

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 18871/2014

In the matter between:

Zandile Ellen Tshabalala

Applicant

And

The Speaker of the National Assembly

First Respondent

**The Portfolio Committee for
Communications**

Second Respondent

**The President of the Republic of South
Africa**

Third Respondent

The Minister of Communications

Fourth Respondent

JUDGMENT DELIVERED ON 12 NOVEMBER 2014

BAARTMAN, J

- [1] The applicant sought the following declaratory relief: “...that the inquiry contemplated in section 15A(1) of the Broadcasting Act 4 of 1999 (*the Act*) is a disciplinary inquiry to which the principles of natural justice apply;”

BACKGROUND

- [2] On 25 September 2013, the applicant became the chairperson of the board of the South African Broadcasting Corporation (**the SABC**). The SABC board consists of 12 non-executive and 3 executive members. In terms of section 13(13) of the Act, the SABC board is the accounting authority for the effective functioning of the SABC.
- [3] On 13 September 2014, the City Press newspaper published an article in which it alleged that the applicant was not qualified for the position in that she had not obtained a bachelor's degree in Commerce or a diploma in Labour Relations from the University of South Africa (**Unisa**), as alleged in her *curriculum vitae*.
- [4] Mr Davis, a member of the Democratic Alliance, requested the Portfolio Committee for Communications of the National Assembly (**the second respondent**) to conduct an inquiry, as envisaged in section 15A(1)(a) of the Act, into the allegations. On 30 July 2014, Ms Joyce Moloi-Moropa, the chairperson of the second respondent, in correspondence, requested the applicant to respond to the allegations made in the press. In that correspondence, the applicant was called upon to admit or deny the allegations. It was common cause that the applicant had not supplied copies of her academic qualifications as she alleged that they had been lost in a house burglary in 2001–2002.
- [5] The applicant had allegedly attempted to obtain proof of her qualifications from Unisa. On 26 August 2014, the applicant indicated the following in e-mail correspondence to the second respondent: “UNISA has not been able to furnish me with any detail of my true statement of results.”
- [6] The second respondent alleged that it had received correspondence from Unisa, dated 4 July 2014, indicating that it had not awarded any academic qualifications to the applicant. That correspondence

together with what second respondent considered dilatory behaviour on the part of the applicant caused it to resolve, on 16 September 2014, to hold an inquiry into the allegations of misrepresentation. On 17 September 2014, the second respondent informed the Speaker of the National Assembly (**the first respondent or the Speaker**) of its decision and proposed that the Speaker request the third respondent (the President) to suspend the applicant pending finalisation of the inquiry.

- [7] On 23 September 2014, the second respondent served a Notice of Hearing on the applicant in which the hearing was scheduled for 14 October 2014. I deal with content of the notice to the extent necessary below. On the scheduled date, the second respondent reluctantly agreed to a postponement of the hearing to 23 October 2014 to allow the applicant an opportunity to consult with her legal team. It is apparent that some members of the second respondent were of the opinion that the issue under investigation warranted neither legal representation nor a postponement.
- [8] After the postponement, the applicant sought confirmation from the second respondent that the pending inquiry was disciplinary in nature and that the rules of natural justice applied to it. The parties reached agreement that the rules of natural justice applied to the inquiry. It is in issue whether the pending inquiry is a parliamentary or a disciplinary process.
- [9] On 22 October 2014, the applicant launched these proceedings on an urgent basis and sought, in Part A, the postponement of the hearing scheduled for 23 October 2014 pending finalisation of these proceedings. On 23 October 2014, Van Rooyen AJ, by agreement between the parties, postponed the hearing scheduled for 23 October 2014 *sine die* pending finalisation of this application and ordered costs to stand over.

DISCUSSION

[10] The parties agreed, correctly in my view, that the inquiry constituted administrative action as defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000; therefore, the rules of natural justice (procedural fairness) were applicable to the inquiry.

[11] Mr Arendse SC, counsel for the applicant, submitted that, *“the removal of members of the Board is governed by section 15(1) read with section 15A”* of the Act. He further submitted that, *“...in the context of section 15(1)(b)...the inquiry in terms of section 15A(1) convened by the Committee is aimed at finding the applicant guilty of misconduct and is the first step towards the adoption of a resolution by the National Assembly to recommend to the president that he remove the applicant from office. It is therefore punitive in nature.”* The relevant sections provide as follows:

“15 Removal from office and resignation of member

(1) The appointing body –

....

(b) Must remove a member from office after a finding to that effect by a committee of the National Assembly and the adoption by the National Assembly of a resolution calling for that member’s removal from office in terms of section 15A.

....

15A Resolution for removal of member, dissolution of Board and appointment of interim Board

(1)(a) The National Assembly may, after due inquiry and by adoption of a resolution, recommend the removal of a member from office on account of any or all of the following...”

[12] Section 15(1)(b) provides for “a committee of the National Assembly” to make a finding. The applicant conceded that the second respondent is such a committee and therefore has jurisdiction to conduct the inquiry. It is important to note that the Act provides for “a committee” rather than a presiding officer or disciplinary committee as one would expect in the case of a disciplinary inquiry.

[13] Section 15A(1)(a) provides that the National Assembly “...may, after due inquiry...” I am persuaded that the inquiry envisaged is as described in the matter of **Du Preez and Another v Truth and Reconciliation Commission** 1997 (3) SA 204 (A) – on which both the applicant and the respondents relied – at 218 D–F:

“In an inquisitorial inquiry there are no litigants. There are simply witnesses who have, or may have, knowledge of some of the matters under investigation. The witnesses have no ‘case’ to promote. It is true that they may have an interest in protecting their reputations, and interest in answering as cogently and comprehensively as possible allegations made against them.

There may be damaging factual evidence given by others which the witness disputes. There may be opinion evidence given by others which disparages the witness. In these events the witness may need an opportunity to give his own evidence in refutation.”

[14] I accept that the findings of the second respondent, sitting as the committee, may have far-reaching consequences, even removal from office, for the applicant. Mr Arendse submitted that the applicant would be excluded from the second stage of the process, the debate in the National Assembly leading to the adoption of a resolution to recommend the applicant’s removal from office.

[15] That is correct, and although the second respondent will also be excluded from that process, its findings will form the basis for the National Assembly’s process. In determining whether, in the

circumstances of this matter, her exclusion from the National Assembly process will be unfair, I had regard to the Du Preez matter in which the court applied the following passage from **Doody v Secretary of State for the Home Department and Other Appeals** [1993] 3 All ER 92 (HL)).

"The principles of fairness are not to be applied by rote identically in every situation. What fairness demand is dependent on the context of the decision, and this is to be taken into account in all its aspects."

[16] The context of the decision, in this matter, appears from the above background and the Notice of Hearing in which the following is stated:

"...

Notice of Hearing:

...You are hereby notified that you are requested to attend a hearing on Tuesday, 14 October 2014....

Charges and allegations:

You are required to answer the charge and allegations relating to the misconduct listed, below, at the hearing.

Charge 1

It is alleged that, as a member of the South African Broadcasting Corporation (SABC) Board, you are guilty of conduct constituting misconduct in terms of section 15A(1)(a)(i) of the Broadcasting Act, 1999 (Act No. 4 of 1999) (" the Act") in that, whilst a member of the SABC Interim Board and during the nomination process for the members of the current Board to the National and/or the Portfolio Committee on Communications, you committed misconduct by misrepresenting and/or lying about your academic qualifications in your Curriculum Vitae submitted to the National Assembly and/or the

Portfolio Committee on Communications, by representing that you possess a Bachelor of Commerce (BCom) Degree and a Post Graduate Diploma in Labour Relations of South Africa (UNISA), when you knew or ought reasonably to have known that you did not possess the claimed academic qualifications.

Charge 2

It is alleged that you are guilty of conduct constituting an offence in terms of section 9 of the Justices of the Peace and Commissioners of Oath Act, 1963 (Act No. 16 of 1963) in that, in an affidavit, affirmation or solemn or attested declaration made on 23 July 2013 and before a person competent to administer an oath or affirmation or take the declaration in question, you made a false statement knowing it to be false by claiming that you could not furnish copies of your academic qualifications as you lost them in a burglary around 2001–2002.

Your rights and obligations

At the hearing, you will be afforded the opportunity to answer the charges and allegations against you and you are entitled to be assisted by a fellow member of the SABC Board.

Furthermore, you may request the Committee to allow you legal representation by a person who is not a member of the SABC Board at your own cost. In this regard, kindly notify the Committee timeously should you wish to seek outside legal representation so as not to delay the hearing. The Committee will then inform you in due course of whether you may be represented by a legal practitioner. (my emphasis)

If you wish to give an explanation after receiving this notice, you may do so either verbally or in writing. You may present such oral explanation at the hearing. However, should you opt for a written explanation, then kindly submit the explanation to the Chairperson before the hearing for the Committee's consideration.

The aforesaid charges will be put at the commencement of the hearing and the Chairperson will request you to plead to the charges. You may give a plea explanation, should you so wish. Should you refuse to enter a plea, the Chairperson will enter a plea of "not guilty" on your behalf.

You may call witnesses, present documentary and verbal evidence in support of your case at the hearing. The proceedings will be conducted in English. Should you require an interpreter, this will be provided by Parliament on your timeous request.

You will be provided with copies of your Curriculum Vitae and other relevant documents and materials.

The Committee reserves the right to amend or supplement the aforesaid charges and to add further charges to the above, should this become necessary.

You are further advised that should you fail to attend this hearing, it may be conducted and concluded in your absence."

- [17] Apart from the reference to legal representation, underlined above, the notice complies with the rules of natural justice. Fortunately, the issue of legal representation has been dealt with appropriately and the applicant will, as she is entitled, be represented by a legal team of her choice and at her own cost. The applicant has further received, although some only shortly before the hearing of this application, all the particulars that she requested. She is not, however, in possession of the correspondence in which Unisa allegedly indicated that it had not awarded any academic qualifications to her. Evidently, this is a gross oversight as the respondents have not given any reason to refuse her a copy of the letter. I do not have the necessary information to make a finding in respect of the letter; however, the issue in any case should be dealt in accordance with the principles of natural justice which would in the absence of good cause dictate that

the applicant be given a copy of the letter. If this is so, the submission by Mr Potgieter SC, counsel for the respondents, would be correct that the applicant's rights will not be compromised in the pending hearing.

- [18] However, there is merit in the submission that she will be prejudiced by virtue of her exclusion from the process in the National Assembly. It must follow that, in the circumstances of this matter, the applicant should have an opportunity to respond to the report prior to the proceedings in the National Assembly. In the circumstances of this matter, the rules of natural justice would demand that the applicant be given a copy of the committee's finding and a reasonable opportunity to respond thereto in writing which response should accompany the committee's report to the National Assembly and should be taken into consideration in the process leading to the adoption of any resolution.

COSTS

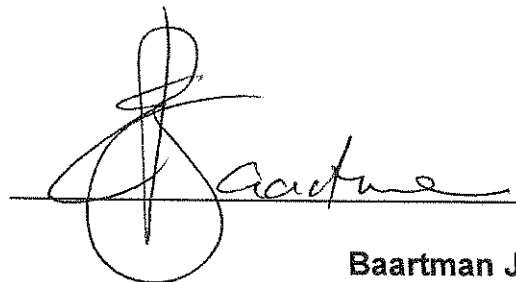
- [19] Mr Arendse SC submitted that the second respondent had unreasonably refused to agree to postpone the hearing scheduled for 23 October 2014, thereby necessitating the relief sought in Part A. The applicant had persisted that she was unable to proceed with the hearing without knowing whether she faced a disciplinary or a parliamentary process, despite the respondents conceding that the rules of natural justice applied to the process. Therefore, so the argument went, the respondents should bear the costs of those proceedings as it only agreed to postpone the hearing after the application was launched. In respect of this application, counsel submitted that the public interest was sufficient to warrant the court making no costs order against the applicant should she be unsuccessful. Mr Potgieter SC submitted that the dispute was more

imaginary than real but conceded that there was considerable public interest in a speedy resolution of the matter.

CONCLUSION

[20] In my view, the declaratory relief that the applicant seeks does not accord with the plain meaning and context of the Act in which a parliamentary process is envisaged. Evidently, the rules of natural justice must apply to the process. I, for the reasons stated above, make the following order:

- (a) The declaratory relief sought is refused with no order as to costs.
- (b) No order as to the costs is made in respect of the proceedings on 23 October 2014.



Baartman J