itself. In *The Mont Chevaux Trust v Tina Goosen and Others* 2014 JDR 2325 LCC the court held that section 17(1)(a)(i) requires that there be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against before leave to appeal is granted.

"An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal." (See: *MEC For Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016).

APPEAL TO THE SUPREME COURT

[5] Leave to appeal is sought herein to the Supreme Court of Appeal or the full bench of this division. Section 17(6)(a) of the Act makes it mandatory for a judge granting leave to appeal to direct that the appeal be heard by the full bench of the particular division the matter was heard in. Leave to appeal to the Supreme Court of Appeal may only be granted if the decision appealed against entails an important question of law or a decision of the Supreme Court of Appeal is necessary to resolve differences or conflicting decisions, or the administration of justice necessitates a decision by the Supreme Court of Appeal. None of these considerations has been shown to exist to justify leave to appeal to the Supreme Court of appeal.

APPLICANT'S GROUNDS OF APPEAL

- [6] Dr Motau has raised three grounds for seeking leave to appeal.

FIRST GROUND

- [7] In his first ground for seeking leave to appeal, Dr Motau correctly states that the minister can only suspend him in terms of the HPCSA internal code of conduct and procedure policy. He contends that the provisions of clause 9.1(c) of the HPCSA internal code of conduct upon which the minister relied for the decision could not have formed the source of the minister's authority as the impugned conduct *in casu* is not included therein. The said clause, as quoted by Dr Motau with his emphasis underlined reads thus:

"In cases where the allegation of misconduct is of such a nature that the continued presence of the employee under investigation within the working environment might jeopardize any investigation into the alleged misconduct or endanger the well-being or safety of any employee or the property of the PCSA, the said employee shall be suspended with full pay pending the outcome of the disciplinary inquiry but will however be required to be contactable within normal working hours."

- [8] Dr Motau essentially contends that a failure to disclose crucial information is not, firstly, stated in clause 9.1(c) and, secondly, there was no evidence before the court of any of the jurisdictional grounds stated in clause 9.1(c) and that this court has, therefore, erred in not finding that his suspension pending investigations was unlawful. This contention indicates a lack of appreciation of the nature of a code of conduct, being that the code serves as a mere guideline providing for the institution of disciplinary action, including a suspension, against an employee for misconduct. As a mere guideline, a code of conduct cannot be expected to state each and every act of misconduct. The wording in the provisions of code of conduct is to be phrased to address the specific act of misconduct in each case. In *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 5 BLLR 431 (LAC) at para [44] the nature of a code of conduct was stated in the following terms:

"[44] The correct approach is that disciplinary codes are guidelines which can be applied in a flexible manner.....It was there stated, correctly, that the purpose of the Labour Relations Act of 1956 was the promotion of good labour relations by way of striking down and remedying unfair labour practices. To that end a strict legalistic approach should yield to an equitable, fair and reasonable exercise of rights; and insistence on uncompromising compliance with a code, to substantial fairness, reasonableness and equity."

This decision of the Labour Appeal Court was endorsed by the Constitutional Court in *Stokwe v The MEC, Department of Education (Eastern Cape) 7 Others* 2019(4) BCLR 506 (CC).

- [9] In his own words, Dr Motau has stated, in para 125 of his founding affidavit that he:

"Fully accepts that any prospective employee has a duty to disclose to his future employer information which may affect the employer's decision to employ him. The failure to disclose such information constitutes an instance of misconduct and may lead to dismissal."

This is a profound concession by Dr Motau particularly on two aspects; he is alive to the fact that a failure to disclose crucial information that one ought to disclose is an act of misconduct and that, that may result in a dismissal, clearly not without a prior disciplinary hearing, which in this matter can be held only in terms of clause 9.1(c) of the HPCSA code of conduct and procedure policy. It is highly improbable that another court would find a different interpretation of Dr Motau's words and, therefore, the finding of this court. The first ground of appeal must, consequently, be dismissed.

THE SECOND AND THIRD GROUNDS

- [10] The second ground of appeal is somehow conflated and therefore calls for an individualised consideration of the poignant facts. The first question is whether there was an obligation on the part of Dr Motau to disclose the investigation by the Hawks of the corrupt activities of his subordinates that persisted for six of the eight years that he was at the helm of the Free State department of health.

He sought to distance himself from the position of accounting officer and named a person from the Provincial Treasury as having been the accounting officer during the period the corrupt activities occurred. What is strange in this regard is that Dr Motau himself, in a purported attempt to exculpate himself, purportedly trivialises the seriousness of him being criminally charged by describing it as an after- thought and goes further to state that the charges were brought against him merely because he was the accounting officer of the department (*own emphasis*).

- [11] It is noted with concern that having made the statement quoted in the para [7], above paragraph, Dr Motau describes the necessity to disclose relevant information pertaining to the corruption that was being investigated in the department he headed as “*an absurdity and irrelevant*” and the disciplinary charge relating thereto as irrational.
- [12] Considering the statement by Dr Motau quoted in para [9], above, it is inconceivable that he would seek in these proceedings that a determination be made regarding his alleged failure to disclose crucial information – a finding that would invariably impact on the reputation of the person against whom it is made. Dr Motau bemoans and seeks to appeal the finding that his failure to disclose was intended and calculated to mislead. To his knowledge his appointment to be the CEO of the third respondent depended on his suitability for the position. His concealment of crucial information misled the respondents into believing that he was the candidate he actually was not.
- [13] What the court was called upon to determine, was whether the minister's decision to suspend Dr Motau was irrational on the facts before it and to set aside the decision if it indeed was. Whether a finding would impact on the reputation of a party was not, as it should not have been a consideration in the determination of the core issue. The issue itself arises from the conduct of Dr Motau which he concedes in his statement referred to earlier that it constitutes misconduct. It is that misconduct which caused his suitability for the position of CEO and integrity to be questioned by the respondents. The relief he seeks is aimed at clearing his name and protecting his reputation. A consideration of and a finding on these aspects was inevitable for the determination of the

rationality or lack thereof in the decision to suspend him and is not on its own appealable. The applicable principle was stated in *ABSA Bank Limited v Mkhize* 2014 (5) SA 16 (SCA) at 37A, in the following words:

"In truth the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by the court. Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355."

- [14] I pause to make the remark that the disclosure was unlikely to adversely affect Dr Motau if he had taken disciplinary action against the implicated officials in his department. Proper and effective action taken would in all likelihood have enhanced the chances of his appointment. As fate would have it, Dr Motau failed to take disciplinary action against the implicated officials due to him having handed over to the police the documents required as evidence in a disciplinary hearing, without making and retaining copies thereof. It has to be borne in mind that the investigations of the corruption in Dr Motau's erstwhile department by the Hawks had not been finalised and were on-going at the time of his interview for the new position. His reply in the questionnaire that there was nothing in his knowledge that could impede his performance of his duties could not be true.
- [15] As fate would have it once again, Dr Motau was summoned and appeared in court two months after his appointment on a string of serious charges for his contravention of several provisions of the Public Finance Management Act during his tenure as the head and accounting officer of the Free State department of health. As earlier stated, his trivialisation of his appearance in court on the charges against him is shocking considering that these provisions are applicable in his new position and at a much expanded national as opposed to provincial level. He would have to oversee the use of public funds at national level. The inevitable conclusion in this regard, informed by the nature of the dispute between the parties and Dr Motau's perceptions on the issues, is that he would never have been found suitable and appointed had he disclosed the

information forming the subject of his suspension. The rationality of his suspension is well grounded in the circumstances.

- [16] The retention of a person in the position of CEO while he is under investigation for serious criminal charges that have a bearing on that position could harm the reputation (property) of the third respondent. The suspension is meant to avert this outcome and could not be more justified and rational.

NEW REASONS FOR SUSPENSION

- [17] Dr Motau alleges that the minister has, subsequent to the letter of intention to suspend him, introduced new reasons *ex post facto* for the suspension. He does not, however, state what the new reasons are. Instead, he seeks to rely on a misreading of exactly what this court found to be "plausible and accords with justice" in paragraph 25 of the main judgment, being the minister's abandonment, allegedly consequent to him accepting advice, of the insistence that Dr Motau had knowledge of the existence of criminal investigations against him at the time of his interview. This court accepted Dr Motau's denial and the evidence supporting it and applauded the minister for his gesture which the court found to accord with justice. The failure to disclose the investigations of corruption in the department he headed has always been and remains core in Dr Motau's suspension. The allegation that *ex post facto* new reasons have emerged for the suspension stand to be dismissed.

CONCLUSION

- [18] The grounds of appeal in this case do not come close to meeting the requirements of the provisions of section 17 of the Act for granting leave to appeal. Section 16(2) precludes this court from granting leave to appeal for the mere argument on the concern of Dr Motau for his reputation. Leave to appeal must, consequently, be refused.

COSTS

- [19] The general principle that costs follow the outcome of the proceedings apply

ORDER

- [20] Resulting from the findings in this judgment, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the costs which shall include the costs consequent upon the employment of two counsel.



MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON
22nd..... MARCH 2023