Republic of South Africa

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

Case No. 21955/2018

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 13 June 2019
Judgment: 19 June 2019

In the matter between:

BONGANI THOMAS BONGO	Applicant
and	
THE PARLIAMENT OF SOUTH AFRICA	First Respondent
THE PARLIAMENTARY JOINT COMMITTEE ON ETHICS AND MEMBERS' INTERESTS	Second Respondent
BALEKA MBETE N.O.	Third Respondent
THANDI RUTH MODISE N.O.	Fourth Respondent
PENELOPE NOLIZA TYAWA N.O.	Fifth Respondent
FATIMA EBRAHIM N.O.	Sixth Respondent
AMUSEN SINGH N.O.	Seventh Respondent
NKOSIYAKHE AMOS MASONDO N.O.	Eighth Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant, who is a member of the National Assembly and one-time Minister of State Security in the Cabinet of former President Zuma, is currently the

subject of a parliamentary investigation into allegations that he attempted to bribe an employee of Parliament who was engaged as the evidence leader in hearings being conducted by a parliamentary committee into the affairs of three state owned enterprises, Eskom, Transnet and Denel. He denies the allegations. He seeks in the current proceedings to have the investigation set aside; alternatively, to obtain a positive interdict directed at expediting the completion of the current phase of the investigative procedure.

[2] Eight respondents were cited in the application. The first respondent is the Parliament of the Republic of South Africa. The second respondent is the Parliamentary Joint Committee on Ethics and Members' Interests. The third and fourth respondents are the Speaker of the National Assembly and the Chairperson of the National Council of Provinces in their capacities as such. The fifth respondent is the Acting Secretary of Parliament. The sixth respondent is the Acting Co-Registrar of Members' Interests. The co-chairpersons of the second respondent were cited as the seventh and eighth respondents, respectively.

[3] The investigation into the allegations against the applicant is being conducted by a sub-committee of the Parliamentary Joint Committee on Ethics and Members' Interests ('the sub-committee'). The investigative proceedings are governed by rule 10 in the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Council Members ('the Code').

[4] The Code, which is published on the Parliamentary website,[1] is administered by the Joint Committee established by Joint Rule 121, as provided for in Part 11 of the Joint Rules made in terms of s 45 of the Constitution. The purpose and scope of the Code are set out in rule 2 in the Code. It 'is intended to provide a framework of reference for Members of Parliament when discharging their duties and responsibilities'. It professes to outline 'the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct'. And its stated purpose is 'to create public trust and confidence in public representatives and to protect the integrity of Parliament'.

[1] At https://www.parliament.gov.za/code-conduct (accessed on 14 June 2019).

[5] Breaches of the Code that are susceptible to investigation and report to the House by the Committee include breaches by members of their oaths of office to uphold the law, failures by members to act in accordance with the public trust placed in them and failures by members to maintain public confidence and trust in the integrity of Parliament and thereby engender the respect and confidence that society needs to have in Parliament as a representative institution.[2] In the event that the Committee considers that a member is guilty of any infringement of the Code of the nature just mentioned, it must recommend a sanction to be imposed by the House which must be greater than any of the following (i) a reprimand in the House; (ii) a fine not exceeding the value of 30 days' salary; (iii) a reduction of salary or allowances for a period not exceeding 30 days; or (iv) the suspension of certain privileges or a Member's right to a seat in Parliamentary debates or committees for a period not exceeding 30 days.[3]

[6] The aforementioned investigative process and the imposition of any sanction upon a member that might follow pursuant thereto are matters of Parliamentary business and, in that sense, are part of the internal self-regulated governance mechanisms of the legislative arm of state. In matters in which the conduct constituting a breach of the Code involves the commission of a criminal offence - as would the allegations of bribery against the applicant, if they were to be established - the internal processes of Parliament are not substitutes for, or alternatives to, public prosecution of the offender under the criminal justice system. This serves to underscore the essentially domestic character of the investigative and disciplinary procedures under the Code, albeit that they are enforceable in terms of the constitutional powers of Parliament.

[7] The alleged act of attempted bribery by the applicant was reported to have occurred on 10 October 2017, eight days before the applicant's appointment to the Cabinet. The matter was formally reported to the acting Secretary of Parliament on 26 October 2017. The applicant says that he was first informed of the allegations against him on 20 February 2018 about four months later. A hearing into the matter was conducted by the sub-committee on 5 September 2018, at which the subject of the alleged bribery attempt and one other witness gave oral evidence. After the

[2] See rule 4.1 in the Code.

[3] See rule 10.1.1.3 read with rule 10.7.7.1 and 10.7.7.2 in the Code.

conclusion of the hearing on that date, the applicant was informed that the sub-committee wished to hear the evidence of four other witnesses in the matter. He was advised of the identity of the additional witnesses, and informed that he would in due course be placed in possession of copies of their witness statements and given the date when the hearing of oral evidence would resume.

[8] The applicant registered his objection to any resumption of the oral hearing and protested that the intended additional witnesses were not in a position to give admissible evidence that could advance the investigation in any relevant way. He also demanded a transcript of the proceedings on 5 September. The sub-committee initially declined to provide a copy of the transcript. It gave as its reason that the transcript would only be prepared at the conclusion of the oral hearing. When the applicant persisted with his demand, the sub-committee relented and indicated that facilities would be made available for him to have the transcription done at his own expense. He was told that the transcribing would have to be done at a place to be made available within the Parliamentary precinct, and subject to confidentiality undertakings by the transcribers to be privately appointed by the applicant.[4] The applicant was also informed that he would be required to make arrangements for the transcription be done by 26 October 2018. It bears mention that in pressing his demand for a transcript before the completion of the oral evidence, the applicant stated that he also needed the transcript for the purpose of judicial review proceedings that he might be advised or decide to bring.

[9] The current litigation was commenced on 28 November 2018, when the applicant filed his notice of motion, in which he applied for an order in the following terms:

> 1. reviewing, rescinding and setting aside the hearing and deliberations to date of [the Parliamentary Joint Committee on Ethics and Members' Interests'] … sub-committee appointed jointly by Third Respondent and Fourth Respondent [i.e. the Speaker of the National Assembly and the Chairperson of the National Council of Provinces] … to hear evidence, to consider and determine a complaint concerning Applicant arising out of an allegation which allegedly took place on 19. 10. 2017, which hearing was held and concluded on 05. 09. 2018.

[4] The joint committee's business is conducted in closed session in terms of the Joint Rules and its members and staff are required in terms of Joint Rule 127 to swear or affirm their commitment to honour the requirements of confidentiality in respect of the Committee's business.

in the alternative

2. ordering and directing Second Respondent through its sub-committee to comply forthwith with the provisions of Rule 10.7.5.2.11 of the Code of Ethical Conduct and Members' Interests ("the Code") within a period of not more than 10 (ten) days calculated from and including the date after which an Order is made in this matter by this Honourable Court, alternatively within a time period to be determined by this Honourable Court and to do so by making its recommendations to the full Committee of Second Respondent.

3. ordering and directing Second Respondent to comply forthwith with the provisions of Rule 10.7.5.2.13 (first part) of the said Code and to do so by furnishing to Applicant a copy of the recommendations of its sub-committee in the form and as soon as received by Second Respondent from its sub-committee and further to do so within the same time period as is set out in paragraph 2 above.

4. ordering and directing Second Respondent to furnish to Applicant a full and complete record of all proceedings heard before its sub-committee, including all documents relating to the constituting, mandate and procedure of the sub-committee, together with all and any supporting documentation.

5. ordering and directing Second Respondent to forthwith to set down a date upon which Second Respondent will consider the recommendations of its sub-committee and to do so subject to what is provided in paragraph 6 below.

6. ordering and directing Second Respondent to comply with the provisions of Rule 10.7.5.2.13 (second part) of the said Code and to do so by informing Applicant of the date upon which Second Respondent will consider the recommendations of its sub-committee and to give such notice to Applicant of not less than 10 days before the said date.

[10] The material basis for the applicant's complaint is the delay that he says has attended the enquiry into the allegations against him. He points out that the timeframes provided in terms of the Code have not been complied with, and asserts that the delay has exacerbated the reputational harm that he says has incurred consequent upon the protraction of the enquiry process. In this regard he laid emphasis on rule 10.2.1 of the Code, which provides in respect of the procedure for the investigation of complaints that the 'procedure is based on and intended to be guided by the principle of promptness, fairness and consistency'.

[11] It is convenient, having regard to the formulation of the relief sought in terms of the applicant's notice of motion, to preface the discussion of his claim with a summary of the applicable procedures for the investigation of complaints as set forth

in rule 10 of the Code. The registrar of members' interests is required to inform members of any relevant complaint laid against them within seven days of the receipt thereof.[5] The rule contemplates that any such complaints should be addressed by the complainants to the registrar in writing. The member is expected to respond to the complaint, also within seven days.[6] If he or she fails to do so, the investigation proceeds regardless. If there is a response from the member, the complaint must be assessed by the registrar, who must consult with the chairperson of the Committee. The registrar must thereafter make a recommendation, which may include recommending 'that a further investigation be instituted with a suggested procedure to be followed with an elaboration of issues and facts to be investigated' together with an indication of 'who will conduct the investigation and the duration of such a proposed investigation'. The Committee then decides, upon a consideration of the registrar's report in closed meeting, how the investigation should proceed, including whether a hearing should be conducted. There are no prescribed time periods in respect of what may be done between the time afforded for a response by a member to an allegation that the Code has been infringed and the commencement of any hearing into the alleged infringement that may follow. The Code also does not contain any express limitations as to the time period within a hearing must be completed.

[12] Rules 10.7.1 to 10.7.5 of the Code regulate the conduct of investigative hearings in respect of complaints against members of Parliament. A hearing may be convened on 10 days' notice to the affected member. A sub-committee of the Committee is established to conduct hearings under the Code. The proceedings are held in closed session. All proceedings before the sub-committee are required to 'be recorded in full'. Witnesses may be summonsed to give notice at such hearings on up to 30 days' notice. The rules provide that the hearings are to be conducted on an inquisitorial basis, and 'while the Sub-committee has the discretion regarding [the] weight to be attached to different forms of evidence and the extent of cross-examination of witnesses the minimum standards of justice and fairness must be maintained'.

[13] Upon the conclusion of the hearing, the sub-committee is required, in terms of Rule 10.7.5.2.11 (referred to in paragraph 2 of the notice of motion), to make

[5] Rule 10.2.2.4.

[6] Rule 10.2.2.6.

recommendations to the full Committee in respect of the findings to be made in respect of the investigation. The recommendations must set out 'all different views' of the sub-committee's members. Rule 10.7.5.2.13 (referred to in paragraphs 3 and 6 of the notice of motion) prescribes that 'a copy of the recommendations of the Sub-committee must be given to the Member concerned and the Member concerned should be informed of the date that the Committee will consider the recommendations of the Sub-committee'.

[14] In the current matter the subject of the alleged bribery attempt was the person who ordinarily performed the functions of the registrar for the purposes of rule 10 of the Code. As the complainant, he was obviously disqualified from doing so in this case. It was accordingly necessary for a substitute to be engaged to fulfil the role. The bureaucratic processes entailed in appointing a substitute caused some delay in the initiation of the aforementioned procedures for the processing of the complaint in terms of the Code. It also complicated the initial formal reporting of the complaint.

[15] Counsel did not address in argument the basis upon which judicial review relief as sought in terms of paragraph 1 of the notice of motion was sought or might be granted in this case. They did not address the question whether it fell to be approached as an application for the judicial review of administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 or as a legality review. It ultimately became unnecessary to make any determination as to its proper characterisation. This came about because the applicant's counsel indicated he would not press for relief in terms of paragraph 1 of the notice of motion when I put to him at the outset of his argument the considerations (i) that it was evident that the internal parliamentary processes concerned were still far from completed, and it was well established that the courts will, save in exceptional cases, not intervene in parliamentary processes until they have run their full course (see *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[7]); and (ii) that any

[7] I noted recently in my judgment in *Mohlaloga v Speaker of the National Assembly of the Republic of South Africa* [2019] ZAWCHC 31 (26 March 2019) at para. 18 that 'The question in *Doctors for Life* concerned intervention by the courts in the legislative process, but the principles would apply equally in [a] matter … which engages Parliament's statutory oversight function in respect of extant legislation and an organ of state'. That observation about the broader application of the principles enunciated in *Doctors for Life* loc. cit., which are founded on the constitutional doctrine of the separation of powers, also holds true in the peculiar context of the current matter.

contention by the applicant that non-compliance by the sub-committee with the procedural provisions of the Code had vitiated its investigation was something that he could urge before the Committee (and if unsuccessful there) before the House, and that he had not demonstrated why these internal remedies should not first have been exhausted before the court was approached.

[16] The effective abandonment of the claim for the relief sought in terms of paragraph 1 of the notice of motion was well advised.

[17] In my judgment there is also no merit in the claim for interdictory relief that was sought in the alternative to the review. The relief sought in that regard would effectively require the sub-committee to abandon its intention to hear further evidence and compel it to report forthwith to the Committee on the basis only of the evidence that it has already heard. The applicant has not established any right to such relief.

[18] Moreover, the applicant's complaint, based as it is on the allegedly prejudicial effect of the delay in finalising the process, is rather ironic in the circumstances. It is evident from the answering affidavit deposed to by the sixth respondent, who is the acting registrar appointed to stand in as registrar for the purposes for the investigation because of the complainant's conflict of interest, that the hearing of further evidence has been postponed pending the determination of the applicant's application to court. The applicant's own conduct has therefore materially contributed to the delay in finalising the investigation. The decision not to proceed further with the investigation until the court had decided the review/ interdict application was understandable in my view, for no point would be served by proceeding in the face of the possibility (remote as it might seem with the wisdom of hindsight) that the applicant might succeed in obtaining the review and setting aside of the investigative process, or an interdict effectively excluding the leading of any further oral evidence before the sub-committee.

[19] Earlier delays in the process, which admittedly did not proceed with the expedition contemplated in the ideals recorded in rule 10.2.1 in the Code, were, as mentioned, due to the need for someone to appointed to stand in as registrar for the complainant. The process could not begin until such appointment had been made, for in the peculiar circumstances of this case the person who ordinarily would have fulfilled the role of pro-forma prosecutor happened also to be the complainant.

[20] In any event I do not read even those time periods expressly prescribed for the various stages of the investigative process in terms of the Code as peremptory, in the sense that a failure for any reason to comply with them should, without more, invalidate the process. Having regard to the purpose and scope of the Code, it is plainly more material that the substance of any alleged infringement be determined upon investigation, than that the investigation should be undertaken with strictly undeviating adherence to the 'principle of promptness'.

[21] Whilst it is conceivable that in an extreme case the effect of delay on the member subject to investigation might be so unfair as to vitiate the process, whether that were actually so in the given case would depend on the circumstances. Fairness is a concept that does not lend itself to determination in the abstract. It has to be weighed with regard to a given context; cf. e.g. *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 at para. 56. And if the applicant were able to make out a case that the sub-committee's investigation should be invalidated by delay, as to which it is preferable that I express no view, it is a case that he should first make out, if necessary, to the full Committee; and should he fail there, to the House.

[22] The interdictory relief sought by the applicant in the current case seeks in effect to prevent the sub-committee from hearing any further evidence before submitting its report to the Committee. In this respect, he complains not only of the attendant delay involved if further evidence is heard, but also that the evidence to be led would be irrelevant or inadmissible. It is for the sub-committee, not this court, to determine the evidence that should be adduced and to decide on its admissibility and the weight to be attached to it.

[23] For all these reasons the application will be dismissed.

[24] The seventh and eighth respondents failed to file the record of proceedings for the purposes of the review timeously or within the period directed by the court in terms of an order taken by agreement between the applicant and the respondents. The respondents also omitted to deliver their answering papers within the period directed in terms of the court order. Applications for the condonation of such non-compliance were made. The applicant opposed both applications. No point was served by his opposition to the first application because the filing of the record, albeit out of time,

was at his instance and for his benefit. An adequate explanation was given for the late delivery of the answering papers. The condonation application was not brought, however, as it should have been, as soon as it became evident that the respondents would not be able to comply with the pertinent part of the court order fixing the time for their delivery. Bringing the application only when the answering papers were delivered gave the unfortunate impression of a cavalier disregard of the importance of punctilious compliance, especially by the state, with orders of court. It has been repeatedly stressed that condonation should be sought as soon as it is appreciated that it will be required. The application for the hearing of the condonation application need not be set down separately from or before the hearing of the principal case, but it should be lodged promptly to show the applicant's bona fides. Thus, notwithstanding that I consider that the applicant's opposition to the application for condonation of the late filing of the record was unreasonable, no order will be made as to costs in respect of the condonation applications.

[25] The following order will issue:

1. Condonation is granted in respect of the late filing by the seventh and eighth respondents of the record in terms of Uniform Rule 53(1)(b) and in respect of the late delivery of the respondents' answering papers.
2. Subject to paragraph 3 of this order, the application is dismissed with costs.
3. No order as to costs is made in respect of the respondents' applications for condonation.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**D. Kawalsky**
Applicant's attorneys:	**De Jager de Klerk Attorneys**
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Respondents' counsel:	**D. Potgieter SC**
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