

**HIGH COURT
BISHO**

CASE No. 230/99

In the matter between:

VATISWA SINDISWA BAM-MUGWANYA	APPLICANT
and	
THE MINISTER OF FINANCE AND PROVINCIAL EXPENDITURE EASTERN CAPE GOVERNMENT	FIRST RESPONDENT
EASTERN CAPE TENDER BOARD	SECOND RESPONDENT
THE GOVERNMENT OF THE EASTERN CAPE	THIRD RESPONDENT

JUDGMENT

EBRAHIM J:

1. These are review proceedings in which the applicant seeks to have reviewed, and set aside, the decision terminating her membership of the second respondent. The application is opposed by the respondents. The relief, as initially prayed for in the notice of motion, is set out as follows:
- ‘1.1 That the decision by the Executive Council of the Eastern Cape Government to terminate the Applicant’s membership of the Second Respondent on the 9th July 1999 be reviewed and set aside.
 - 1.2 That the decision of the First Respondent to terminate the Applicant’s term of office as a Member and the Deputy Chairperson of the Second Respondent be set aside.
 - 1.3 That the Applicant be re-instated as a Member and the Deputy Chairperson of the Second Respondent on terms similar to those prior her term of office being terminated.

- 1.4 That the Respondents be ordered to pay the Applicant's costs.
- 1.5 Such further or alternative relief as this Court deems meet.'

The factual background

- 2. The circumstances which have given rise to this application appear from the applicant's founding affidavit. During November 1995 the applicant was appointed as a member of the second respondent ('the Tender Board') in terms of section 3 of the Provincial Tender Board Act 2 of 1994 (Eastern Cape). The applicant's membership was for a period of three years and terminated in 1998. In January 1999 she was re-appointed for a further period of three years and at the same time appointed to the position of deputy chairperson of the second respondent. The applicant, regrettably, has not furnished the specific dates on which her appointments took effect but it appears from an annexure to the answering affidavit of the respondents that her re-appointment for a second term took effect on 22 December 1998.
- 3. On 11 February 1999 the applicant was informed verbally by a member of the second respondent that a sub-committee had been appointed to investigate alleged impropriety on her part. This impropriety, it would appear, concerned the applicant's failure to disclose to the Tender Board her membership of a close corporation which had a direct interest in the extension of certain contracts for the provision of bus services. On 12 February 1999 the applicant received a letter, dated the same day, (annexure 'BM1') from the chairman of the second respondent informing her of the findings of the sub-committee and inviting her to submit representations to the Tender

Board regarding these findings.

4. On 22 February 1999 the applicant addressed a detailed written explanation (annexure 'BM1') to the chairman of the second respondent. The gist of the applicant's explanation was that on 12 March 1998 she did not have any interest in Bam Consortium CC, the close corporation of which she was a member. She had disposed of her '*membership interest*' to one of her co-members in the close corporation, namely, her brother P N Bam, with effect from 1 March 1998. However, on 12 March 1998, even though transfer of her members interest '*had not been registered in Pretoria*' she did not have any financial interest in Bam Consortium CC at that date. Further, she also acted as a consultant and adviser to '*numerous bus operators*' but '*received no financial gain whatsoever for services rendered*'.
5. After the applicant had submitted this written explanation she also made verbal representations to the sub-committee. Following this, certain correspondence passed between her and the chairman of the second respondent. The applicant was invited to submit an addendum to her written submissions, if she so wished, but declined the invitation. Instead, she requested that the sub-committee '*communicate to (the first respondent) that I shall be grateful that before he takes a decision on this matter (that) he affords me an audience*'.
6. On or about 31 March 1999 the applicant received a letter dated 31 March 1999 from Dr E Tom in his dual capacity as Director-General and Cabinet Secretary.

This letter conveyed the following:

'Dear Mrs Bam-Mugwanya

PROPOSED TERMINATION OF YOUR MEMBERSHIP FROM THE PROVINCIAL TENDER BOARD IN TERMS OF SECTION 3 (8) OF THE PROVINCIAL TENDER BOARD ACT (EASTERN CAPE) 2 OF 1994

Kindly be advised that Hon E Godogwana member of the Executive Council responsible for the administration of the act has approached the executive council with a recommendation that your term of term office on the said board be terminated.

The reasons advanced by the responsible member are as follows:-

- * That on 12 March 1998 when the board was considering provision of bus passenger transport services in the Transkei you failed to disclose to the board that you were at the material time still a member of a close corporation that stood to benefit from the decision of the board and further that you failed to disclose that you were in the process of relinquishing your interest in the said close corporation.
- * That notwithstanding the foregoing you participated in the deliberations of the Tender Board on the stated 12 March 1998.
- * That the responsible member and the board are of the view that your actions has resulted into an irregularly (sic) and that the board is currently in the process of preparing to approach the high court for declaratory order to have the decision of 12 March 1998 set aside.

Before the Executive Council takes a decision in this matter, you are hereby afforded an opportunity to provide your representation.

Such written representation shall be in writing addressed to the Director General/Cabinet Secretary on or before Tuesday 6th April at 10H00.

Yours faithfully

(Sgd) M E Tom

31/03/99

Dr E TOM

DIRECTOR GENERAL/CABINET SECRETARY'

7. On 4 May 1999 attorneys Woodroffe and Kleyn, acting for the applicant, wrote to Dr M E Tom and submitted a memorandum to him with detailed representations and submissions (annexure 'BM 10'). The letter indicated that the applicant required *'the opportunity to make verbal representations to the Executive Council and to be afforded the opportunity to call witnesses including all members of the Tender Board as at 12th March 1998 to testify*

at such hearing'.

8. In the concluding paragraphs of the memorandum the applicant's submissions were summarised as follows:

'8. In all the circumstances the allegations made in the letter of the 31st March 1998 as amplified in Annexure 'B' are without foundation.

8.1 Although Mrs Mugwanya was still registered as a member of a Close Corporation that stood to benefit it is quite clear that she personally did not stand to benefit and the only reason that she remained registered as a member was because of an administrative problem experienced by the Auditors of the Close Corporation of which problem she was unaware. In those circumstances her failure to disclose to the members of the Tender Board that she was a member of a Close Corporation in circumstances when she did not know of her membership does not constitute a good and valid reason for terminating her office as a member of the Tender Board.

8.2 Her participation in the deliberation of the Tender Board on the 12th March 1998 was not irregular in that:-

8.2.1 She tendered to recuse herself from meeting as she had an interest representing all bus owners contracted to the Department of Transport which offer of recusal was refused.

8.2.2 She had no financial interest in the decision of the Tender Board.

8.2.3 The decision taken at the Tender Board on the 12th March did not favour transport operators who had existing contracts with the Department of Transport.

8.2.4 She was unaware of the fact that she was a member of a Close Corporation that stood to gain financially.

In the circumstances her participation in the deliberations of the Tender Board on the 12th March 1998 do not constitute a good valid reason for the termination of her office.

8.3

9. Should the Executive Committee have any queries relating to the submissions made above Mrs Bam-Mugwanya reserves the right to present evidence and call witnesses to testify before the Executive Committee.'

9. On 24 June 1999, at a meeting of the Tender Board, the applicant was shown

a letter dated 22 June 1999 (annexure 'BM11'). It was addressed to her, and signed by Dr M E Tom, and stated that the Executive Council of the Eastern Cape Government had terminated her membership of the second respondent with immediate effect. On 9 July 1999 she received a similar letter signed, apparently on 22 June 1999, by Dr M E Tom and bearing the date stamp of 24 June 1999 thereon.

10. The aforementioned circumstances, save for the opinions expressed and conclusions drawn by the applicant in respect of various matters, have not been placed in issue by the respondents. What is disputed by the respondents is, however, that the decision is open to review.

The grounds for review

11. The applicant has asserted in her founding affidavit that the first respondent and the Executive Council, in taking the decision to terminate her term of office as a member of the Tender Board, relied on the findings of the sub-committee established by the second respondent. Further, that the decision was taken without affording her an opportunity to submit verbal representations to the Executive Council or to call witnesses and without consideration for the representations which she had submitted to the sub-committee. It was the contention of the applicant, therefore, that the first respondent and the Executive Council had failed to apply their minds in regard to whether there were good and valid reasons for terminating her term of office. Consequently the decision of the Executive Council was open to review.

12. In regard to the merits of the application the respondents have contended in their answering affidavit that the decision of the executive Council is not open to review as it had been properly taken. Moreover, '*good and valid reasons*' existed for the termination of the applicant's term of office. At the Tender Board meeting of 12 March 1998 the extension of contracts for the provision of bus services by a number of operators was considered. One of these concerned the close corporation of which she and her brother were members and, in view thereof, she should have recused herself. Since she had not done so she had committed an act of misconduct which justified her dismissal from the Tender Board.

In limine defences

13. Before dealing with the merits it is convenient to consider the *in limine* defences raised by the first, second and third respondents. They have contended, firstly, that the Court does not have jurisdiction to hear the application, and secondly, that the applicant does not have *locus standi*.
14. Mr Brassey, who with Mr Mngqaba appears for all the respondents, submitted in regard to the issue of this Court's jurisdiction that the Executive Council has the status of a Cabinet and its proceedings are, therefore, confidential. By entrusting the Executive Council with the power to remove members of the Tender Board the legislature must have contemplated that such decisions would not be open to review by the Court. He has contended that these decisions are not subject to judicial scrutiny and review as any disclosure of how they were arrived at would compromise the confidentiality of the process.

15. In so far as the issue of the applicant's *locus standi* was concerned, Mr Brassey argued that the relationship between the applicant and the Tender Board was not governed by a contract of employment nor one of any other nature. Although the applicant, as a member of a statutory body, had certain duties she was not vested with any rights of a personal nature. She did not, therefore, have any claim which could be vindicated through litigation.
16. It is my *prima facie* view that the arguments presented by Mr Brassey in respect of these defences are not sustainable. This Court would be extremely loath to permit the Executive Council to envelop in a cloak of secrecy the decision, that is being sought to be reviewed, when the decision emanates from the performance of a statutory duty. See *Hira and Another v Booysen and Another* 1992 (4) SA 69 at 93A-F. Notwithstanding this, however, in view of the conclusion that I have arrived at in so far as the merits of the application are concerned, I do not consider it necessary to determine if the *in limine* defences are well-founded or not. I accordingly refrain from expressing any decisive view in regard to whether either of these defences should succeed.

The merits

17. Mr Pillemer, who appears for the applicant, has attacked the decision as being unlawful. The respondents have not provided evidence of the written and signed decision of the Executive Council in terms of s 140 of the Constitution (Act 108 of 1996) nor the good and valid reasons upon which it had relied in coming to its conclusion. Section 33 of the Constitution requires that these reasons be

furnished. He has contended, therefore, that the only reasonable inference to be drawn in the absence thereof was that there was no evidence which would advance the respondents' case.

18. Mr Brassey, on the other hand, submitted that there was no need to place the written document, evidencing the decision to terminate the applicant's term of office, before the Court as it was not in dispute that the Executive Council had taken such a decision. Further, good and valid reasons existed for the termination of the applicant's membership of the Tender Board. He has contended that the Executive Council was vested with a subjective discretion as a matter of law. But, even if it could be said that the discretion was an objective one, this element had been demonstrated by the applicant's admission that she was still a member of the close corporation when she attended the Tender Board Meeting on 12 March 1998.
19. Mr Pillemer contended further that the Executive Council adopted an incorrect approach by relying on the report of the sub-committee, set up by the second respondent, instead of holding the enquiry itself. Since it was a factual question that had to be decided oral evidence should have been heard and the applicant afforded the opportunity to call witnesses. The failure to accede to the applicant's request to be allowed to do so was procedurally unfair. As far as the applicant was concerned there was no need for her to have disclosed her membership interest in the close corporation as she had relinquished same. It was only with the benefit of hindsight that it could be said that she should

have disclosed this.

The issue of procedural unfairness

20. The applicant has attacked the procedure adopted by the Executive Council as being procedurally unfair. As I understand the applicant's case, the contention is that the Executive Council itself should have held a full-scale hearing, or something akin thereto, instead of relying on the report of the sub-committee and the written representations of the applicant. The Executive Council should also have given the applicant the opportunity to address it verbally and to call witnesses. While Mr Pillemer has conceded that the applicant was afforded the opportunity to submit written representations to the Executive Council, he has submitted that this was insufficient to meet the standard of procedural fairness.

21. The power to terminate the term of office of a member of the Tender Board vests in the Executive Council of the Government of the Eastern Cape by virtue of the provisions of section 3 (8) of the Provincial Tender Board Act 2 of 1994. The relevant section sets out the following:

‘The Executive Council may at any time terminate the term of office of any member or alternate member of the Board if there are good and valid reasons for doing so: Provided that the Executive Council shall, before taking such decision, advise the member or alternate member concerned of the proposed action and the reasons therefor and afford him or her an opportunity to make representations thereon.’

22. It is clear from the provisions of Section 3(8) that certain procedural requirements have to be met before the Executive Council is entitled to take a decision terminating the term of office of a member or alternate member of the Tender

Board. In this regard the applicant was informed of the intention to terminate her membership of the Tender Board; she was also furnished with the reasons why this step was being contemplated; and she was invited to submit representations prior to the Executive Council taking a decision on the matter. Two questions arise from this. Firstly, was there compliance with the requirements of the relevant section and, secondly, did the process accord with the rules of natural justice.

23. I do not consider the attack on the procedural fairness of the process to be sustainable. In addition to submitting representations to the Executive Council the applicant had, prior thereto, been invited to submit written representations to the sub-committee and in fact did so. To these representations she also annexed a letter from a firm of chartered accountants in support of her contention that she had relinquished her membership interest in the close corporation on 1 March 1998. Moreover, she was also given an opportunity to make verbal representations to the sub-committee on the question of her membership of the close corporation. And, in addition, she was invited to submit an addendum to her written representations, if she so wished, but declined this invitation.
24. The fact that the applicant's request to appear personally before the Executive Council, in order to address it and call witnesses, was not acceded to does not in itself result in the process being unfair. The applicant had more than sufficient opportunity to place whatever evidence she deemed necessary before the

Executive Council. This she could have done by way of affidavits or statements or other documentary proof. The applicant does not claim that she was denied the opportunity of doing so. Her complaint is confined to the fact that she was not given the opportunity to address the Executive Committee personally and was not allowed to call witnesses to testify. I do not find this complaint to be well-founded. I agree with Mr Brassey's submission that it is not a necessary requirement of the *audi alteram partem* rule that oral, in addition to written, representations should have been permitted. Accordingly, in the circumstances of this matter, I am of the view that the proceedings did not offend against the rules of natural justice.

Non-compliance with the provisions of Section 140 of the Constitution of South Africa Act 108 of 1966

25. Mr Pillemer has submitted that the failure of the Respondents to produce a written and signed decision of the Executive Council in terms of Section 140 of the Constitution (Act 108 of 1996) justifies the inference that a decision was not taken. However, as Mr Brassey pointed out in argument, the applicant has not contended in her founding affidavit that a decision had not been taken to terminate her membership of the Tender Board nor was that the basis of her case. On the contrary, the applicant has accepted that such a decision was taken and her application was directed at obtaining an order to review and set aside the decision. In the absence of such a decision there can obviously not be a review thereof. In such a situation the relief the applicant would then have to seek would be directed at the unlawfulness of the termination of her

membership of the Tender Board on the basis that there was no order to that effect. Clearly there cannot be any basis for reviewing and setting aside a decision that is in fact non-existent. I find that Mr Pillemer's submissions in regard to this issue are without foundation.

Facts not in dispute

26. The Executive Committee did not conduct its own enquiry into the factual position regarding the applicant's membership of the close corporation. However, this does not *per se* result in the decision to terminate the applicant's membership of the Tender Board being fatally flawed since the factual findings of the sub-committee are not in dispute. The applicant admitted to both the sub-committee and the Executive Council that she was a member of Bam Consortium CC, and that on 12 March 1998 transfer of her membership interest had not yet been effected to her brother, who was a co-member of the close corporation, because of '*certain problems*' that had arisen in regard to the third member of the close corporation. The applicant also did not deny that the close corporation stood to benefit financially from the Tender Board's decision regarding the extension of contracts for the provision of bus services, save to claim that she herself did not stand to benefit therefrom.
27. Consequently because of her failure to disclose, firstly, her membership of the close corporation and, secondly, that she was in the process of relinquishing her membership interest therein, the applicant was informed by letter that the Executive Council intended taking a decision that her term of office be

terminated. Notwithstanding her previous representations to the sub-committee, she was invited by the Executive Council to submit representations for its consideration. There can be no doubt, therefore, of the factual premise on which the conclusions of the sub-committee was based. In any event, the applicant has admitted the correctness of those facts.

28. Similarly, the applicant has not contested the veracity of the reasons disclosed in Dr Tom's letter dated 31 March 1999 addressed to her which precipitated the process resulting in the decision to terminate her term of office. She has answered these allegations by providing an explanation for her non-disclosure thereof at the Tender Board meeting of 12 March 1998. It is clear, therefore, that the Executive Committee did not initiate the process against the applicant without reason and the pertinent question that has to be considered is whether the reasons furnished by the Executive Council are good and valid reasons for terminating her term of office.

29. When the issue of the extension of the bus contracts of various bus operators arose for discussion in the Tender Board meeting of 12 March 1998 the chairperson enquired of the applicant whether she should be participating in the debate. The minutes of the meeting record that the following discussion took place between the chairperson and the applicant:

“CHAIRPERSON: Thank you. Number 2, the interim contracts? Ms Bam-Mugwanya? Are you sure you should be debating on this matter? For purposes of the record, are you sure you should be debating on this matter?

Ms BAM-MUGWANYA: Yes, sir, if you look at our Tender Board regulations. It does not say in ST 36

and ST 37, there is nothing that (debars) me from participating here because this is not a tender, but a negotiated contract.

(?): Chairperson, I propose...

CHAIRPERSON: No, I do not think we should propose. It should be Ms Bam-Mugwanya's own issue. If you have an interest on the matter in whatever form we are debating it, you should recuse yourself. You are the only person who knows that you have an interest or you do not have an interest.

Ms BAM-MUGWANYA: Thank you again, Chairperson. This that I was, it did come up before the Board previously, I think about 18 months ago and it was felt that I could stay. But the reason why I have been quite throughout the proceedings, I am feeling uncomfortable because the people that are here are the people I am going to be debating with in any case afterwards. It is not for my personal interest in this, but I have an interest in the sense that these are bus operators whom I am, in fact from the start I am the one who initiated the subsidy situation for all the bus operators. I have no special bus operator that I am favouring, but it is for all the bus operators and that has been the situation as understood even by the Department of Transport. But, if it makes the Board comfortable or it is a comfortable situation, I will gladly recuse myself.

CHAIRPERSON: I do not think it is necessary if you have no financial interest on the matter. You remember that this was raised some time and it was not sure. I was giving you a chance just to clarify yourself on that because it has a bearing to our adjudication. It can be challenged at any time if in fact you had a financial interest on the matter and you remained then deliberated on the issue. You have just clarified it and I hope the Board is happy. The Board is happy.

Information lost due to changing of cassettes.

Ms BAM-MUGWANYA: ... my position as the advisor to the bus operators."

30. It is apparent from the foregoing that the applicant made no mention at all of her membership interest in Bam Consortium CC, nor did she indicate that she was in the process of disposing thereof to a co-member of the close corporation, more particularly, her brother P N Bam. Mr Pillemer sought to minimise the implications of the applicant's non-disclosure of this information. He contended that the applicant had, at worst, been negligent in failing to

appreciate that she remained a member of the close corporation until her resignation had been registered. I should indicate that in terms of the provisions of the Close Corporations Act 69 of 1984 registration thereof is to be effected at the office of the Registrar of Close Corporations. Mr Pillemer contended that her failure to recuse herself and to disclose her brother's interest in the close corporation was an error of judgment, but these did not constitute good and valid reasons for terminating her term of office.

31. Mr Pillemer's argument is unpersuasive. When the issue of her participation in the discussion of the extension of the bus contracts was raised in the Tender Board meeting by the Chairperson, he specifically mentioned that if she had '*an interest on the matter, in whatever form*' she should recuse herself. He added that she was the only person who knew whether there was such an interest, or not. Yet, despite this she failed to disclose the true position. Even if she had laboured under the erroneous impression that she was no longer a member of the close corporation there was no valid reason for her not to have disclosed her former membership. There was no reason either for her not to disclose that her brother was still a member of the close corporation and that she had disposed of her membership interest to him.
32. Counsel were not in agreement in regard to the nature of the discretion which the Executive Council had to exercise in terms of the provisions of section 3(8) of the Provincial Tender Board Act 2 of 1944. Mr Pillemer argued that it was an objective discretion that had to be exercised and it was, therefore, reviewable.

Mr Brassey, on the other hand, contended that it was a subjective discretion but, even if it were to be held that it was an objective one, then the Executive Council had nevertheless exercised its discretion properly. However, I do not consider it necessary that I determine whether it is an objective or subjective discretion. Such an exercise would be fruitless since, on an application of either test to the facts of this matter, one is driven to the same conclusion. In view of this, I express no further opinion on the nature of the discretion which is applicable.

33. I can scarcely conceive of a more clear-cut example of a situation which necessitated that a person in the position of the applicant should have recused herself from any further participation in the discussion on the extension of the bus contracts. She, as well as her brother, were members of Bam Consortium CC and, as such, had a direct financial interest in whether the bus contracts were to be extended or not.
34. But, her interests were even wider than that as she was an advisor to various bus operators who stood to benefit from the contracts being extended. Even if, as the applicant contends, she was not being paid for her services in that capacity it does not alter the fact that she identified with the interests of those bus operators as their advisor. Moreover, in the mind of the ordinary person the perception that the applicant would be unable to participate in the deliberations of the Tender Board in an objective and unbiased manner would inevitably arise.
35. It is self-evident that members of the Tender Board are required to uphold

standards of ethical behaviour which are beyond reproach. They cannot be seen to, and in fact should not, participate in any debates, nor should they be involved in the decision making process, in regard to matters in which they may have any financial or other interest. The applicant manifestly failed to uphold such standards of ethical behaviour. There is no doubt, therefore, that whatever the reasoning the Executive Council may have adopted there were good and valid reasons for terminating the applicant's term of office as a member of the Tender Board.

36. It should be apparent from what I have said that the argument that the Executive Council failed to properly apply its mind in arriving at its decision, is not sustainable. The Executive Council did not err in respect of the issue that it was required to determine, nor was the decision improperly taken. The decision was rational in relation to the facts presented to it and, accordingly, there are no grounds for this Court to alter the decision on review. See *Hira and Another v Booysen and Another* (supra) at 93G-H.

Conclusion

37. It follows from the foregoing that the applicant has failed to establish that there is any basis upon which the decision of the Executive Council may be set aside on review. Accordingly, the application must be refused. In regard to the costs herein, there is no reason why the costs should not follow the result. In my view, too, the matter is of sufficient magnitude to warrant the costs of two counsel.

38. In the result, there is an order in the following terms:

- (a) the application is refused;
- (b) the applicant is ordered to pay first, second and third respondents' costs of this application, such costs to include the costs of two counsel.

DATED at BISHO this 3rd DAY OF MAY 2001.


Y EBRAHIM
JUDGE OF THE HIGH COURT (BISHO)

I concur


C S WHITE
JUDGE OF THE HIGH COURT (BISHO)

Heard on	:	15 March 2001
Judgment delivered on	:	3 May 2001
Counsel for the Applicant	:	Mr Pillemer SC
Attorneys for the Applicant	:	Squire Smith & Laurie 44 Taylor Street KING WILLIAMS TOWN
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