

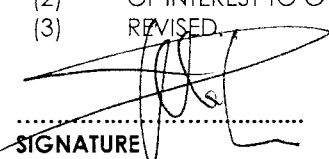
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

20/02/2015

CASE NO: 5203/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	DATE 20/2/15

In the matter between:

MAJOR GENERAL SHADRACK SIBIYA

Applicant

And

MINISTER OF POLICE

1st Respondent

**NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE**

2nd Respondent

**OFFICE OF THE NATIONAL HEAD
DIRECTORATE FOR PRIORITY CRIMES
INVESTIGATIONS: ACTING NATIONALS
HEAD-MAJOR GENERAL
BERNING NTLEMEZA**

3rd Respondent

JUDGMENT

Matojane J

Introduction

[1] This is an urgent application for an order to declare the notice of indefinite suspension served upon applicant on 20 January 2015 and the appointment of Major General Elias Dlamini into the Applicant's position as the acting Provincial Head of the Directorate for Priority Crime Investigation ("the DPCI") unlawful, unconstitutional and invalid.

[2] The Directorate for Priority Crime Investigation has been established as an independent directorate within the South African Police Service in terms of Section 17C of the South African Police Service Act, 1995 as amended by the South African Police Service Amendment Act, 2008¹.

[3] The Directorate for Priority Crime Investigation is now responsible for the combating, investigation and prevention of national priority crimes such as serious organized crime, serious commercial crime and serious corruption in terms of Section 17B and 17D of the South African Police Service Act, 1995 as amended. Sadly the DPCI has been in the news for reasons unrelated to their constitutional mandate.

¹ (Act 57 of 2008).

[4] Third Respondent opposes the application. The First and Second Respondents have indicated that they have no interest in this matter and no relief is sought against them.

The parties

[5] The Applicant is employed in the South African Police Service as a Major General and presently he is the Gauteng Provincial Head of the Directorate of Priority Crimes Investigations ("DPCI").

[6] The Third Respondent is Major General Ntlemeza, the Acting National Head of DPCI who in his capacity as such issued a notice to place Applicant on precautionary suspension forming the subject matter of this application.

[7] The appointment of Third Respondent as Acting National Head of DPCI was recently set aside and declared as unlawful and invalid by this court in the matter of **Helen Suzman Foundation v The Minister of Police and others**². The court made the following order:

- "1. It is declared that the decision of the first respondent (the Minister of Police) of 23 December 2014 to suspend Lieutenant General Anwa Dramat, the National head of the Directorate for Priority Crime Investigation ("the DPCI) is unlawful and invalid and the decision is set aside.
2. It is declared that the decision of the Minister to appoint Major-General Berning Ntlemeza as Acting National Head of the DPCI is unlawful and the decision is set aside."

² Case No 1054/2015 (23 January 2015).

[8] It follows from the above order that Lieutenant General Anwa Dramat is no longer suspended from his position as the National Head of DPCI and the decision of the Third Respondent in his capacity as acting head, to place applicant on precautionary suspension and his decision to appoint Major-General Dlamini should as a consequence equally be unlawful and invalid as he had no legal basis to make such decisions. I shall advert to the consequences of the declaration of invalidity on the decisions taken by Third Respondent during the period he was acting as the national head of the DPCI in due course.

[9] Mr. Mkhari SC for the Third Respondent argued *in limine* that this court does not have jurisdiction to hear this application, as “*the Applicant is not in law entitled to approach this court to declare unlawful, unconstitutional or invalid his suspension from employment*”. He argued that applicant’s suspension is a purely labour law matter that should be dealt with in accordance with the relevant sections of the Labour Relations Act. Counsel referred to the case of **Transnet Ltd and others v Chirwa**³ where the majority of the court upheld the jurisdiction of the Labour Court, and held that the High Court did not have the jurisdiction to hear the matter because the claim was actually based on a breach of the Labour Relations Act.

[10] The majority judgments of Skweyiya J at para [73] and Ngcobo J at para [150] both hold that a remedy under section 33 of the Constitution is not available to public sector employees who complain

³ (2008)29 ILJ 73 (CC)

of unfair conduct by their employers. Skweyiya J writing for the majority explained that where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal ... it is in the first instance through the mechanism established by the Labour Relations Act that the employee should pursue her or his claims.

[11] The Applicant in the present matter, is challenging the legality of the decision by Third Respondent to place him on precautionary suspension, the relief sought is of constitutional nature flowing from the rule of law. Applicant contended that the decision by Third Respondent to suspend him was taken in bad faith and for reasons other than those given. He states that the decision is arbitrary and not rationally connected to the purpose for which it was taken and accordingly it is unlawful as it violates his constitutional right to administrative action that is lawful, reasonable and procedurally fair.

[12] This case it will appear, is not about the fairness or otherwise of Applicant's suspension but implicates the principle of legality and the rule of law. This court has jurisdiction to declare any conduct unlawful and invalid if it violates the principle of legality⁴. It follows, in my view that the point *in limine* falls to be dismissed, as the provisions of the Labour Relations Act do not apply.

⁴ s 172(1)(a) &(b) of the Constitution of South Africa.

Background

[13] On 5 January 2015 Third Respondent served Applicant with a Notice of Intention to place him on precautionary suspension. The notice stated:

"1. It has come to our attention that there are certain allegations of illegal rendition of Zimbabwean nationals related to transactions that implicate you and, other members within the Directorate during period 2010 and 2011."

[14] On 7 January 2015 applicant through his legal representatives requested further particulars from the Third Respondent with regards to his exact role in the alleged transgressions, in particular details about the place and time and against whom it was alleged that he transgressed. Third Respondent was also alerted to the fact that the notice was defective in that it omitted to refer to the empowering provision in terms of which it was issued.

[15] Third Respondent failed to comply with the request. Applicant instituted an urgent Labour Court application to restrain Third Respondent from placing him on precautionary suspension until he is provided with further particulars and the statutory provisions authoring Third Respondent to do so.

[16] On 13 January 2015, the Third Respondent withdrew the notice to suspend the Applicant and on 14 January 2015 Applicant removed his application from the roll and Third Respondent tendered the costs.

[17] During the course of the day on the 14 January 2015, the Third Respondent issued the Applicant with the second notice of intention to place him on precautionary suspension. The Applicant was afforded (5) days to provide reasons why he should not be placed on precautionary suspension. The notice still did not state the relevant statutory provisions upon which Third Respondent purported to act. The notice stated that:

"I intend to place you on precautionary suspension with full pay and benefits as contemplated in the South African Police Service Act 68 of 1995 as amended, read with the Police Discipline Regulations to the extend that same are applicable to you."

[18] Applicant forwarded his representations to the Third Respondent on the 19 January 2015. In his representation, Applicant stated that Third Respondent was conflicted and thus not legally entitled to make any decision relating to his precautionary suspension because:

18.1 On 21 July 2009, Lt General Mdluli, who then held the position of Divisional Commissioner: Crime Intelligence of the South African Police Service had requested Third Respondent, as the Deputy

Provincial Commissioner to investigate irregularities within crime intelligence precipitated by a newspaper article which appeared in The Sowetan newspaper linking Richard Mdluli to the murder of his love rival, Oupa Ramogibe.

- 18.2 On 14 January 2010 Third Respondent compiled a final report concerning the alleged irregularities and exonerated Lt General Mdluli from the murder of Oupa Ramogibe.
- 18.3 Members of Applicant's team investigated the matter, questioned Third Respondent's report with a view to determine whether Third Respondent defeated the ends of justice whilst he covered for Lt General Mdluli in his report.
- 18.4 Applicant stated in his representations that Third Respondent was motivated by a desire to seek revenge against him as he investigated Lt General Mdluli and had him charged for the murder of Ramogibe.

[19] On 20 January 2015 Applicant was issued with a Notice of Precautionary suspension forming the subject matter of this application.

[20] On 21 January 2015 Applicants legal representatives yet again requested Third Respondent to specify the section in the SAPS or a particular regulation supposedly authorising him to issue the notices. Third Respondent failed to respond to the letter.

Issues

[21] The purpose of a precautionary suspension is to allow the employer to investigate allegations against an employee. Suspensions of senior members of the crime-fighting units of the country have negative impact in public confidence and the rule of law and importantly, have the unintended consequence that the employee suffers palpable prejudice to his reputation and advancement. It follows therefore that employees should only be suspended pending a disciplinary hearing only if there are compelling reasons and suspensions should be a last resort. This, it seems is not the case in this matter.

[22] Paragraph 3 of the second notice of intention to place applicant on precautionary suspension states:

“Witness statements in my possession, which cannot be disclosed because the investigation is still continuing, and also to protect their identity, have directly implicated you in the alleged offences, and that upon unlawfully arresting the above mentioned Zimbabwean nationals, under your direction or instruction you caused them to be illegally deported to Zimbabwe to be unlawfully handed over to the Zimbabwean Police, to be unlawfully arrested, assaulted and harassed

by the Zimbabwean Police. It is also alleged that one of the DPCI officers who directly participated in the rendition of these Zimbabweans either with you present, or upon your direction or instruction is Colonel M. L. Maluleke who has since been placed on suspension arising from the same allegations of unlawful rendition of Zimbabwean nationals”.

[23] The Third Respondent is aware that the independent investigation into applicant’s conduct by the Independent Police Investigation Directorate (“IPID”) was conducted in February 2012. The IPID has finalised its investigations and has submitted its report to the National Prosecuting Authority for a decision. The IPID has advised Applicant in writing that it did not recommend that he should be prosecuted or suspended due to lack of evidence implicating him in the commission of the alleged offences.

[24] The office of the National Head through its Integrity Unit has conducted an investigation into the alleged involvement of Applicant in the illegal renditions of the Zimbabweans and has cleared the Applicant. Third Respondent was repeatedly challenged to produce both the IPID and Integrity Unit reports and has refused to take the court and the Applicant into his confidence by making the reports available because they vindicate the Applicant.

[25] Lt Colonel Andre Neethling, a Section Commander for the Organised Crime Tactical Section who assisted in the arrest of the Zimbabweans made a statement in which he explained how they conducted the operation and how he provided escort for the high-risk

suspects to Musina. His statement does not in any way implicate the Applicant

[26] Warrant Officer Makoe is a member of the DPCI Gauteng under the command of the Applicant. He was a group leader of 'A Group' and had 8 policemen under his command. He is a relevant witness to the events surrounding the police operation, the role of the different policemen, who requested the operation and who was present during this operation. He was interviewed by a Mr. IH Cuba of the IPID Limpopo who questioned him about the circumstances around the operation in particular whether Applicant was present during the operation. Warrant Officer Makoe informed Mr Cuba that Applicant was not at the scene and that Colonel Maluleke was in charge of the operation.

[27] At the end of the discussion, Mr Cuba refused to take a statement from Warrant Officer Makoe because the statement '**would be bad for his (Cuba's) case**'. To date no statement has been taken from Warrant Officer Makoe.

[28] The Third Respondent does not explain precisely what Applicant's role was in the transgressions, and how materially different the allegations in the witness statements, allegedly in his possession is from those already investigated. Third Respondent has not attached to his answering affidavit any confirmatory affidavits or documents on which he relies to ground the suspension despite invitation by Applicant to redact the identities of witnesses whose identities he does not want to reveal. Most importantly, Third

Respondent has failed to identify in terms of which particular provision he purports to act.

[29] On Third Respondent's own version the alleged acts of misconduct by Applicant occurred in or about 5th November 2010 and he regards these allegations as very serious given the seniority of the Applicant. There is no suggestion that Applicant hindered or interfered with several investigations that were conducted concerning the same allegations and that there has neither being a report or complaint that Applicant interfered with witnesses since 2010, on the contrary, the undisputable evidence suggests that Applicant was not involved in the illegal rendition of Zimbabwean nationals as alleged or at all. There is therefore no basis for suggesting that Applicant's continued presence in the workplace will be prejudicial to the investigations or intended enquiry.

[30] It is worth mentioning that in paragraph 4 of the said second Notice of Intention to place Applicant on precautionary suspension Third Respondent states that the investigations for purposes of a disciplinary inquiry are completed and the only outstanding investigations relate to the criminal aspect. Paragraph 4 reads:

"The Independent Police Investigation Directorate ("IPID") investigated this allegations against members of the DPCI. IPID has submitted its report to the National Director of Public Prosecution (NDPP) for a decision on the criminal aspect of the matter. The investigation relating to the criminal aspect is still continuing and for that reason IPID had being unable to make the report public again (sic) such report containing the names of the potential witnesses and

the statements made by them, cannot at this stage be disclosed in order to protect the witnesses or the potential witnesses.”

[31] In my view, there exists no basis in law or fact for the Third Respondent to take the drastic measure of placing Applicant on precautionary suspension. I agree with the Applicant that the decision by Third Respondent was taken in bad faith and for reasons other than those given. It is arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it is unlawful as it violates Applicant’s constitutional right to an administrative action that is lawful, reasonable and procedurally fair.

Power to suspend

[32] Having decided that the Third Respondent had no grounds for suspending Applicant, the next question to be decided is whether Third Respondent has the power to suspend Applicant. Third Respondent contends for the first time in his answering affidavit that the Applicant’s suspension is in terms of Regulation 13(4) of the South African Police Service Discipline Regulations, published in Government Gazette No.28985 dated 3 July 2006 Act.

[33] The difficulty with this submission is that when the Regulations were promulgated in 2006, Chapter 6A of the South African Police Service Act had not yet been enacted. Chapter 6A, which establishes

the Directorate for Priority Crime Investigation was inserted into the Act by the South African Police Service Amendment Act, 2008⁵.

[34] Section 17AA of the Act provides that:

"The provisions of Chapter 6A in respect of the mandate of the Directorate apply to the exclusion of any section within this Act".

[35] Section 17G regulates the conditions of service and provides that:

"The remuneration, allowances and other conditions of service of members of the Directorate shall be regulated in terms of section 24".

[36] Section 24 deals with the issue of suspensions it provides:

(1) The Minister may make regulations regarding –

(f) labour relations, including matters regarding suspension, dismissal and grievances;

(g) (i) the institution and conduct of disciplinary proceedings or inquiries; (ii) conduct by members that will constitute misconduct;...

[37] It follows that the Regulations that Third Respondent purports to rely upon cannot govern the suspension of the Applicant. Accordingly, Third Respondent was not empowered to issue the notice

⁵ (Act 57 of 2008).

of suspension. His conduct was accordingly unlawful and invalid and stands to be set aside.

[38] Section 172(1)(a) of the Constitution requires the court to declare the suspension decision unlawful and invalid to the extent of its inconsistency with the Constitution. Mr Mkhari relying on **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others**⁶ argued that the decision of the Third Respondent ought to be regarded as valid until it is declared invalid.

[39] The Constitutional Court in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security**⁷ emphasized that the principle of legality has to be enforced. At paragraph [30] the court said:-

“Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reserved where they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality”.

Conclusion

[40] For the reasons set out above, and because of my finding that Third Respondent had no grounds for suspending Applicant and further that he had no power to suspend Applicant. I am satisfied that Applicant has made out a case for the relief that he seeks.

⁶ 2004 6 SA 222 (SCA).

⁷ 2014(4) SA 179 (CC).

The Order

[41] I make the following order:-

1. It is declared that the Notice of Suspension served on the Applicant on 20 January 2015 is unlawful, unconstitutional and invalid; and
2. It is declared that the appointment of Major-General Elias Dlamini as the acting Provincial Head of DPCI- Gauteng is unlawful, unconstitutional and invalid.
3. The Third Respondent is ordered to pay the costs of the Applicant, which will include the costs of a senior and junior counsel.



MATOJANE KE

JUDGE OF THE HIGH COURT