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Without Prejudice

During October 2017, yet again, our courts were called upon to adjudicate a matter with wider political implications. This concerned the suspension of the Director-General of Home Affairs, Mr Mkuseli Apleni, by the erstwhile Minister of Home Affairs in the case of *Mkuseli Apleni v President of the Republic of South Africa & Another*, High Court of South Africa, Gauteng Division, Pretoria, Case Number 65757/2017.

The court was called upon to determine the following succinct issues:

1. Whether the Minister of Home Affairs (the Minister) had the authority to suspend Mr Mkuseli Apleni (the Applicant);
2. Whether the suspension of the applicant by the Minister was unconstitutional, and of no force and effect; and
3. Depending on the answers to 1 and 2 above, whether the suspension stands to be set aside.

Ironically, before the 2007 African National Congress elective conference, in *Masethla v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)* the court dealt, in part, with similar legal issues or principles raised in this matter.

The suspension

On 18 September 2017, the Minister placed the Applicant on precautionary suspension due to allegations of misconduct. The Applicant approached the court to challenge the suspension on several grounds; the most important being that the Minister acted outside of her authority, or rather, that the Minister lacked the authority to suspend him.

The Applicant contended that the powers to place him on precautionary suspension were reserved for the President of the Republic and had not been delegated to the Minister.

Furthermore, it was argued that section 12 of the Public Service Act 103 of 1994 (the Act), which

relates to the appointment and other career incidents of the Heads of Department (HoD) shall be dealt with, in the case of a Head of a National Department, by the President.

In both letters sent to the Applicant confirming his extension of office, it stated that the extension of the employment contract was approved by Cabinet. In terms of the Constitution of the Republic of South Africa, 1996 (the Constitution), the President is the Head of Cabinet and therefore the Minister acted after the approval of Cabinet. The only way in which the Minister would have been empowered to suspend the Applicant was, if there had been a lawful delegation from the President.

Conversely, the President argued in the papers filed on his behalf before court (although his Acting Director-General deposed to an affidavit on his behalf; he didn't), that there was delegation of this power to the Minister, based on some old letter written by President Mbeki dated 8 October 1999. In essence, President Mbeki had at the time relied on section 3B(4)(a) of the Act as the empowering provision in delegating this power. In furtherance of his argument, counsel for the President relied upon certain provisions of Chapter 8 of the Senior Management Service Handbook of 2003 (the SMS Handbook). Reliance was placed on clause 18, which relates to suspensions. Clause 18 provides that an Executive Authority (EA) may suspend a HoD if they have committed a serious offence and the EA believes that the HoD might jeopardise the investigation. It was argued that the EA referred to in s18.2 of the SMS Handbook is the mainly the Minister. That is the meaning of executive authority in the Public Finance Management Act, 1999 and there is no reason to deviate from such.

Reliance was then placed on clause 2.7(2) of the SMS Handbook wherein it provides that an employer may suspend or transfer a member, if the member is alleged to have committed a serious offence and the employer believes that the presence of the member in the workplace might jeopardise the investigation.

The abovementioned letter was not signed by President Mbeki and another Cabinet member as envisaged by the provisions of section 101(1) and (2) of the Constitution.

The delegation

Counsel for the Applicant argued that it is common cause that there was no delegation by President Zuma. The court observed that from an evidentiary point of

view, the delegation relied upon by the President and Minister in this matter, did not comply with section 101 of the Constitution as it was not signed by President Mbeki, nor was it countersigned by another Cabinet member of the National Department concerned.

Furthermore, the court stated that section 3B of the Act, upon which President Mbeki ostensibly relied and in terms of which he purported to act, at the time of the letter, had been repealed by section 5 of the Public Service Amendment Act, 2007 (the 2007 Act). Counsel for the applicant argued that it is a well-established principle that the repeal of an enabling statute of power in turn repeals a Regulation or by-law made thereunder, unless it is specifically reserved by some or other provision. So the argument went that the position was in fact very clear: any delegation done pursuant to a statute that was repealed lost its force, unless saved by the repealing provisions. In this instance, the power to delegate was now contained in the 2007 Act by way of the provisions of section 42A (3), which stated that the EA referred to in section 12(1) may, in the case of the President, delegate to a Minister the powers conferred on the President by section 12.

In upholding the contention raised by the Applicant, the court stated that "section 12 of the 2007 amending Act deals with the appointment of Heads of Department and career incidents and states that such, in the case of a Head of a National Department, shall be dealt with by the President". In the *Masethla* case at par. 147, it was held that "career incidents" was a wide enough phrase to include other matters relating to the career of an HoD including terms and conditions of employment. This would in my view then include the power to suspend such a head.

In this case there was also no preservation. The Act has a repeal of laws and savings provision in section 43. Section 43 (2) provides that "anything done under any law repealed by subsection (1) and which could be done under provision of this Act, shall be deemed to have been done under that provision". The repeal of section 3B of the Act by the 2007 Act, is not included in the list of laws that are saved by section 43(2). It was therefore not open to the first respondent to argue that the delegation and power provided for in section 3B was now catered for in section 12(1) and section 42A(3) of the 2007 Act. Had it been the intention of the legislature to preserve anything done under the repealed section 3B, it would have expressly stated so.

In respect of the issue of whether President Mbeki's letter complies with the provisions of section 101(1)(b) of the Constitution, it was argued by counsel for the first respondent that the delegation is akin to an administrative action and not an executive action merely because the President made it and, therefore, it does not need to comply with section 101 of the Constitution. The reason for this argument was due to section 42A(7)(a) of the Act that merely required any delegation of power to perform a duty in terms of that section to be in writing.

In deciding whether President Mbeki's delegation was executive or akin to administrative action, the learned Judge considered the Promotion of Administrative Justice Act, 2000, in particular the definition of "administrative action" contained therein. It was held that the letter from "President Mbeki that was relied on is more closely related to matters of policy in terms of the relevant section of the Act". It is clearly envisaged that the optimum departmental functioning is a consideration as well as effective service delivery. These are matters that pertain to the executive and are not administrative functions, nor "akin to an administrative act". The learned Judge held that the letter from President Mbeki was an executive act and therefore, it had to comply with section 101(1)(a) of the Constitution. It was held that there was no lawful delegation as, from an evidentiary point of view, the delegation was not signed by President Mbeki or signed by a Cabinet member as envisaged by section 101(1)(a) of the Constitution, reference made to *Masetlha* at par 15.

The Judge went on further to state that in any event, the purported delegation was rendered ineffective by the repeal of the provisions of section 3B of the Act and as a result, the Minister had no lawful authority to suspend the Applicant.

In setting aside the suspension, the court reaffirmed the principles enunciated in *Masetlha*. Even though the President has such powers, in exercising same, the President cannot act in bad faith, arbitrarily and irrationally and principle of legality still remains paramount.

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