


**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 43355/2021**

(1)	REPORTABLE: <i>NO</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>YES</i>
(3)	REVISED. <i>NO</i>
	<u><i>15/03/2022</i></u>
	
	<i>DATE</i> <i>SIGNATURE</i>

In the matter between:

**DR DAVID BOIKHUTSO MOTAU**

Applicant

and

**THE MINISTER OF HEALTH**

First Respondent

**PRESIDENT OF THE HEALTH PROFESSIONS  
COUNCIL OF SOUTH AFRICA**

Second Respondent

**HEALTH PROFESSIONS COUNCIL OF SOUTH  
AFRICA**

Third Respondent

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## JUDGMENT

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**MBONGWE J**

### INTRODUCTION

- [1] This opposed application was initially set down for hearing in the Urgent Court, but was struck from the roll for lack of urgency. The Applicant seeks a review and setting aside of the decision of the First Respondent to place him on precautionary suspension from his newly assumed position of Chief Executive Officer/Registrar of the Third Respondent. The impugned decision was taken consequent to the Applicant being arrested and his appearance in court. The Applicant contends that the decision to suspend him is irrational in that the facts upon which it is premised are irrelevant. The relief sought is in terms of the principle of legality and/or the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
- [2] The Applicant is a medical doctor who was appointed by the First Respondent, the Executive Head of the Third Respondent, to the position of Registrar /Chief Executive Officer of the Third Respondent in terms of section 12(1) of the Health Professions Act 56 of 1974, with effect from 01 June 2021.
- [3] On the 2 August 2021, that is, two months into his newly assumed position, the Applicant was arrested and appeared in court on criminal charges relating to the fraud and corruption that occurred in the Free State Department of Health headed by the Applicant. The Applicant reported his arrest and court appearance to the chairperson of the Second Respondent shortly thereafter.
- [4] Concerned by these developments, and in order to protect the integrity of the HPCSA and the office of its Registrar/CEO, the First Applicant, in consultation with the Second and Third Respondents, took a decision to place the Applicant on precautionary suspension with a view to subjecting him to a disciplinary

hearing for his failure to disclose, prior to or during his interview for the position of the Registrar, that he had been under criminal investigation.

- [5] On the 13 August 2021 the First Respondent wrote to the Applicant communicating his intention to suspend him and calling upon the Applicant to advance reasons why he should not be placed on suspension pending investigations and a possible disciplinary hearing for misconduct.

## **FACTUAL BACKGROUND**

- [6] During a routine audit of the Free State Department of Health headed by the Applicant, the Auditor General of South Africa had unearthed fraudulent and corrupt activities that had taken place in the 2014/2015 financial year which, the Auditor determined, had commenced in 2011.
- [7] The department's officials implicated in the fraud and corruption were arrested and charged. The proceedings are still pending. According to the Applicant the arrests came as a result of special investigations that were instigated by him subsequent to him gaining knowledge of the Auditor General's report. The Applicant had been aware of the developments in the criminal proceedings and cooperated with the law enforcement agencies in their investigations, including providing them with documentation relating to the uncovered fraud and corruption.
- [8] In his response to the suspension letter, the Applicant advised the First Respondent that he had not been aware at the time of his interview that he personally was under investigation and that he was only informed thereof after his appointment to his new position. To this, the First Respondent replied;

*"I find it illogical that the Hawks or the SAPS would have investigated the criminal conduct (of all 23 accused persons) without informing you as the first accused person in the same criminal matter."*

- [9] The ultimate decision of the First Respondent to forge ahead with the suspension and disciplinary hearing was conveyed to the Applicant in the following terms;

*“I view the criminal charges levelled against you in a serious light and the fact that you omitted to inform the Ministry and the Council of the criminal investigation against the employees of the Free State Department of Health which you headed and service providers of the Free State Department of Health are in my view, also significant developments in the decision to place you on precautionary suspension.”*

- [10] The Applicant alleges to have received the letter of his suspension on the 24 August 2021 when he noted that the suspension became effective on the same date. He commenced these proceedings on the 27 August 2021.

- [11] The premise of the Applicant’s contention that the decision of the First Respondent to suspend him is irrational appears in paragraph 42 of the founding affidavit wherein the Applicant states;

*“42. It is accordingly, shocking, and surprising that the Minister’s office spoke to the police and was informed by an independent person that I was not aware of any investigation against me, the decision to charge me was only taken after the investigation was complete only on the basis that I was the head of department. This further collaborated the letter of the MEC which will be discussed under the heading of “MEC OF HEALTH: FREE STATE.”*

- [12] The Applicant contends that he had not been the accounting officer of the department he headed prior to 16 March 2018. He became the accounting officer on 16 March 2018 to May 2021 when he resigned to take the position of CEO/Registrar of the Third Respondent. The Applicant states at paragraph 15 of the founding affidavit;

*“15. Furthermore, despite my appointment as the HOD, Mr Mahlatsi, who is currently the acting HOD since my departure in May 2021, was appointed as the accounting officer from March 2014 until 15 February 2018 in terms of section 36(3)(a) of The PFMA by the provincial treasury. I attach herein the withdrawal letter of Mr Mahlatsi’s appointment as the accounting officer sent to the relevant Member of the Executive Council (“MEC”).”*

- [13] It is noted from the above that no indication is given as to who the accounting officer was prior to the appointment of Mr Mahlatsi. However, the Applicant’s assertion that he was never the accounting officer since his appointment is contradicted by what his counsel states in his heads of argument. At paragraph 19 of the heads of argument the counsel state:

*“Whilst the applicant was the HOD, Mr. Mahlatsi, was appointed as the accounting officer from March 2014 until 15 February 2018 in terms of section 36(3) (a) of the PFMA by the provincial treasury. As a result, the applicant regained the role of accounting officer from 16 February 2018 until May 2021, when he resigned. Accordingly, the irregularities identified by the AGSA fell outside the period of the charges levelled against him, which period ranges from 2011 to 2015.” (Own underlining)*

- [14] The word regained In the above statement suggests that the Applicant had previously been the accounting officer. What is not stated are the circumstances leading to the appointment of Mr Mahlatsi as the accounting officer during the Applicant’s tenure as HOD.
- [15] Pointing to the fact that what transpired in the department he headed fell in the purview of the control of the accounting officer and not his, the Applicant states at para 18;

*“18. The Auditor – General’s findings can be summarised as follows:*

*18.1 There was no evidential and/or source documents to justify or to confirm the services having been rendered. In other*

*words, there was alleged collusion between Departmental staff and external individuals and/or entities, wherein the Department incurred financial loss(es), in terms of services not having been rendered.”*

[16] And at paragraph 19:

*“19. Upon learning of the AGSA’s (Auditor-General) findings, even though I was not the accounting officer at the time, I immediately contacted and informed the Provincial Treasury, being Mr Mahlatsi who was the also the accounting officer of the department of health at the time as well as the Office of the Accountant General about the findings. Further, I requested the office of the Provincial Treasury to assist with the investigation as the department did not have the capacity to do so. The AGSA was also requested to conduct a special investigation.”*

## **DELAYED DISCIPLINARY HEARING**

[17] I pause to state assailable facts in this case. The First Respondent avers that with suspension of the Applicant with full pay and benefits, the Applicant was advised that investigations were on-going and he would be obliged, in terms of the Code, to avail himself when so requested and to attend the disciplinary hearing. As at the date of this hearing, the disciplinary proceedings had not commenced despite arrangements and demands having been made for the hearing to take place. The Respondents place blame for the lack of progress on the Applicant’s alleged obstructionism in that, while on suspension and on full pay and benefits, the Applicant seem reluctant to have the disciplinary hearing take place.

[18] The Applicant has given reasons for his inability to attend the hearing. He also furnished a doctor’s certificate suggesting that the effects of medication the Applicant was taking would impede him from participating meaningfully in the disciplinary hearing. The Applicant’s medical condition, which is coded on the

certificate, on its own appeared to have introduced another aspect of none disclosure during argument.

## **RATIONALISATION OF DECISION**

[19] The Applicant raised a point that the Respondents have rationalise the reason for the suspension of the Applicant in their two sets of answering affidavits. It was argued that the Respondent had premised the decision to suspend the Applicant on the Applicant's failure to disclose, prior to his appointment, that he was under criminal investigation by law enforcement agencies, yet in the answering affidavits the Respondents state:

The First Respondent:

*"16.1 I have been advised to give the Applicant the benefit of doubt as to whether he was aware or not of the criminal investigations and or criminal charges against him for the purpose of this application without conceding that he was indeed not aware of it"*

The Second and Third Respondents:

*"16.2 The Applicant failed to disclose that, during a large part of his tenure as the Head of Department at the Free State Department of Health, his department was subject to criminal investigation as a result of alleged fraudulent and/or corrupt activities....."*

[20] A further point raised was that the First Respondent has advanced new reasons for the suspension of the Applicant, being that the Applicant failed to bring to the attention of the Third Respondent that the Department of Health which he headed, had been the subject of investigation by Provincial Treasury, the Hawks and SAPS.

[21] With regards to the above objections, the Applicant, in seeking the review and setting aside of this application, cited the decision of the Constitutional Court in *NERSA v PG GROUP (Pty) Ltd 2020 (1) SA 450 CC at paragraph 139* where the Court stated:

*“[139] it is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful.”*

The Applicant sought that the decision of the First Respondent to suspend the Applicant be reviewed and set aside on the strength of the decision in the NERSA case.

## **ANALYSIS**

- [22] The issues raised by the Applicant in paragraphs 16, 17 and 18 deserve to be considered first for the effect they may have even before the consideration of the lawfulness of the suspension decision at the time it was taken. This calls for a consideration of the contents of the letters conveying the suspension of the Applicant. The Applicant has annexed to his founding affidavit the letter I have quoted in paragraph 7, above. In it the First Respondent has mentioned two reasons for the suspension of the Applicant, namely, (a) the perspective in which the First Respondent views the criminal charges against the Applicant, and, (b) the failure of the Applicant to disclose to the Ministry and the Council that employees of the department the Applicant headed and service providers were under criminal investigation.
- [23] Having again read the letter and the contents of the paragraphs in the answering affidavits referred to by the Applicant, I cannot understand how it can be said that the allegations therein constitute new reasons for the suspension of the Applicant. In my view, these allegations give more details of what is stated in the suspension letter. There are consequently no new reasons given for the suspension of the Applicant.
- [24] It is common cause between the parties that the investigations by the Third Respondent are or had been on going in preparation for the disciplinary hearing and while the Applicant is suspended. The possibility of the emergence of detailed information and even new information cannot therefore be excluded.



[25] The Applicant's reason that he had not been aware that he was under investigation and would face criminal charges appears to me to be well founded and supported. The First Respondent has stated that he has since taken advice that he accepts the Applicant's assertion in this regard; both the advice and the First Respondent's acceptance thereof are plausible and accord with justice, in my view.

## **DISCLOSURE**

[26] The requirement for the disclosure of relevant facts depends on a variety of consideration including an individual's conceptualisation of what constitutes relevant facts. To a greater extent the facts to be disclosed are those pertinent to the issue at hand. In the present matter it was the suitability of the Applicant for appointment to the position of the Registrar/CEO of the Third Respondent. Being himself a medical doctor and having headed the Free State Department of Health placed the Applicant in a pole position for appointment. It was therefore necessary that he discloses particularly the challenges he had encountered and what he had done to overcome them. The failure to disclose such information in circumstances where the Applicant's subordinates had engaged in fraudulent and corrupt activities can only be deliberate and calculated to mislead.

[27] The question in the HR form the Applicant had to complete requiring him to state whether there was anything that could impede him in the performance of his duties were he to be appointed, had to be answered fully by the Applicant as he had knowledge of the fraudulent and corrupt activities that occurred in the department he headed and the pending criminal case. The possibility of him being called to testify, as the provider of evidential documents of the commission of the fraud and corruption was foreseeable. For that reason the Applicant should have disclosed the existence of the criminal case that could interfere with his duties. Worse still is the fact that the duration of criminal cases is undeterminable. There are, according to the First Respondent, 23 accused persons in the case. The Applicant was to be in his position of CEO for a fixed period of five years. This information was relevant for the decision whether to

appoint him or not, considering that his new position was for a fixed period of 5 years. The failure to disclose it could only be deliberate and self-serving.

- [28] A further disconcerting fact in this case is the Applicant's oblivion to the seriousness of the charges against him. He makes light of the list of contraventions of quite a number of sections of the Public Finance Management Act brought against him.

## THE LAW

- [29] It is trite that the exercise of public or statutory power is subject to the observance of values enshrined in the Constitution. To this end section 33(1) of the Constitution provides that an administrative action has to be lawful, reasonable and procedurally fair. In terms of Section 33(2), everyone whose rights have been adversely affected by the exercise of administrative action has a right to be given written reasons for the action. PAJA was enacted to give every person adversely affected by an administrative action / decision the right to challenge the decision by way of review proceedings. Section 1 of PAJA defines an administrative action in the following terms:

*“administrative action means;*

*‘any decision taken, or any failure to take a decision, by –*

*(a) An organ of state, when –*

*(i) Exercising a power in terms of the Constitution or a provincial constitution; or*

*(ii) Exercising a public power of performing a public function in terms of any legislation; or*

*(b) A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms*

*of an empowering provision, which adversely affects the rights of any person or which has a direct, external legal effect, but does not include the listed exclusions’*

- [ 30] Explaining what the concept of ‘administrative action’ entails, the Court in the matter of *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 39 (CC) at paras [33] and [34] said the following;

*“[33] The concept of ‘administrative action’ , as defined in section 1 of PAJA, is the threshold for engaging in administrative – law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions. ....*

*[35] To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that enquiry. But the requirement has two important functions. First, it obliges courts to make a ‘positive decision in each case whether a particular exercise of public power..... is of an administrative character’(see **Sokhela id at para 61**) .... Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration.”*

- [31] Whether conduct is administrative action or not depends on the nature of the power being exercised. Other relevant considerations include the source of the power, the subject matter, whether it involves the exercise of a public duty and its proximity to the furtherance of the provisions of a legislative

instrument [see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 SA 1 (CC)].

[32] It is common cause that the First Respondent is an organ of state and, therefore, had to comply with the aforementioned legislation and legal principles. The procedures that the First Respondent had followed, as outlined in this judgment are, in my view in line with the provisions of the law. The subject of his decision accordingly obliged him to exercise his statutory powers and, in doing so, to be alive to the importance of the Third Respondent and the rights of the Applicant. By suspending the Applicant with full pay and benefits, no prejudice has been caused to the Applicant. Importantly the reasons for the suspension emanate from facts known to the Applicant.

[33] The intended disciplinary hearing, from the papers before, would have taken place shortly after the suspension of the Applicant and lasted for no more than four weeks. That it has not commenced is outside the control of the first Respondent and has to do with circumstances arising from or pertaining to the Applicant.

## **CONCLUSION**

[34] I am satisfied that there has been compliance with the provisions of the law in First Respondent's exercise of his statutory power and that the need to do so had arisen. The Applicant's contention that the decision of the First Respondent is irrational is not supported by the facts. Consequently, the application ought to fail.


## **COSTS**

[35] There is no reason why costs should not follow the results.

## ORDER

[36] In light of the findings in this judgment the following order is made:

1. The application is dismissed.
2. The Applicant is ordered to pay the costs, which costs shall include the costs consequent on the employment of two counsel where applicable

  
**M. MBONGWE J**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA.**

### APPEARANCES

For the Applicant:	Adv M.C Erasmus SC with Adv M. Vimbi
Instructed by:	N. Gwala Attorneys 482 Chopin Street Constantia Park Pretoria
For the 1 <sup>st</sup> Respondent:	Adv L. Halgryn SC with Adv K. Boshomane
Instructed by:	The State Attorney, Pretoria Salu Building 316 Thabo Sehume Street Cnr Thabo Sehume & Francis Baard Street
For the 2 <sup>nd</sup> & 3 <sup>rd</sup> Respondent:	Adv A. Ellis
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Date of hearing: 12 November 2021.

**JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES/ LEGAL REPRESENTATIVES ON THE 15<sup>TH</sup> MARCH 2022.**