IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: **2752/2024**

In the matter between:

KENNILWORTH ITUMELENG DICHABE Applicant

and

FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY First Respondent

FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY Second Respondent

THE CHAIRPERSON OF FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY Third Respondent

MEC: ECONOMIC AND SMALL BUISNESS DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, FREE STATE PROVINCE Fourth Respondent

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JUDGMENT BY: **I VAN RHYN, J**

HEARD ON: **31 MAY 2024**

DELIVERED ON: **4 JUNE 2024**

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[1] Applicant approached this Court on an urgent basis on Friday, 31 May 2024, for an order in the following terms:

"1. That the applicant's non-compliance with the Rules and directives relating to time periods for filing and service of documents and form be condoned and that this application be enrolled and heard on an urgent application.

2. That the first, Second and Third respondents are interdicted from proceeding with the disciplinary hearing against the applicant, scheduled for 5 June 2024, pending the finalization of the relief sought in Part B hereof.

3 That the relief sought in Part B hereby is postponed *sine die*.

4. That the costs associated with Part A be reserved for determination in Part B."

[2] The applicant is Kennilworth Itumeleng Dichabe, employed as the Chief Executive Officer ("CEO") of the first respondent, the Free State Gambling, Liquor and Tourism Authority (the "Authority"), a juristic person and a public entity in terms of schedule 3C of the Public Finance Management Act[1] ("PFMA"), established in terms of Section 4 of the Free State Gambling and Liquor Act[2] (the "Gambling Act").

[3] The second respondent is the Free State Gambling, Liquor and Tourism Board (the "Board"), a board appointed in terms of section 4(3) of the Gambling Act to manage and control the powers and functions of the Authority. (It appears as if a typographical error occurred in the heading of the papers in that the first and second respondents are cited exactly the same). The third respondent is the chairperson of the Board (the "Chairperson"), cited in his official capacity. No specific relief is sought against the chairperson. The fourth respondent is the Member of the Executive Council for the Department of Economic and Small Business Development, Tourism and Environmental Affairs, Free State Province (the "MEC"). The applicant indicated that the MEC is cited herein as his employer and no specific relief is sought from the MEC (save for costs in the event of opposition of the relief claimed).

[4] The application was issued on 17 May 2024 and served upon the respondents. The Authority, the Chairperson and the Board (referred to collectively as the "Respondents") filed their notice to oppose as well as their answering affidavit on 27 May 2024. The MEC filed a notice to abide by the decision of the court. The

[1] Act 1 of 1999.
[2] Act 6 of 2010.

respondents disputed the urgency of the matter and prayed that the applicant's application be struck from the roll for lack of urgency with an appropriate cost order. The Respondents argued that the urgency in the matter is self- created on the basis that the applicant was placed on precautionary suspension on 17 April 2024 pending the finalization of the investigation into allegations of misconduct against him and any disciplinary process that might be taken against him. The result is that the applicant became aware of the suspension one full month prior to issuing the urgent application.

[5] Mr Mphela, counsel on behalf of the applicant, indicated that it is not the suspension of the applicant per se, more specifically in Part A of this urgent application, that forms the subject of the relief sought by the applicant. It is not in dispute that the applicant was placed on suspension on the 17th of April 2024. The applicant's primary contention in Part B of the application is that the Board's decision to <u>suspend him and subject him to a disciplinary hearing</u> are unlawful because the Board lacks the authority to discipline the CEO, as this power is exclusively vested in the MEC. (*My underling*). In part A, which is the relief sought on an urgent basis, the applicant does not seek any relief in respect of his suspension.

[6] However, the suspension of the applicant was followed by the Board's notice on the 16th of May 2024 to attend a disciplinary hearing on 5 June 2024. On the 17th of May 2024, the following day, the applicant issued the urgent application. Regarding urgency, the applicant seeks an urgent interim interdict, interdicting the Board from proceeding with a disciplinary hearing scheduled to commence on Wednesday, 5 June 2024, pending final determination of the relief sought in Part B. The purpose of the interdict is to protect the applicant from participating and submitting to a process that is argued to be *prima facie* unlawful for want of proper authority. The relief sought in Part B seeks to vindicate a Rule of Law, which the applicant contends, is inherently urgent.[3]

[7] To consider the urgency of this matter, the factual background circumstances pertaining to the date when the application was issued, the letter informing the applicant of the date for the disciplinary hearing and the fact that the application was issued the following day as well as the arguments on behalf of the parties were duly

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[3] Apleni v the President of the Republic of south Africa and Another [2017] ZAGPPHC 656 [2018] 1 All SA 728 (GP) (25 October 2017) at para10.

considered. After hearing argument in respect of urgency during the morning of Friday, 31 May 2024, I gave my ruling that the matter is urgent where after arguments in respect of the merits of the application were heard. This is my judgment on the merits in respect of the relief sought by the applicant in Part A of the application.

[8] On behalf of the applicant it is contended that he has been appointed by the MEC as the CEO of the Authority in terms of section 12(1) of the Gambling Act. The CEO is a member of the Board in terms of section 6 of the Gambling Act. In terms of the provisions of section 10 of the Gambling Act the term of office of a board member may only be terminated by the MEC. Section 10 furthermore provides that the MEC is required to afford a board member an opportunity to state his or her case before a decision to dismiss a board member can be made.

[9] Mr Mphela contends that the Board does not feature anywhere in this process and the section implies that the MEC, and not the board, has the power to discipline not only a board member but also the CEO. The disciplinary process is the first step that may ultimately lead to dismissal. Therefore, so the argument goes, the power to discipline should be exercised by the person who has the power to dismiss.

[10] The respondents argued that the suspension and the subsequent disciplinary proceedings initiated by the Board are lawful on the grounds that the Board is acting within its powers to institute disciplinary proceedings against the applicant in line with the following legislative provisions:

10.1 The provisions of section 51(e) of the PFMA which provides that an accounting authority for a public entity must take effective and approporiate disciplinary steps against any employees of the public entity who-

(i) Contravenes or fails to comply with a provision of the PFMA;

(ii) Commits an act which undermines the financial management and internal control system of the public entity; or

(iii) Makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

10.2 Clause 33.1.3 of the Treasury Regulations 2001 provides that if an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must ensure that appropriate disciplinary proceedings are initiated immediately. The said Treasury Regulations 2001 define "executive authority" as meaning a chairperson of a constitutional institution.

10.3 Section 12(4)(c) of the Gambling Act provides that the responsibility of the CEO include the day to day operations of the Authority, which include reporting on the performance of the Authority, accounting to the board on operational and financial matters and any matter referred to the CEO by the Board.

10.4 On behalf of the respondents it was furthermore argued that the Board held urgent board meetings during January 2024 regarding the reputational damage to the Board as a result of news circulating on social media. A report was compiled which incorporated issues of fraud and corruption. The report then gave rise to certain decisions, the charge sheet against the applicant and notice of the disciplinary hearing to be held on 5 June 2024. According to the respondents the applicant clearly accepted that the Board has a duty of care to exercise and investigate any wrongdoing by any member of the Authority, including himself as the CEO.

[11] For purposes of the interdictory relief in Part A, the applicant is required to establish the following grounds before the court can exercise its discretion in his favour:

11.1 Urgency, which was already found to be in the applicant's favour.

11.2 The prospects of success in Part B; and

11.3 The requirements for an interim interdict.

[12] In **Masetlha v President of the Republic of South Africa and Another**[4] the Constitutional Court held that the power to appoint implies the power to dismiss. The applicant argued that the contention that the Board has the power to discipline the CEO in terms of section 12(4)(c) of the Gambling Act is misplaced. Section 12(4)(c) of the Gambling Act is not an empowering provision. It records the CEO's responsibility to account to the Board. The CEO is a member of the Board. Where a Board member is

[4] 2008(1) SA 566 (CC) at para 68.

alleged to have committed financial misconduct envisaged by the PFMA, section 84 of the PFMA prescribes a legal regime and procedure to be followed in disciplining a board member. The relevant executive authority must initiate an investigation into the charges and if the allegations are confirmed, the appropriate disciplinary proceedings ought to be initiated immediately. However, according to the applicant, the board is not the executive authority of the CEO.

[13] The applicant brought a two-part urgent application. In Part A, the applicant seeks an interim interdict pending the finalization of Part B of the application. Having regard to the arguments raised on behalf of the parties, I am of the view that the applicant has a reasonable prospect of success in Part B of the application.

[14] An interim interdict is a court order preserving or restoring the *status quo* pending the determination of the rights of the parties.[5] The dispute in an application for an interim interdict is not the same as that in the main application, in other words, Part B of the application, to which the interim interdict relates. The requirements for an interim interdict are –

14.1 a *prima facie* right, though open to doubt;

14.2 a reasonable apprehension of imminent harm;

14.3 an absence of of a suitable alternative remedy.[6]

14.4 that the balance of convenience favours the granting of an interim interdict.

[15] There is a dispute about whether the Board or, on the other hand, the MEC has the authority to disicpline the applicant. It therefore cannot be said that the applicant has established a clear right. The approach to be followed in establishing whether an applicant has established the requirements were set out in **Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another**:[7]

> "In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is prima facie established though open to some doubt.

[16] Even though the respondents argued that the HR policy and the applicant's employment contract empowers the Board to discipline the CEO, no specific

[5] National Gambling Board v Premier, Kwa-Zulu Natal and Others 2002 (2) SA 715 (CC).
[6] Setlogelo v Setlogelo 1914 AD 221.
[7] 1996(3) SA 706 (C) at 714E-G

paragraphs and/or clauses were referred to by the respondents. The argument that the Board possess the necessary authority to discipline and eventually, if needs be, dismiss the applicant, does not throw serious doubt upon the case of the applicant. I do not have to decide the rights of the parties at this stage. I leave that for determination in Part B of the application. I am thus satisfied that the balance of convenience favours the granting of the interim interdict.

[17] In respect of the requirement that the applicant had to show that he has no alternative remedy, it should be kept in mind that the alternative remedy should be found to be adequate in the circumstances, should be ordinary and reasonable and should grant similar protection.[8] This requirement should also not be viewed in isolation, but in conjunction with the other requirements when exercising my discretion whether or not to grant the interim interdict. The interim interdict is in my view the most reasonable and effective procedure in the circumstances of this matter. The respondents will not suffer any prejudice in waiting for the outcome of Part B. I am of the view that the applicant will be severely prejudiced if he is forced to undergo a disciplinary hearing and the disciplinary proceedings are later declared to be unlawful.

[18] Having taken into consideration all the evidence placed before me, I am satisfied that the respondents are to be interdicted from proceeding with the disciplinary hearing scheduled to commence on 5 June 2024 against the applicant pending the finalization of the relief sought in Part B.

[19] The applicant moves for an order that Part B of the application be posponed *sine die*. I am not inclined to postpone the matter *sine die*. The application is postponed to the unopposed roll to afford the parties an opportunity to come to an agreement pertaining to the date for the hearing of Part B of the application, on the filling of supplementary affidavits, if any, and heads of arguments by the parties.

[20] In the result the following order is granted:

[8] Chapman's Peak Hotel v O'Hagans [2001] 4 All SA 415 (C) at 420.

1. The First, Second and Third respondents are interdicted from proceeding with the diciplinary hearing against the applicant, scheduled for 5 June 2024, pending the finalization of the relief sought in Part B of this application.

2. Part B of the application is postponed to the unopposed roll of 20 June 2024.

3. The costs associated with Part A are reserved for determination in Part B.

[redacted]

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant: ADV R B MPHELA
Instructed by: RAMPAI ATTORNEYS
BLOEMFONTEIN

On behalf of the First, Second and Third Respondents: ADV K SHOLE
Instructed by: STATE ATTORNEYS
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