IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

11/08/2009
DATE

SIGNATURE

Case No: 8550/09

Date heard: 06/08/2009

Date of judgment: 11/08/2009

In the matter between:

Pikoli, Vusumzi Patrick	Applicant
and	
The President	1st Respondent
The Speaker of the National Assembly	2nd Respondent
The Chair of the National Council of Provinces	3rd Respondent
and	
Freedom Under Law	as *amicus curiae*

JUDGMENT

DU PLESSIS J:

In terms of section 179(1)(a) of the **Constitution of the Republic of South Africa**, **1996** the head of the national prosecuting authority is the National Director of Public Prosecutions (NDPP). In terms of the same subsection the NDPP is appointed by the President, as head of the national executive. The relevant provision of the Constitution is mirrored by section 10 of the **National Prosecuting Authority Act**, **32 of 1998** ("the Act") in the following terms: "The President must, in accordance with section 179 of the Constitution, appoint the National Director."

In February 2005 President Mbeki, who was then the President of the Republic, appointed the applicant as NDPP. Section 12(1) of the Act provides that the NDPP shall, subject to a presently irrelevant age restriction, "hold office for a non-renewable term of 10 years". It follows that the applicant's term of office was to expire in 2015. On 8 December 2008, however, President Motlanthe, who had by then succeeded President Mbeki, purported to remove the applicant from office. I say purported because the applicant disputes the lawfulness and the validity of the President's decision to remove him.

As is required by section 12(6)(b) of the Act, the President referred his decision to remove the applicant from office to Parliament. The National Assembly resolved on 12 February 2009 and the National Council of Provinces resolved on 17 February 2009 not to recommend the applicant's restoration to office.[1]

On 18 February 2009 the applicant launched an application in this court seeking an order to review and set aside the President's decision to remove him from office. That application, in which the lawfulness and validity of the applicant's purported removal from office is at issue, is scheduled to be heard by this court in November of this year. I shall refer to it as "the main application".

On 15 July 2009 President Zuma, who succeeded President Motlanthe, notified the applicant that he intends to appoint a new NDPP. Before this court now is an urgent application for an interim interdict to restrain the President, pending the main application, from making a permanent appointment of a new NDPP.

The requirements for an interim interdict are well established[2] and I shall in due course deal with each of them. More in general, one of the aims of an interim interdict is to preserve the *status quo* pending the final determination of the rights of the parties to pending litigation. The interim interdict does not involve a final determination of the parties' rights and it does not affect such final

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[1] See section 12(6)(b) of the Act.
[2] **The Law of South Africa** (2nd edition) Vol. 11, p. 419, para. 403.

determination.[3] When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief.[4] The court itself has an interest to ensure that it will ultimately be in a position to grant effective relief to the successful party. For reasons that will appear in due course, the issues in the main application and also in this application are constitutional issues. In such cases the court considering whether to grant or refuse an interim interdict must also bear in mind that the courts have a constitutional obligation to uphold the Constitution and to "declare that any ... conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".[5] The court must also bear in mind that not only the parties but society as a whole have an interest in upholding the Constitution and that relief in cases of constitutional breaches must vindicate the Constitution.[6]

As a first requirement, the applicant had to show that he has at least a *prima facie* right, though it might be open to some doubt, to the relief he seeks in the main application, that is, to review and set aside the decision to remove him from office. In other words, the applicant had on a *prima facie* basis to prove facts that establish that his removal from office was unlawful and therefore subject to be reviewed and set aside.

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[3] **Harms: Civil Procedure in the Supreme Court**, A5.6 with the authorities at footnote 1.
[4] See **V & A Waterfront Properties v Helicopter & Marine Services 2006 (1) SA 252 (SCA)** where, in para. 23, where the court held that a litigant is entitled not to be forced to seek alternative relief. The judgment dealt with final relief but the principle applies here.
[5] Section 172(1) of the Constitution.
[6] ***Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA)** at para. 17, 27 and 28 with the authorities there.

In the main application the applicant relies on a number of grounds for the review of the President's decision. Some of those grounds are predicated thereon that the President's decision constituted administrative action as defined in the **Promotion of Administrative Justice Act, 3 of 2000** (PAJA). Consequently, there was some debate before me as to whether the President's decision constituted administrative action as defined in PAJA or whether it constituted the exercise of executive power. The court that deals with the main application will probably have to decide that issue. For the moment I assume without finding that the decision to remove the applicant from office constituted the exercise of executive power.

In the main application the applicant contends, among other grounds, that the President's decision constituted a breach of the legality principle in that it was not authorised by law[7]. Our Constitutional Court has held, and has repeatedly reaffirmed, that "(i)t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[8] "Lawfulness is relevant to the exercise of all public power, whether or not the exercise of the power constitutes administrative

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[7] The rule of law, and thus the principle of legality, is a founding principles of our Constitution, see section 1(c).

[8] **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Metropolitan Council and Others 1999 (SA) 374 (CC)** at para. 58. See also **Pharmaceutical Mnfrs of SA: *in re ex parte* President of the RSA 2000 (2) SA 674 (CC)** at para. 17 to 20.

action."[9] Therefore, it is necessary first to consider the legal provisions that empower the President to remove the NDPP from office.

In section 12(5) thereof the Act provides: "The National Director .... shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8)." I shall return to the facts in some more detail later. It suffices now to point out that when President Motlanthe took the decision, he expressly relied on section 12(6)(a)(iv) of the Act. It is also the President's case in the main application that the decision was taken in terms of section 12(6)(a)(iv). It is on the empowering provision of that subsection that I shall now concentrate.

Section 12(6)(a)(iv) of the Act provides that the President may remove a NDPP from office "on account thereof that he or she is no longer a fit and proper person to hold the office concerned". The applicant contends that the President had no factual basis for holding that he is no longer fit and proper to hold office and therefore that his removal was not authorised by law. The question is whether the applicant has established on a *prima facie* basis that the President acted without a factual basis.

Before I turn to the facts, it is necessary to give content to the concept "a fit and proper person" when one is dealing with the NDPP. Section 9 of the Act deals with the qualifications for appointment as NDPP. Section 9(1)(b) provides that he or she must "be a fit and proper person, with due regard to his or her

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[9] **Minister of Health v New Clicks SA (Pty) Ltd and Others 2006 (2) SA 311 (CC)** at para. 144.

experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned". But it goes further. Section 179(4) of the Constitution provides that "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice." This necessarily implies that the Constitution requires an independent prosecuting authority. Section 32 of the Act embodies that constitutional principle. I quote section 32(1):

> "(1) (a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.
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> (b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

Section 179(4) of the Constitution and section 32 of the Act entrenches a principle of prosecutorial independence that has long been part of our law. Prosecutors "have always owed a duty to carry out their public functions independently and in the interests of the public".[10] In R v Riekert[11] the principle was stated thus: "The public prosecutor has a

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[10] **Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)** para.72.

[11] **1954 (4) SA 254 (SWA)** at 2610 to G. See also **S v Yengeni 2006 (1) SACR 405 (T)** at para. 51.

wider task than counsel or attorney for a client. He represents the state, the community at large and the interests of justice generally... ". Mr Budlender for the *amicus curiae* referred to a number of foreign law authorities from which it appears that similar principles of prosecutorial independence apply in Canada, in the United States of America, in the United Kingdom and in Namibia. "The rule of law requires that, subject to any immunity and exemption provided by law, the criminal law of the land should apply to all alike. ... The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed."[12]

As the head of the national prosecuting authority the NDPP has a duty to ensure that this prosecutorial independence is maintained. It follows that a person who is fit and proper to be the NDPP will be able to live out, and will live out in practice, the requirements of prosecutorial independence. That he or she must do without fear, favour or prejudice.

The facts giving rise to the decision to remove the applicant from office briefly are the following. It is common cause that President Mbeki suspended the applicant from office in September 2007. He did that on two grounds that purportedly rendered the applicant not fit and proper to hold office. After the suspension, acting in terms of section 12(6)(a) of the Act, President Mbeki

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[12] The quotation is from the main judgment of the Privy Council in **Sharma v Brown-Antoine and Others [2007] 1 WLR 780 (PC)**.

appointed Dr F Ginwala as chairperson of an inquiry to determine whether the applicant is a fit and proper person to continue in the office of NDPP. At the instance of government representatives the inquiry went much wider than the two original grounds. After a lengthy inquiry, Dr Ginwala prepared a report that she submitted to President Motlanthe on 4 November 2008. According to Dr Ginwala's report, the government had failed to substantiate any of the grounds upon which they had contended that the applicant was no longer fit and proper to hold office. Dr Ginwala recommended that the applicant "be restored to the office of NDPP".

Despite her positive recommendation, Dr Ginwala in her report made certain adverse findings against the applicant. Evidently based on these findings, President Motlanthe concluded, according to the written reasons he gave, that the applicant's conduct in relation to national security issues indicates "a clear lack of insight, which by further necessary implication rendered him a person not fit and proper to hold the office of NDPP". It is the latter inference and also its factual basis that are at issue. The applicant's qualifications, his experience, his conscientiousness and his integrity are not in question.

As to Dr Ginwala's adverse findings against him, the applicant disputes the factual correctness thereof. He also contends that he was not afforded an adequate opportunity to deal with the allegations that gave rise to the findings.

To sum up, the Ginwala-inquiry found the allegations giving rise to the applicant's original suspension to be unsubstantiated. The inquiry found the applicant to be a fit and proper person to hold office and recommended his reinstatement. Yet, based on factual findings that are in dispute, President Motlanthe removed him from office because of a lack of insight into matters of national security.

If Dr Ginwala's adverse findings were incorrect, the basis for the President's conclusion that the applicant is not a fit and proper person falls away. I have pointed out that the applicant has put forward facts that, on a *prima facie* basis show that the factual findings were not correct. On that basis, the applicant has made out a *prima facie* case that the decision to remove him from office was not authorised by the law and therefore is invalid.

Despite her adverse findings, Dr Ginwala recommended the applicant's reinstatement. President Motlanthe held a different view. Having regard thereto that it was the purpose of Dr Ginwala's inquiry to determine whether the applicant is fit and proper to hold office, the facts establish on a *prima facie* basis that President Motlanthe might have misconstrued the term "a fit and proper person" as a requirement for the office of NDPP. It is possible that the court might in the main application hold that, in view of the constitutional requirement of prosecutorial independence, the President's reasons for removing the applicant from office do not show that he was in fact not a fit and proper person to hold the office of NDPP. On that basis too the applicant has established a *prima facie*

right the relief in the main application on the basis that the decision to remove him breached the legality principle.

I conclude that, based on the legality principle, the applicant has established on a *prima facie* basis facts that, if proved finally, will entitle him to the relief sought in the main application. The applicant has at least put forward "a serious question to be tried" which is the test for interim relief that has been used when constitutional issues are at stake.[13]

For the President Mr Buchanan submitted that the President has a constitutional duty to appoint the NDPP. For the court now to interdict him from doing so, will be an unnecessary breach of the principle of the separation of powers.

In order properly to consider Mr Buchanan's submission, it is necessary to deal with a number of relevant legal principles. Those principles will also inform the proper consideration of the other requirements for an interim interdict.

The purported exercise of public power that is not authorised by law is invalid from the outset.[14] A declaration that executive action is invalid "is merely descriptive of a pre-existing state of affairs".[15] In the interest of an orderly society, however, such action is treated as if it were valid until it is declared

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[13] **Ferreira v Levin NO**; **Vryenhoek v Powell NO 1995 (2) SA 813 (W)** at 825C.
[14] See sections 1(c) and 2 of the Constitution.
[15] *Per* Kriegler J in **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)** at p. 94.

invalid.[16] The court that finds executive action not authorised by law, must declare it invalid. Such a court, however, has the discretion to limit the retrospective effect of the declaration of invalidity.[17] If the latter power is exercised, the court does not, it cannot, declare the action valid. In the exercise of its discretion the court may merely recognise the practical consequences of action that was invalid, but was treated as if it were valid until declared invalid and thus limit the retrospective effect of its declaration of invalidity.[18]

When there is a serious challenge to the validity of the purported exercise of public power, a state of uncertainty necessarily follows: On the one hand the action is treated as if it were valid until declared invalid. On the other hand the practical consequences of the action may turn out to be invalid as well. For that reason the law requires of all concerned to respect the pending legal process and, as far as is reasonably possible, to limit the practical consequences of the challenged action. "in appropriate circumstances ... an authority should ... halt its actions when it is aware that review proceedings are to be instituted against it. Failure to do so may render the official concerned liable for contempt of court".[19]

Because the decision to remove the applicant from office is at the moment still treated as valid and because it might in the end turn out to be valid, counsel is correct that, strictly speaking, the President has the power to appoint a new NDPP. I cannot agree, however, that interdicting the President from exercising

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[16] **Hoexter: Administrative Law in South Africa**, p. 486.
[17] Section 172(1)(b)(i) of the Constitution.
[18] See **Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)**. See also the discussion by **Hoexter: Administrative Law in South Africa** at p. 486.
[19] **De Ville: Judicial Review of Administrative Action in South Africa** at pp. 332 and 333.

that power would amount to a breach of the separation of powers. The very power to appoint a new NDPP is the subject matter of court proceedings and, apart from the considerations set out above, the law affords the court the discretion to issue the interim interdict.

I now turn to the further requirements for an interim interdict.

The second requirement is that the applicant has a reasonable apprehension that he will suffer irreparable harm if the interdict is not granted. I have made reference to section 172(1)(a) of the Constitution in terms whereof the court must declare conduct that is inconsistent with the constitution invalid. The effect of such a declaration in the present case will be that the President's decision to remove the applicant from office will be void from its inception and that it will have no legal force or effect.[20] The court can, in terms of section 172 make an order limiting the retrospective effect of the declaration of invalidity.

Assuming that the applicant will be successful in the main application, an appointment now of a new NDPP will severely limit his remedies. In view of the fact that there will then be another NDPP in the post, the court will be more inclined to limit the retrospective effect of its declaration of invalidity. The applicant's rights to be reinstated will also be adversely affected. In my view there is a reasonable apprehension that the applicant will suffer irreparable harm if the interim interdict is not granted.

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[20] See **Hoexter** at pp. 484 – 485.

In this regard, the interests of the public as a whole must also be taken into consideration. The public has an interest in the President and the courts upholding the Constitution. I have pointed out that if a breach of the Constitution occurs, the public as a whole has an interest in an effective remedy. If, for the reasons that I have set out, the applicant's remedies are limited, then the public interest is also affected adversely. Allowing the President now to appoint a new NDPP might ultimately turn out, if the applicant is successful, to have countenanced the unlawful exercise of public power. That is not in the interests of society as a whole.

The third requirement for an interim interdict is that the balance of convenience must favour the grant of the interim interdict. It is common cause that, since the applicant's suspension in 2007 there has been an acting NDPP. There is no evidence that he did not duly and properly perform the duties of the NDPP.

For the President Mr Buchanan submitted that it is not desirable to continue to have an acting NDPP performing the important functions in question. It may be accepted, as a general proposition, that it is not desirable for a lengthy period of time to have an acting NDPP. That undesirability must be weighed against the alternative that the appointment of a new NDPP offers.

I have pointed out that the very lawfulness of the appointment of a new NDPP will from the outset be at issue. Decisions of a person who was unlawfully

appointed as NDPP might be subject to attack. It is not now necessary to consider whether such attacks would be successful. The mere fact of such attacks and the attendant uncertainty are undesirable. Moreover, the appointment of a new NDPP might turn out to be temporary. While the fact of the appointment might well influence the court's exercise of its discretion, it remains possible that a court might remove the newly appointed NDPP so as to reinstate the applicant. Such a state of affairs is undesirable not only because it renders the new appointment possibly temporary, but also because the appointment itself creates uncertainty.

In my view the balance of convenience clearly favours the applicant, especially in view thereof that there is no evidence that the acting appointment that has been in place for nearly two years has caused any practical difficulties.

The fourth requirement for an interim interdict is that the applicant must show that he has no alternative remedy. Mr Buchanan submitted that if the applicant is successful, it does not necessarily follow that he will be reinstated. He could also claim damages for his unlawful dismissal.

I have pointed out that conduct inconsistent with the Constitution is void from its inception. From that it follows that the applicant will automatically be reinstated if the main application succeeds, unless the court makes an order to limit the retrospective effect of its declaration. If the court makes such an order the applicant might be constrained to claim damages. All of that is speculation,

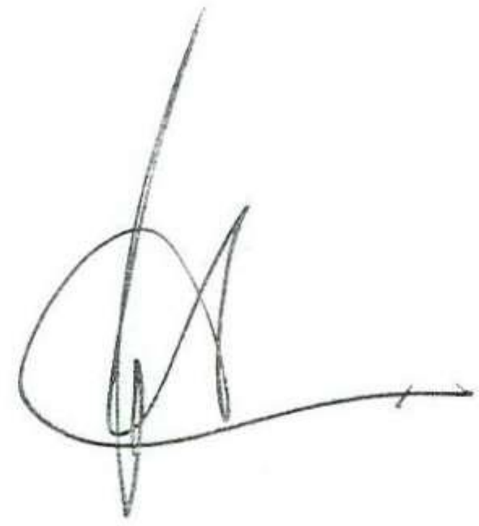
however. The only effective way to protect the applicant's right to reinstatement if he succeeds is to grant the interim interdict. I have already pointed out the society as a whole also has an interest in an effective remedy. To award damages to the applicant might countenance the invalid exercise of public power.

According to its notice of motion, the applicant seeks the interim order pending the final determination of the main application or, in the alternative, until this court has given judgment in the main application. The court that deals with the main application will be in a much better position than this court to decide whether an interim order should be made pending a possible appeal against its decision. In the circumstances I am of the view that the order must be made pending judgment in the main application.

Mr Bruinders submitted that costs should follow the event. There is something to be said for the view that the President should have been advised not to oppose this application. I have, however, no basis to doubt his assertion that he is acting in the interests of orderly government. In my view the equitable order will be to order that costs be costs in the main application. In that way, the party who is ultimately successful will in effect have a costs order relating to these proceedings in his favour.

In the result the following order is made:

1. The first respondent is interdicted from making a permanent appointment of a new National Director of Public Prosecutions until this court has given judgment in the main application in case no. 8550/09.
2. The costs of this application shall be costs in the main application.



B.R. du Plessis

Judge of the High Court

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