IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/463/2020**

In the matter between

THE PRIME MINISTER **1st APPLICANT**

THE MINISTER OF JUSTICE AND LAW **2nd APPLICANT**

THE CHIEF JUSTICE **3rd APPLICANT**

THE ATTORNEY GENERAL **4th APPLICANT**

TRIBUNAL ON THE REMOVAL OF DIRECTOR GENERAL OF THE DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES **5th APPLICANT**

JUSTICE TEBOHO MOILOA **6th APPLICANT**

JUSTICE SEMAPO PEETE **7th APPLICANT**

JUSTICE POLO BANYANE **8th APPLICANT**

AND

MAHLOMOLA MOSES MANYOKOLE **1st APPLICANT**

Neutral Citation: The Prime Minister & 7 Others v Mahlomola Manyokole (CIV/APN/463/2020) [2021] LSHC 12

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **22nd FEBRUARY 2021**

DATE OF JUDGMENT: **22ND FEBRUARY 2021**

SUMMARY

CIVIL PRACTICE: *Functus officio-* ***Judgment and an order of court brought for interpretation*** *– Applicable principles considered and applied.*

ANNOTATIONS:

Legislation:

Prevention of Corruption and Economic Offences Act No.5 of 1999 (as Amended)

High Court Rules 1980

Cases:

Childerly Stores v Standard Bank of S.A 1924 OPD 163

De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A)

Firestone South Africa (PTY) Ltd. V Gentiruco AG 1977 (4) SA 298 (A)

S v Wells 1990 (1) SA 816
Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012).

MOKHESI J

[1]] This matter concerns interpretation of my judgment and orders issued in the matter of **Mahlomola Manyokole and 1 v The Prime Minister and 7 Others (CIV/APN/463/2020) [2021] LSHC 02**. As a general rule once the court has pronounced judgment and order it cannot revisit it because it is *functus officio*. This rule is, however, not absolute as it is subject to some common law exceptions. At common-law judgment granted by a court may only be revisited by it where it was granted by default of one of the parties upon showing sufficient cause for such default. The exceptional power of the court to rescind its own judgment will be exercised again in circumstances where the aggrieved party complains of and proves that it was obtained by fraud, or *Justus error* **(Childerly Stores v Standard Bank of S.A 1924 OPD 163, De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) 1031**). The other exceptions allowed by the common-law relate to supplementation and correction of errors in the judgment or orders. These latter exceptions do not relate to rescissions of judgments. They were authoritatively stated in the case of **Firestone South Africa (PTY) Ltd. V Genturuco AG 1977 (4) SA 298 (A**) where Trollip JA said, at 306 F – 307G:

> *"the general principle now well established in our law; is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased…*
>
> *There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this court. Thus, provided the court is approached within a reasonable time of its*

pronouncing the judgment or order, it may correct, alter or supplement in it one or more of the following cases:

(i) the principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant ….

(ii) the court may clarify its judgment or order, if, of a proper interpretation, the meaning thereof remains obscure ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance of the judgment or order….

(iii) the court may correct a clerical arithmetical other error in its judgment or order so as to give effect to its true intention… this exception is confined to the mere correctio of an error in expressing the judgment or order, it does not extend to altering its intended sense or substance ….

(iv) where counsel has argued the merits and not the costs of a case ….but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order."

(See also: **S v Wells 1990 (1) SA 816 at 820 C – G**).

[2] The above common-law exceptions find expression under Rule 45 (1) of the rules of this court. Rule 45 (1) provides that:

"45. (1) The court may, in addition to any powers it may have mero motu or upon the application of any party affected, rescind or vary-

(a) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgement in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as a result of a mistake common to the parties.

(2) Any party desiring any relief under this Rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed….."

[3A judgment or an order like any document falls to be interpreted in terms of the well-known approach espoused in the **Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012).** The approach is a unitary one, attributing meaning to the words used in a document by simultaneously taking into account the language used in the light of ordinary rules of grammar and syntax, the context in which the provision appears, and the apparent purpose for which it was directed. It is trite that when more than one meaning is generated, each possible meaning must be deciphered in the light of these considerations.

[4] The apparent controversy which engendered this interpretative exercise is the order which was pronounced in court and one which was signed afterwards. In the main, I had ordered that " The application is dismissed with costs" coupled with an order that the 5th to 8th respondents were not awarded costs, for reasons stated in the main judgment. Afterwards, an order prepared by the applicant's counsel was presented before me for signature. This latter order had in addition to an order stated above, included an order that " The suspension of the applicant is declared null and *void ab initio*, pursuant to paragraph 22". I signed the order in this form, on a firm and reasonable belief that it would cause no harm or prejudice to the respondents: the reason for this belief is simply that, the applicant's application was two-pronged. The first prong related to interim reliefs, and the second one covered the main reliefs. To shed more light as to the context in which I signed the order in this form, perhaps it is apposite to reproduce the factual background as articulated in the main judgment (in relevant parts):

> *"[1]* ***INTRODUCTION***
>
> *The 1st Applicant is a Director General (D.G.) of the Directorate on Corruption and economic Offences (DCEO). The DCEO was established in terms of the* ***Prevention of Corruption and Economic Offences Act 1999*** *as amended by Act No.8 of 2006(hereinafter 'the Corruption Act'). This application was lodged on an urgent basis seeking interim and substantive reliefs in the main. He is seeking a review of the 1st respondent's decision to appoint a Tribunal to probe his incapacity and/or misconduct in terms Sections 4(3) – (6) of the Corruption Act. I revert to the grounds of review advanced by the applicant in due course.*
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> *[2]* ***BACKGROUND FACTS***

Although this matter is heavily laden with sensationalism, factual fire and fury which are totally ungermane to its determination, its factual background is, however, largely common cause. On the 10th December 2020, the 2nd respondent (Minister of Justice) authored a correspondence to the 1st applicant in terms of which he sought representations(first show-cause letter) from the latter why he could not be suspended from office pending recommendation by the former to the 1st respondent (Prime Minister) to establish a Tribunal to investigate "Your Fitness of Hold Office in terms of ***Section 4(5) of the Prevention of Corruption and Economic Offences Act No.5 of 1999*** *(as Amended)." Aggrieved by this move on the part of the 2nd respondent, the 1st applicant launched a review application challenging that decision, in CIV/APN/451/2020. In the wake of this challenge the 2nd respondent withdrew the show-cause letter presumably upon realization that he had committed fatal procedural missteps. Even though CIV/APN/451/2020 still pends before the court, in essence, the withdrawal of that show-cause letter had effectively gouged the matter of its substratum.*

[3] On the 18th December 2020, unrelenting in his efforts to have the 1st applicant dealt with in terms of the law, the 2nd authored another show-cause letter (second show-cause letter). This time the 1st applicant was informed that the Tribunal had been established to investigate his fitness to hold office, and that, pending that investigative exercise by the tribunal, the 1st applicant was requested to make representation as to why he could not be suspended from exercising the functions of his office pending the disciplinary inquiry by the tribunal. The said tribunal was established in terms of Legal Notice No.139 of 2020 (hereinafter "Legal Notice"). The tribunal's terms of reference were provided in section 2 of the Legal Notice as follows:

"Terms of reference

2. The terms of reference of the tribunal are –

(a) To investigate and determine the questions of removing the Director-General of the Directorate on Corruption and Economic Offences Advocate Mahlomola Manyokole; and

(b) Make recommendations to the Prime Minister as to whether or not Advocate Mahlomola Manyokole ought to be removed, from office."

[4] It is common ground that when the 2nd respondent made representations to the 1st respondent and the latter deciding to establish the said tribunal, the 1st applicant was not afforded a pre-decision hearing. In a written representation to the 1st respondent, the 2nd respondent detailed what he terms the incidences of misconduct and/or incompetence which he alleged ought to be investigated by the tribunal. The reasons which were posited are materially the same as those contained in the first show-cause the letter the subject matter of CIV/APN/451/2020 which is yet to be heard save for one allegation appearing in the second show-cause letter to the effect that the 1st applicant should be probed for using 'gratuitous and intemperate language in the affidavits filed of record' against both the 1st and 2nd respondents..

[5] In respect of the second show-cause letter, the 1st applicant did not respond but instead launched the current application on the 31st December 2020. In terms of this show-cause letter which was served on

the 29th December 2020, the 1st applicant was given three (days) within which to make written representations, failing which the 2nd respondent would advise the Prime Minister to suspend him. As already said, instead of responding to the show-cause letter, the applicants launched this review application in terms of which they sought interim interdicts against the 2nd respondent advising the 1st respondent to suspend the 1st applicant, pendent lite.

[6] In the main, the applicants sought to assail the decision of the 1st respondent appointing the tribunal variously on the grounds that there was no jurisdictional fact for establishing same and that the decision to appoint the tribunal was made without observing the audi alteram partem rule, and therefore constituted an incursion into the independence of the DCEO; that the Legal Notice is void for intelligibility, vagueness and over-breadth and in violation of the Corruption Act; that the decision by the 3rd respondent (Chief Justice) to appoint Justice J.T. Moiloa was irrational as he is the subject of DCEO investigations for transgressions relating to money laundering.

[7] ***In the interim, the 1st applicant sought an interdict pendent lite against the 2nd respondent advising the 1st respondent to suspend him, and interim interdict against the 1st respondent suspending the 1st applicant, and further, suspension of his suspension in the event the decision to suspend him being already made by the 1st respondent.***

[8] An interim order was made by a Duty-Judge and directives as to the filing of subsequent papers was made, and that parties were directed to appear before court on the 4th January 2021. On that date, the respondents had not yet filed their answering affidavits and the period given to the 1st

applicant to respond to the show-cause letter had accordingly lapsed. On that date I was allocated the matter even though I was on duty and I gave directives for filing of the answering affidavits and set down the date for hearing of the matter on the 07th January 2021 for arguments on the interim reliefs. On that date the matter was not ready to be heard as the respondents had not(sic) yet again failed to file their answering affidavits. The matter was again set down for hearing on the 14th January 2021. In the meantime, the 2nd respondent had advised the Prime Minister to suspend the 1st applicant from exercising the functions of the office, and on the 07th January 2021 the 1st respondent suspended the 1st applicant as contemplated.

[9] In response, the respondents raised two points in limine, viz, misjoinder of the 2nd applicant (DCEO), and (b) delayed jurisdiction of this court as regards prayer 2.6 of the Notice of Motion: The said prayer reads:

> *"2.6 The decision of the Chief Justice to select JUSTICE TEBOHO MOILOA as a member and chairperson of the tribunal on the Removal of the Director General of the DCEO shall not be reviewed, corrected and set aside."*

[10] After hearing arguments on the 14th January 2021 I determined that the decision of the 2nd respondent seeking representations on suspension of the 1st applicant pending the determination of the main matter cannot be assailed. Before I deal with this aspect of the case, I wish to deal with the points in limine raised by the respondents.

[11] …….

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[11] …….

[12] …….

[13] …….

[14] I turn now to deal with the interim reliefs sought by the applicant. It is common ground that when the applicant launched these proceedings there was a pending show-cause letter initiating the process of his suspension from exercising his duties and functions as the DG – DCEO. A specific prayer was sought interdicting the 2nd respondent from advising the 1st respondent that the 1st applicant be suspended, and that in the event that the 1st respondent acts on the basis of the 2nd respondent's advice to suspend the applicant, that such suspension be suspended pending the final determination of this matter. It is common ground that pending the hearing of this matter, the 2nd respondent advised the 1st respondent to suspend the applicant, and indeed he was accordingly suspended. This suspension was effectuated although the issue of the interdict against 2nd respondent advising the 1st respondent not to suspend the applicant was yet to be argued and determined by this court."(emphasis added)

[5] In the main judgment I dealt specifically with the conduct of the 2nd respondent advising the 1st respondent to suspend the applicant when that issue was squarely before this court to decide. I took an issue with that conduct as I considered it usurpation of this court's powers. Consequently, I declared the applicant's suspension *null and void ab initio*. What that declaration meant was that we reverted to the point where we were before the Minister advised the Prime Minister to suspend the applicant despite the fact that that issue was *sub judice*. At that point, there was a show-cause letter which the applicant had not responded

to and was still extant. In other words, what the declaration of nullity, furthermore, meant was that I proceeded to deal with the matter based on the *status quo* which existed prior to the Minister advising the Prime Minister to suspend the applicant.

[6] In keeping with this approach, I determined that the applicant's interim reliefs were without merit, and dismissed them. A declaration that the applicant's suspension was a nullity did not have a Siamese relationship with the interim reliefs such that when they suffered the fate which ultimately befell them, the declaration of nullity fell with them. Put differently and simply, the nullity of the applicant's suspension had a life of its own which survived the dismissal of the interim reliefs. The long and the short of this is that, in reality, the applicant is still in the office unsuspended, and because the show-cause letter has not been responded to, the Minister is still at large to advice the Prime Minister, if he so wishes, to suspend him. *Ex abundanti cautela,* declaring the applicant's suspension a nullity is without prejudice to the exercise of powers by the Minister of Justice and Law and the Prime Minister in terms of the provisions of s.4 (6) of the **Prevention of Corruption and Economic Offences Act 1999 as amended by Act no.8 of 2006**. This exposition is in consonant with the approach I gave to the main judgment, as I treated the matter on the basis that the applicant was unsuspended and that there was an impending suspension against him.

[7] Having dismissed the main application with costs, I had laboured under a misapprehension that that final relief would be read with the declaration of nullity in the body of the judgment, and so, when the order which was prepared by the applicant's counsel was presented incorporating a declaration of nullity I signed for it with an understanding that it would cause no prejudice to the respondents because as a matter of fact the applicant is still unsuspended, until such time the Minister will exercise his statutory power to advice his suspension. The other

source of confusion seemed to have related to the fact that the applicant had sought an order in the main that in the event that the Minister advices the Prime Minister to suspend the applicant despite that issue being *sub judice,* that that suspension be declared *null and void*. Because the suspension prayer had already been dealt with in the first prong of the application, it was therefore academic and unnecessary to have that prayer as part of the main reliefs and should logically have been excluded from the panoply of reliefs which were dismissed by this court in the main.

[8] In order to clear this apparent ambiguity, and so as to imbue the main order with the factual reality discussed above, that order should read as follows:

(a) The interim reliefs are dismissed.

(b) Suspension of the applicant is declared null and *void ab initio*.

(c) The Final reliefs (excluding prayer 2.10 of the Notice of Motion) are dismissed with costs, which cost shall exclude the costs of the 5th to 8th respondents.

MOKHESI J

For the Applicants: Adv. C.J. Lephuthing assisted by Mr. M. Rasekoai

For the Respondent : Adv. Maqakachane instructed by Clark Poopa Attorneys