

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



Case number: 020531/2023

Date of hearing: 7 March 2023

Date delivered: 23 March 2023

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED

23/3/23

DATE

SIGNATURE

In the matter between:

SEMAKALENG DAPHNEY MANAMELA

Applicant

and

**THE NATIONAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICE
THE PREMIER OF THE MPUMALANGA
PROVINCIAL GOVERNMENT
THE MINISTER OF POLICE**

First Respondent

Second Respondent

Third Respondent

JUDGMENT

SWANEPOEL J:

[1] This application came before me on an urgent basis. Applicant seeks an order uplifting her suspension from her post as provincial commissioner of police for Mpumalanga by first respondent on 24 February 2023. Applicant also seeks an order that first respondent be interdicted from taking any steps to establish an enquiry into applicant's fitness for office.

[2] The facts are uncontroversial. Applicant is a lieutenant-general in the South African Police. She is the current provincial commissioner, Mpumalanga, appointed in terms of section 207 (3) of the Constitution. On 2 February 2023 first respondent delivered a notice to applicant (dated 1 February 2023) advising her, firstly, of his intention to establish a Board of Inquiry into allegations of misconduct, and secondly, that he was considering suspending the applicant pending the outcome of the inquiry.

[3] The alleged misconduct concerned allegations that applicant had received gifts at four official police events held in August 2021, September 2021, January 2022 and February 2022 respectively. The notice further said that more particulars of the allegations would be communicated 'through the Board of Inquiry'.

[4] On 6 February 2023 applicant's attorneys responded to the notice. They pointed out that the notice was vague in regard to the misconduct alleged by the first respondent. They also pointed out that it was not sufficient to say that the applicant would be given more information relating to the alleged misconduct through the inquiry. They were of the view that the notice was so vague, and so devoid of particularity regarding alleged transgressions, that applicant could not meaningfully answer to the allegations.

[5] The applicant's attorneys also took issue with the legal basis of the suspension, arguing that the first respondent had not taken the steps required by section 8 (2) of the South African Police Service Act, 1995 ("the SAPS Act"), before initiating the process of suspending applicant and convening an inquiry. Considering the view that I take on the notice given to applicant, I do not believe that it is necessary to deal with this issue.

[6] On 24 February 2023 first respondent wrote to applicant. He said:

"This serves to inform you that you are hereby suspended with immediate effect in accordance with the provisions of section 8 (3) of the South African Police Service Act, 1995, pending the inquiry into your fitness for office or capacity for executing your official duties efficiently as contemplated in section 9 of the South African Police Service Act. 1995.

As previously indicated, the particulars regarding the allegations against you would be provided through the Board of Inquiry."

[7] Respondents say that applicant was the subject of an investigation by a retired police officer, one Thulani Ntobela. That report was leaked to the press, and came to applicant's notice after she read an article in the Mail and Guardian. It documented a number of alleged transgressions. A further report, which has yet to be disclosed, was drafted by a Lt. Gen. Kwena, apparently as a result of the Ntobela report. Kwena handed the applicant a copy of the Ntobela report. A perusal of the Ntobela report shows that the allegations against the applicant are far-ranging, and extend well beyond the receipt of gifts. The allegations include nepotism, abuse of power and maladministration.

[8] There is no dispute on the papers that the decision to suspend the applicant constitutes 'administrative action' for purposes of the Promotion of Administrative Justice Act, 2000 ("PAJA"). Section 3 (1) of PAJA provides that all administrative action that materially and adversely affects the rights of a person must be procedurally fair. It is not denied by the respondents that the applicant's suspension has materially and adversely affected her rights.

[9] Section 3 (2) of PAJA provides that any person referred to in s 3 (1) is entitled to adequate notice of the nature and purpose of the proposed administrative action and that all persons who are subject to administrative action should be given a reasonable opportunity to make representations on the contemplated action, before the decision is taken. First respondent's actions fell short of the statutory requirements for two reasons:

[9.1] First respondent's notice to applicant was so devoid of any detail that it was impossible for applicant to provide any substantive response. I do not say that a notice such as this should display the particularity that one would expect from a charge sheet, for instance, but it is in my view at least required that the person should be advised of the nature of the transgression, the date thereof, if possible, and what law, regulation or employment condition has been transgressed. The notice failed to give any particularity save to state that the applicant has received gifts, and that she will be furnished with more particulars in future.

[9.2] The ultimate decision to suspend the applicant hinged not on the alleged receipt of gifts, but on her alleged unfitness for office. That phrase is as wide as the ocean, and can mean anything. Whereas the receiving of gifts may entail a transgression of Public Service Regulations or official police instructions, such a transgression need not necessarily result in the applicant being unfit to hold office. It is clear that applicant was suspended for reasons other than those (vaguely) referred to in the notice of 1 February 2023.

[10] One further contention by the first respondent requires attention, and that is that once he had received the Kwena report, he lost confidence in applicant. I digress to emphasise again, that applicant has never been provided with the Kwena report. First respondent makes the astonishing submission that once he loses confidence in applicant, for whatever reason, he is entitled to suspend her by virtue of the provisions of s 8 (3) of the SAPS Act. That contention is incorrect for at least two reasons:

Firstly, first respondent's subjective view of applicant's fitness for office is immaterial. His view must be reasonable and objectively tenable. He cannot simply suspend a commissioner because, in his subjective view, the person is unfit for office. Secondly, even if the first applicant holds a view that is objectively and reasonably tenable, then he must still adhere to the requirements of procedural fairness, which includes the applicant's right to be told of the case against her, and the right to make representations before the decision to suspend or not is taken.

[11] I find, therefore, that applicant was not given a proper opportunity, prior to her suspension, to make representations to the first respondent. Her suspension must, consequently, be set aside.

[12] Applicant also sought an order interdicting the first respondent from taking any further steps to establish an enquiry into applicant's fitness to hold office. That I cannot do. I have not been apprised of exactly where the process of establishing a Board of Inquiry stands at present, and whether any steps have in fact been taken to establish a Board of Enquiry. First respondent is entitled, if he acts lawfully and in accordance with the SAPS Act, to establish an inquiry. I am not prepared to give an interdict preventing first respondent permanently from doing what he is entitled to do by virtue of the SAPS Act.

[13] One further aspect requires discussion. Respondents urged me to hold that the application was not urgent. This matter is concerned with the conduct of a public official concerning a person appointed in terms of the

Constitution. The suspension of the applicant has an impact on policing in Mpumalanga, and it has an impact on the public purse, as applicant remains entitled to full employment benefits during her suspension. In this regard I was referred to *Apleni v President of the Republic of South Africa* 2018 1 ALL SA 728 (GP) at para 10 where the following was said:

"Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact the rule of law, and may have a detrimental impact on the public purse, the relevant relief sought ought. Normally be urgently considered."

[14] Furthermore, there is an ongoing violation of applicant's dignity, resulting from her unlawful suspension as provincial commissioner, which should not be allowed to stand.¹

[15] Consequently I make the following order:

[15.1] Applicant's suspension from her duties as provincial commissioner on 24 February 2023 is set aside;

[15.2] Respondents shall pay the costs of the application jointly and severally, the one paying the other to be absolved.

¹ See: *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T)



SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

COUNSEL FOR APPLICANT

Adv. JF Nalane SC
Adv. B Morris

ATTORNEY FOR APPLICANT:

Thapelo Kharametsane
Attorneys

COUNSEL FOR RESPONDENTS:

Adv. JL Khan

ATTORNEY FOR RESPONDENTS:

The State Attorney

DATE HEARD:

7 March 2023

DATE HANDED DOWN:

23 March 2023