

IN THE HIGH COURT OF SOUTH AFRICA
TRANSCAAL PROVINCIAL DIVISION

J'

DATE: 5 SEPTEMBER 2007

CASE NO: 24328/06

NOT REPORTABLE

In the matter between:

M. J. MSIBI

APPLICANT

And

PREMIER: MPUMALANGA

RESPONDENT

JUDGMENT

MOLOPA J

The Applicant launched an application for an order in the following terms:

[1] That the decision of the Respondent dated 6 June 2006 - Annexure "HI (terminating the Applicant's contract of employment) be reviewed and/or set aside.

- [2] That the Applicant be reinstated to his position as a commissioner of the Mpumalanga Youth Commission with retrospective effect from 6 June 2006 until the expiry of his employment contract on 1 June 2008.
- [3] Alternatively to paragraph 2 above, directing the Respondent to pay compensation to the Applicant equal to his full salary and benefits for the period 6 June 2006 to 16 June 2008.
- [4] That the Respondent be ordered to pay costs of this application on an attorney and own client scale.
- [5] That the Applicant be granted such further and/or alternative relief as the court seems meet.

The Applicant was apparently appointed on 17 June 2003 as a Youth Commissioner for the Mpumalanga Youth Commission in terms of the Mpumalanga Youth Commission Act No.5 of 1996 ("The Act").

The Applicant subsequently entered into an employment agreement on 20 October 2003, with the Mpumalanga Provincial Government, duly represented by the Premier of the Mpumalanga Province under whose

jurisdiction the Youth affairs fall-under.

The employment agreement aforesaid sets out the terms and conditions of the Applicant's appointment as a member (commissioner) of the Youth

Commission.

In terms of Clause 3.2. of the agreement:

"3.2. The Commissioner, in terms of the Agreement, is not an agent of the State and cannot bind the State in any agreement unless he is specifically authorised thereto in writing and he hereby indemnifies the State against any claims, actions or proceedings (and legal costs) that may be instituted against state pertaining to agreements entered into by the Commissioner purporting to bind the State:"

On 28 February 2005 the Applicant was charged with three (3) counts of misconduct in contravention of Clause 3.2. hereabove, it being alleged as set out in Annexure 'H3' to the founding Affidavit that:

(1) On or about February 2004 the Applicant wrongfully misrepresented to the educational institutions that he has authority to financially bind the Mpumalanga Provincial

Government (The state) in student fees knowing that he did not have authority to do so

(2) On or about February 2004 the Applicant wrongfully and unlawfully exposed the State to legal suite from educational institutions in the amount of R1 282 645.80 in tertiary education fees unlawfully and wrongfully pledged in the name of the Commission knowing that he had no authority to do so

(3) On or about February 2004 the Applicant wrongfully misrepresented to Edilstate Executive Apartments that he has authority to financially bind the State in accommodation fees, knowing that he did not have authority to do so

AL TERNA TIVEL Y TO 3 above

On or about February 2004 the Applicant wrongfully and unlawfully exposed the State to legal suite from Edilstate Executive Apartments in the amount of +-R14 542 .52 in accommodation fees unlawfully and wrongfully pledged in the name of the State, knowing that he had no authority to do so.

On 28 April and 25 May 2005 a disciplinary hearing was conducted, following on the charges aforesaid. On 13 June 2005, in his findings, the chairperson of the disciplinary hearing,

Mr VRS Ngobe found the Applicant not guilty of charges 1 to 3, and found him guilty on the alternative charge for negligence on the basis that an employee acting like a reasonable man in the position of the Applicant could have foreseen the possibilities of the consequences that could follow resulting from his action. Following thereupon the chairperson recommended that the Applicant be reprimanded or be given a written warning not to commit acts purporting to contravene his written and common law contract of employment (" 1st recommendation")

The Applicant was given 5 days within which to Appeal the findings and/or the recommendations aforesaid. Suffice it to state that on the papers filed no where is it stated that the Applicant appealed the findings and/or recommendations aforesaid.

It does not appear from the papers filed that after his findings of 13 June 2006 the Chairperson gave either party to the disciplinary enquiry an opportunity to present mitigation and/or aggravating circumstances prior to recommending an appropriate sanction.

It appears that the office of the Respondent was not satisfied with the recommendations as it is alleged by the Applicant that they (the office of the Respondent) requested an opportunity from the chairperson to furnish aggravating circumstances with a view to persuade him to change his recommendations as regards the penalty, and that subsequently the hearing was reconstituted on 6 July 2005, following upon which the chairperson recommended that Applicant be given a final written warning alternatively one month suspension without pay suspended for six months ("2nd recommendation".)

Following upon the Second recommendation and in a letter dated 28 February 2006 the Director General Mr K W Ngema, ("D-G") communicated to the Applicant that his suspension from duty was lifted with immediate effect, whereupon the Applicant immediately resumed duties on 02 March 2006.

It apparently came to the attention of the Respondent on 07 March 2006 that the Applicant had resumed duties. Apparently there was a misunderstanding between the Respondent and the D-G on such resumption of duties by the Applicant since the Respondent is of

the view that he would have preferred that the Applicant remain on suspension pending finalisation of a decision pertaining to his continued employment. The D-G confirms in his Confirmatory Affidavit attached to the Answering Affidavit that amongst others, due to some administrative back-log had to catch up with in the office, he misunderstood that the Respondent accepted the findings of the Chairperson of the disciplinary enquiry; that the Respondent actually intended to exercise his powers in terms of Section 5 of the Act.

Immediately on becoming aware of Applicant's resumption of duties the Respondent sought to set up a meeting with the Applicant to discuss his tenure of office as Youth Commissioner. There is a dispute between the parties as to when such meeting was set up, the Applicant saying it was sometime in mid-May 2006, the Respondent saying it was for the 18th April 2006. Further, there is a dispute as to whether the Applicant was informed of the purpose of the meeting or not. The Applicant alleging that he was never told what the purpose of such meeting was nor what would be discussed therein, the Respondent stating that the Applicant was informed by Mrs Pretorius (his P A) when the meeting was set up this is confirmed by Mrs Pretorius, and also that at the meeting of the

purpose of the meeting and requested at the meeting to advance reasons to the Respondent why he should not be removed from office, and that at no stage during the proceedings did the Applicant request postponement to consider his position and/or to obtain legal representation.

The grounds upon which the Respondent terminated the Applicant's contract are set out in Annexure 'HI' to the Founding Affidavit. It is clear from the contents of Annexure 'HI' aforesaid that the Respondent exercised his rights in terms of Section 5(1) of the Act, which reads as follows:

"The members of the Commission shall hold office for such fixed term as the Member of the Executive Council may determine at the time of their appointment, but not exceeding 5 years, provided that the Member of the Executive Council may remove any member from the office at any time after consultation with the Commission if there are sound reasons for doing so."

It appears from Annexure 'HI' that prior to terminating the Applicant's contract as a youth commissioner the Respondent consulted with the Youth Commission. This fact is not disputed by the Applicant. Further, it appears from Annexure 'HI' that there has been a breakdown of trust and confidence amongst the Youth Commissioners due to the conduct of the Applicant. This aspect is also not disputed by the Applicant.

In fact the Applicant in this application does not challenge the correctness of the grounds upon which his contract was terminated by the Respondent, as set out in Annexure 'HI', nor as already stated, does he deny that the Respondent did consult with the Youth Commission, as required by Section 5(1) of the Act. It is thus not in dispute that the Respondent acted within the ambit of the empowering legislation, I.e. Section 5 of the Act.

Further, although the Act refers to Member of the Executive Council, it is not disputed that the Respondent, being the Premier of the Mpumalanga Province is charged with the administration of the Act, and that therefore the Youth Commission directly falls under his jurisdiction.

It is alleged in the Answering Affidavit (paragraph 10 thereof), that the duty to decide whether the applicant could carry on as a commissioner

rests with the Respondent. This has not been in anyway challenged nor disputed by the Applicant. This means that the Applicant accepts that it is only the Respondent, under whose jurisdiction the Youth Commission falls, who can finally decide on the continuity of the Applicant as a youth commissioner or on termination of the Applicant as such.(after consultation with the Youth Commission).

It cannot be said that since there was a misunderstanding between the Respondent and the D-G on the issue of resumption of duties and/or continued suspension of the Applicant pending finalisation of the matter, which is as already stated above confirmed and explained by the D-G in his Confirmatory Affidavit, that therefore the Respondent must be estopped from denying same. This would mean that the office bearers/ "public authorities would extend their powers, thus acting ultra vires, by making representations outside the scope of their statutory or common law powers which would be binding on them." See in this regard *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001(4) SA 661 (W) at 682 par [31.].

It is trite that recommendations are not binding on the executive. This was conceded by counsel for the Applicant. Clearly, the Act itself gives the Respondent the right to remove any member (of the youth

commission) from office after consultation with the Commission. There has been consultation with the commission, and the Respondent, after giving the Applicant an opportunity to address him on the merits and/or demerits of termination, duly exercised his discretion in terms of the Act to terminate the contract and/or to remove the Applicant from office.

In my view the Respondent acted within the ambit of the Act and I cannot find fault with his conduct in this regard.

In so far as the Applicant alleges that when he was called to a meeting with the Respondent he was not informed of the purpose of the meeting nor that he was not given an opportunity to get legal representation, both the D-G and Mrs Pretorius confirm in their confirmatory affidavits that prior to the meeting Applicant was apprised of the purpose of the meeting. It is inconceivable why the two would lie under oath, especially Mrs Pretorius who confirms that he contacted the Applicant and informed him that a meeting pertaining to his tenure of office would be held on

18 April 2006 (contrary to the Applicant vaguely stating that the meeting took place in Mid-May 2006) In any event the Applicant himself creates a dispute on of fact on the papers in his regard.

Further, the Applicant himself confirms in paragraphs 15 & 16 of the founding affidavit that he did partake in the discussions with the Respondent regarding his tenure of office. At no stage does he indicate that during the discussions he requested a postponement nor that the meeting should stop to enable him to obtain legal representation. He seems to have taken part in the discussions unhindered. The Respondent states in the Answering Affidavit that the meeting took place in the afternoon and lasted well into the evening. Surely, in my view, there was an opportunity and/or time for the Applicant to object and/or refuse to partake in the meeting/discussions aforesaid.

In the light of the aforesaid, the Applicant's grounds of Review as set out in paragraph 20 of the Founding Affidavit cannot stand. I am not persuaded that the Respondent in terminating the Applicant's contract in terms of Section 5(1) of the Act exercised his discretion highhandedly capriciously and/or arbitrarily, and therefore subject to the reviewed .The Applicant has not, in my view made out a proper case for review nor for any other prayers sought in the Notice of Motion.

In the result the Application is dismissed with costs.

MOLOP A J

JUDGE OF THE HIGH COURT

HEARD ON: 03 NOVEMBER 2006

FOR THE APPLICANT: ADV. D T SKOSANA

INSTRUCTED BY: N.K. MAKHAYA ATTORNEYS C/O SEKATI MONONYANE
& PARTNERS

FOR THE RESPONDENT: ADV. T P KRUGER

INSTRUCTED BY:

JUDGMENT DELIVERD ON: 05 SEPTEMBER 2007