Republic of South Africa

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

Case No. 7082/2018

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 18 March 2019
Order made: 19 March 2019
Reasons furnished: 26 March 2019

In the matter between:

RUBBEN MANYABA MOHLALOGA Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY
OF THE REPUBLIC OF SOUTH AFRICA
and four others First to Fifth Respondents

JUDGMENT

BINNS-WARD J:

[1] In this matter, application was made as a matter of urgency for an interdict restraining the National Assembly from adopting a resolution for the removal of the applicant from his position as the chairperson of the Independent Communications Authority of South Africa ('ICASA') and as a member of its Council until such time as his appeal against his convictions on charges of fraud and contravening s 4 of the Prevention of Organised Crime Act 121 of 1998 (money laundering) under case no. 111/86/2012 in the Regional Court at

Pretoria has been finally determined. ICASA is a juristic person and an organ of state in the national sphere of government. It operates through its Council.[1]

[2] The application was heard on 18 March 2019, on the day preceding the scheduled consideration of the matter by Parliament. I made an order on the morning of 19 March 2019 dismissing the application with costs. It is a matter of public record that the National Assembly adopted a resolution later that day removing the applicant from office. When I made the order I indicated that written reasons for my decision would be handed down later. This judgment sets out those reasons.

[3] The background is that the applicant was convicted on 15 January 2018 and, on 14 February 2019, he was sentenced to 20 years' imprisonment. He was granted leave to appeal against the sentence, but leave was refused in respect of the conviction. On 7 March 2019, he submitted a petition to the Judge President of the Gauteng Division of the High Court for leave to appeal against his conviction. The petition had not yet been decided when the interdict application came before me.

[4] Section 6(1) of the Independent Communications Authority of South Africa Act 13 of 2000 ('the ICASA Act') provides:

> **Disqualification**
>
> (1) A person may not be appointed as a councillor if he or she-
>
> (a) is not a citizen of the Republic;
>
> (b) is not permanently resident in the Republic;
>
> (c) is a public servant or the holder of any other remunerated position under the State;
>
> (d) is a member of Parliament, any provincial legislature or any municipal council;
>
> (e) is an office-bearer or employee of any party, movement or organisation of a party-political nature;
>
> (f) or his or her family member has a direct or indirect financial interest in the electronic communications, postal or broadcasting industry;
>
> (g) or his or her business partner or associate holds an office in or with, or is employed by, any person or body, whether corporate or unincorporated, which has an interest contemplated in paragraph (f);
>
> (h) is an unrehabilitated insolvent;
>
> (i) has been declared by a court to be mentally ill or disordered;
>
> (j) has at any time been convicted, whether in the Republic or elsewhere, of-

[1] See s 3 of the Independent Communications Authority of South Africa Act 13 of 2000 and s 239 of the Constitution.

(i) theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention of Corruption Act, 1958 (Act 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any other offence involving dishonesty; or

(ii) an offence under this Act or the underlying statutes;

(k) has been sentenced, after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), to a period of imprisonment of not less than one year without the option of a fine; or

(l) has at any time been removed from an office of trust on account of misconduct.

The various grounds of disqualification set forth in s 6(1) are those to be expected in respect of persons being considered for appointment to a body charged with a wide range of important functions. These include adjudicative functions in respect of matters of significant financial and political consequence, which, if they are to be carried out effectively and in a manner inspiring public confidence, require qualities of independence and impeccable probity in the persons discharging them. The chairperson is a key member of the Council, being responsible, in terms of s 4(5) of the ICASA Act, for providing 'overall leadership to the Council' and managing the activities of the councillors.

[5] The resolution enlisted for consideration by the National Assembly was put on the order paper for consideration in terms of s 8 of the ICASA Act. Section 8 provides as follows in the respects relevant for present purposes:

Removal from office

(1) Subject to subsection (2), a councillor may be removed from office on account of-

(a) …;

(b) …,

(c) …;

(d) …;

(e) …;

(f) his or her becoming disqualified as contemplated in section 6 (1); or

(g) … .

(2) A councillor may be removed from office only on-

(a) a finding to that effect by the National Assembly; and

(b) the adoption by the National Assembly of a resolution calling for that councillor's removal from office.

(3) The Minister-

(a) may suspend a councillor from office at any time after the start of the proceedings of the National Assembly for the removal of that councillor;

(b) must remove a councillor from office upon adoption by the National Assembly of the resolution calling for that councillor's removal;

(c) must suspend a councillor from office at any time after the start of the proceedings of the National Assembly for the removal of that councillor upon the request of the National Assembly.

Were it to adopt a resolution to remove the applicant from office, the National Assembly would be acting in terms of s 8(2) read with ss 8(1)(f) and 6(1)(j) of the ICASA Act. The provisions of s 8 are but one of the myriad mechanisms in the constitutional and legislative framework that give effect to one of the National Assembly's primary constitutional responsibilities provided for in terms of s 55(2) of the Constitution; i.e. the responsibility to ensure the accountability to *it* of all organs of state in the national sphere of government and maintaining oversight of the exercise of national executive authority, including the implementation of legislation, and oversight of any organ of state.

[6] Proceedings for the applicant's removal from office commenced before the National Assembly shortly after the date of his conviction. The matter was placed before the relevant portfolio committee. The applicant made representations at the time to the Deputy Speaker in which he indicated his intention to appeal against his conviction and contended that the effect of any such appeal would be to suspend the effect of the judgment in terms of which he had been convicted. The applicant argued that consequently, for the purposes of s 8 of the ICASA Act, he could not be regarded as having been disqualified in terms of s 6(1)(j) until the final determination of any appeal he might bring.

[7] The Deputy Speaker responded to the applicant's representations in a letter dated 8 February 2018. He informed the applicant that his letter had been referred to the portfolio committee on communications for consideration. The Deputy Speaker also remarked that he accepted that the effect of the applicant's appeal was to suspend the effect of his conviction, and that pending the outcome of his appeal the question of a resolution calling for his removal therefore did not arise.[2]

[2] The relevant part of the Deputy Speaker's letter read as follows:

Kindly note that Mr Mohlaloga's right to appeal the conviction of fraud and the offence of contravening the provisions of section 4 of the Prevention of Organised Crime Act, 1998, is duly noted. Kindly note further that your letter has been referred to the Portfolio Committee on Communications for its consideration.

[8] Notwithstanding the opinion expressed by the Deputy Speaker, the portfolio committee resolved on 27 February 2018 to commence the process for the applicant's removal from office. A letter, dated 28 February 2018, was addressed to the applicant calling upon him to provide the committee with written reasons why he should not be removed from office. He responded though his then attorneys contending that his prospects of success on appeal were good and that a balance should be struck between his personal interests and the duties of the ICASA Council. It was submitted that it would be more appropriate to suspend him from his duties pending the determination of his appeal than to remove him from office. Notably, the applicant's attorneys placed no reliance on an undertaking by the Deputy Speaker.

[9] It would appear that the portfolio committee was not persuaded by the applicant's representations because a resolution for his removal from office was subsequently scheduled for consideration by the National Assembly on 24 April 2018. That happened pursuant to a unanimous decision by the committee on 27 March 2018.

[10] The applicant reacted by instituting proceedings in this court for urgent interdictory relief on the very day that the National Assembly was scheduled to consider his removal from office. The Speaker and her deputy were cited as the first and second respondents, respectively. The chairperson of the portfolio committee was joined as the third respondent and the Minster as the fourth respondent. By agreement between the parties, Stelzner AJ made an order (i) removing the item from the parliamentary agenda, (ii) postponing the application *sine die*, with leave to the applicant to re-enrol it if the item were placed back of the National Assembly's agenda and (iii) recording an undertaking by the first to third respondents to give the applicant's attorney of record at least 48 hours' written notice should the item be placed back on the agenda. Costs were stood over for later determination.

[11] On 24 April 2018, the National Assembly resolved to refer the matter back to the portfolio committee for further consideration and report. The Minister of Communications thereafter afforded the applicant an opportunity to make representations to her on the question of his suspension from office. The Minister intimated that the applicant's suspension from office was being considered in the light of his convictions and the commencement by the National Assembly of the process to remove him from office. It would appear therefore that the Minister was considering acting in terms of s 8(3)(a) of the

---

We further recognise that pending an outcome of an appeal process a conviction is suspended and subsequently (sic) section 8(3)(b) of the ICASA Act, … , does not arise.

ICASA Act. The applicant submitted written representations to the Minister on 26 April 2018 through a different firm of attorneys. The applicant's representations merely reiterated the arguments upon which his urgent application had been brought. They are summarised in paragraph [14] below.

[12] Notwithstanding his representations and contentions, the portfolio committee resolved on 29 May 2018 to request the Minister to suspend the applicant from office. This evoked a letter from the applicant's new attorneys to the Speaker, the chairperson of the parliamentary portfolio committee and the Minister, dated 12 June 2018. The attorneys contended, amongst other things, that, in the light of their understanding that the portfolio committee was not proceeding with the removal of the applicant from office at that stage, it was not open to the Minister to suspend him. The chairperson of the portfolio committee responded by letter on 18 June 2018 refuting the applicant's attorney's assertion that the removal process had been halted. The chairperson pointed out '[t]*he process is ongoing as indicated by the committee resolution which calls for suspension pending the finalisation of the process*'.

[13] On 12 March 2019 the portfolio committee reported to Parliament that it had resolved that the applicant should be removed as a councillor and chairperson of the ICASA Council. A resolution to give effect to the report was then scheduled for consideration by the National Assembly on 19 March 2019. In compliance with the undertaking incorporated in the court order of 24 April 2018, the applicant was given notice of the intended proceedings in the National Assembly. He then promptly re-enrolled the interdict proceedings for hearing on supplemented papers before me as the duty judge dealing with matters of urgency.

[14] The application was founded on two contentions:

1. That the intended proceedings in the National Assembly were in breach of an undertaking by the Deputy Speaker that the applicant's removal from office on account of his convictions would stand over until the final determination of any appeals against it; and

2. That on a proper interpretation of s 6(1)(j) of the ICASA Act, the appellant was not disqualified from holding office whilst his convictions were subject to appeal.

[15] Proceedings in which a litigant prays for interim interdictory relief that would impinge on the functions of Parliament were it to be granted call out for judicial circumspection; cf. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012(6) SA 223 (CC) and *International Trade Administration Commission v*

SCAW SA (Pty) Ltd 2012 (4) SA 618 (CC). Those cases involved applications for interdictory relief that would impinge on the functions of the executive, but the pertinent principles, which are grounded in judicial respect for the separation of powers, apply equally when the relief would entail encroaching on the domain of the legislative arm of the state.

[16] It appears plainly from the provisions of ss 6 and 8 of the ICASA Act, quoted above, that it is within the exclusive functional domain of the National Assembly to make a finding whether the applicant is disqualified from office in terms of s 6(1)(j), and whether it should on that account adopt a resolution to remove him. Necessarily inherent in that acknowledgment must be an acceptance that making a primary finding on those questions is not a judicial function. On what grounds then might a court intervene to stop the Assembly making a decision that has been specially entrusted to it by legislation?

[17] The proper role of the courts in the given situation may be illustrated by hypothesising the nature of the remedy that a court would be inclined to grant were an interested party to institute litigious proceedings on the grounds that the National Assembly was unlawfully neglecting to exercise its functions under s 8. Our constitutional jurisprudence suggests that the indicated remedy in such a case, at least at first resort, would be a direction to Parliament to exercise its functions, not one that would involve the court in assuming the role of Parliament in a substitutive way by making the decisions for it.[3] Depending on the circumstances, a court might also be moved to assist in conducing to a lawful discharge by Parliament of the function at issue by giving declaratory relief. But the applicant did not seek such relief in the current matter. And, as I shall indicate later in this judgment, I found no basis to consider granting it *mero motu* under the heading of 'further and/or alternative relief'.

[18] A very compelling case would need to be made out for a court, exceptionally, to pre-empt decisions falling within the competence of Parliament. Considerations of comity

---

[3] Compare, for example, *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21, 2017 (5) SA 300 (CC), 2017 (8) BCLR 1061, in which the UDM sought, amongst other things, a mandatory interdict directing the Speaker of the National Assembly to make all the necessary arrangements to ensure that the motion of no confidence in the President scheduled for 18 April 2017 was to be decided by secret ballot, including designating a new date for the motion to be debated and voted on no later than 25 April 2017. The Constitutional Court, while being prepared to grant declaratory relief in respect of the applicable principles, refrained from granting the interdict, and instead referred the matter back to the Speaker to exercise her discretion with regard to the principles as declared. The Court's approach in this regard was explained at para. 94 of the judgment as follows: '*Whether the proceedings are to be by secret ballot is a power that rests firmly in the hands of the Speaker, but exercisable subject to crucial factors that are appropriately seasoned with considerations of rationality. This Court cannot assume that she will not act in line with the legal position and conditionalities as now clarified by this Court. No legal or proper basis exists for that.*'

between the three arms of the state militate against a too ready willingness by the courts to intervene in such situations in the ordinary course. The principled approach in such circumstances was summed up by Ngcobo J in *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at paras. 68-70 as follows:

> 68. Courts in other jurisdictions, notably in the Commonwealth jurisdictions, have confronted this question. Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a "settled practice" or general rule of jurisdiction that governs judicial intervention in the legislative process.
>
> 69. The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or "settled practice". Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.
>
> 70. The primary duty of the courts in this country is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice." And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.
>
> (Footnotes omitted.)

The question in *Doctors for Life* concerned intervention by the courts in the legislative process, but the principles would apply equally in this matter, which engages Parliament's statutory oversight function in respect of extant legislation and an organ of state.

[19] The applicant contended that he could not be afforded substantive relief once the parliamentary process had been completed because his appointment would be forfeit by then, and someone else would have been appointed in his place. It is evident that the applicant's

primary concern was that his removal from office would result in the loss of the substantial remuneration package (approximately R1,9 million) appurtenant to the office of chairperson of Council of ICASA. By the time the matter was argued, the applicant had been suspended from office by the Minister (presumably in terms of s 8(3)(a) of the ICASA Act). His counsel made it clear, however, that the applicant did not seek to impugn his suspension. It was accordingly apparent that the applicant's concern was not about being prevented from fulfilling his statutory functions, but rather about being deprived of the benefits of office. When regard is had to the ICASA Act in general, and the functions of the ICASA Council in particular, it is evident that the central consideration in issue in the application of ss 6(1) and 8 is the operation of the statute for the benefit of the general public, not the personal interests of any aspirant or incumbent council member. In my judgment, any determination of the appropriateness of the court's intervention at a pre-emptive stage therefore falls to be guided in these circumstances primarily by the public interest, and only very incidentally, if at all, by interests of the sort urged by the applicant.

[20] The applicant had no right to pre-emptive protection against the operation of the Act according to its tenor. He was not entitled to ask the court to make the finding provided for in s 8(2)(a) of the ICASA Act, when the legislation has allocated that responsibility to the National Assembly. The only right that the law gives him is to ask the court to strike down any decision the National Assembly might make if he were able to show that it had acted unlawfully. It would be in the context of an application for that form of substantive relief that he might be advised, if he were able to make out a proper case for it, to seek interim relief suspending the effect of the impugned parliamentary resolution pending the determination of his complaint about its legality.

[21] The substantive effect of the purportedly interim relief actually sought by the applicant would be to prevent Parliament from exercising its responsibility. That would plainly be inimical to the proper administration of the ICASA Act, which is an important instrument. It is the legislation enacted to give effect to s 192 of the Constitution, and also intimately bound up with the discharge by the state of its duty, in terms of s 7 of the Constitution, to promote and protect the fundamental rights to freedom of expression and political choices. Parliament would fall short in fulfilling its responsibility if the organ of state it created for these purposes were not structured and maintained in a way that inspired public confidence in its integrity.

[22] For these reasons I considered that the applicant's attempt to forestall the National Assembly from exercising its oversight function in terms of s 8 of the ICASA Act was misconceived. He did not have any right to do so. His application fell to be dismissed on that account alone.

[23] In the light of that conclusion it is strictly unnecessary to consider the applicant's contentions based on the alleged undertaking by the Deputy Speaker and the effect of his pending application for leave to appeal against his convictions. I shall nonetheless do so briefly, however; for the sake of completeness, and also to explain why I did not consider it appropriate to come to the applicant's assistance with a declaratory order concerning the effect of the pertinent provisions of the ICASA Act.

[24] In my view the Deputy Speaker's letter of 8 February 2018 did not contain an undertaking. He merely expressed an opinion. It is telling that the applicant's previous attorneys did not rely on any undertaking when they made representations in March 2018 as to why he should not be removed from office. That suggests that the notion that the applicant could rely on an undertaking was an idea come up with belatedly when he engaged a different set of attorneys. The Deputy Speaker's letter made it quite clear that he had referred the applicant's attorneys' letter to the portfolio committee for consideration. That conveyed plainly enough that the further conduct of the matter rested with the committee, not the Deputy Speaker. In any event I know of no basis upon which the Deputy Speaker could by his personal undertaking competently hold off the National Assembly from exercising its statutory functions.

[25] The applicant's contention as to the suspensive effect of his intended appeal was premised on the common law doctrine that an appeal against a conviction suspends the effect of any sentence imposed in respect of it, including any accessory orders, for example the cancellation of a driver's licence or a declaration of incompetence to possess a firearm. The operation of the common law in this respect has to a material extent been done away with by the provisions of the Criminal Procedure Act.[4] But, as the applicant's counsel correctly conceded during argument, the question whether an appeal against conviction suspended the effect of a disqualification in terms of s 6(1)(j) of the ICASA Act for the purposes of s 8 of the Act is an issue of statutory construction, not the application of the common law.

[4] Act 51 of 1977 (s 309(4)(b)).

[26] There are a number of recent decisions by the Constitutional Court and the Supreme Court of Appeal that have rehearsed the proper approach to statutory interpretation. The principles are clear. The language employed in the statute must be construed according to its tenor with due regard to its context and the apparent objects of the legislation, and always mindful of s 39(2) of the Constitution.

[27] There is no difficulty with the meaning of s 6(1) of the ICASA Act. It sets out in paragraphs (a) to (l) a list of factual circumstances that render any person to whom any one of them might apply disqualified from appointment to the ICASA Council. The rationale for many of them is obvious. They are to ensure that only persons who are independent, unlikely to be conflicted, and of respectable and honest character should serve on the Council. That its members should not only have, but also be seen to have, these attributes is necessary if the Council is to be able to discharge its functions in the manner to which the statute is directed, and if public confidence is to be inspired in its decisions.

[28] It is not in dispute that the applicant has been convicted of fraud, and therefore is now a person to whom s 6(1)(j) of the ICASA Act would pertain. The argument is that on a proper construction of the Act, the National Assembly is nevertheless not entitled to exercise its powers in terms of s 8 of the Act to resolve to require the Minister to remove him from office until he has exhausted all of the procedural remedies afforded to him by law to challenge his conviction on appeal.

[29] In my judgment the applicant's construction of the relevant provisions of the statute cannot be sustained. Firstly, it is not consistent with the plain and unambiguous language of the provisions. Secondly, it requires the implication of considerations that would be inimical to the evident purpose of the expression of the criteria for disqualification in s 6(1). Thirdly, it attributes to the provisions an incidental purpose of protecting incumbent members of the Council from removal by reason of their personal interests, when, as discussed above, the context clearly indicates that they are directed instead at the effective functioning of the Council for the optimal realisation in the public interest of the objects of the Act.

[30] The facts of matter demonstrate that the criminal appellate process, just like the civil one, can be a long drawn out process. It is more than a year since the applicant was convicted, and he is still in the process of obtaining leave to appeal against the conviction. If experience in this Division is anything to go by, it could be a year or more before any appeal that he is given leave to prosecute is heard. And if the appeal were unsuccessful, he could

apply for special leave to appeal to the Supreme Court of Appeal. And if he were not successful there, he could apply to be heard in the Constitutional Court. It is not farfetched to conceive of the appellate process being stretched over several years. Appointments to the ICASA Council are fulltime engagements for fixed terms (four years in the case of ordinary councillors and five years in the case of the chairperson). It follows that were the interpretation contended for by the applicant to apply, a councillor convicted of fraud could, merely by exercising his or her right of appeal, feasibly hold off his removal from office during the greater part of, or even the entire, remainder of his or her term. The scope for s 8 of the Act to apply in respect of the disqualification criterion in s 6(1)(j) would be materially hamstrung, and in many cases rendered altogether nugatory. Closely comparable considerations would also apply in respect of the disqualification criteria specified in paragraphs (k) and (l) of the subsection. Such results would be starkly at odds with the apparent scheme and objects of the legislation.

[31] Construing s 6(1)(j) according to its tenor in relation to the National Assembly's powers in terms of s 8 would, on the other hand, not leave a Council member who happened to become the unfortunate victim of a demonstrably dubious conviction on a count of fraud or for contravening one of the ICASA Act's 'underlying statutes' open to arbitrary removal from office.[5] It would be open to such a member to put up a persuasive case to the National Assembly not to remove him or her, or to postpone any determination until after he or she had taken the conviction on at least one level of appeal. The provisions of s 8 do not oblige the Assembly to request the Minister to remove a councillor who has become disqualified in terms of s 6(1), they empower it to do so. It must exercise the power rationally.

[32] For all these reasons I concluded that the application fell to be dismissed with costs and made an order accordingly. I should perhaps make it clear that the costs order included the costs stood over for later determination in terms of the order made by Stelzner AJ on 24 April 2018.

A.G. BINNS-WARD

Judge of the High Court

[5] The ICASA Act's '*underlying statutes*' are defined in s 1 of the Act to mean '*the Broadcasting Act, Postal Services Act and Electronic Communications Act*'.

APPEARANCES

Applicant's counsel:	**N.J. Graves SC** **B. Joseph**
Applicant's attorneys	**ENSafrica** **Johannesburg and Cape Town**
First to Third Respondents' counsel:	**Karrisha Pillay**
First to Third Respondents' attorneys:	**The State Attorney** **Cape Town**