

FIT AND PROPER IN THE EYES OF THE PUBLIC OR FIT AND PROPER IN THE EYES OF THE MINISTER? HELEN SUZMAN FOUNDATION AND ANOTHER V THE MINISTER OF POLICE AND OTHERS [23199/16]

By Ms Christine Botha: Legal Officer, Centre for Constitutional Rights

The qualification criteria of a “fit and proper person” exercising a public power once again came under scrutiny in the matter of *Helen Suzman Foundation and Another v the Minister of Police and Others* (Ntlemeza matter). The Ntlemeza matter dealt with the review application pertaining to the appointment of Major General Ntlemeza (Ntlemeza) by the Minister of Police (Minister) as the National Director (ND) of the Directorate for Priority Crimes Investigations (DPCI).

The DPCI, better known as the Hawks, is specifically responsible for the investigation of national priority crimes, such as serious commercial crimes and serious corruption in terms of the *South African Police Service Act* (the Act). In terms of the Act, the Minister, with the concurrence of the Cabinet, must appoint the ND and the Minister must then report to Parliament on the appointment. The only qualification criteria for the position as ND, as with the National Director of Public Prosecutions, is that the person, in terms of the Act, must be a South African citizen and must be a “*fit and proper person, with due regard to his experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned...*”.

The Minister appointed Ntlemeza on 10 September 2015, following an appointment process which involved recommendations by an Interview Panel. Following the appointment decision, the Helen Suzman Foundation wrote to the Minister requesting full reasons for the appointment of Ntlemeza and copies of any documents and information on the basis of which the appointment was made. In the reply of the Minister to the said request it became very clear that judgments in the matter of *Sibiya v the Minister of Police and Others* (Main application and Leave to Appeal, *Sibiya* matter), in which remarks by Judge Matojane about the integrity of Ntlemeza were made, were never considered by the Interview Panel. This failure became the crux of the review application launched by the Helen Suzman Foundation.

The *Sibiya* matter in brief concerned an urgent application and appeal for the setting aside of the suspension of Major General Sibiya in December 2014 by the then acting National Head of the DPCI, Ntlemeza. The Judge specifically noted that Ntlemeza’s decision to suspend Major General Sibiya was taken in “*bad faith and ... was arbitrary and not rationally connected to the purpose for which it was taken*”. Ntlemeza then sought leave to appeal the judgment and in the application for leave to appeal, the Court held that the conduct of Ntlemeza “*shows that he is biased and dishonest...and lacks integrity and honour, he made false statements under oath*”.

In the Minister's answering affidavit in the Ntlemeza matter, he acknowledged that he read the judgments in the *Sibiya* matter and that a two-page memorandum, authorised by Ntlemeza, which dealt with some of the aspects of the judgments in the *Sibiya* matter, was given to the Interview Panel. However, no evidence was tendered that copies of the judgments were given to the Interview Panel. In the Minister's opinion, the comments pertaining to the fitness of Ntlemeza in the *Sibiya* matter were remarks and not findings, and did not concern Ntlemeza's fitness for the position.

The Court launched a scathing attack on the Minister's failure to provide copies of judgments in the *Sibiya* matter to the Interview Panel and emphasised that the remarks made by Judge Matojane, pertain to the core of a "fit and proper person" and are judicial pronouncements by a superior court, which cannot be brushed aside. For guidance on the interpretation of a "fit and proper person", the Court considered the Constitutional Court judgment of *Democratic Alliance v President of South Africa and Others* (the Simelane matter) which concerned the appointment of Simelane as the National Director of Public Prosecutions by the President. In the Simelane matter, the President appointed Simelane despite adverse findings made on the character of Simelane by the Ginwala Commission. The Court emphasised in the Simelane matter that the requirement of a "fit and proper person" are "*essential jurisdictional facts*" which must be rationally related to the decision to appoint the person and can therefore be objectively ascertained. In the Ntlemeza matter, the Court stated that the Minister failed to consider all relevant facts, which cast a serious doubt on the integrity of Ntlemeza to hold such an important public office and therefore the decision is not rationally connected and had to be set aside.

This matter has once again shone light on the legislative *lacuna* on guidance of what constitutes a "fit and proper person" and the need for stricter requirements for persons holding positions in public office. Fortunately, judicial guidance can be sought in matters such as *General Council of the Bar of South Africa v Jiba and Others* (*Jiba* matter) and the Simelane case. The *Jiba* matter concerned the question of whether the respondents, all advocates, were still "*fit and proper persons*" to remain on the roll of admitted advocates, after their conduct pertaining to the prosecution of certain cases. The Court emphasised in *Jiba* that one step in the inquiry test involved in the removal of advocates in terms of the *Admissions of Advocates Act* includes a weighing up of the conduct complained against, against the conduct expected of a fit and proper person to practice and is a value judgment consideration. However, as confirmed in the Simelane case, the fact that this determination involves a value judgment does not mean that "*the decision becomes one of subjective determination immune from objective scrutiny*" and as with all decisions by the Executive, the decision, as well as the process by which the decision is made, must be rational.

To ensure the exercising of public power is not abused, and the constitutional mandate of these important public offices are kept intact, the need for stricter legislative qualifications and guidance - in line with judicial considerations on what factors need to be considered in the appointment process of these positions - has become all the more apparent.



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***At time of writing, Ntlemeza had applied for leave to appeal the judgment and according to media reports, the Helen Suzman Foundation has filed an urgent application to have the Order executed.**