

SOUTH AFRICA / JUDGMENT

South African Policing Union and Others v Minister of Police and Others (66522/2020) [2021] ZAGPPHC 10 (8 January 2021)

[2021] ZAGPPHC 10

COURT

North Gauteng High Court, Pretoria

BEFORE

Minnaar

CASE / FILE NUMBER

66522/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE

NO.: 66522/2020

In

the matter between:

SOUTH
AFRICAN POLICING UNION
First
Applicant
LIEUTENANT
GENERAL: P A
JACOBS
Second Applicant

BRIGADIER:

L.A LOMBARD
Third
Applicant

COLONEL:

I
WALLJEE
Fourth Applicant

COLONEL: M GOPAL
Fifth
Applicant
MAJOR
GENERAL: M J
LEKALAKALA
Sixth Applicant

COLONEL: B.W
MATAMELA
Seventh
Applicant
and
MINISTER
OF
POLICE
First Respondent
NATIONAL
COMMISSIONER OF THE
SOUTH
AFRICAN POLICE SERVICE
Second
Respondent
THE
INSPECTOR GENERAL OF INTELLIGENCE
Third Respondent

JUDGMENT

Minnaar AJ:

1. This application was set down in the urgent court for hearing on Tuesday 5 January 2021. The application was allocated to be heard at 11h30 on Wednesday 6 January 2021 via Microsoft Teams. At the outset I wish to thank all counsel involved for their comprehensive heads of argument: it assisted a great deal.
2. At the commencement of proceedings the parties were requested to address the court on urgency. Vigorous argument was presented by counsel for both parties regarding urgency. After having considered the submissions made I regard this application as urgent and as such no further comment in this regard is necessary.
3. The applicants seek a final declaration that the suspensions dated 8 to 10 December 2020 respectively, are unlawful. The alleged illegality is premised on the breach of section 7(7)(f) of the Intelligence Services Oversight Act, 40 of 1994 (“the IOA”). The National Commissioner of the South African Police Services (“National Commissioner”), the second respondent, and the Inspector General of Intelligence (“the IGI”), the third respondent, oppose the application. The Minister of Police (“the Minister”), the first respondent, abides by the decision of this court.

4. Counsel for the applicants submitted that it is necessary for this court to determine the correct meaning of Regulation 10(4) of the South African Police Service Discipline Regulations (“the Regulations”) in the interpretation of the South African Police Service Act, No. 68 of 1995 (“the SAPS Act”).
5. On behalf of the second and third respondents their counsel submitted that the question to be answered is whether section 7(7) of the Intelligence Services Oversight Act, No. 40 of 1994 (“the ISO Act”) provide that the National Commissioner, as the employer, may not suspend employees (the second to seventh applicants) until the IGI submits a report to the Minister, and until the Minister recommends their suspensions.
6. This court need not delve on the merits of the allegations or basis of the suspensions of the second to seventh applicants: save to state that the second to seventh applicants are alleged to have violated a number of provisions, regulations and instructions provided for in the procurement regulatory framework. In this regard, on or about 27 November 2020 the IGI alerted the National Commissioner of allegations of procurement irregularities relating to the purchase of PPE using the Secret Service Account in the Crime Intelligence

Division of the SAPS.

7. Subsequent to the aforesaid the following occurred:

7.1 On 30 November 2020, the National Commissioner appointed Lieutenant General Vuma to conduct an internal investigation into the allegations against the second to seventh applicants. This was done in terms of the Discipline Regulations of 2016;

7.2 The second to seventh applicants were also served with notices of intended suspension and they were invited to make written submissions on why they should not be suspended;

7.3 On 1 December 2020, the Minister addressed correspondence to the National Commissioner stating that in terms of section 7 of the Intelligence Services Oversight Act, No. 40 of 1994 (“the ISO Act”) the IGI must submit a report to him and that, until such time that a report has been furnished, the suspensions must be held in abeyance. This was followed by another letter on 4 December 2020 wherein the Minister reiterated the position expressed above;

7.4 The National Commissioner responded on 4 December 2020 to the following effect:

- i) The disciplinary process that was initiated was a separate and independent process from the IGI’s duty to submit a report to the Minister in terms of section 7 of the ISO Act;
- ii) The steps taken were necessary in terms of section 40 of the South African Police Service Act, No. 68 of 1995 (“the SAPS Act”) read with the Discipline Regulations. Further that as the accounting officer, the Public Finance Management Act, No.1 of 1999 (“PFMA”) enjoins him as the National Commissioner to act on allegations of financial misconduct;
- iii) These steps were taken because there were reasonable grounds to suspect that there has been misconduct requiring an investigation; and

iv) Given that all the legal requirements have been met, it was not within the National Commissioner's powers to hold the matter in abeyance.

7.5 The second to seventh applicants submitted their written representations explaining why their suspensions should not be proceeded with. These were considered by the National Commissioner and a decision was taken to suspend the second to seventh applicants;

7.6 On 13 December 2020, the second to seventh's applicants' attorney sent a letter to the National Commissioner requesting that the suspensions be uplifted. This request was denied;

7.7 On 21 December 2020, the IGI sent comments on the Minister's letters of 1 and 4 December 2020. The comments are set out in detail in Annexure "AA1" to the answering affidavit. In essence, the IGI explained that there is nothing precluding interactions between the IGI and the National Commissioner, that cooperation and interaction between their offices is required, and that section 7(7) of the ISO Act does not fetter the National Commissioner's authority in relation to the management of discipline in the SAPS.

The Intelligence Services Oversight Act, No. 40 of 1994 ("the ISO Act"):

8. Section 7(7) of the ISO Act reads:

"The functions of the Inspector-General are, in relation to the Services-

- (a) to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence;
- (b) to review the intelligence and counter-intelligence activities of any Service;
- (c) to perform all functions designated to him or her by the President or any Minister responsible for a Service;

(cA) to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph (a), the commission of an offences [sic] referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member;

(d) to submit the certificates contemplated in subsection (11) (c) to the relevant Ministers;

(e) to submit reports to the Committee pursuant to section 3 (1) (f); and

(f) to submit reports to every Minister responsible for a Service pursuant to the performance of functions contemplated in paragraphs (a), (b), (c) and (cA): Provided that where the Inspector-General performs functions designated to him or her by the President, he or she shall report to the President."

9. In terms of the ISO Act 'services' means the Agency, the Intelligence Division of the National Defence Force and the Intelligence Division of the South African Police Service.
10. The National Commissioner is one of the Heads of Service as defined in the Act.
11. Section 7(7A) of this Act provides that the reports of the IGI contemplated in subsection 7(f) in respect of monitoring and reviewing shall contain the findings and recommendations of the IGI.
12. The relationship between the IGI and the National Commissioner (as Head of the Service) is as set out in section 7(8)(a) of the IOA. Since the IGI reports to the Minister in terms of Section 7(7)(f), the IGI is empowered to demand from the relevant Head of Service (in this instance the National Commissioner) and its employees such intelligence, information, reports and explanations deemed necessary for the performance of his functions.
13. The National Commissioner, as the Head of service for Crime Intelligence, must in terms of section 7(11)(a) of the ISO Act, submit to the Minister a report, in respect of every period of 12 months or such lesser period as is specified by the Minister responsible for that Service, on the activities of crime intelligence and copy the IGI.
14. The National Commissioner is also enjoined by section 7(11)((b)(i) to report to the IGI regarding any unlawful intelligence activity or significant intelligence failure of that Service and any corrective action that has been taken or is intended to be taken in connection with such activity or failure. Section 7(11)(b)(ii) provides that the National Commissioner shall submit the report referred to in subparagraph (i) to the IGI within a reasonable period after such unlawful intelligence activity or significant intelligence failure came to his or her attention.
15. As soon as practicable after the IGI receives the report mentioned in section 7(11)(a) the IGI is in turn enjoined by section 7(11)(c) to submit to the Minister a certificate stating the extent to which the IGI is satisfied with the report and whether anything done by that service is in the opinion of the IGI unlawful, or involves an unreasonable or unnecessary exercise of power by the state.
16. Further steps as directed by the Act will then follows which includes submitting the report of the IGI to the Joint Standing Committee of Intelligence so that it can carry out its functions in terms of section 3 of the IOA.
17. It is the case of the applicants that the suspensions of the second to seventh applicants contravene section 7(7) of the ISO Act. In this regard it is the case of the applicants that:

17.1 The IGI has certain statutory monitoring and compliance duties, for which he is directly accountable to the Minister. This includes monitoring compliance with applicable laws and relevant policies on, as in the present case, alleged maladministration. This is an express obligation in terms of section 7(7)(cA) read with section 7(7)(a).

17.2 The outcome of this monitoring and compliance is a report, which must be submitted to the relevant Minister. That report must, as prescribed by section 7(7A), contain findings and recommendations. The report in turn is underpinned by information from the Head of Service, in this case the National Commissioner, that the IGI is empowered under section 7(8)(a) to demand for the purposes of reporting to the Minister;

17.3 The IGI cannot simply act without restraint, particularly as in this case where the information that forms the subject matter of the report is subject to restriction in terms of any law. Before that information can be disclosed, the President or Minister, as appropriate must be consulted. If it is agreed that the information in question can be disclosed such as for example for use in a hearing involving members of Crime Intelligence, the disclosure must be subject to restrictions imposed by the IGI himself and where it has been established that disclosure is not detrimental to the national interest;

17.4 The ISO Act also regulates the relationship of the National Commissioner to the Minister. The National Commissioner, in his capacity as Head of Crime Intelligence, must report to the Minister on its activities and copy the IGI. In so doing he is mandated to report any unlawful intelligence activity or intelligence failure. On receipt of the report the IGI submits to the Minister a certificate stating whether he is satisfied with the report. The Minister in turn submits the report to Parliament;

17.5 These provisions exist as a collaborative whole creating obligations for the Minister, the National Commissioner, the IGI and Parliament with the overall aim of giving effect to the national strategic intelligence agenda as set out in the National Strategic Intelligence Act, 39 of 1994. That aim is to protect national security against the threats defined in the Act.

17.6 This is the framework within which the illegality of the suspension must be understood, and the Minister's request that, before any further disciplinary action is taken, he is furnished with a report by the IGI. Regulation 10 and the powers conferred on the National Commissioner cannot be interpreted in conflict with the obligations of the National Commissioner, the IGI and the Minister under the ISO Act. Section 24(1) of the SAPS Act (dealing with regulations that the Minister may make) and the Disciplinary Regulations thereto, must be interpreted in harmony with section 7(7).

17.7 It follows as a matter of rational and proper statutory interpretation that the SAPS Act, and the Discipline Regulations promulgated in terms thereof, must be construed together with these statutes, as they are in *pari materia*.

17.8 Their aim is not to deprive the Minister of his powers under the Constitution and the SAPS Act, but rather to regulate somewhat more onerously the discipline of members of the Service, with good reason. That reason is rooted in the protection of national security against what the definition section to the Strategic Intelligence Act records as:

'national security' includes the protection of the people of the Republic and the territorial integrity of the Republic against-

- (a) the threat of use of force or the use of force;
- (b) the following acts:
 - (i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;
 - (ii) terrorism or terrorist-related activities;
 - (iii) espionage;
 - (iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
 - (v) exposure of economic, scientific or technological secrets vital to the Republic;
 - (vi) sabotage; and
 - (vii) serious violence directed at overthrowing the constitutional order of the Republic;
- (c) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic's responsibilities to any foreign country and international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent;

17.9 These are the objectives of collaborative monitoring, compliance and reporting of maladministration. These powers are fully intact, but in the case of Crime Intelligence, fall to be exercised contextually and purposively to give effect to the national intelligence agenda. This is why the ISO Act regulates the relationship between the three respondents, prescribing for each their obligations inter se. It is a statutory covenant that binds them to a single, harmonious intelligence agenda within the sphere of their allocated powers;

17.10 It is not the applicants' case that the consent of the Minister is required before the National Commissioner exercises his powers, but just that the consultative process called for by section 7(7) of the ISO Act is given effect to because it exists alongside the powers of the National Commissioner.

17.11 In conclusion it is then the case of the applicants that the failure of the National Commissioner to wait for the IGI to furnish the report to the Minister thus impinged on section 7(7) of the ISO Act, and the relevant provisions of the Secret Service Act 56 of 1978 and National Strategic Intelligence Act 39 of 1994, in which framework the Discipline Regulations fall to be interpreted. For this reason, the suspensions are unlawful and should be set aside.

18. In the recent decision of *Independent Institute of Education (Pty) Ltd v Kwa-Zulu Natal Law Society and Others* 2020 (2) SA 325 (CC) (relied on by the applicants) the Constitutional Court was called upon to interpret the Legal Practice Act in harmony with the Higher Education Act, the Court per Theron J expressed the principle as set out below:

“[38] It is a well-established canon of statutory construction that “every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every

other unrepealed statute enacted by the Legislature”. Statutes dealing with the same subject matter, or which are in *pari materia*, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

[39] This canon of statutory interpretation was expressly recognised and affirmed by this Court in *Shaik*. In that case it was held that the words “any person” in section 28(6) of the National Prosecuting Authority Act, despite their wide ordinary meaning, should be construed restrictively to avoid a clash with a provision in another statute.

[40] More recently, this Court in *Ruta* interpreted provisions of the Immigration Act together and in harmony with those of the Refugees Act. In a unanimous judgment, this Court noted that “[w]ell-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together.”

[41] This canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly

contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that words should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive approach must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where “the words to be construed are clear and unambiguous”.

[42] This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external

context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in light of the text of the legislation as a whole (internal context). This Court has also recognised that context includes, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this case, other legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in *Shaik*. In *Shaik*,

this Court considered context to be “all-important” in the interpretative exercise...

19. From the above it is evident that every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute. It thus follows that section 7(7) cannot be read in isolation. The applicants referred to the provisions of section 7(11) and same must be read in conjunction with what is provided for in section 7(7).
20. In terms of section 7(7)(a) the IGI is to monitor compliance with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence.
21. In terms of the ISO Act “intelligence” is defined as the process of gathering, evaluation, correlation and interpretation of security information, including activities related thereto, as performed by the Services.
22. “Counter-intelligence” means counter-intelligence as defined in section 1 of the National Strategic Intelligence Act, 39 of 1994. In that Act ‘counter-intelligence’ means measures and activities conducted, instituted or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence and any classified information, to conduct

vetting investigations and to counter any threat or potential threat or potential threat to national security.

23. This court cannot, at this stage, come to the conclusion that the violations allegedly conducted by the second to seventh applicants can in any way be construed to mean that same relates to applicable laws and relevant policies on intelligence or counter-intelligence as provided for in section 7(7)(a) of the ISO Act. As such it would be premature to determine whether there was a duty on the IGI to monitor compliance as provided for in section 7(7)(a) of the ISO Act.
24. In the same breath the alleged violations can also not, at this stage, be construed as being non-compliance with the Constitution as provided for in section 7(7)(a) of the ISO Act.
25. It would further be premature to determine, at this stage, whether same applies to the specified complaints mentioned in section 7(7)(cA) of the ISO Act. In as far as reliance is placed thereon that the alleged violations are premised on maladministration then this subsection makes mention of ‘alleged’ maladministration: it follows that the IGI would not be in a position

to present a report on alleged actions without having concluded a thorough investigation.

26. In amplification to the above the same apply to whether there was a breach of ‘national security’ as defined in the definition section to the National Strategic Intelligence Act, 56 of 1978.

27. In terms of Annexure “AA1” to the answering affidavit it is evident that the IGI is currently seized with an investigation against the second to seventh applicants. As such it should be accepted that the IGI is currently acting in terms of the provisions of section 7(7)(cA) of the ISO Act. The IGI clearly states in Annexure “AA1” that there are allegations of procurement irregularities and that the report envisaged in section 7(7)(f) will be submitted to the Minister as and when it is completed.
28. The applicants’ sole reliance on section 7(7) is misconstrued as section 7(11) also makes provision for reports to be submitted by the National Commissioner to both the Minister and the IGI.
29. Section 7(11)(b)(i) provides for a situation where the National Commissioner (as Head of a Service) shall report to the IGI regarding any unlawful intelligence activity or significant intelligence failure of that Service and any corrective action that has been taken or is intended to be taken in connection with such activity or failure.
30. In terms of section 7(11)(b)(ii) such report shall be submitted to the IGI within a reasonable period after such unlawful intelligence activity or significant failure came to his or her attention.
31. The ‘corrective action’ referred to in section 7(11)(b)(ii) might for all purposes include the precautionary suspensions of members, the current investigation by Lieutenant General Vuma and any disciplinary process (if any) that might follow.
32. Regarding the aforesaid it is clear that there is currently an investigation undergoing and disciplinary processes are pending. The second respondent is still at full liberty to act in terms of the provisions of sections 7(11)(b)(i) and (ii) and/or the provisions of section 7(7)(f) (as alluded to in Annexure “AA1” to the answering affidavit).
33. Until such time as the investigations by Lieutenant General Vuma and/or the IGI is concluded it would be premature to decide whether the alleged misconduct or violations relates to intelligence and counter-intelligence as provided for in section 7(7)(a), or constitutes maladministration as provided for in section 7(7)(cA) or whether same is catered for in terms of section 7(11)(a) and/or (b) of the ISO Act.
34. In the premises the applicants are premature in approaching this court on the provisions of section 7(7) of the ISO Act.

National Commissioner’s authority to act:

35. In terms of the Constitution of the Republic of South Africa, 1996 the National Police Service is provided for in section 205 of the Constitution. The objects of the police service are listed in Section 205(3). They are “to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their

property, and to uphold and enforce the law”. Section 205 provides that National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively.

36. The person tasked with exercising control over and managing SAPS is the National Commissioner. According to section 207(1) of the Constitution, the National Commissioner is appointed by the President, and according to section 207(2), the National Commissioner “must exercise control over and manage the police service.” This general provision is given more flesh in Schedule 6 Item 24 read together with Annexure D, which is concerned with the responsibilities of the National Commissioner.
37. The National Commissioner is specifically made responsible for the maintenance of an impartial, accountable, transparent and efficient police service, as well as the recruitment, appointment, promotion, and transfer of all the members of SAPS.
38. Also of relevance is the provisions related to the public services. The police service forms part of the public service in South Africa. The Constitution places the public service within the public administration, and the basic values and principles governing public administration would also govern the public service including the police service. In terms of section 195(1) of the Constitution this includes:
 - i) the promotion and maintenance of a high standard of professional ethics;
 - ii) the promotion of efficient, economic, and effective use of resources;
 - iii) the requirement that public administration must be accountable; and
 - iv) the cultivation of “good human resource management and career development practices”.
39. In terms of Section 195(2) of the Constitution, the above principles apply to all organs of state and in the administration of every sphere of government.
40. The South African Police Service Act 68 of 1995 (“SAPS Act”) is the national legislation contemplated in section 205(3) of the Constitution. The preamble to the SAPS Act is an indication of its purpose. It must combat crime, uphold, and safeguard the fundamental rights of every person.
41. Section 24(1) of the SAPS Act, empowers the Minister to make different regulations (subordinate legislation) in respect of a variety of topics, including but not limited to:
 - i) the exercising of policing powers and the performance by members of their duties and functions;
 - ii) the recruitment, appointment, promotion and transfer of members;
 - iii) the training, conduct and conditions of service of members;

- iv) the general management, control and maintenance of the service; returns, registers, records, documents, forms and correspondence in the service; labour relations, including matters regarding suspension, dismissal and grievances; and
 - v) the institution and conduct of disciplinary proceedings or inquiries.
- 42. In general, these regulations are aimed at ensuring the proper functioning of the police service and regulating the conduct and discipline of its members.
 - 43. Section 40 of the SAPS Act states that “disciplinary proceedings may be instituted in the prescribed manner against a member on account of misconduct whether such misconduct was committed within or outside the borders of the republic”.
 - 44. To give effect to this section and section 24 of the SAPS Act, the Minister has enacted the Disciplinary Regulation of 2016.
 - 45. Discipline within the SAPS is dealt with under the South African Police Service Discipline Regulations 2016 published by the Minister in Government Gazette No. 40389 on 1 November 2016 (“the Discipline Regulations”).
 - 46. The Discipline Regulations, in section 1(d), define “employer” as the National Commissioner or any person delegated by the National Commissioner to perform any function in terms of the Regulations.
 - 47. The scope of the regulations is set out in regulation 2. The Regulations apply to the employer and all its employees including members of the Senior Management Service of the Service, excluding the National Commissioner and Provincial Commissioners.
 - 48. Regulation 4 is of significance hereto:

Regulation 4 sets out the principles underpinning disciplinary action. Discipline is considered corrective and not punitive. It is to be applied in a manner that is prompt, fair, consistent and progressive. Disciplinary action is considered a line management function.

- i) Regulation 4 also allow for the appointment of an employee who is impartial and not in any way connected to the alleged misconduct to represent the employer at, preside over the disciplinary hearing or investigate alleged misconduct against an employee. An employee appointed to investigate the alleged misconduct must be of equal or higher rank than the employee being investigated. The investigation into an alleged misconduct must be done independently and be separate

from any other investigation.

- ii) Finally, regulation 4 sets out procedural protections for employees going through disciplinary action. An employee undergoing disciplinary proceedings has the right to representation. A person appointed as a chairperson is required to act objectively, unbiased and protect the interest of both parties and at no stage must assume the role or act on behalf of any of the parties.

49. Regulation 5 sets out conduct that warrants disciplinary action. In particular, regulation 5(3) provides as follows:

“(3) An employee will be guilty of misconduct if he or she

- (a) fails to comply with, or contravenes an Act, regulation or legal obligation;
- (b) performs any act or fails to perform any act with the intention;
 - (i) to cause harm to or prejudice the interests of the Service, be it financial or otherwise;
 - (ii) to undermine the policy of the Service; or
 - (iii) not to comply with his or her duties or responsibilities;
- (c) wilfully or negligently mismanages the finances of the State;
- ...
- (t) conducts himself or herself in an improper, disgraceful and unacceptable manner;
- (v) incites other employees to unlawful conduct or conduct in conflict with accepted procedure;
- ...”

50. Sub-regulation 5(4) lists conduct which may warrant the institution of the expeditious procedure as provided for in regulation 9:

“ ...

- (f) Corruption;
- (x) Any act of misconduct which detrimentally affects the image of the Service or brings the Service into disrepute or which involves an element of dishonesty;

51. Regulation 8(1) provides that “[a] supervisor must ensure that the investigation into the allegations of misconduct is completed within thirty (30) calendar days or as soon as practically possible thereafter, and if satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, refer the outcome of the investigation to the employer representative within seven (7) working days to initiate a disciplinary enquiry. The employee must be informed of the alleged misconduct and pending investigation.”

52. Importantly, regulation 10 allows the National Commissioner to place an employee on suspension as a precautionary measure. It provides as follows:

“(1) A suspension or temporary transfer is a precautionary measure.

- (2) The National, Provincial or Divisional Commissioner may suspend or temporarily transfer an employee, provided that before effecting such a suspension or transfer such an employee is afforded a reasonable opportunity to make written representations.

- (3) The employer may after having afforded an employee a reasonable opportunity to make written representations and after consideration of the representations, suspend with full remuneration, or temporarily transfer an employee as a precautionary measure on conditions, as may be determined.
- (4) After an employee is suspended with full remuneration or temporarily transferred as a precautionary measure, the employer must hold a disciplinary hearing within sixty (60) calendar days from the commencement of the suspension. Upon the expiry of the sixty (60) calendar days the chairperson of the hearing must decide whether the suspension or temporary transfer should continue or be terminated and if the suspension or temporary transfer continues, it should not be more than thirty
- (30) calendar days where after, the suspension or temporary transfer is automatically uplifted.”
53. The Public Finance Management Act No.1 of 1999 (“the PFMA”) is the national legislation envisaged in section 216 of the Constitution, and seeks to give effect to, amongst others, the values underpinning sections 217 and 195 of the Constitution. The PFMA was enacted to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.
54. Section 36 of the PFMA provides that every department and every constitutional institution must have an accounting officer. The head of a department must be the accounting officer for the department. The National Commissioner is SAPS’s accounting officer as envisaged by section 36.
55. Section 51 of the PFMA sets out the duties and responsibilities of accounting officers.
- “(1) *An accounting authority for a public entity—*
- (a) must ensure that that public entity has and maintains—
- (i) effective, efficient and transparent systems of financial and risk management and internal control;
- (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and
- (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

- (b) must take effective and appropriate steps to—
 - (i) collect all revenue due to the public entity concerned; and
 - (ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and
 - (iii) manage available working capital efficiently and economically;
 - (c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;
 - (d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;
 - (e) must take effective and appropriate disciplinary steps against any employee of the public entity who—
 - (i) contravenes or fails to comply with a provision of this Act;
 - (ii) commits an act which undermines the financial management and internal control system of the public entity; or
 - (iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;
 - (f) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;
 - (g) must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and
 - (h) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.”
56. Failure to comply with this provision attracts severe consequences for an accounting officer. In this regard section 86 of the PFMA applies.
57. Accounting officers are thus legally required to act where there has been contravention or failure to comply with a provision of the PFMA. The aforesaid includes acts which undermine the financial management and internal control system of the public entity, irregular expenditure or fruitless and wasteful expenditure.
58. The IGI derives his mandate from the Constitution and the ISO Act. This Act provides for the appointment of Inspectors General of Intelligence and defines the IGI's functions.

59. As already mentioned the National Commissioner is the ‘Head of Service’ in terms of the ISO Act.
60. The National Commissioner is the Head of the Intelligence Division of SAPS for financial and administrative accounting. Thus in matters involving financial and administrative accounting, the IGI is required to communicate with the National Commissioner. As stated, the IGI’s functions are set out in section 7(7) of the ISO Act.
61. The law relating to the interpretation of legislation in this country is well-settled. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012] ZASCA 13; 2012 (4) SA 593 (SCA). (“Endumeni”) the SCA expounded the principle as follows:

“[18] . . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory

instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence . . . The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

- [26] . . . in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”
62. The applicants contend that section 7 of the ISO Act requires the IGI to submit a report to the Minister and that the Minister must take a decision on the veracity of the allegations contained in the report before the National Commissioner may take any decision on the question of the Employees’ suspension.
63. As a point of departure, section 7(7) deals with the functions of the IGI. In the main, the IGI’s oversight role over the intelligence and counter-intelligence services is restricted to monitoring their compliance with the Constitution and other laws. Section 7(7) creates an oversight mechanism where the IGI can receive complaints and reports on matters, investigate them and submit findings to the Minister.

64. It is clear from a textual reading of section 7(7) that the provision does not regulate the second to seventh applicants' suspensions at all, nor does it create the preconditions sought to be read in by them. It does not provide that in the absence of the IGI submitting a report to the Minister, and in the absence of a decision by the Minister which is communicated to the National Commissioner, the National Commissioner will have no power of suspension.
65. The interpretation advanced by the applicants would "lead to impractical, consequences or that will stultify the broader operation of the legislation" (Endumeni at para 28).
66. It is the National Commissioner's prerogative as the employer to initiate investigations and disciplinary action against the second to seventh applicants as employees.
67. The Minister is responsible for determining national policing policy (section 206 of the Constitution) and the overall execution of the department's mandate, in relation to key pieces of legislation.
68. The National Commissioner, on the other hand, is the Accounting Officer of the SAPS. Deputy National Commissioners (under whom the divisions and components of the SAPS fall) and provincial commissioners (under whom the cluster and station commanders fall) report to the National Commissioner.
69. The National Commissioner has the power to suspend the second to seventh applicants in accordance with his entitlement to do so in terms of section 40 of the SAPS Act read with Regulations 4, 5, 8 and 10 of the Discipline Regulations. Furthermore, the National Commissioner is obliged by section 51 read with section 86 of the PFMA to take appropriate action in cases of procurement irregularities and flouting of Treasury Regulations. For the applicants to allege otherwise (on the basis that the whole process in terms of section 7(7) of the ISO Act should first be exhausted) would defeat this whole purpose. Speedy investigations and action is clearly needed in instances like these.
70. In this regard I need to state that it was conceded by counsel on behalf of the applicants that the second to seventh applicants are indeed employees of the South African Police Service and that, as such, the National Commissioner has the authority to suspend them pending investigation and disciplinary proceedings. The rider was however that they are members of Crime Intelligence and as such section 7(7) of the ISO Act should first be adhered to before such suspensions. Premised on what has already been found with regard to the premature reliance on the provisions of section 7(7) of the ISO Act, and the duties and obligations of the National Commissioner, this court cannot align itself with this rider.
71. The interpretation advanced by the applicants further deprives the National Commissioner of his powers, undermines his prerogative on matters of discipline in the employment realm, and undermines his ability to meet his obligations as set out in the SAPS Act and the PFMA by suggesting that disciplinary action can only be taken once the Minister has made some kind of decision based on the IGI's report.

72. There is nothing in the ISO Act that prohibits or precludes the National Commissioner from initiating disciplinary action – or an internal investigation for that matter – in the event that he becomes aware of serious allegations of misconduct committed by senior officials within the SAPS. It follows that he needs to act swiftly in execution his mandate.
73. In *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) (“Ruta”) at paras 41-6, the Constitutional Court noted that a “[w]ell-established interpretive doctrine enjoins [the Court] to read the statutes alongside each other, so as to make sense of their provisions together.”
74. In *Arse v Minister of Home Affairs & others* 2012 (4) SA 544 (SCA) at para 19, the SCA held as follows:
- “[19] ... In so far as there may be a conflict between the two provisions [in different but related statutes] they should be reconciled. Where two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another. In Petz Products v Commercial Electrical Contractors[1] it was said:*

‘Where different Acts of Parliament deal with the same or kindred subject- matter, they should, in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and inter-dependent, and the content of the one statutory provision may shed light upon the uncertainties of the other.’”

75. Read together, the only interpretation that makes sense and accords with the principles of interpretation advanced in our jurisprudence is that advanced by the National Commissioner and the IGI.
76. Suspensions of this nature are at the prerogative of the employer. In this case, the National Commissioner is the employer of the second to seventh applicants. The Minister’s role is circumscribed and does not extend to the day-to-day employment-related affairs of the SAPS.
77. The suspensions are clearly an interim measure to provide space for a proper investigation. The National commissioner explains the necessity of this step as follows in his answering affidavit:

“94.1 First, an investigation is required to look at the veracity of the allegations, and it needs to be comprehensive and thorough.

94.2 Second, the Employees are all senior members of the crime intelligence division, their seniority creates a likelihood of interference with the investigation, intimidation of witnesses and tampering with documents. Their mere presence during the investigation could undermine the processes and jeopardize the investigation by rendering persons with knowledge necessary for the investigation reluctant to come forward or be forthcoming. In order to protect the process, this interim measure is necessary.

94.3 Third, the suspensions are for a limited time. Regulation 10 provides for automatic upliftment of the suspensions. “Upon the expiry of the sixty (60) calendar days the chairperson of the hearing must decide whether the suspension or temporary transfer

should continue or be terminated and if the suspension or temporary transfer continues, it should not be more than thirty (30) calendar days where after, the suspension or temporary transfer is automatically uplifted.”

94.4 Fourth, the suspensions are with full pay which ameliorates any prejudice to the Employees.”

78. From the papers it is clear that all the legal prescripts have been met for the lawful suspension of the second to seventh applicants pending the internal disciplinary processes. They do not contend otherwise – instead, their application is premised on the existence of additional prescripts in section 7(7) of the ISO Act. For the reasons already set out, such prescripts are simply not there.
79. Section 40 of the SAPS Act provides that the National Commissioner (and employer) may institute disciplinary action against any employee who commits misconduct. The prescribed manner is set out in the Discipline Regulations discussed above.
80. Furthermore, section 51(1)(c) read with section 86(2) of the PFMA mandates accounting officers to act where there has been contravention or failure to comply with a provision of the PFMA. Failure to act attracts serious consequences.
81. It follows that, the National Commissioner is not only entitled to act against the second to seventh applicants’ alleged misconduct, but is obliged to do so by law, specifically section 51 read with section 86 of the PFMA.

Costs:

82. The applicants approached this court to protect their interests and to seek an order that they be reinstated. Although novel legal points were raised it cannot be said that the applicants were not aware of the National Commissioner and the IGI’s approach and justification of the steps taken by them. Same is evident from the letter from the National Commissioner to the Minister on 4 December 2020 (Annexure “PJ3” to the founding affidavit) and more prudently from the letter issued by the IGI to the National Commissioner on 21 December 2020 (Annexure “AA1” to the answering affidavit). Despite this the applicants proceeded with this application seeking final relief. There is no justification to depart from the general rule that costs should not follow the outcome.
83. Both the applicants and the second and third respondents employed two counsel.

In the premises the following order is made:

- 1) The application is dismissed;

- 2) The applicants, jointly and severally the one paying the other to be absolved to pay the costs of this application, such costs to include the costs in the employment of two counsel.

J MINNAAR (AJ)

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION

DATE OF HEARING : 06 JANUARY 2021

DATE OF JUDGMENT : 08 JANUARY 2021

APPEARANCES:

For The Applicants'

: Advocate R Tulk

Advocate KT Kgole

For Second and Third Respondent : Advocate R Itzkin

Advocate T Pooe

[1] 1990 (4) SA 196 (C) at 204H.

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