



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable Yes/No
Case No: 990/2024

In the matter between:

**HEAD OF DEPARTMENT: FREE STATE PROVINCIAL
TREASURY**

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR FINANCE (MEC): FREE STATE
PROVINCIAL GOVERNMENT**

First Respondent

PUBLIC SERVICE COMMISSION (PSC)

Second Respondent

PREMIER OF THE FREE STATE

Third Respondent

CORAM: Hefer AJ

Heard: 29 August 2024

Delivered: 03 October 2024

Summary:

ORDER

1. The Applicant is granted leave to appeal against the whole of the judgment and order dated **19 March 2024** to the Supreme Court of Appeal.
2. The costs of the application for leave to appeal are costs in the appeal.

JUDGMENT

Hefer AJ

[1] The main grounds relied upon in this application for leave to appeal against an order in terms of which I dismissed an urgent application for an interim interdict, pending a review application which the applicant intends to bring, relates principally to ten aspects of the judgment and order, being:

- (i) the Court's finding that the pending review and the anticipated disciplinary hearing against the applicant constitutes an alternative remedy;
- (ii) the Court's finding by following *Ithala SOC Ltd v South African Reserve Bank Prudential Authority and Others*¹ (*Ithala*), a judgment by a lower court, that the review constitutes a suitable remedy under the circumstances wherein the Constitutional Court on more than one occasion followed a different approach;
- (iii) the Court's failure to take into consideration the second part of the recommendations which related to the first respondent, namely that the post must be re-advertised and filled in accordance with prescribed requirements for filling all vacancies in the public service;
- (iv) the Court's failure to appreciate the applicant's case involved rights guaranteed in the Bill of Rights especially ss 33(1) and 10 of the Constitution;

¹ *Ithala SOC Limited v South African Reserve Bank and Others* [2022] ZAGPPHC 784.

- (v) the Court's failure to consider the applicant's prospect of success of the review;
- (vi) the Court's finding that the first and third respondents are under no obligation to accept any of the recommendations of the second respondent, under the circumstances wherein the evidence before the Court showed that the first and second respondents not only accepted the recommendations of the second respondent, but they are already implementing them;
- (vii) the Court's finding that the applicant has not satisfied the alternative remedy and irreparable harm requisites;
- (viii) the Court's finding that the interim relief sought by the applicant will not have the effect that the applicant is trying to achieve;
- (ix) the Court's finding that the role of the first respondent was only limited to declare the process to fill the post of Director: Fiscal Policy, a flawed process and regard it as null and void; and
- (x) the Court's finding on costs.

The Court's finding that the review and the anticipated disciplinary hearing constitutes alternative remedy and failure to consider prospect of success on review:

[2] Mr Molotsi, appearing for the applicant, referred me, as far as the alternative remedy requisite is concerned, to the matter of *Economic Freedom Fighters v Gordhan and Others: Public Protector and Another v Gordhan and Others*² (*EFF-matter*), where the Constitutional Court had the following to say about an interim interdict:

'Turning to the present matter, it should be borne in mind that both applicants seek urgently to appeal an interim interdict, which is purely interlocutory in nature. An interim interdict is a temporary order that aims to protect the rights of an Applicant, pending the outcome of a main application or action. It attempts to preserve or restore the *status quo* until a final decision relating to the rights of the parties can be made by the review court in the main application.'³

² *Economic Freedom Fighters v Gordhan and Others: Public Protector and Another v Gordhan and Others* 2020 ZACC 10; 2020 (8) BCLR 916 (CC).

³ *Ibid* para 47.

[3] In my judgment I have dealt with the facts pertaining to the *EFF-matter* and indicated to what extent they are distinguishable from the present matter. In particular, unfortunately for the applicant, the declaration by the first respondent to the effect that the process is already held to be flawed, may have already affected the reputation and integrity of the applicant. That is in the past and will continue until the report by the second respondent had been set aside on review. Even if the interim relief was granted, as sought by the applicant, it would not have had the effect which the applicant was trying to achieve and motivated for by the applicant herself. The implementation of the recommendations pertaining to the first respondent will not do away with how the reputation and integrity of the applicant has been affected through the report of the second respondent up to date. As stated, the first respondent has already declared the process to fill the post of Director: Fiscal Policy to be flawed and it has already been declared null and void.

[4] I fail to see how the further implementation by the first respondent regarding the re-advertisement of the post will affect the applicant, as argued by Mr Molotsi.

[5] The further recommendations pertaining to the first respondent, as contained in the report by the second respondent, are to the effect that the first respondent must subject a certain Mr Mabilo to disciplinary action for allowing the Applicant to 'unlawfully interfere with and intercept a recruitment and selection process. . .' Furthermore, the first respondent is to subject a certain Mr Mokotso to disciplinary action for failing to advise the selection committee against accepting and implementing advice which was procedurally flawed and irregularly given by the said Mr Mabilo to the first respondent. In those respects, the further implementation of the recommendations pertaining to the first respondent might however affect the rights of the Applicant.

[6] Mr Molotsi again referred me to the matter of *National Treasury v Opposition to Urban Tolling Alliance*⁴ in which the Constitutional Court held:

‘It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrate’s Courts and High Courts. However, now the test must be applied cognisant of the normative schemes and democratic principles that underpin our Constitution. This means that when a Court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.

Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a Court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.

However, one of the important considerations would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.’⁵

[7] With reference to the fact that the test must be applied cognisant of the normative scheme and democratic principles that underpin the Constitution, Mr Molotsi is correct in his contention that the interim interdict that the applicant sought to attain was aimed at protecting her rights, especially her constitutional rights in respect of ss 33(1) and Section 10. Particularly s 33(1) of the Constitution on account of the fact that the report by the second respondent constitutes an administrative action (exercise of statutory power) in terms of s 196(4) of the Constitution and s 10 of the Public Service Commissions Act 46 of 1997.

[8] Mr Molotsi is also correct in his contention that the applicant was, and remains, entitled to a procedurally fair administrative action in terms of the Constitution. In this regard he is also correct where he submitted that the Court *a quo* was bound to consider the applicant’s prospects of success in the review. Unlike in the *EFF-matter*, however, I was and still am not in a position, ‘to peek into the grounds of

⁴ *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (11) BCLR 1148 (CC).

⁵ *Ibid* para 45-47.

review raised in the main review application and assess their strength.’⁶ For purposes of the present application, I am however, of the view that the applicant should have the benefit of the doubt and it should be accepted, at least *prima facie*, that she has a good prospect of success in the review application she proposes to launch.

[9] Related to the applicant’s constitutional rights referred to, regard is also to be had to the requirement of irreparable harm. As indicated, the remaining recommendations contained in the report by the second respondent, relate to the disciplinary actions to be taken by the first respondent (the only respondent against whom the interim relief is sought), against other persons and not the applicant herself. Such disciplinary actions may however have an impact on the rights of the applicant and she may suffer irreparable harm.

[10] Section 17(1) of the Superior Courts Act 10 of 2013, and the related authorities thereto, provide that leave to appeal may only be given where the judge or judges concerned are of the opinion that:

- (i) the appeal would have reasonable prospects of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[11] It is also now trite that the proverbial ‘bar has been raised’ and that ‘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’.⁷

[12] Mr Molotsi argued that the applicant’s case raised important constitutional issues. This relates to ss 33(1), 10, 23 and 22 of the Constitution. As stated in *Pikoli*

⁶ Footnote 2 para 42.

⁷ *MEC Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176, para 17.

v President,⁸ where constitutional rights are violated, the Courts and the public have an interest to vindicate the Constitution.⁹

[13] Mr Molotsi further argued that the Supreme Court of Appeal needs to resolve the uncertainty regarding the fact whether a pending review constitutes an alternative remedy for the purposes of the requisites of an interim interdict. In this regard he referred to the fact that, as far as the alternative remedy requisite is concerned, I relied to a large extent on *Ithala*¹⁰ and to a lesser extent on the judgment of *National Treasury and Another v Kuhakeli*.¹¹

[14] Therefore, both on the grounds of prospect of success in the appeal as well as the compelling reason requisite, I am satisfied that applicant should be granted leave to appeal to the Supreme Court of Appeal. There is no reason why the usual order as to costs is not to be granted.

Order

The following order is granted:

1. The Applicant is granted leave to appeal against the whole of the judgment and order dated **19 March 2024** to the Supreme Court of Appeal.
2. The costs of the application for leave to appeal are costs in the appeal.

J J F HEFER, AJ

⁸ *Pikoli v President and Others* [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP).

⁹ *Ibid*. See also *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) paras 17, 27 and 28.

¹⁰ Footnote 1.

¹¹ *National Treasury and Another v Kuhakeli* [2015] ZASCA 141; 2016 (2) SA 507 (SCA).

Appearances:

On behalf of the Applicant:

Instructed by:

Adv H Molotsi SC
Rampai Attorneys
Bloemfontein

On behalf of the First and Third Respondents:

Assisted by:

Instructed by:

Adv Baloyi-Mere SC
Adv Thembi Ntoane
State Attorney
Bloemfontein

On behalf of the Second Respondent:

Instructed by:

Adv C Snyman
Phatshaone Henney Attorneys
Bloemfontein