IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NUMBER 9799/2015

MAJOR GENERAL JOHANN WESSEL BOOYSEN **Applicant**

And

NATIONAL HEAD OF THE DIRECTORATE FOR

PRIORITY CRIME INVESTIGATION **First Respondent**

MINISTER OF POLICE **Second Respondent**

JUDGMENT

VAN ZYL, J:

1. The applicant, a serving officer in the South African Police Service holding the rank of Major-General, was appointed as the Provincial Head of the Directorate for Priority Crime Prevention for KwaZulu-Natal with effect from 1 March 2010. By notice issued by the first respondent and dated 14 September 2015 he was suspended from duty with immediate effect. A copy of the notice is annexed marked "D" to the applicant's

founding affidavit and will for convenience hereafter be referred to simply as the suspension notice.

2. In terms of the suspension notice it was issued by virtue of the provisions of Regulation 13(1) of the South African Police Discipline Regulations, 2006 (the Regulations), as promulgated in terms of section 24(1) of the South African Police Service Act, 1995 (Act 68 of 1995) and published on 3 July 2006. Regulation 13 is headed "Precautionary suspension" and sub-regulation (1) provides as follows-

> "*The employer may suspend with full remuneration or temporarily transfer an employee on conditions, if any, determined by the National Commissioner.*"

3. In terms of the definitions contained in Regulation 1 the employer is defined as the National Commissioner of Police or "*any person delegated by him or her to perform any function in terms of these Regulations*". During argument counsel advised that the parties are *ad idem* that the first respondent was duly vested with the necessary authority to issue a suspension notice in terms of Regulation 13(1).

4. The applicant initiated proceedings by way of an urgent application issued on 17 September 2015 and seeking to set aside the suspension notice. The first respondent gave notice of intention to oppose. The second respondent, being the Minister of Police, was merely cited as an

interested party and abides the decision of the court. For convenience the first respondent is herein referred to as the respondent. The matter came before Sishi J on 21 September 2015 when it was adjourned by consent to a date to be allocated for opposed argument and directions were given regarding the exchange of affidavits and heads of argument. The matter then came before me for argument 27 October 2015.

5. The application was carefully framed so as to avoid being couched as an administrative review. On the approach taken by the applicant the nature of the proceeding is one attacking the validity of the first respondent's decision on the principle of legality. The applicant contends that the decision to suspend him was unlawful because it was taken *mala fide*, for some ulterior purpose and was not one the respondent could reasonably have arrived at if he had actually considered the relevant facts, including the representations made by the applicant prior to his suspension.

6. By contrast it was submitted on behalf of the respondent *in limine* that the nature of the application was one of an administrative review which could only competently be brought in terms of the provisions of the Administrative Justice Act 3 of 2000 (PAJA) and then only where the conduct complained of was a decision taken by an administrative functionary and was an administrative act.

7. In developing his argument Mr Mokhari SC, who appeared for the respondent together with Mr Abraham and Mr Mokhatla, drew attention to the decision of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paragraphs 44 – 45 and submitted that there was no distinction between judicial review under the Constitution or in terms of the common law and that the latter had been subsumed by the enactment of PAJA, which now provides for the review of administrative action.

8. With reference *inter alia* to the decision in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) counsel submitted that it was trite law that a decision to suspend or dismiss a State employee did not amount to administrative action or conduct, was therefore not susceptible to review before this Court which lacked jurisdiction to hear the matter and by reason thereof the application stood to be dismissed.

9. Mr Van Niekerk SC, who appeared with Ms Allen for the applicant, submitted that the applicant placed no reliance upon PAJA at all. In this regard counsel emphasized that the application was premised upon the principle of legality and which fell beyond the scope of administrative action as contemplated in PAJA. In short, counsel submitted that

whereas PAJA required the action to be impugned to be administrative action as defined in the Act, the principle of legality extends into a broader constitutional field beyond this requirement.

10. In *Chirwa* (supra) and with reference to the dismissal by Transnet of the applicant, Ngcobo J considered that the act of dismissal amounted to the exercise of a public power because it was vested in a public functionary, who was required to exercise such power in the public interest (at para 138).

11. The courts have recognized their ability and indeed a duty to scrutinize all aspects of the exercise of public power which must comply with the prescripts of the Constitution. In *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA), Nugent JA remarked upon this developing approach at para 60 and at para 61 endorsed the views of Professor Hoexter in her work Administrative Law in South Africa 2 ed at page 254 where the learned author suggested that in time constitutional review based upon the principle of legality and administrative review were likely to converge.

12. In this regard counsel for the applicant also drew attention to the recognition of a process for judicial review under the principle of legality. In *Khumalo and Ano v Member of the Executive Council for Education:*

KwaZulu-Natal (2014) 35 ILJ 613 (CC) Skweyiya, J stated at para 28 that;

> *"The principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational."*

13. With reference to the decision in *Pharmaceutical Manufacturers Association* (supra) as relied upon by counsel for the respondent, counsel for the applicant referred to the remarks at para 17 of that judgment where the Constitutional Court outlined the different ways in which the exercise of public power was regulated by the Constitution, with one of them being constitutional controls flowing from the doctrine of legality. In *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA), Navsa JA, relying upon this passage, remarked that "*This is the principle of legality, an incident of the rule of law.*" (at para 1) and at para 47 said that:

> "*In present-day jurisprudence acting with an ulterior motive or purpose is subsumed under the principle of legality. Section 6(2)(e)(ii) of PAJA makes administrative action taken for an ulterior purpose or motive subject to review. The classification of an action taken by a member of government is immaterial. As stated at the commencement of this judgment, the legislature, the executive and judiciary, in every sphere, are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.*"

14. Finally counsel for the applicant handed up a transcript of the very recent judgment in the matter of *The South African Broadcasting Corporation Soc Ltd and Others v the Democratic Alliance and Others* (393/2015) [2015] ZASCA 156 (8 October 2015) and drew attention to para 59 where the court of appeal summarized the current approach with reference *inter alia* to the decisions in *Pharmaceutical Manufacturers Association* (supra) and *Scalabrini Centre (supra).*

15. In the light of the above I am persuaded that counsel for the applicant are indeed correct in their submission that the court is entitled to consider the present application as one based upon the principle of legality and the respondent's argument *in limine* must fail.

16. It is common cause that on 11 August 2015 the respondent served notice upon the applicant (annexure A to the founding affidavit) calling upon him to make written representations as to why the respondent should not place the applicant on suspension pending (the outcome of) an investigation into certain allegations against the applicant.

17. The allegations, according to the notice, attributed the following misconduct to the applicant, namely that;

    (a) During October 2008 the applicant had recommended himself and certain members of his then unit for cash rewards of R15 384-62

each together with a certificates (of commendation) by the National Commissioner (of Police);

(b) Such recommendation amounted to a fraudulent misrepresentation by the applicant, in that the case dockets referred to in support of the recommendation had no relevance to the killing of a Superintendent Choncho and by way of example reference was made to Howick CAS 106/08/2008.

(d) It was further alleged that as a result of such misrepresentation the sum of R15 384-62 was paid to the applicant and to other officers then under his command in circumstances where no monetary awards should to have been made.

18. It is likewise common cause that the applicant, by letter dated and delivered on 17 August 2015 (annexure B) responded to the notification in considerable detail and that the respondent thereafter in a written notice dated 14 September 2015 (annexure D) suspended the applicant from his employment with immediate effect.

19. The relevant portions of the suspension notice (annexure D) advised the applicant, as follows:-

> *"3. Serious allegations exist against you which warrant an exhaustive investigation and possible disciplinary charges being preferred against you. I have considered your representations and am of the view that there is basis for placing you on precautionary suspension pending finalization of the contemplated investigation.*

> *4. This letter now serves as formal notice of your precautionary suspension with full remuneration of your employment by the Directorate for Priority Crime Investigation ("DPCI"), effective immediately until completion of the investigation and/or possible disciplinary proceedings related to gross misconduct, dishonesty and misrepresentation with the intention to defraud the DPCI; alternatively, the South African Police Services ("SAPS")."*

20. The approach of the applicant at the outset is premised upon the alleged unlawfulness of the decision to suspend him. Counsel submitted that such a suspension could only be justified where firstly the employer had reason to believe both that the employee had engaged in serious misconduct and in addition that there was some objectively justifiable reason to deny the employee access to the workplace during the intervening period whilst the investigation was in progress.

21. The applicant contended that in all the circumstances of the matter the respondent could not have harbored any *bona fide* belief that any misconduct had in fact been committed and even less so that the applicant himself had committed any misconduct. In this regard it was submitted that there could have been no facts at the disposal of the respondent to give rise to any such belief.

22. In developing his argument counsel for the applicant submitted that in giving the initial notice (annexure A) the respondent contended that the information at his disposal revealed that the applicant had made a fraudulent misrepresentation and in particular had cited case dockets in

support of his alleged recommendation for the making of monetary rewards, *inter alia*, to himself. In this regard specific reliance was placed upon Howick docket CAS 106/08/2008.

23. The applicant had, in response thereto, pointed out that the body of the submission (annexure C to the applicant's founding affidavit) had been prepared by then Superintendent W. Olivier, but utilizing a standard format document which reflected the signatory as the applicant. However, because the applicant himself was a potential beneficiary, he had transmitted the draft to his then superior officer Assistant Commissioner P T Brown, the Provincial Head of Detectives, who considered the proposals contained therein and made the actual recommendation for R10 000-00.

24. When the recommendation document itself is examined, it is apparent from its heading that enquiries in regard thereto are to be directed to Senior Superintendent Aiyer and/or Superintendent W Olivier. It is marked on its first page for "ATT: DIR BOOYSEN", suggesting that the author(s) of the draft intended the Applicant as its recipient. It is also clear from the list of potential beneficiaries on the first page that the applicant's name is at the top of the list, so that if he were to have considered the proposals and to have made any recommendation

thereon, he would have found himself in a situation of a conflict of interests.

25. The typescript of the document deals with the background and motivation for awards to be made to the various beneficiaries and concludes with space for any recommendation to be entered in longhand under a heading "Comments:", followed by a line where a signature is to be affixed. Here the name of the applicant appears in print, but had been deleted and a stamp with the name of "Asst. Comm. P. T. Brown" affixed in its place together with his apparent signature. In the space provided for comments the following appear in longhand, namely;

> "*Recommended that members receive a certificate of commendation by the National Commissioner and an incentive of R10 000-00.*"

26. Beneath the place for signature of the recommendation and in typescript under the heading "Award Options:" appear two categories, namely monetary awards and non-monetary awards. The monetary award options are listed in order of priority, starting with the highest award being the S A Police Service Gold Cross for Bravery coupled with a monetary award of R35 000-00 (plus applicable tax) and ending with the lowest award to a police official, being a Certificate of Commendation from the National Commissioner coupled with a monetary award of R10 000-00 (plus applicable tax).

27. In context the document suggests that the draft, without any entry under the heading "*Comments*", was submitted to Assistant Commissioner Brown who, having considered its contents, decided firstly upon the making of a recommendation for a monetary award and secondly at what level that award should be recommended. Having made a decision he entered his recommendation in longhand under the "*Comments*" heading and signed the document before forwarding it for consideration by the relevant authorities.

28. In his written response to the notice of intention to suspend him the applicant stressed that he had no hand in compiling or making the recommendation concerned, either in draft or final form. He also attached thereto an affidavit by Lieutenant Colonel (previously Superintendent) Olivier, now retired, wherein the latter confirmed that he had forwarded the draft recommendation, which had been prepared in his office, to the applicant for consideration but that the applicant had declined to do so because he considered it inappropriate. At a later stage he again had sight of the recommendation which by then had been signed by Assistant Commissioner P T Brown and who had also "*written a recommendation in his own handwriting.*"

29. The affidavit of Olivier, in its penultimate paragraph, also referred to the issue of the case dockets to which reference was made in the letter of recommendation and explained that both CAS 106/8/2008 and CAS 107/8/2008 represented typing errors and that the "8" in each of them should have been a "9". He pointed out that these two dockets were opened after "the shooting". With reference to paragraph 3 of the letter of recommendation it is apparent that these dockets were alleged to have been opened following a shooting which occurred near the Cedara turn-off on the N3 highway in the Howick area on 16 September 2008 and in which two alleged suspects were killed. The letter of recommendation, at the end of paragraph 3 states that "*The following cases were opened: Howick CAS106/8/2008: Attempted Murder and possession of unlicensed firearms - Howick CAS107/8/2008: Inquest.*" In his affidavit Olivier said that the charges in Howick CAS106/9/2008 related to charges opened against the police members involved in the shooting and that Howick CAS107/9/2008 related to the inquest into the deaths of the alleged suspects.

30. In his response the applicant also pointed out that the monetary reward involved was R10 000-00 and not R15384-62 as alleged by the respondent in the suspension notice. That too is apparent from the scale of possible awards contained at the conclusion of the letter of recommendation (annexure C). The applicant further pointed out that

Howick "*CAS 106/08/2008*" did not relate to "*a house breaking* case" as alleged to by the respondent in paragraph 5 of the suspension notice, but in fact to theft of a motor vehicle. He then drew an analogy between these errors and the typing errors relevant to the Howick dockets and observed that errors of this nature did not establish that any misrepresentation was intended.

31. In his written response the applicant also dealt with the other dockets referred to in the letter of recommendation, but which were not specifically referred to by the respondent in the suspension notice. The allegation of a general nature as contained in the suspension notice was to the effect that the case dockets referred to therein "*have no relevance whatsoever to the killing of Supt Choncho.*" With regard to KwaDukuza CAS 150/08/08, as referred to in paragraph 2 of the letter of recommendation, it is apparent that this related directly to the killing of Superintendent Choncho on 27 August 2008. With regard to the remaining docket references the applicant explained that these related to peripheral investigations.

32. In his written response to the suspension notice the applicant in addition dealt at some length with the background and previous steps taken against him. He did so in order to demonstrate that the suspension notice was tainted by ulterior motives. In all the applicant asserted that

the docket references were relevant to the matters dealt with in the letter of recommendation and he denied both that any misrepresentation had occurred and that he had misrepresented any facts. He accordingly also denied the South African Police Service had been "*financially and reputationally*" prejudiced as alleged by the respondent.

33. Against this background the respondent admittedly issued the suspension notice and in paragraph 3 thereof asserted that;

> "*I have considered your representations and am of the view that there is (a) basis for placing you on precautionary suspension pending finalization of the contemplated investigation."*

The nature of the investigation appeared from paragraph 4 of the suspension notice, as follows;

> "*.. related to gross misconduct, dishonesty and misrepresentation with the intention to defraud the DPCI; alternatively, the South African Police Service ('SAPS').*"

34. In the present application the applicant broadly repeated the facts foreshadowed in his written response to the notice of intention to suspend him. He also attached confirmatory affidavits by the former Superintendent Olivier and Assistant Commissioner Brown, both now retired. With regard to the latter the applicant alleged that some three weeks prior to his own approach to Brown, this witness had been

approached for a statement by the respondent and had made a statement which accords with the applicant's version of events.

35. In his answering affidavit the respondent denies that he personally had approached Brown for a statement but confirmed that Brown had been approached on his behalf and had given an "*unsigned statement*", presumably to Colonel K M Mabuela, who was in charge of the investigation, but that the respondent himself had never had sight of this statement. In his confirmatory affidavit on behalf of the respondent Col Mabuela confirmed the respondent's averments relating to him.

36. What is noteworthy is that there is no denial that the draft statement obtained by Col Mabuela from Brown, in fact accorded with Brown's version in support of the applicant. Since Brown deposed to his confirmatory affidavit on 17 September 2015 and the suspension notice was issued on 14 September 2015, it follows that Col Mabuela was advised by Brown some weeks earlier that the applicant was not involved in the reward recommendation (annexure C) but that this was finalized and signed by Brown himself. What remains unexplained is why the respondent had not consulted Col Mabuela as to Brown's version of events prior to making his decision to suspend the applicant. This is all the more disturbing since an affidavit from Olivier was attached to the applicant's response to the notice of intention to suspend.

37. Despite the fact that both Olivier and Brown had deposed to confirmatory affidavits in support of the applicant's version of how the recommendation (annexure C) came to be prepared, finalized, signed and forwarded for ultimate approval, the respondent avoided dealing with their versions and did not comment in answer upon their affidavits. These therefore remain unchallenged.

38. There is also no indication that the respondent, after the applicant had pointed out that the references to the Howick docket numbers CAS 106/08/2008 and CAS 107/08/2008 were incorrect and that the correct docket numbers contained "09", signifying September 2008 events, had in fact followed up or referred to the dockets under their corrected docket numbers. Instead the respondent merely repeated, in paragraph 27.9 of his answering affidavit, that the award was based *inter alia* upon the incorrect docket numbers of which CAS 106/08/2008 related to theft of a motor vehicle and CAS 107/08/2008 to housebreaking.

39. In fact, there is no substantive indication that the respondent had read and considered, or followed up upon, any of the material details contained in the applicant's response to the notice of intention to suspend him.

40. With regard to the applicant's averments in his founding affidavit, the respondent contented himself with broad denials of personal knowledge of the allegations. This is particularly apparent with reference to paragraph 12 of the founding affidavit where the applicant set out in detail the various unsuccessful disciplinary actions and criminal charges brought against him by various functionaries acting under the auspices of the South African Police Force. These are relevant because the alleged motivations date back to the same period and the incidents relevant to the recommendations contained in annexure C and which allegedly form the basis for the applicant's present suspension.

41. Save to admit that the disciplinary hearing presided over by Adv Cassim SC had exonerated the applicant and recommended his immediate reinstatement, the respondent denied personal knowledge of the remaining averments contained in paragraph 12 of the founding affidavit and "*put the applicant to the proof thereof*".

42. In my view the respondent's claims of personal ignorance do not raise any real or substantial conflicts of fact regarding the history of unsuccessful attempts to discipline or charge the applicant.

43. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), Corbett JA stated at page 634 H – 635 B;

"*It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858(A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H).*"

44. The respondent nevertheless, in answer to the applicant's direct allegations of *male fides* for ignoring Brown's version of events, responded to the applicants averments in paragraphs 24 and 25 of his founding affidavit by merely denying that he ever had sight of Brown's unsigned statement and then expressed the unsupported opinion in paragraph 29.2 of his answering affidavit that the applicant;

> "*… was clearly the author of the memorandum referred to in paragraph 25 of his affidavit (*annexure C) *and a careful scrutiny of this document, reveals this. It was with respect, an afterthought that the applicant could not sign the document as he was one of the recipients of the incentives. I have no knowledge of the remainder of the allegations herein. I deny that my conduct is unlawful and male fide and put the applicant to the proof thereof.*"

45. The respondent also neglected to explain why, in the absence of personal knowledge, he failed to enquire into the background events relevant to

the applicant and the allegations against him before exercising his decision to suspend him. In his response to the notice of intention to suspend the applicant had pertinently in paragraph 12 of annexure B alleged that;

> "*… I should point out to you, that after months of investigation by Major General Mabula and a team of detectives, and Mr Glen Angus from IPID guided by at least six prosecutors, I was never charged for fraud in this regard. This also raises another question, as to who 'has recently' brought the so-called misrepresentation, as stated in your notice, to your attention? The only explanation I can conceive of is that it comes from Major General Mabula or some-one from his team. He, as well as his team, has had the disputed documents in his possession since 2012.*"

46. In seeking to justify the suspension the respondent did not deal with any of the detailed background matters raised by the applicant. Instead he stated in his answering affidavit that;

> "[23.2] *The applicant's allegations of ulterior motives and mala fides have no basis. They are merely conjecture. What the applicant is simply doing in this instance is to refuse to submit himself to the discipline of his employer as applicable to all members in the ministry of police.*
> *[23.3] All the employer seeks to achieve is to conduct a thorough investigation into the serious and prima facie allegations of misconduct against the employee. …*
> *[23.4] The applicant has appeared in a disciplinary inquiry before and was exonerated. There is no reason whatsoever for this unfounded allegations by the applicant. The employer is within its right to suspend the employee while it investigates the allegations of serious misconduct against an employee.*"

47. These responses are also relevant against the background of the events to which the applicant referred in his founding affidavit. They represent

opinion, unsubstantiated by factual averments in support of the conclusions to which the respondent claims to have come.

48. By blandly asserting to be within his rights to suspend the applicant while he investigates suggests an unfettered and arbitrary discretion, to be exercised at will as a matter of entitlement, irrespective of whether the allegations objectively have any merit.

49. In my view the discretion to suspend must have a rational basis before it can lawfully be exercised. Suspension, even with full benefits, has a drastically adverse impact upon the subject of the suspension. Where, as here, the suspension is effected based upon allegations of fraud, dishonesty and misrepresentation the inevitable stigma attaching to and the assault upon the dignity of the subject of the suspension is exacerbated.

50. Section 22 of the Constitution of the Republic provides that;

> "*[22] Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.*"

51. With regard thereto Ngcobo J held in *Affordable Medicines Trust and Others v Minister of Health and Others*2006 (3) SA 247 (CC) at paragraph 59 that;

> *"[59] What is at stake is more than one's right to earn a living, important though that is. …. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence'"*

52. The interconnection between the right to dignity and the right to work is well recognized (*Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC), Leeuw AJ at paragraph 35). An unjustified and arbitrary suspension from employment is thus constitutionally offensive, despite the fact that the suspension is with full benefits.

53. In the circumstances of the present matter the respondent sought to emphasise that the allegations were serious and that the suspension was a precautionary measure pending investigation thereof. But what remained unanswered were the applicant's assertions that the subject matter of the allegations were not new, had been the subject of investigation in the past and against the background of sustained unsuccessful efforts to suspend or discipline him, amounted to a sinister attempt again to remove him from office on a pretext, for reasons which remain unclear.

54. There is no indication from the answering affidavits when the investigations of Colonel Mabuela commenced, but merely that the

allegations had, according to paragraph 1 of the notice of intention to suspend dated 9 August 2015, "*recently*" come to the attention of the respondent. There is also no indication of how these allegations came to his attention, nor what steps, if any, the respondent took to verify the facts contained in the applicant's written response to the notice of intention to suspend him.

55. The suspension notice itself merely records in paragraph 3 thereof that the respondent had considered the applicant's representations, but without comment upon their validity. It continued that "*there is a basis*" for placing the applicant upon a precautionary suspension, but without elaboration as to what such basis comprised.

56. In his answering affidavit the respondent referred to alleged inaccuracies in the written recommendations (annexure C) but without dealing with the applicant's explanations thereof, or with the impact of such alleged inaccuracies upon the adjudication process when the awards were made.

57. In paragraph 19.11 of his founding affidavit the applicant alleged that before any reward was paid, the recommendation therefor was scrutinized and approved by Awards Committees at provincial and national levels. The respondent in reply avoided responding thereto. It thus remains unclear whether the verification process relating to the

recommendation bearing the signature of Brown, was in fact misled by any matter contained in the recommendation. Nor was it demonstrated, with reference to the "*correct*" docket numbers as identified by the applicant in his response, that the content of the recommendation was materially incorrect or misleading. Apart from the incorrect Howick docket numbers the remaining content of the recommendation has also not been shown to be materially inaccurate, nor has the respondent demonstrated that it did not comply with the criteria for such recommendations and awards.

58. With regard to docket reference numbers it is not in dispute that the second set of numerals reflects the month of the year in which the docket is opened. In this instance the events to which the recommendation (annexure C) refer in paragraph 3 thereof commenced with effect from 15 September 2008 and culminated in the shooting which occurred on 16 September 2008. It was then alleged that as a result Howick docket numbers CAS 106/08/08 and 107/08/08 were opened. This is not the kind of error which is likely to mislead even a junior police official. The probabilities of the experienced members of the Awards committees being misled, appear remote.

59. In the end the nature of the allegations being levelled against the applicant may be summarized as follows. In the first instance the

allegation was made that the applicant had recommended himself for a monetary award of R15 384,62. It has been conclusively shown that the award was only R10 000,00 and that the level of the award was as determined and written in longhand by Brown at the conclusion of annexure C. It is thus clear that the respondent's information on the amount of the award was mistaken, as was his information that it was the applicant who made the recommendation.

60. Secondly the incorrect Howick docket numbers have been shown to be typing errors and there is no suggestion that the correct docket numbers (CAS 106/09/08 and CAS 107/09/08), as identified by the applicant in his response to the respondent, did not in fact relate to the submissions contained in paragraph 3 of annexure C. Nothing sinister can therefore be inferred from the inclusion of the incorrect docket numbers in the recommendation.

61. Thirdly it was alleged that the general content of the recommendation was misleading and amounted to a misrepresentation and, impliedly, that it did mislead the awards committees at provincial and national levels into making the awards to the various members concerned, including the applicant. As already discussed, there is an insufficient factual basis for drawing the conclusion that the recommendation was misleading. But, even if it were, then there is not a shred of evidence that

the applicant was in any way involved in formulating its content and the respondent's conclusion to the contrary is, at best, entirely speculative.

62. The claim that as a result of the conduct of the applicant the South African Police Service has suffered prejudice is not sustained by the facts before the court. The claim that it suffered reputational damage is without merit, particularly since there is no suggestion that awards of this nature are ever published for general information.

63. The applicant has pointed to the series of actions taken against him as being indicative of the respondent acting with an ulterior motive. Whilst denying such a motive, the respondent has not placed in dispute the previous actions taken against the applicant, or that they were unsuccessful. A strong suggestion arises that there is an ongoing move, possibly even a campaign to unseat the applicant. But there is not sufficient evidence before the court to draw firm conclusions in this regard and neither party has sought a referral for the hearing of oral evidence in order to resolve these factual conflicts.

64. What is however noteworthy is that the respondent had embarked, for reasons unclear, upon a course of action as against the applicant which was unsustainable upon the information at his disposal. When the applicant responded with detailed and motivated submissions to the

notice of intention to suspend him, the respondent effectively ignored these and proceeded with the suspension in any event. When the applicant instituted the present application to set aside the suspension, the respondent doggedly opposed the relief sought.

65. One of the grounds of opposition was that the matter was not urgent. This ground was persisted in despite the fact that the matter had been postponed for the exchange of affidavits before being enrolled for opposed argument. There are, of course, degrees of urgency. But counsel for the applicant drew the analogy between offending against the right not to be unlawfully suspended from employment and the right not to be unlawfully detained. Both are constitutionally offensive. Relying upon the remarks in *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) at paragraph 10 where Malan JA said that "*A 'detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention'*", counsel for the applicant submitted that an unlawful suspension likewise should not be tolerated for any longer than absolutely necessary and that the matter was therefore one of sufficient urgency to be heard and determined. I agree.

66. Given the circumstances counsel for the applicant submitted that the proper order would be one granting the alternative relief sought by the

applicant and as set out in paragraph 44 of his replying affidavit. This envisages the setting aside of the suspension of the applicant as originally sought, but in addition that the suspension would remain ineffective for the duration of any disciplinary proceedings brought against the applicant and arising out of the notification issued to the applicant and advising him of a departmental investigation regarding "*fraud*". A copy thereof is attached to the notice of intention to suspend (annexure A) previously referred to. The fraud allegation is the same allegation contemplated in the notice of intention to suspend.

67. The respondent's objection to the alternative relief thus contended for was based upon the submission that it was impermissible for the applicant, in reply, to seek relief in the alternative which differed from that which was sought at the outset. The approach to this issue was authoritatively restated in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) by Ngcobo, J in paragraph 9, as follows;

> "*The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed' These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?*"

68. In the present matter the respondent was aware of the additional relief which the applicant intended seeking (as foreshadowed in his replying affidavit) in good time prior to preparing for the hearing. The "*fraud*" is the same issue which formed the subject matter of the complaint about the suspension from the outset and dates back to 2008. There is no serious suggestion that the documents relevant to such investigation could be vulnerable to interference by the applicant, whose undisputed averment was that these have been in the possession of various investigators for some years. In any event and despite that, as already indicated, there is not even *prima facie* evidence that such fraud had been committed, or if it had, that the applicant is implicated therein. Against the background of sustained unsuccessful attempts in the past to remove the applicant from office, it is not unreasonable to suppose that further attempts in this regard may be made, despite the paucity of evidence against the applicant. In my judgment relief, in the nature of the alternative relief now sought by the applicant, is justified in all the circumstances and no injustice would result from the granting thereof in the form contained in the order set out below.

69. With regard to costs it is not in dispute between the parties that the employment of senior counsel by each side was justified, in each instance assisted by a junior counsel. The applicant, however, seeks a

costs order as against the respondent personally on the scale as between attorney and client.

70. In *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA), Navsa JA remarked in paragraph 52 that;

> "*Our present constitutional order is such that the state should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of their constitutional rights."*

In the same judgment and in relation to the issue of costs the learned Judge of appeal in paragraph 54 said that:-

> "*The special costs order, namely, on the attorney and client scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers.*'

71. The respondent in the present matter may well give serious consideration to the *caveat* thus expressed by the supreme court of appeal. However, upon the totality of the information before me I am not persuaded that, for present purposes, an order for costs *de boniis propriis* against the respondent personally would be justified. The conduct of the respondent nevertheless deserves censure and as a mark of the court's disapproval I consider that costs on the scale as between attorney and client would be justified.

72. In the result I make the following order, namely:-

a. The suspension of the applicant from his employment with the South African Police Service, as communicated to him by the first respondent on 14 September 2015 by written notice of that date, is hereby set aside.

b. Pending the outcome of any disciplinary proceedings instituted by the South African Police Service against the applicant and arising out of the aforesaid notice of suspension and/or the Notification of Departmental Investigation dated 11 August 2015, the applicant shall not be liable to suspension from his employment with the South African Police Service by reason thereof.

c. The first respondent is ordered to pay the costs of this application, including the costs reserved on 21 September 2015 and including the costs of two counsel, on the scale as between attorney and client.

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VAN ZYL, J.

JUDGMENT RESERVED: **27/10/2015**

JUDGMENT HANDED DOWN: **18/11/2015**

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