

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG HIGH COURT, PRETORIA)**

Case Number: 6588/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	<u>NO</u>
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	<u>NO</u>
(3) REVISED. ✓	
18/3/15	
DATE	SIGNATURE

18/3/2015

In the matter between:

**THE INDEPENDENT POLICE
INVESTIGATIVE DIRECTORATE
ROBERT MCBRIDE**

**FIRST APPLICANT
SECOND APPLICANT**

And

**MINISTER OF POLICE
MINISTER FOR PUBLIC SERVICE
AND ADMINISTRATION**

**FIRST RESPONDENT
SECOND RESPONDENT**

JUDGMENT

Fabricius J,

1.

The Applicants herein launched an application in the Urgent Court on 13 March 2015 in which they, as per part A thereof, sought an order which would interdict and restrain First Respondent from suspending the Second Applicant from his position as the Executive Director of the Independent Police Investigative Directorate. Costs of two Counsel were also sought. The Respondents were given one day to file an Answering Affidavit and the First Respondent did indeed so, but without dealing with the merits of the factual allegations made in the Founding Affidavit, together with its annexures, which almost comprise of 400 pages. The interim interdict was sought pending the final determination of part B of the application in which the following relief would be sought:

1. "It is declared that the decision of the First Respondent (The Minister of Police) to initiate a process to suspend the Second Applicant from his position as Executive Director of the First Applicant (The Independent Police Investigative Directorate) is unlawful and invalid and the decision is set aside.

2. It is declared that the following provisions are unconstitutional and unlawful to the extent that they purport to authorize the Minister of Police to suspend or remove from office the Executive Director of the Independent Police Investigative Directorate;

2.1 Section 6(6) of the Independent Police Investigative Directorate Act No 1 of 2011;

2.2 Section 17(1) and section 17(2) of the Public Service Act, 1994; and

2.3 Paragraph 2.7(2) of Chapter 7 and paragraph 18 of Chapter 8 of the Senior Management Service Handbook, 2003.

A cost order was also sought.

Second Applicant alleges that on 11 March 2015 he was given a letter by the First Respondent as a notice to inform him that the Minister intended placing him under precautionary suspension with full pay and benefits for a period not exceeding 60 calendar days. Details of the alleged serious misconduct committed over a course of time were then given, and it was concluded that:

“Because of the seriousness of these allegations, given the most senior position you occupy at IPID, the possible interference with the investigation and the tempering (sic) with evidential material, I intend placing you on precautionary suspension with full pay for a period not exceeding 60 calendar days, pending an investigation into the abovementioned allegations and possible disciplinary enquiry against you.”

Second Applicant was given an opportunity to make representations as to why he should not be suspended and he was given until the close of business on 12 March 2015 to do so.

3.

In the Founding Affidavit Second Applicant said that he appreciated that the Respondents would have very little time to answer this application but, if they required such further time, he would be prepared to accord it on the condition that the Minister would not suspend him pending the outcome of the application under part A.

4.

The Minister had not suspended the Second Applicant at the time the application was heard, but Applicant's Counsel, Mr Budlender, submitted that this was no obstacle to him inasmuch as the application was launched not only to protect the Second Applicant's rights, but also to preserve the independence and effective functioning of IPID, and to prevent further unlawful ministerial interference without delay. It was alleged that IPID was an indispensable, constitutionally required investigative body, which was mandated to investigate police misconduct and offences. Its investigations

extended to the highest offices in South Africa. It therefore had to be given substantial protections to carry out its mandate without political interference.

The Executive Director was at the very heart of IPID's ability to function effectively to fulfil its constitutional mandate, and was critical to ensuring the proper conduct of investigations by IPID. Should a suspension be effected, such an act would have immediate deleterious consequences for the effective functioning of IPID, so it was submitted. This was especially so in the current political climate, and given the extent of ministerial interference in the independent institutions in the criminal justice sector. I am paraphrasing this allegation in the Founding Affidavit, and it is noticeable that no details were given of what was meant by the "current political climate" and what actual facts underlay the submission that the Minister interfered in the independent institutions in the criminal justice sector. The following was then said in the Founding Affidavit: "The suspension of the Executive Director would, in all likelihood, be followed by the Minister's appointment of a new acting Executive Director, who could fundamentally undermine the effective

functioning of the institution and impede high-profile investigations. This is demonstrated by the events that followed the suspension of the Head of the Directorate for Priority Crime Investigation (the DPCI or the Hawks) Lieutenant-General Dramat, and the appointment of Major-General Ntlemeza as an acting National Head of the DPCI. Those events are detailed in the Founding Affidavit filed by the Helen Suzmann Foundation in the Constitutional Court on 25 January 2015.” This was annexed to the Founding Affidavit. Those events are all in the public domain, and have been the subject matter of litigation in this Court. I do not intend dealing with the judgments relevant to those proceedings. They speak for themselves.

5.

In part B of the Founding Affidavit it was alleged that initiation of the process to suspend Second Applicant was unlawful and unconstitutional, on the grounds that the Minister did not have the power to suspend the Executive Director of IPID, as this would contravene the independence of IPID

enshrined under *Section 206 (6) of the Constitution*. Alternatively, even if the Minister had the power to suspend the Executive Director, the Minister had exercised his power unlawfully by creating a reasonable perception that IPID's independence was under threat. It further alleged that the Minister's decision was vitiated by ulterior purpose or improper motive and bad faith. It was also said that his decision was irrational and unreasonable. It was submitted that the review under part B was brought on the basis of the principle of legality and the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*. I must say at this stage that *s. 6 (6) of the IPID Act* gives the Minister the power to remove the Executive Director from office on account of misconduct. Does this mean that he can also suspend him in the interim? His appointment is made by the relevant Parliamentary Committee upon nomination by the Minister. Does this mean that only this Committee can suspend him lawfully? The Act is silent on these topics.

6.

The First Respondent said in his Answering Affidavit that he did not intend dealing with the merits of the application at this stage, but would oppose it on the basis that the Second Applicant had not been suspended and that he had made written representations which he was considering, and that in any event he had not met the requirements of an interim interdict because he had not demonstrated irreparable harm if the relief that he sought was not granted on an urgent basis. The application was therefore premature and ill-conceived. The First Respondent also stated that he was aware of the fact that IPID performs a critical statutory and constitutional function which requires stability in order for it to optimally perform its statutory obligation. It was submitted that Second Applicant would have alternative remedies in due course, and if he were to be suspended it would be with full pay and benefits and only for the limited time of 60 days. It was also open for Applicant to approach the CCMA or the relevant Bargaining Council depending on how he framed his cause of action. He denied that the balance of convenience favoured the Applicant at all, inasmuch as particular sections of the Act that were sought to be attacked had

been in operation for a number of years, and that the Applicant could not say that he wished to remain immune from any steps pertaining to allegations of misconduct against him whilst he intended challenging the constitutionality of legislation which did confer powers of him to play the particular oversight role. What would happen after suspension, if it was decided upon, was currently merely of a speculative nature. As a result, it was submitted that Applicant had not made out a case for the relief sought in part A.

7.

I do not intend dealing with the likelihood or otherwise of the relief sought in part B of this application being granted or not. However, there is merit in the submission that these type of bodies should be independent, but at the same time I am also aware of the fact that independence is one of degree, depending upon the relevant context of the legislation applicable.

See: *Van Rooyen vs The State 2002 (5) SA 246 (CC)*

Also, to prevent abuse of power, which is obviously and sadly part of human nature, someone has to guard the guardian. "Quis custodiet ipsos custodes" the Roman

poet Juvenal asked in one of his Satires. He lived in the first century AD. As opposed to that realistic view (some call it sceptical), Plato (The Republic) was overly optimistic when he opined that it was absurd that city fathers would require oversight. This was his view some 500 years before Juvenal expressed his more practical view. I am merely mentioning this because I do believe that part B is arguable, and it does have reasonable prospects of success. That is in my view one of the requirements in the present context having regard to the test laid down in

Airoad Express (Pty) Ltd vs Chairman Local Road Transportation Board Durban 1986 (2) SA 663 (AD).

8.

I am not convinced that the decision of the First Respondent and the decision whether to suspend Second Applicant or not, is of an administrative law nature.

However, Applicants' Counsel said, while we briefly debated this issue, that the Minister's decision not only affected the Second Applicant, but also the public at large. See in this particular context *Chirwa vs Transnet Ltd and Others 2008 (4)*

SA 367 (CC) and *Provincial Commissioner, Gauteng: SAPS vs Nguni [2013] 2 All*

SA 262 (SCA) at 269 par. 16. I do however not need to decide this debate in the present instance, because it is well established that the lawfulness of public power is subject to scrutiny by the Courts. See: ***National Treasury infra at par. 44***, and ***Pharmaceutical Manufacturers Association of South Africa in re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at par. 17.***

9.

The requirements for an interdict have been set out throughout the decades of our illustrious common-law history. In ***National Treasury and Others vs Opposition to Urban Tolling Alliance 2012 (6) SA 223 CC***, Moseneke DCJ again repeated them, and emphasized that under the test of ***Setlogelo vs Setlogelo 1914 AD 221*** as later refined in ***Webster vs Mitchell 1948 (1) SA 1186 (WLD)***, a particular claimant must establish not merely that he has a right to approach a Court in order to review a decision (administrative decision), but it must be a right to which, if not protected by an interdict, irreparable harm would ensue. Quite apart from the right to review and to set aside impugned decisions, an Applicant would have to demonstrate a *prima*

facie right that is threatened by impending or imminent irreparable harm. A right to review an impugned decision does not require any preservation *pendente lite* because obviously it does exist.

10.

In the context of a Minister exercising powers invested in him by a statute it was said in *Gool vs Minister of Justice and Another 1955 (2) SA 682 CPD* that in the absence of allegations of *mala fides*, a Court would not readily grant such an interdict. A Court would only grant such an interdict in exceptional circumstances and when a strong case has been made out for relief. This is not surprising. Subject to the principle of legality and the separation of powers between the executive, the legislative and the judiciary, a Court must ask itself not whether an interim interdict against an authorized State functionary is competent, but rather whether it is constitutionally appropriate to grant the interdict. See: *National Treasury supra at par. 66*.

In the context of the question of the balance of convenience, Mr Budlender submitted that the stronger the prospects of success were, the less the balance of convenience arose. I accept that, but I must also consider to which extent an order at this stage would disrupt legislative functions authorized by law. It is clear that while a Court has power in this context, it would not readily exercise it except when a proper and strong case has been made out for the relief and then only in the clearest of cases. This was also emphasized in the *National Treasury* decision *supra par. 66*. I may just add that I am also aware that the *National Treasury* case is distinguishable from the present facts as a policy decision of the Government is not attacked, but nevertheless the Court's *dicta* relating to the requirements for urgent interdicts are of general application. What is important in the present instance is that if the order were to be granted now, pending a likely very lengthy process under part B, including proceedings before the Constitutional Court, the Applicant would in reality be immune from disciplinary steps in the interim, no matter what

further serious evidence against him might emerge. I agree with Mr Mokhari SC on behalf of First Respondent that this cannot be in the interests of justice.

12.

I have also had the occasion to write a judgment about the requirements of interim interdicts in *AFRISAKE NPC vs City of Tshwane Metropolitan Municipality and Others* under case number *74192/2013* dated 14 March 2014 (not reported). I also emphasized that the proper question would be whether an Applicant in interdictory proceedings required an order now so as to protect a right which he would otherwise not be able to protect at all. One does not require an interdict *pendente lite* to protect a right which one can in any event protect in future by, amongst others, litigation in due course. It is an absolute minimum requirement that irreparable harm must be shown to exist before the Court can grant such an interdict, and in the present context the constitutional desirability of such an interdict weighs heavily on my mind. A Court is not to disrupt legislative functions where authority is exercised within the bands of legislation and the Constitution. See: *Doctors for Life*

International vs Speaker of National Assembly and Others 2006 (6) SA 416 CC at par. 69.

13.

The Second Applicant has not yet been suspended. He has made representations which the Minister will consider. What the outcome will be, I do not know. an interdict cannot be aimed at the past. Ordinarily that would be the end of the matter, accept insofar as the Second Applicant alleges that the public at large is also affected by the decision because of the important oversight role that the First Applicant plays. What will happen if he is suspended, in the context of his temporary successor, I also would not know and cannot speculate. I cannot simply accept as a given that such person would be open to unlawful manipulation or that the public would perceive this to be so. Fortunately vigorous debates are held in the press about such appointments and the background of such persons. The fact of the matter is of course that the Applicants do have the right to approach the Court for the relief in part B. That right has not been taken away from them and cannot be taken away from them. It also requires no interdict in the interim. I am not satisfied that the

Applicants have shown that they will suffer irreparable harm in the meantime. If actual harm does arise on some or other ground, whilst an application for the main relief is pending, nothing would stop them from approaching Court for appropriate relief.

Mr Budlender has accepted that this is not an ordinary case, and that he would have to show more than a *prima facie* right, and indeed would have to make out a very strong case, on analogy of the *dicta* that I have referred to in the *National Treasury* decision *supra*. In that context he submitted that the whole process was presently unconstitutional and caused harm not only to the Second Applicant but to the general public at large. The Second Applicant was not an ordinary employee, and if the Minister was under the apprehension that he could continue to act without lawful statutory authority, the harm would be on-going. On that basis he was entitled to urgent relief and the Applicants had a right which needed to be protected now. I do not agree for the reasons stated. The Applicants can exercise all the rights that they rely on in the future in due course. They do not require an urgent interdict now to

safeguard such rights. I am aware of the fact that a Court has a power to grant this relief but that is not the issue in my view at all.

See: *President of South Africa and Others vs United Democratic Movement and*

Others 2003 (1) SA 472. It was held therein that the High Court has jurisdiction to

grant interim relief designed to maintain status quo or to prevent violation of a

constitutional right where legislation was alleged to be unconstitutional and

reasonably feared that it might cause irreparable harm of a serious nature. Such

interim relief should be granted only, it was held, where strictly necessary in the

interest of justice. In determining the interest of justice in such a context, the Court

had to balance the interests of persons seeking interim relief against the interest of

others who might be affected by the grant of such relief. Such interim relief should be

strictly tailored to interfere as little as possible with the operation of legislation.

14.

The facts do not support the relief sought, nor do the applicable legal considerations.

The application is not urgent.

It is accordingly struck off the Roll.

15.

In my view the application in due course under part B is not without merit, and it is accordingly not appropriate that I make a cost order against the Applicants.

See: *Biowatch Trust vs Registrar, Genetic Resources 2009 (6) SA 232 CC at par.*

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A handwritten signature in black ink, appearing to read 'H.J. Fabricius', is written above a horizontal line.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

Case no.: 6588/15

Counsel for the Applicants:

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Adv W R Mokhari SC

Instructed by: Hogan Lovells (South Africa)

Heard on: 13/03/2015

Date of Judgment: 18/03/2015 at 10:00