



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 327/2017

In the matter between:

THE NATIONAL POLICE COMMISSIONER

FIRST APPELLANT

THE MINISTER OF POLICE

SECOND APPELLANT

and

BETTY MMAMONNYE NGOBENI

(PROVINCIAL POLICE COMMISSIONER: KWAZULU-NATAL)

RESPONDENT

Neutral citation: *National Police Commissioner v Ngobeni* (327/2017)

[2018] ZASCA 14 (15 March 2018)

Coram: SHONGWE ADP, WALLIS, SALDULKER and
MATHOPO JJA and PLASKET AJA

Heard: 1 March 2018

Delivered: 15 March 2018

Summary: Institution of a board of inquiry into alleged misconduct, unfitness for office or incapacity of a provincial commissioner of police – powers of national commissioner of police in terms of ss 8 and 9 of South African Police Service Act 68 of 1995 – s 207 of Constitution

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban
(Chili J sitting as court of first instance):

- 1 The application to strike the appeal from the roll is dismissed with costs.
- 2 The appeal is upheld with costs.
- 3 The order of the High Court is altered to read:
‘The application is dismissed with costs.’

JUDGMENT

Wallis JA (Shongwe ADP, Saldulker and Mathopo JJA and Plasket AJA concurring)

[1] In 2009 the respondent, Lieutenant General Ngobeni, was appointed as the Provincial Commissioner for KwaZulu-Natal of the South African Police Service. Her appointment was renewed in 2014 by the then National Police Commissioner, General Phiyega. On 18 March 2016 the then acting National Commissioner, Lieutenant General J K Phahlane, served her with notice of the establishment of a board of inquiry into ‘alleged misconduct and/or fitness for office and/or capacity to execute duties efficiently’. On the same day he served her with a notice of intended suspension. After receiving her submissions, Lieutenant General Phahlane suspended her with effect from 20 May 2016. This prompted Lieutenant General Ngobeni, citing herself as the Provincial

Police Commissioner KwaZulu-Natal, to bring proceedings in the KwaZulu-Natal, Durban, High Court to review and set aside both the establishment of the board of inquiry and her suspension. The application succeeded before Chili J. He refused leave to appeal, but leave was given on petition to this Court.

Lapsing of the appeal

[2] I deal briefly at the outset with an application by Lieutenant General Ngobeni, for an order declaring the appeal to have lapsed and striking it from the roll. There is no merit in this application. It was based upon two points. The one was that the record included a document in the form of an affidavit that was not before the High Court. The simple answer to that is that the members of this Court ignored the document as they would any other irrelevant material placed before them. As Innes ACJ once commented in argument about a similar submission, ‘this is a perfectly ridiculous point’.¹ The second was that in the High Court the Provincial Executive Council, KwaZulu-Natal was cited as the Third Respondent, but played no part in the proceedings. Nonetheless in the preparation of the record it was reflected on the cover of the record as the second respondent. It commonly occurs that parties who were cited but did not participate in the proceedings in the High Court are nonetheless shown on the cover of the record and other documents in this court as a party in the appeal. If that occurs it is irrelevant and is ignored, as it was in this case. The application will be dismissed and the respondent must pay the costs in relation thereto.

¹ *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 397.

[3] In the event of the respondent not securing an order declaring the appeal to have lapsed, she sought condonation of the late filing of her heads of argument. This was granted without opposition at the outset of the appeal. I turn to the merits.

The issues

[4] The central issue in both the High Court and this Court was whether Lieutenant General Phahlane was in law entitled to establish the board of inquiry and, pursuant to its establishment, to suspend Lieutenant General Ngobeni from her position as Provincial Commissioner for KwaZulu-Natal. The answer to that question lies in a consideration of the provisions of ss 205 to 207 of the Constitution and those of ss 8 and 9 of the South African Police Service Act 68 of 1995 (the Act). If that question is answered adversely to Lieutenant General Ngobeni, because the National Commissioner did indeed have these powers, then in the alternative, their exercise was challenged on conventional review grounds.

[5] Section 207(1) of the Constitution provides for the President as head of the national executive to appoint the National Commissioner of the police service. This is reflected and confirmed in s 6(1) of the Act. Section 207(3) of the Constitution provides that:

‘The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province . . .’

That constitutional provision is reflected and confirmed in s 6(2) of the Act. It can be accepted that Lieutenant General Ngobeni was appointed as the Provincial Commissioner for KwaZulu-Natal in accordance with these provisions.

[6] This case concerns the circumstances in which alleged misconduct or unfitness for service or incapacity to fill their post on the part of a Provincial Commissioner of police may be investigated and resolved, potentially resulting in him or her being dismissed or otherwise disciplined. Three other provisions of the Constitution have a bearing on this question. Under s 207(2) the National Commissioner:

‘... must exercise control over and manage the police service in accordance with the National Policing Policy and the directions of the Cabinet member responsible for policing.’

Under s 207(4) the Provincial Commissioners are responsible for policing in their respective provinces as prescribed by national legislation, but:

‘subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).’

Finally, in terms of 207(6):

‘If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.’

[7] The national legislation referred to in these sections is the Act, the key provisions of which are ss 8 and 9. In relevant part they read as follows:

8 Loss of confidence in National or Provincial Commissioner

(1) If the National Commissioner has lost the confidence of the Cabinet, the President may establish a board of inquiry ... to —

- (a) inquire into the circumstances that led to the loss of confidence;
- (b) compile a report; and
- (c) make recommendations.

(2)(a) If a Provincial Commissioner has lost the confidence of the Executive Council, the member of the Executive Council may notify the Minister of such occurrence and the reasons therefor.

(b) The Minister shall, if he or she deems it necessary and appropriate, refer the notice contemplated in paragraph (a) to the National Commissioner.

(c) The National Commissioner shall, upon receipt of the notice establish a board of inquiry ... to —

(i) inquire into the circumstances that led to the loss of confidence;

(ii) compile a report; and

(iii) make recommendations.

(d) ...

(3)(a) The President or National Commissioner, as the case may be, may, after hearing the Commissioner concerned, pending the outcome of the inquiry referred to in subsection (1) or (2)(c); suspend him or her from office ...

(4) to (7) ...

(8) If a Provincial Commissioner has lost the confidence of a National Commissioner, the provisions of subsections (2)(c) and (d), (3), (4), (5), (6) and (7) shall apply *mutatis mutandis*.

9 Misconduct by or incapacity of National or Provincial Commissioner

(1) Subject to this section, subsections (1) to (8) of section 8 shall apply *mutatis mutandis* to any inquiry into allegations of misconduct by the National or Provincial Commissioner, or into his or her fitness for office or capacity for executing his or her official duties efficiently.

(2) The board of inquiry established by virtue of subsection (1) shall make a finding in respect of the alleged misconduct or alleged unfitness for office or incapacity of executing official duties efficiently, as the case may be, and make recommendations as contemplated in section 8(6)(b).'

[8] Lieutenant General Ngobeni contended that if the National Commissioner wished to institute an inquiry into allegations of misconduct against her, or her fitness for office, or capacity for executing her official duties efficiently, the route he had to follow was to refer the matter to the Provincial Executive Council of KwaZulu-Natal. If the Provincial Executive Council formed the view that the National Commissioner's concerns resulted in a loss of confidence in the

Provincial Commissioner, then it would have been obliged to notify the Minister of that fact and of its reasons for reaching that conclusion. Thereafter the Minister, if he or she deemed it necessary and appropriate, could have referred the notice to the National Commissioner. Once that happened the National Commissioner would have been obliged to constitute a board of inquiry. The acting National Commissioner did not follow that route. It was alleged accordingly that he acted without lawful authority in constituting the board of inquiry and suspending Lieutenant General Ngobeni. This argument was upheld by the High Court.

The law

[9] Whether the National Commissioner had the powers he purported to exercise is a matter of interpreting the provisions of s 9 of the Act, which is the section dealing with alleged misconduct, unfitness for office or incapacity, in the light of the relevant constitutional provisions. That exercise is to be undertaken in the light of the summary of the proper approach to interpretation in *Endumeni*,² a judgment that has been repeatedly cited and followed in this court and in the Constitutional Court.³

[10] Sections 8 and 9 of the Act deal with two separate situations that may lead to the termination of the appointment of the National Commissioner or a Provincial Commissioner. The first, in s 8, is where there is a loss of confidence in the incumbent. The second, in s 9, is where there is misconduct by the incumbent, or circumstances arise

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

³ Most recently in *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [2017] ZACC 43; 2018 (2) BCLR 157 (CC) para 28 and *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32; 2018 (1) SA 94 (CC); 2017 (12) BCLR 1562 (CC) para 52.

causing them to be unfit for office or to lack the capacity to execute their official duties efficiently. It is first necessary to deal with s 8 and situations of loss of confidence. The reason is that, because the provisions of sub-sections (1) to (8) of s 8 are incorporated *mutatis mutandis* in relation to investigations under s 9, the proper construction of those sub-sections must be determined before one can assess what changes will be necessary in applying s 9.

[11] Loss of confidence in a police commissioner may arise for many reasons and is not necessarily linked to any misconduct, unfitness for office or lack of capacity. It is far more likely to arise because of dissatisfaction with the manner in which they are discharging the duties and functions of their office and whether under their command the South African Police Service, nationally or provincially, is fulfilling its functions in a satisfactory manner.

[12] The Act does not deal with the situation where the President loses confidence in the National Commissioner of Police, but it is a necessary corollary of the President's power to appoint the National Commissioner that the President may also dismiss the incumbent.⁴ However, when appointing the National Commissioner under s 206(1) of the Constitution, the President is acting as head of the national executive and accordingly exercises the executive authority to make that appointment together with the other members of the Cabinet in terms of s 85(2)(e) of the Constitution. For that reason, s 8(1) provides that if the Cabinet loses confidence in the National Commissioner the President must appoint a

⁴ *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC) paras 66-72.

board of inquiry to inquire into the circumstances leading to that loss of confidence, to report and to make recommendations.⁵

[13] The parallel provision in s 8(2) applies if the Executive Council of a province loses confidence in its local Provincial Commissioner. The reason is again apparent, namely, that the Executive Council played a role in the appointment of the Provincial Commissioner and, if it has lost confidence in the person it helped to appoint, it should be able to address that situation. Section 207(6) of the Constitution contemplates this and s 8(2)(a) is the required legislative response to it. When invoked the Executive Council must notify the Minister of Police in the national government of its loss of confidence in the Provincial Commissioner and give its reasons for that occurring.⁶ No involvement on the part of the National Commissioner is required. If the Minister of Police deems it necessary and appropriate to do so the notice from the Executive Council is referred to the National Commissioner, who is then obliged to constitute a board of inquiry in terms of s 8(2)(c) of the Act to inquire into the circumstances leading to the loss of confidence, report and make recommendations.

[14] The third situation dealt with under s 8 is where the National Commissioner, as the person constitutionally responsible for the appointment of Provincial Commissioners, loses confidence in a Provincial Commissioner. That is dealt with in s 8(8) and it is appropriate to repeat the provisions of that section. It reads:

⁵ It is unnecessary for present purposes to decide whether the President's power to dismiss the National Commissioner is linked to a loss of confidence in the incumbent on the part of the Cabinet or whether this is a separate and distinct power arising from the Constitution alone.

⁶ Section 8(2)(a) of the Act.

‘If a Provincial Commissioner has lost the confidence of a National Commissioner, the provisions of subsections (2)(c) and (d), (3), (4), (5), (6) and (7) shall apply *mutatis mutandis*.’

[15] It is notable that the earlier provisions of ss 8(2)(a) and (b), that apply when an Executive Council’s loses confidence in the Provincial Commissioner, are not made applicable when the National Commissioner loses confidence in a Provincial Commissioner. Only s 8(2)(c), which is the section dealing with the establishment of the board of inquiry, applies and even then it is applicable *mutatis mutandis*, that is, ‘with necessary changes in point of detail’.⁷ The word ‘necessary’ deserves emphasis. It is not for the court to redraft the section, but merely to change those things that are essential to it being of application in its new setting.

[16] What changes are necessary to make the provisions of s 8(2)(c) applicable in the context of the National Commissioner’s loss of confidence in a Provincial Commissioner, and the need consequent upon that to establish a board of inquiry? One only has to read the section to realise that the words ‘upon receipt of the notice’ are glaringly inappropriate. Those words refer to a notice by the Minister of Police under s 8(2)(b), arising from the Minister’s consideration of an Executive Council’s report under s 8(2)(a) that it has lost confidence in its Provincial Commissioner. Section 8(8) has no bearing on that situation. Its concern is the National Commissioner’s loss of confidence in the Provincial Commissioner, not that of the Executive Council.

⁷ *Touriel v Minister of Internal Affairs* 1946 AD 535 at 545; *South African Fabrics Ltd v Millman NO and Another* 1972 (4) SA 592 (A) at 600C-E.

[17] The omission of the words ‘upon receipt of the notice’ in s 8(2)(c) resolves the difficulty. That is also a sensible construction. If the National Commissioner loses confidence in a Provincial Commissioner that ought to be the subject of inquiry. The National Commissioner is responsible in terms of s 207(2) of the Constitution for control over and management of the police service. Under s 207(4) Provincial Commissioners perform their functions subject to the power of the National Commissioner to exercise control over and manage the police service. There is no conceivable reason and none was suggested why the institution of a board of inquiry into the National Commissioner’s loss of confidence in a Provincial Commissioner should be constrained by the need to follow the route under s 8(2)(a) and (b). Making the institution of such an inquiry dependent on the support of the Executive Council and a possible veto by either that body, or the Minister of Police, is not sensible and could hamper the proper management of the police service.

[18] The argument on behalf of Lieutenant General Ngobeni does not contemplate any amendment at all to s 8(2)(c). It was based on the proposition that the words ‘upon receipt of the notice’ have the effect of importing into s 8(8) the provisions of sub-sections 8(2)(a) and (b), notwithstanding their deliberate omission from that section. That is an impermissible approach involving a misconception of what is meant when provisions in one section are incorporated *mutatis mutandis* into another having a different subject. Such incorporation affects only the provisions expressly incorporated and the necessary amendment of those provisions in their new setting. It cannot incorporate matter that is deliberately excluded.

[19] In summary therefore, s 8 deals separately with the Cabinet losing confidence in the National Commissioner and either the Executive Council of a province, or the National Commissioner, losing confidence in a Provincial Commissioner. In the first case, the President, and in the latter two cases, the National Commissioner, must establish a board of inquiry. The composition of the board, the subject and manner of conducting the inquiry and the possible outcomes are in each instance the same. Under s 8(3)(a) the President, or the National Commissioner, as the case may be, is entitled to suspend the National Commissioner or the Provincial Commissioner once a board of inquiry has been established. Lastly, if the National Commissioner is the person who has lost confidence in a Provincial Commissioner the establishment of a board of inquiry and, pursuant thereto, a suspension of the affected Provincial Commissioner requires no input from the Executive Council of the province concerned, even if it disagrees with the National Commissioner.

[20] Turning then to s 9(1), the provisions of sub-sections 8(1) to 8(8) inclusive are made applicable *mutatis mutandis* to any inquiry into allegations of misconduct, unfitness for office or incapacity on the part of either the National Commissioner or a Provincial Commissioner. Manifestly that cannot mean that all of those sub-sections are applicable when the President is dealing with alleged misconduct on the part of the National Commissioner. Nor can they all apply where the National Commissioner is considering alleged misconduct on the part of a Provincial Commissioner. By way of example, sub-section (1) can only apply where the President institutes an inquiry into alleged misconduct by the National Commissioner and sub-sections (2) and (8), which deal only with alleged misconduct involving Provincial Commissioners, have nothing to do with that situation. The converse is equally true, that sub-

section (1) has no application to an inquiry in respect of a Provincial Commissioner.

[21] Section 9 makes s 8(8) applicable *mutatis mutandis* to inquiries into alleged misconduct, unfitness for office or incapacity. As explained in the analysis of s 8(8) in paragraphs 14 to 19 of this judgment, the National Commissioner's decision to establish a board of inquiry to investigate a loss of confidence in a Provincial Commissioner does not require a reference to the Provincial Executive. Similarly, when an investigation into a Provincial Commissioner's alleged misconduct, unfitness for office or incapacity is called for, the National Commissioner must establish a board of inquiry without reference to the Executive Council of the province and whether or not the Executive Council has lost confidence in the Provincial Commissioner.

[22] I am aware that s 9(1) appears to apply the whole of s 8(2) *mutatis mutandis*, but that must be viewed alongside its similar incorporation of s 8(8), which only incorporates s 8(2)(c). As the latter section deals with a situation where the National Commissioner acts of his or her own volition, while the former is concerned with the Executive Council, which is not implicated in and cannot instigate an inquiry into alleged misconduct, unfitness for office or incapacity,⁸ it is to the latter that we must look. That being so the National Commissioner need not refer alleged misconduct, unfitness for office or incapacity on the part of a Provincial Commissioner to the Executive Council of the relevant province before appointing a board of inquiry into those matters.

⁸ It could of course do so indirectly by referring such matters to the National Commissioner, but it has no power to do so of its own volition.

[23] It follows that the approach of the High Court was incorrect. There was no attempt in argument before us to pursue the other grounds of review. That was wise as the acting National Commissioner was in possession of prima facie evidence of misconduct when he took the decision to establish a board of inquiry and suspend Lieutenant General Ngobeni. The other review grounds were accordingly unfounded. The appeal must succeed and the following order is made:

- 1 The application to strike the appeal from the roll is dismissed with costs.
- 2 The appeal is upheld with costs.
- 3 The order of the High Court is altered to read:
‘The application is dismissed with costs.’

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: T Ngcukatoibi (assisted in drafting heads of argument by F Hobden and R Taki)

Instructed by: The State Attorney, Durban and Bloemfontein

For respondent: P Daniels SC (Heads of argument prepared by G Harpur SC and K Thango)

Instructed by: Ravindra Maniklall & Company, Umhlanga Hill, McHardy and Herbst, Bloemfontein.