IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No:	**7441/06**
	9396/06
Dates heard:	**23/11/2006**
	24/11/2006
Date of judgment:	**19/12/2006**

In the matter between:

BILLY LESEDI MASETLHA Applicant

and

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA First Respondent
M. E. MANZINI Second Respondent

JUDGMENT

DU PLESSIS J:

On 14 December 2004 the President of the Republic of South Africa, who is the first respondent in these proceedings and to whom I shall refer as "the President", appointed the applicant as the Director-General (DG) of the National

Intelligence Agency ("the Agency"). The appointment was for the period 1 January 2005 until 31 December 2007.

In September 2005 a South African businessman complained to the Minister for Intelligence Services ("the Minister") that the Agency had placed him under unlawful surveillance. The Minister asked the applicant, as DG and thus head of the Agency, for a report. The applicant submitted a report to the effect that the surveillance was the result of an error on the part of certain operatives. The report did not satisfy the Minister and he referred the matter to the Inspector General of Intelligence. The Inspector-General is an independent functionary appointed in terms of section 7(1) of the Intelligence Services Oversight Act, 40 of 1994. It is one of his functions to "monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence" (Section 7(7)(a) of the Oversight Act).

The Inspector-General inquired into the surveillance and in the process questioned the applicant. About 17 October 2005 the Inspector-General submitted a written report to the Minister. He found that the surveillance of the businessman was unauthorised and unlawful. He also made certain findings adverse to the applicant and recommended, *inter alia,* that disciplinary steps be taken against the applicant.

Following on the Inspector-General's report, the Minister informed the applicant of the recommendations and told him that he (the Minister) had sent the recommendations to the President. The applicant was then called to a meeting with the President. What the President told the applicant during this meeting does not appear from the papers.

On 20 October 2005 the applicant was again called to a meeting with the President. The Inspector-General and the Minister were present. The President told the applicant that they should listen to the Minister who proceeded to read to the applicant a letter to the effect that he was suspended[1] from his post as DG and head of the Agency.

On 12 November 2005 the applicant launched an urgent application against the Minister and the President seeking relief to the effect that the suspension was unlawful. This application was not proceeded with and is only relevant to the extent that the applicant's founding papers therein were incorporated by reference into the papers now before this court.

[1] The applicant contends that the Minister, and not the President took the decision to suspend him. It is at this stage unnecessary to deal therewith. Suffice to point out that the President and the Minister aver that the former took the decision and that the latter, in accordance with advice received, conveyed it.

By way of a presidential minute dated 15 November 2005, the President purported[2] to record his decision to suspend the applicant with effect from 20 October 2005.

In view of the Inspector-General's first report, the Minister referred to him further matters for investigation. Included in the matters so referred was the question of certain hoax e-mails relevant to actions of the Agency and the applicant. The applicant stated his preparedness to submit to the Inspector General's questioning regarding the further investigation, but he put certain conditions to his submission. As it turned out, the applicant did not actually present himself for questioning.

On 10 March 2006 and under case number 7441/06, the applicant launched an application against the President seeking relief aimed at declaring the purported suspension invalid and unlawful and at setting it aside. I shall refer to this application as "the suspension application". In the founding papers the applicant accuses the President of a falsehood and attacks the President's integrity in other respects too.

2 The applicant denies that the presidential minute actually records a decision of the President.

On 20 March 2006, and before he had filed an answer to the suspension application, the President wrote to the applicant that the "relationship of trust between me, as Head of State and the National Executive and you as head of the National Intelligence Agency, has broken down irreparably". The letter continued: "Accordingly, after consultation with the Ministers for Intelligence Services and for the Public Service and Administration, I have decided to amend your current term of office as head of the said Agency to expire on 22 March 2006".

The President's letter prompted a further application, this time aimed at declaring that the President does not have the power to amend the applicant's term of office and that the President's decision is unlawful and invalid. The applicant also seeks an order reinstating him in his post as DG. This application was launched under case number 9396/06. The President later appointed a new DG for the Agency. The new DG was joined as the second respondent in the application, but he abides the decision of the court and took no part in the proceedings. Further reference to the second respondent is unnecessary.

The applicant applied for the consolidation of the two applications, 7441/06 and 9396/06. In the absence of opposition from the President, an order was issued consolidating the two applications. This judgment deals with the consolidated application.

Without the leave of the court, the applicant filed a supplementary replying affidavit annexing to it a copy of a charge sheet in a criminal case and an extract from Hansard. When the matter was called, I ruled that the supplementary replying affidavit is inadmissible, but that reference may be made to the two public documents annexed thereto.

The two main issues in the consolidated application are, first, the validity and lawfulness of the applicant's suspension from his post and, secondly, the lawfulness and validity of the amendment of his term of office. If the applicant's term of office was lawfully amended so as to expire on 22 March 2006, the suspension application is academic save for the question of costs. Therefore, I propose to deal first with the amendment of the applicant's term of office.

The nature and effect of the President's decision to amend the applicant's term of office.

In terms of the President's letter of 20 March 2006, he notified the applicant that he (the President) had decided to amend the applicant's term of office so as "to expire on 22 March 2006", 21 months before the term was to

expire in terms of the initial appointment. Counsel for both the parties made submissions as to the President's constitutional power to dismiss the applicant. In reply, counsel for the applicant submitted, however, that if regard is had to the relief that the applicant claims, the true issue is whether the President had the right, as a party to the contract, unilaterally to amend the applicant's contract of employment.

In his answering affidavit the President states that he "deemed it in the best interests of the State and the Applicant and his family that his benefits should, as far as is legally permissible, be maintained as if his contract of employment had run its full course". In a supporting affidavit the Minister for the Public Service and Administration explains how her department went about ensuring, to the extent that it is lawful, that the applicant's benefits were calculated in, for him, the most beneficial way and that those benefits were paid into his bank account. In addition the applicant was offered his full remuneration for the whole remaining portion of his initial term of office before its amendment. In summary, the Minister states that the applicant was placed in substantially the same financial position as he would have been in had his contract run its full course. Although the applicant has repaid an amount that has been paid into his bank account, there is no dispute about the financial effect of the offer made to him.

As a matter of private law of contract, one contracting party cannot, as a general rule, unilaterally amend the terms of the contract. As I shall illustrate in due course, the post of the DG for the Agency requires from its incumbent the evaluation, analyses and interpretation of information that is important for the welfare and security of the Republic and its people. The post has constitutional and public law implications. It would be unrealistic to approach the present issues as if they were matters of private law of contract. In fact, to decide the case on such a basis would avoid rather than resolve the true issues. Having regard to the facts, and the manner in which the parties approached the issues in the papers, the case must be decided on the basis that, while taking steps to limit resultant financial loss on the part of the applicant, the President, purporting to act in his capacity as such, dismissed the applicant as DG and head of the Agency.

Dismissing the DG of the Agency: Administrative action or the exercise of executive power?

Counsel for the applicant contended that the appointment and dismissal of the DG of the Agency constitute the implementation of legislation. As such, the argument continued, the President's decision to dismiss the applicant constituted "administrative action" as defined in section 1 of the **Promotion of Administrative Justice Act, 3 of 2000** ("PAJA"). Accordingly, it was submitted,

the decision is subject to judicial review under the provisions of PAJA. For the President it was contended that the decision is not subject to review under PAJA as it constituted the exercise of executive power that is excluded from the definition of administrative action in terms of PAJA.

Chapter 11 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") deals with security services. Section 209 is part of Chapter 11 and it provides as follows:

> "Establishment and control of intelligence services
>
> (1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.
>
> (2) The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility."

The scheme of section 209(2) differs from that of 209(1) in that the former does not provide that the appointment of heads of the intelligence services must

be made in terms of national legislation. The constitutional scheme in this regard therefore is that intelligence services must be established in terms of national legislation, but the President's power to appoint heads (directors-general) of such services is founded in the Constitution itself.

Section 3(1) of the **Intelligence Services Act, 65 of 2002** ("the ISA") provides for the continued existence of the Agency. Section 3(3)(a) of the ISA provides that the President must appoint a director-general for each of the intelligence services, including the Agency. Section 3(3)(b) of the ISA provides that the DG shall bee the head of the relevant intelligence service. In my view section 3(3) of the ISA merely echoes the relevant provision of section 209(2) of the Constitution and makes it clear that the "heads" referred to in section 209(2) are the directors-general. Section 3B(1)(a) of the **Public Service Act, 103 of 1994** ("the PSA"), deals generally with the appointment of heads of national departments, including that of the Agency (See the definition of "head of the department" in section 1 of the PSA, read with Schedule I thereto.). This section, however, is of general application to all heads of public service departments and it does not purport to grant the specific power to appoint the head of the Agency. The original source of the power to appoint heads of intelligence services remains the Constitution itself.

In terms of section 83(a) of the Constitution the President has two distinct capacities, first, as Head of State and, second, as head of the national executive (President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at paragraph 144). Section 85(2) of the Constitution sets out the executive powers of the President. Included therein is the performance of "any other executive function provided for in the Constitution or in national legislation" (Section 85(2)(e)). Section 209(2) of the Constitution that I have quoted earlier is unequivocal in its provision that the President appoints heads of intelligence services in his capacity as head of the national executive. Therefore, there can be no doubt that the President's appointment of the applicant as DG for the Agency constituted the exercise of an executive power under section 85(2)(e) of the Constitution.

The present inquiry concerns the dismissal of the DG for the Agency. The Constitution itself contains no express provision authorising the dismissal of heads of intelligence services. Section 8(1)(b) of the ISA provides that the Minister may "promote, discharge, demote or transfer any member" of the intelligence services. This provision, if regard is had to the proviso to section 8(1)(b), includes deputy directors-general, but not directors-general. The proviso reads: "Provided that such appointment, promotion, discharge, demotion or transfer in respect of a Deputy Director-General or equivalent post may only be effected in consultation with the President." It would be absurd to read section 8(1) as if it permitted the Minister to discharge directors-general, but that he

could only discharge deputy directors-general in consultation with the President. There is no provision in the ISA for the dismissal of heads of intelligence services.

I have pointed out that the appointment of directors-general for intelligence services are dealt with in section 3B of the Public Service Act. Section 12 of the PSA deals with the manner of appointment of heads of departments, including the DG of the Agency. Section 17 of the PSA deals with the discharge of officers in the public service. Members of the Agency are specifically excluded from these provisions (see section 17(2) read with the definition of "Agency" in section 1 of the PSA). The PSA does not make provision for the dismissal of the DG of the Agency.

In terms of section 2(b) thereof, the provisions of the Labour Relations Act, 66 of 1995 do not apply to members of the Agency. Section 3(1)(a) of the Basic Conditions of Employment Act, 75 of 1997, also excludes the members of the Agency from the provisions thereof.

In summary, I was not referred to and I did not find any legislative provision that expressly provides for the dismissal of the DG of the Agency. Where, then, does the power to dismiss the DG of the Agency lie? I have earlier

concluded that section 209(2) of the Constitution confers on the President the power to appoint the head (DG) of the Agency and that such appointment constitutes executive action under section 85(2)(e) of the Constitution. I shall later make fuller reference thereto, but it is self-evident that mutual trust must exist between the President and the heads of intelligence services. The President has to work closely with those officials and he has to rely heavily on them for important decisions affecting the security of the Republic. Therefore, substantial considerations of policy and a high degree of personal preference on the part of the President are inherent in the appointment and continuance in office of heads of intelligence services. Moreover, the power to appoint will, in the absence of any specific provision to the contrary, include the power to dismiss. Therefore, I conclude that the President's power to dismiss the head of the Agency is necessarily implicit in section 209(2) of the Constitution. Just as the power to appoint, the power to dismiss constitutes an executive power as provided for in section 85(2)(e) of the Constitution.

The power to review the President's decision to dismiss the applicant.

Counsel for the applicant contended that the court has the power to review the decision to dismiss the applicant under the provisions of PAJA. In terms of section 33(1) of the Constitution everyone has the right to just administrative

action. PAJA is the national legislation that gave effect to this right in accordance with section 33(3) of the Constitution. PAJA defines administrative action and provides for the courts' power to review such action. Specifically excluded from the definition of administrative action are the "executive powers or functions of the National Executive, including" the powers or functions referred to in section 85(2)(e) of the Constitution. It follows that counsel for the applicant's submission that the decision to dismiss the applicant is subject to review under PAJA, cannot be upheld.

It does not follow, however, that the decision to dismiss the applicant is not subject to review at all. In terms of section 1(c) of the Constitution, the rule of law is a founding principle of the Constitution and it is one of the founding values of the Republic. The Constitutional Court has repeatedly held that it follows from this that the exercise of public power, including executive action, must conform to the principle of legality and that the courts have the power to inquire into the legality of such actions (See for instance Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) at paragraphs 56 to 58; President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at paragraphs 142 to 148; Pharmaceutical Manufacturers Association of SA and Another: In re ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) paragraph 85). The exact ambit of review for want of legality might not

have been finally determined, but for present purposes it suffices to point out that, in order for the exercise of public power[3] to be lawful, it must not be exercised *mala fide* and it must not be exercised arbitrarily or irrationally (See for a summary, De Ville, Judicial Review of Administrative Action in South Africa p. 60).

The President dismissed the applicant because the relationship of trust between them has broken down irreparably. According to the papers filed on behalf of the President, the relationship broke down as a result of the applicant's actions following upon the Inspector-General's report, his investigation and the attacks that the applicant made on the President's integrity. The applicant admits that the relationship of trust has broken down. He contends that it is not irreparable, however. According to the applicant, the relationship has broken down through the fault of the President, and could be restored if the President "makes appropriate amends for the harm he has caused" to the applicant's reputation (by suspending and dismissing him).

The DG of the Agency, subject to the directions of the Minister and the provisions of the ISA, exercises command and control of the Agency (Section 10(1) of the ISA). The functions of the Agency are set out in section 2(1) of the National Strategic Intelligence Act, 39 of 1994. Included therein are the duty

[3] I have already held that the President had the constitutional power to dismiss the applicant.

to "gather, correlate, evaluate and analyse domestic intelligence, in order to ... identify any threat or potential threat to the security of the Republic or its people" and the duty to "fulfil the national counter-intelligence responsibilities and for this purpose to conduct and co-ordinate counter-intelligence and to gather, correlate, evaluate, analyse and interpret information regarding counter-intelligence in order to … identify any threat or potential threat to the security of the Republic or its people.. " and to "inform the President of any such threat". These provisions underline the important role that the DG of the Agency plays in identifying threats to the security of the people of this country and reporting them to the President. It also underlines the fact, referred to by the applicant in his papers, that the evaluation, analyses and interpretation of information constitute a major portion of the work of the Agency and its DG. In order for the President to fulfil his roles as Head of State and head of the national executive, he must be able fully to rely on the ability of the DG to furnish him with full and correctly evaluated, analysed and interpreted information. Put differently, a president must subjectively trust the heads of intelligence services. It is, I have pointed out, common cause that the relationship of trust between the President and the applicant has broken down. The breakdown constitutes a lawful basis for the President to have dismissed the applicant. It is not only in the interest of the President that he must be able to trust the head of the Agency, but also in the interest of the public that both the President and the head of the Agency serve. In view of the importance of their respective functions and the importance of mutual trust, a breakdown of the relationship of trust constitutes a rational basis for dismissing the DG of the

Agency from his post as such. Therefore, it is unnecessary in this context to determine whose "fault" the breakdown was.

I accept, however, that the reason for a breakdown in the relationship of trust between a president and a head of an intelligence service may be relevant to determine the legality of the dismissal of such head of intelligence. For instance, if a president in bad faith caused the breakdown of trust in order to get rid of the head of intelligence, the dismissal may not pass constitutional muster. In this case counsel for the applicant did not contend that the President, acting in bad faith, caused the breakdown of the trust between the applicant and himself. I conclude that the President's dismissal of the applicant constituted lawful executive action.

The suspension of the applicant is therefore academic. The only costs relating thereto are the costs of the applicant's founding affidavit in the suspension application. I find it unnecessary to consider the merits of the suspension application only to determine the limited costs implication thereof. Without expressing any view as to the merit or demerit of that application, I deem it equitable not to make any order in respect of the costs thereof.

The applicant as well as the President was represented by two counsel. Counsel were agreed that the costs of two counsel were warranted.

The following order is made:

The consolidated application is dismissed with costs, including the costs of two counsel, but excluding the costs of the founding papers in case number 7441/06.

B. R. DU PLESSIS

Judge of the High Court

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