**IN THE HIGH COURT OF SOUTH AFRICA**

**(NORTH GAUTENG HIGH COURT)**

**CASE NO. 22374/13**

DELETE WHICHEVER IS NOT APPLICABLE

1 REPORTABLE ~~YES~~ / NO
2 OF IMPORTANCE TO OTHER JUDGES ~~YES~~/NO
3 REVISED ✓

5/8/2013 .....
DATE SIGNATURE

1/8/2013

In the matter between:

| | |
|---|---|
| **SIZWE LINDELO SNAIL KA MTUZE** | **Applicant** |
| and | |
| **THE JUDICIAL SERVICES COMMISSION** | **First Respondent** |
| **THE HON JUSTICE S POTTERIL** | **Second Respondent** |
| **THE CHAIRPERSON: JUDICIAL CONDUCT COMMITTEE** | **Third Respondent** |

Date of hearing: 1 August 2013

Date of judgment: 5 August 2013

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**JUDGMENT**

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**VAN NIEKERK J**

Introduction

[1] This is an application to review and set aside *inter alia* a decision made by the third respondent when it dismissed a complaint against the second respondent lodged by the applicant. The applicant also seeks to challenge the validity of s 14(2) of the Judicial Service Commission Act 2008, on constitutional grounds. The application has been enrolled on the unopposed motion roll. None of the respondents have filed answering affidavits, and the applicant contends that in these circumstances, he is entitled to have the merits of the application determined. The first and third respondents submit that the application was improperly enrolled, and that they remain entitled to file answering affidavits in due course in accordance with the provisions of rule 53. Also before the court is an application for joinder, in which the applicant seeks to have the Minister of Justice and Constitutional Development ('the minister') joined as a party to the application.

Factual background

[2] The applicant filed the present application on 16 April 2013. On 8 May 2013, the first to third respondents filed a notice of intention to oppose. The second respondent later withdrew her opposition, on the basis that no relief was sought against her. On or about 23 May 2013, the first and third respondents filed a notice in terms of Rule 30 A(1), in which they gave notice of their intention to apply for an order setting aside the notice of motion and the founding affidavit as an irregular step, in that the applicant had failed to join the minister, and on account of the applicant's failure to comply with rule 53 (1), in particular, to call on the respondents to file a record of the proceedings under review within the prescribed time period.

[3] On 28 May 2013, the applicant filed what he termed an 'amended application for review'. In the amended papers, he cited the minister as a fourth respondent in the main application, and inserted a paragraph into the original notice of motion calling on the first and third respondents to file the record of proceedings as contemplated by rule 53. On the same date, the applicant filed an application to join the minister. In his founding affidavit, the applicant states that it had never been his intention not to cite the minister; he had assumed that the minister, being a member of the first respondent, would have been aware of the application. Be that as it may, the applicant appeared to concede that where a constitutional issue is raised (as is the case in the present proceedings), rule 10A required the minister to be joined. On 14 June 2013, the state attorney, representing the first and third respondents, filed a record of proceedings with the registrar of this court. On 21 June 2013, the applicant filed a supplementary affidavit. Here, the applicant specifically states that the application is brought in terms of PAJA, and in accordance with the rules of procedure for judicial review of administrative action.

[4] On 21 June 2013, the application was enrolled on the unopposed motion roll.

Analysis

[5] I deal first with the application for joinder. The application was filed, no doubt, in response to the first and third respondent's notice in terms of rule 30A (1) and in particular, to the point of non-joinder taken by them. As I have recorded above, the applicant has filed an affidavit in support of the application for joinder in which he concedes that the minister ought properly to have been cited as a party to the proceedings, especially in view of the attack on the constitutional validity of s 14(2) of the Judicial Service Commission Act, 9 of 1994.

[6] Although the amended notice of motion filed by the applicant does not make any specific reference to his application for joinder, none of the respondents were opposed to an order in the terms sought by the applicant. On the contrary, they

agree that the joinder of the minister as the responsible executive authority is necessary.

[7] In these circumstances, I intend to grant an order joining the minister as a party to the application. There is little point in making the customary order to the effect that all pleadings filed of record be served on the minister; he was represented by the state attorney and by counsel and is clearly in possession of all of the relevant documentation. It follows that the minister, as the fourth respondent in these proceedings, is bound by the rules to file any answering affidavit that he may wish to file within the time periods prescribed, which must necessarily commence with effect from the date of this order.

Rule 53 or rule 6?

[8] Turning next to the main application, the crisp issue to be decided is whether the application was properly enrolled for hearing on an unopposed basis. The answer to that question lies, partly at least, in a determination of the rules that apply to these proceedings.

[9] The first and third respondents contend that the application before the court is one properly filed in terms of rule 53, the rule specifically regulating reviews. That rule, briefly described, requires all review proceedings to be brought by way of notice of motion, calling on the decision-maker concerned to dispatch the record of proceedings under review to the registrar within fifteen days after receipt of the notice of motion. (It is common cause that in the present instance, the record was filed on 14 June 2013, within the stipulated time limit.) The registrar is thereafter required to make the record available to the applicant, who in turn is afforded a ten-day period within which to file any amended notice of motion and/or supplementary affidavit. Rule 53(5) (b) requires any party wishing to oppose the

granting of the relief sought to file an answering affidavit "within thirty days of the expiry of the time referred to in subrule (4) hereof." Subrule (4) in turn refers to the ten-day period within which the applicant may vary a notice of motion or file any supplementary affidavit, after receipt of the record.

[10] On this basis, counsel for the first and third respondents submitted that that on the basis that the record had been made available by the registrar on 14 June 2013, the ten and thirty-day time periods contemplated by subrules (4) and (5) (b) respectively expire on a date beyond the date on which the applicant filed the notice of set down. In other words, the filing of the notice of set down was premature. In these circumstances, counsel submitted that the application should be removed from the roll, and that a punitive costs order is warranted.

[11] The applicant disavows any reliance on rule 53. His supplementary affidavit makes reference to the rules of procedure for the judicial review of administrative action, published on 9 October 2009. However, it does not appear that these rules have ever been brought into operation, and in those circumstances, the rules of this court apply. At the hearing of the application, the applicant submitted that the application had been filed in terms of rule 6 of the Uniform Rules, and stood to be dealt with on that basis. In terms of rule 6 (5) (d) (ii), the applicant submitted that the first and third respondents had been obliged to file answering affidavits within fifteen days of the date of their notice of intention to oppose the application. Further, in terms of paragraph 13.10 of the Practice Manual applicable in this court, the applicant contends that he was entitled, in the absence of the filing of answering affidavits, to enroll the application on the unopposed motion roll.

[12] Paragraph 13.10 provides:

> "13.10 ENROLMENT OF APPLICATIONS AFTER NOTICE OF INTENTION TO OPPOSE
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> 1. Where the respondent has failed to deliver an answering affidavit and has not given notice only to raise a question of law (rule 6 (5)(d)(iii)) or a point *in limine*, the application must not be enrolled for hearing on the opposed roll.
> 2. Such an application must be enrolled on the unopposed motion roll. In the event of such an application thereafter becoming opposed (for whatever reason), the application will not be postponed as a matter of course. The judge hearing the matter will give the necessary directions for the future conduct of the matter.
> 3. The notice of set down of such an application must be served on the respondent's attorney of record."

[13] Neither the notice of motion filed on 16 April 2013 nor the amended notice of motion filed on 28 May 2013 make any reference to any statutory provision or any rule in terms of which the application is brought. To the extent that the applicant asserts that he relies on rule 6 read with paragraph 13.10 of the Practice Manual to insist that the matter proceed unopposed, his conduct of the present litigation has not been consistent with this assertion. In particular, in response to the first and third respondent's rule 30 A notice, the applicant amended the notice of motion specifically to require the respondents concerned to file the record, on terms that directly reflect the requirement established by rule 53 (1)(b). The amended notice of motion filed by the applicant reflects in all respects the procedure established by rule 53 (1) and (2). Further, after the record was provided to him, the applicant filed a supplementary affidavit as contemplated by rule 53(4). Although the applicant's submission that he is not necessarily bound by rule 53 may well be correct (see[1]), the fact of the matter is that applicant has conducted these proceedings in a manner entirely consistent

[1] Jockey Club of South Africa v Forbes 1993 (1) 649 (A)

with the application of rule 53. In my view, the first and third respondents are entitled to assume that the time limits established by rule 53(5) are applicable, and they are entitled to file answering affidavits accordingly. Having failed to inject the papers with any degree of specificity in relation to his cause of action, the applicant appears to have been content to take advantage of the consequent uncertainty as a basis to challenge the respondents' right to be heard.

[14] In any event, the application stands to be removed from the roll if only on account of the qualifications incorporated into the wording of item 13.10 of the Practice Manual. Paragraph 1 entitles an applicant to enroll an application for hearing on the unopposed roll after the filing of a notice of intention to oppose if and only if two requirements are met: first, the failure by a respondent to file an answering affidavit and secondly, the absence of any notice of intention by the respondent to raise a question of law or a point *in limine*. On 23 May 2013, in their rule 30A notice, the first and third respondents squarely took the points of non-joinder and the applicant's non-compliance with rule 53. At that stage, the substantive merits of these points were not relevant; they were certainly not, as subsequent events have confirmed, an element of a strategy of delay and the frustration of the litigation initiated by the applicant. For this reason alone, the applicant was not entitled to enroll the application on the unopposed motion roll.

Costs

[15] The application for joinder was effectively before the court with the consent of all of the parties, and I intend to make an order on the same basis. In that respect, in my view, there ought to be no order as to costs. In regard to the main application, the first and third respondents have been substantially successful in their opposition to the applicant's attempts to have the application heard on an unopposed basis. This in itself militates in favour of an order to the effect that the applicant pay the costs of the proceedings of 1 August 2013. I must also

necessarily take into account the letter written by the state attorney to the applicant on 29 May 2013, where the point is clearly made that in the respondents' view, the *dies* for filing answering affidavits had not expired and that they were consequently not in default. Despite this caution, the applicant elected to enroll the application on an unopposed basis.

[16] Counsel for the first and third respondents submitted that the applicant's conduct was such that a punitive costs order is warranted. While it is true that the applicant has expressed himself in the papers in terms that might be described as robust, and even if I were to accept that he subjectively believes that he has been the victim of a conspiracy to delay the proceedings that he has initiated, it should be recalled that an order for costs on the scale as between attorney and client is not lightly granted, and that the courts are generally loath to penalise a party in this fashion. In my view, it is just and equitable that the applicant pays the first and third respondents' costs, including the costs of counsel, on the ordinary scale.

For these reasons, I make the following order:

1. The Minister of Justice and Constitutional Development is joined as a respondent in the main application.

2. There is no order as to costs in the application for joinder

3. The main application is removed from the roll.

4. The applicant is ordered to pay the costs of the costs of the proceedings on 1 August 2013.

**ANDRE VAN NIEKERK**
**ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT**

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