IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 023495/2024
Reportable: No
Of interest to other Judges: No
Revised: No
Date: 9 October 2024
SIGNATURE

In the matter between:

BUSISIWE MKHWEBANE	Applicant
and	
THE OFFICE OF THE PUBLIC PROTECTOR	1st Respondent
KHOLEKA GCALEKA	2nd Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	3rd Respondent
THE MINISTER OF FINANCE	4th Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	5th Respondent

JUDGEMENT

MOOKI J

1 The applicant was formerly the Public Protector. Her appointment was subject to, among other things, the "Public Protector Service Conditions" ("Conditions of Service"). The following Conditions of Service applied when the applicant held office:

PUBLIC PROTECTOR SERVICE CONDITIONS

1. SALARY

An annual salary at a rate equal to that of a Judge of Appeal of the Supreme Court of South Africa.

[...]

3. GRATUITY

3.1 On vacation of office a gratuity calculated in accordance with the formula-

D/7 x 2 x (E+3) x F,

In which formula the factor

(a) D represents the salary (basic per annum) which at the time of his or her vacation of office was applicable to the office of the Public Protector;

(b) E represents the period in years of his or her period in such office; and

(c) F represents the provision for the calculation of income tax calculated at a marginal rate of 40%.

3.2 The surviving spouse of the Public Protector who died before his or her term of office as Public Protector has expired, shall be paid an amount equal to the amount of the gratuity which would in terms of paragraph 3.1 have been payable to the Public Protector had he or she not died but, on the date of his or her death, vacated his or her office in terms of that paragraph; Provided that factor E in the

formula referred to in paragraph 3.1 shall be deemed to be no less than 4.

[...]

8 TRANSPORT AND SUBSISTENCE ALLOWANCE

8.1 [...]

[...]

8.11 On-

(i) removal from office;

(ii) vacation of his or her office; or

(iii) the death of the Public Protector,

his or her effects may be transported, once only, at State expense to any place in the Republic of South Africa where he or she or the surviving spouse, as the case may be, is to settle.

[...]

2 The applicant ceased being the Public Protector on 12 September 2023, when the President advised her that he had removed the applicant from office. This notification followed a resolution by the National Assembly on 11 September 2023 that the applicant be removed from office for misconduct and incompetence.

3 Ms Gcaleka, the second respondent, replaced the applicant as the Public Protector. The applicant wrote to Ms. Gcaleka on 6 December 2023, stating in the main, that:

(1) The applicant vacated office by 12 September 2023, a month before expiry of her term of office,

(2) Clause 3 of the applicant's conditions of service entitled the applicant to payment of a gratuity, and that she had not been paid; and

(3) The applicant demanded payment of the gratuity; or that she be given reasons why she could not be paid.

4 Ms Gcaleka advised the applicant on 12 February 2024 that the applicant will not be paid a gratuity. She informed the applicant that:

(1) The Conditions of Service only authorised payment of a gratuity when the incumbent has "vacated" office, not when the incumbent is removed from office,

(2) The applicant did not vacate office of her own volition; and

(3) There was no other instrument that allows for payment of a gratuity as contemplated in paragraph 3.1 of the Conditions of Service in relation to a Public Protector whose term of office concluded by virtue of a removal by the President in terms of section 194 of the Constitution.

5 The applicant launched this litigation following the above exchange. She contends that "the legal issue which fall for adjudication is quite straightforward and centred around the interpretation of the relevant clause of the Service Conditions." She seeks the following relief:

(1) A declaration in terms of section 172(1)(a) of the Constitution that the refusal to pay her a gratuity is unconstitutional.

(2) That the respondents take steps to ensure payment of the gratuity within 30 days.

(3) As a first alternative, that clause 3 of the Service Conditions be declared *contra bonos mores*.

(4) As a second alternative, a declaration that the respondents breached section 3 of the Basic Conditions of Employment Act, 75 of 1997 ("the BCEA"); an order for specific performance or a mandamus directing payment of the gratuity in terms of section 3 of the BCEA.

(5) As a third alternative, reviewing and setting aside the decision not to grant a gratuity, in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") or the principle of legality.

6 Ms Gcaleka, the Office of the Public Protector, and the Speaker of the National Assembly oppose the application. The other respondents did not participate in the litigation. The applicant made her case as detailed below.

7 She says that "[...] at the heart of this matter is the interpretation of the employment contract or service conditions concluded between the parties as encapsulated in the document headed Public Protectors Service Conditions." She further says that "This matter hinges upon the question whether the first and/or second respondents are legally empowered either by any law, statute and/or the Constitution to make a decision to withhold the payment of my gratuity."

8 The applicant says that the Conditions of Service embody an employment contract referred to in section 32(3) of the BCEA and that the interpretation of the Conditions of Service is at the "heart of the matter." Clause 3.1 of the Conditions of Service, according to the applicant, entitles her to a gratuity because 'vacation of office' simply refers to leaving the office or post.

9 The applicant contends that the respondents' view that 'vacation of office' excludes instances of a Public Protector leaving office not of own volition; leaving

without blemish, or where a Public Protector was not in good standing, are unfounded moralistic qualifications that amount to qualification for a gratuity and that their interpretation would entail having "to rewrite the Conditions of Service, the Basic Conditions of Employment Act, the Public Protector Act and the relevant provisions of the Constitution, including section 194 thereof."

10 The applicant summarised the issue as follows: that the principal question "upon a proper interpretation" is whether removal from office in terms of section 194 falls outside of the vacation of office referred to in the Conditions of Service and whether the gratuity in question fall outside of the overall remuneration of the Public Protector.

11 A gratuity, according to the applicant, is not a discretionary payment. She had a legitimate expectation to a gratuity because all previous incumbents received a gratuity. It was an irrelevant consideration that she was found guilty of serious misconduct. Being refused the gratuity was motivated by malice, vindictiveness and a desire by the first and second respondents to humiliate and degrade her.

12 She contends that the refusal to pay her a gratuity breached several provisions of the Constitution and that there is no law of general application justifying the breach. She raised the following as instances showing breach of the Constitution:

(1) She is the only Public Protector who did not receive a gratuity. It was not a sufficient justification for a differentiation that the other Public Protectors vacated their offices at the expiry of their terms.

(2) Her rights to dignity and self-worth were violated by being denied her livelihood and legitimately expected remuneration.

(3) Her employment rights and the right to fair labour practices were infringed.

(4) To interpret "the relevant statutory and common law provisions" in accordance with section 39(2) of the Constitution in favour of granting relief.

(5) The Constitution does not provide for forfeiture of benefits following the removal of the head of a Chapter 9 institution.

13 The applicant seeks a declaration in terms of section 172(1)(a) of the Constitution as her primary relief. She asks for consequential relief in terms of section 172 (1)(b), as follows:

(1) She seeks the court "to exercise its discretion to propose a wording which will remove any confusion in the future. [...],

(2) The Court is to order the first and second respondents to pay the gratuity forthwith; and

(3) She seeks any other just and equitable remedy.

14 The applicant seeks relief in the alternative as detailed below.

15 The first alternative relief is a declaration that clause 3 of the Conditions of Service is *illegal, null and void* and/or unenforceable for being *contra bonos mores* because other incumbents to whom the clause applies will suffer irreparable harm if the clause is left as it is.

16 Clause 3 is also said to be invalid because it infringes both the Constitution and the rule of law.

17 The applicant seeks a declaration, as her second alternative relief, that the respondents are in breach of Clause 3 and/or the BCEA; with relief that respondents be ordered to pay the gratuity within 30 days of the date of this order.

18 She also says that the legislative provisions are to be interpreted to result in the payment of the gratuity. Furthermore, she says that the common law is to be developed to result in the payment of the gratuity.

19 The applicant seeks relief by way of review proceedings as her third alternative relief. This is the review and setting aside of the decision refusing to pay her a gratuity. The review is in terms of PAJA and legality. The PAJA review is premised on several considerations, including that the respondents considered irrelevant considerations while ignoring relevant ones.

20 The legality review is based on procedural irregularity because she was not given a hearing despite the decision being punitive. She also says the decision is irrational for breach of the BCEA and/or the rule of law.

21 The Public Protector and the Office of the Public Protector made their case as follows.

22 I refer to the first and second respondents collectively as "the Public Protector respondents." Their primary response to the applicant's claim is that a gratuity applies only to those who vacated office, not those removed from office for misconduct and incompetence.

23 They further say that the mere holding of an office does not entitle a person to a gratuity. That is because a gratuity is a contractual issue, not a legal benefit. They say a gratuity is payment meant for good service and that such a payment is contingent on the office bearer maintaining public trust and acting in the public interest. Removal for misconduct and incompetence was a breach of that trust. The applicant was not entitled to a gratuity because she was removed from office with a blemished record.

24 The Public Protector respondents deny that the applicant made-out a case for

declaratory relief in terms of section 172(1)(a). They say such relief is not available on a contractual dispute because a gratuity is a contractual issue.

25 They further contend that the fact that the Constitution does not deal with a Public Protector forfeiting benefits, unlike the removal of a president, does not mean that the applicant is entitled to contractual benefits on being removed from office. Her position differed from that of previous Public Protectors because they were not removed from office.

26 The respondents deny a breach or misapplication of constitutional provisions. They say that the applicant's recitation of provisions in the Constitution does not turn the recitation into a breach.

27 The respondents say denying a gratuity to a dismissed Public Protector aligns with constitutional principles governing public administration to promote accountability, transparency, and responsible governance as contemplated in Section 195 of the Constitution.

28 The respondents deny that the applicant is entitled to a remedy in terms of section 172(1)(b) of the Constitution.

29 The respondents say the refusal to pay a gratuity is not administrative action, because the decision was purely contractual. They also deny that that there is a basis for a legality review, including a denial of breaching the BCEA or provisions of employment law. The respondents further contend that the applicant did not lay a basis that the respondents breached the common law in refusing her a gratuity.

30 The Public Protector respondents averred as follows in relation to the applicant's claim that the Conditions of Service are *contra bonos mores*. They contend that society's concept of *bonos mores* is entrenched in sound governance principles and careful stewardship of public monies; that the Public Protector carries an implicit expectation of accountability and integrity, and that it is justifiable for

respondents to take proper actions and to protect the public when the applicant was found guilty of misconduct and incompetence; that not paying a gratuity is consistent with encouraging good governance practices; it symbolised commitment to good governance, accountability, and safeguarding of public funds and was a vital measure to maintain ethical standards in public service.

31 The Speaker made her case as follows. She gave an account of the process leading to the removal of the applicant from office.

32 The removal process commenced with a member of the National Assembly giving notice to initiate removal proceedings as contemplated in section 194 of the Constitution. An independent panel was appointed.

33 The panel conducted a preliminary assessment to determine whether there was *prima facie* evidence to remove the applicant. The panel presented its preliminary report to the National Assembly. The National Assembly then resolved to establish a committee to conduct an enquiry in terms of section 194 of the Constitution.

34 The committee provided the National Assembly with a report of its findings and recommendations. The committee recommended that the applicant be removed from office for misconduct and incompetence.

35 The question of the applicant's removal was put to a vote by the National Assembly on 11 September 2023. The majority of members resolved that the applicant be removed from office. The resolution was then referred to the President, who removed the applicant from office on 12 September 2023.

36 The Speaker denies that the applicant is entitled to a gratuity. That is because the applicant did not vacate office in terms of paragraph 3.1 of the Conditions of Service. She was removed from office for misconduct and incompetence. "Vacation of office" in the Conditions of Service, which embody the applicant's contract of

employment, excludes instances where a term of office is truncated by an intervening act, such as death or removal from office under section 194(1) of the Constitution.

37 The Speaker illustrated her contention with reference to paragraph 8.11 of the Conditions of Service, which lists three separate trigger events as jurisdictional facts for the "transport and subsistence allowance." She contended that the three events show that "vacation of office" does not include the terms "removal from office" or "the death of the Public Protector."

38 The purpose of paragraph 3.1 of the Conditions of Service, according to the Speaker, supports the conclusion that payment of a gratuity pursuant to the "vacation" of office excludes the "removal" of a Public Protector. That is because a gratuity is a token of appreciation for service by a public protector, such a gratuity being above and beyond the salary and allowance of a public protector. It serves to deter persons holding the office of Public Protector from acting in an incompetent manner. The purpose of a gratuity was not served by providing a gratuity to a person removed from office for misconduct and incompetence. Paying a gratuity under those circumstances would erode public trust.

39 The Speaker denied breaching the applicant's constitutional rights. The Speaker pointed out that the applicant was non-specific in her claim. She denied that a review is competent because there was no decision to be reviewed, in that Ms. Gcaleka did not decide but communicated the content of the Conditions of Service.

Analysis

40 The parties are agreed that the Conditions of Service was a governing contract to the appointment of the applicant as Public Protector. The applicant says the interpretation of clause 3.1 of the Conditions of Service is at "the heart" of the dispute. The respondents agree.

41 The parties differ as to the meaning of the expression "on vacation of office" as it relates to payment of a gratuity. The applicant says the expression means an incumbent no longer holds the office of public protector and that it is irrelevant how an incumbent left office. The respondents contend otherwise. They draw a distinction between "on vacation of office" and "removal from office." They say the expressions differ, with the result that a person removed from office is not due a gratuity.

42 The dispute between the parties is a matter of interpretation of a clause in a contract. I shall revert to the meaning of "on vacation of office" shortly. I first consider the relief sought in terms of section 172(1)(a) of the Constitution. This relief is not competent.

43 Section 172(1)(a) of the Constitution requires courts to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of the inconsistency. Courts exercise jurisdiction conferred by this section in relation to "a constitutional matter." The Constitutional Court put the issue as follows: "Thus, in terms of section 172(1)(a) of the Constitution, a court deciding a constitutional matter must declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency."

44 The dispute between the parties is, fundamentally, a divergence of views on the interpretation of the expression "on vacation of office" in clause 3.1 of the Conditions of Service. The parties agree that the Conditions of Service is a contractual framework applicable when the applicant held office as Public Protector. The dispute concerns the interpretation of that contract.

45 The interpretation of a contract is not, without more, a constitutional matter. This is only the case where the claim advanced requires the consideration and application of some constitutional rule or principle in the process of deciding a matter.

46 There is no constitutional rule or principle that merits attention in interpreting

clause 3.1 of the Conditions of Service. The applicant does not, in seeking the court to invoke section 172(1)(a), contend for the existence of such a rule or principle. An issue does not become a constitutional matter merely because a litigant calls it one or where the issue is dressed up in constitutional garb.

47 It bears mentioning that the applicant did not identify a "law" that is inconsistent with the Constitution in relation to her not being paid a gratuity. The Conditions of Service is not "a law" within the meaning of section 172(1)(a). They are a determination by the National Assembly- not a "law" passed by Parliament. I do not consider that a dispute relating to a difference of view in the interpretation of a clause in a contract constitutes "conduct" for purposes of section 172(1)(a). This is more so given the absence of a constitutional rule or principle that requires explication arising from such interpretation.

48 I ought to say more about the applicant's claim that the respondents infringed several provisions of the Constitution. The applicant's pleaded case on the infringement of the Constitution is non-specific. She averred as follows in her founding affidavit: "Given the large number of constitutional provisions which are relevant to this application which have either been breached, misapplied or misinterpreted and in order to avoid unnecessary prolixity, I do not quote them but list them as follows " She then listed the provisions. The applicant says the various provisions have "either been breached, misapplied or misinterpreted." She did not elaborate as to which provision of the Constitution has either been breached, misapplied or misinterpreted.

49 A court cannot give declaratory relief in terms of s 172(1)(a) on non specific assertions that there are breaches of the Constitution.

50 I conclude that the applicant failed to lay a basis for the court to exercise its section 172(1)(a) power. There is therefore no need to enquire into the relief she seeks in terms of section 172(1)(b).

51 I turn to the applicant's alternative relief. The applicant seeks to review the "impugned decision to refuse to pay my gratuity." She is required to establish that the decision refusing her a gratuity constitutes "administrative action." This is done by demonstrating the existence of the following elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (t) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions (the "Motau criteria").

52 The court enquired from the applicant's counsel during the hearing whether the applicant met the Motau criteria. The court pointed out that those criteria are jurisdictional requirements for a court to exercise its power of review. The court was met with a non-specific response.

53 The applicant did not delineate between sections 1(a) and 1(b) of PAJA in her pleaded case in relation to the definition of 'administrative action.' She contended, in her written submissions, that the decision denying her a gratuity was a decision by "an organ of state." She is then required to have made-out a case for 'administrative action' as defined in section 1(a)(i) or (ii) of PAJA. She had to show that the decision pertained to the exercise of a power and/or the exercise of a function in terms of the Constitution, a provincial constitution, or legislation. She pleaded that she was denied a gratuity on a wrong interpretation of her contract of employment. This does not meet the requirement in section 1(a) of PAJA. A decision consequent to a contract of employment does not constitute 'administrative action' for purposes of section 1(a) of PAJA.

54 A 'decision' for purposes of PAJA means 'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, [...]'. The decision must also involve the exercise or performance of 'a public power' or 'public function'.

55 A court exercising its power of review is required to undertake a close analysis of the nature of the power under consideration.

56 The decision refusing a gratuity was not the exercise or performance of 'a public power' or 'public function. It was conduct pursuant to a relationship arising from a contract of employment, namely clause 3.1 of the Conditions of Service.

57 The Constitutional Court has held that a dismissal following termination of a contract of employment does not constitute administrative action. The applicant has put the issue for determination thus: *"at the heart of this matter is the interpretation of the employment contract or service conditions concluded between the parties as encapsulated in the document headed Public Protectors Service Conditions."* It must follow that the refusal to pay a gratuity, based on an interpretation of a contract of employment, equally does not constitute administrative action.

58 The applicant was thus refused a gratuity on the exercise of a contractual power. Acting pursuant to the terms of a contract does not constitute 'administrative action.' The exercise of a contractual power does not, without more, amount to administrative action.

59 The applicant does not say how the decision refusing her a gratuity is a 'decision of an administrative nature." Conduct of an administrative nature is generally understood as the '... the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law...' The decision refusing the applicant a gratuity is manifestly a matter of construction of clause 3.1 of the Conditions of Service. It is not a decision of an administrative nature.

60 The decision refusing the applicant a gratuity does not constitute 'administrative action.' PAJA review is not available to the applicant. I now consider whether the applicant made-out a case for legality review.

61 The applicant contends that there was "procedural irregularity" because she was denied a hearing in relation to a punitive decision. She also says the decision was irrational because the decision was in breach of the BCEA and/or the rule of law. The applicant pleaded that the Conditions of Service "embody the employment contract" referred to in the BCEA.

62 The applicant's case in relation to the BCEA is that she had to have been paid the gratuity within seven days of 12 September 2023, and that the failure to do so breached the BCEA.

63 The respondents deny that a gratuity forms part of the applicant's remuneration. They referred to the definition of 'remuneration' in the BCEA. They also referred to the determination by the Minister of Labour, where the Minister stipulated that a "gratuity" was not included in the calculation of 'remuneration." The applicant did not cite any law for her claim that a "gratuity" is included in the concept "remuneration" generally, or that a gratuity forms part of her remuneration, specifically.

64 The applicant's remuneration does not include payment of a gratuity. The BCEA defines "remuneration." She was paid "remuneration" as defined. The BCEA does not mention "gratuity." The Public Protector respondents did not breach the Basic Conditions of Employment Act in not paying the applicant a gratuity. Her legality challenge with reference to the BCEA must fail.

65 The applicant's entitlement or otherwise to a gratuity is a function of the terms to her contract of employment. She was not entitled to a hearing before the Public Protector respondents decided that the contract does not entitle her to a gratuity.

66 There is no basis for a finding that Clause 3 of the Conditions of Service is objectionable per se. This is the effect of the relief for a declarator that the clause is illegal, null and void and/or unenforceable for being contra bonos mores.

67 The applicant does not, in her founding affidavit, say why clause 3 is offensive. She only makes the assertion that it is. It is only in her replying affidavit that she sought to substantiate her claim, saying clause 3 is objectionable because "[...] if left as is, all other incumbent to whom it applies will suffer irreparable harm unduly so [...]."

68 The contention that clause 3 is *contra bonos mores* is unmeritorious. It is not open to the applicant to substantiate for the first time in her replying affidavit as to why the clause is objectionable. She is required to have made the case in her founding papers. The history of incumbents to the office of Public Protector militates against the finding sought by the applicant. All previous holders of that office received a gratuity. The applicant is the only holder of that office who was refused a gratuity. The respondents have advanced reasons why that is so. I disagree that future holders of the office of Public Protector "will suffer irreparable harm" if Clause 3 is retained.

69 I now address the meaning to be attributed to the expression "on vacation of office." The Conditions of Service define the contractual arrangement applicable to the applicant whilst she was the Public Protector. Her entitlement or otherwise to a gratuity turns on the provisions of the Conditions of Service. All parties agree that the expression "on vacation of office" is determinative of whether the applicant is due a gratuity, This is a function of construction of the expression.

70 The applicant contends that "on vacation of office" simply means when a person leaves office, and that it is irrelevant how a person leaves office. She further says that it is not open to the respondents to imbue the expression with "moralistic" undertones such as whether a person left office with a blemish.

71 The Public Protector respondents made a case that the Conditions of Service distinguishes "vacating" office and "removal" from office. They pointed to the language used in clause 3.1 and clause 8.1.1. They contend that there was a

deliberate use of different expressions in the Conditions of Service regarding when each of a "gratuity" and a "transport and subsistence allowance" is available. The Speaker essentially adopted the same approach.

72 The law on the approach to interpretation is settled. Expressions in a contract are to be given a sensible interpretation. The manner of interpretation does not depend on the person construing an expression. More fundamentally, expressions cannot mean whatever a person may have in mind.

73 The essence to interpretation has been stated as follows:

> [...] Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. [...]

74 The Judge, when performing the interpretative exercise, is cautioned to guard against the temptation to substitute what the Judge regards as reasonable, sensible or businesslike for the words actually used.

75 The Conditions of Service are to be construed as a whole, including the sub headings to the document, in discerning the meaning of the expression "on vacation of office." The court has regard to the fact that the expressions "on vacation of office" and "removal from office" are related. They both carry the sense of a person, at a point, no longer being in office. The fundamental question is whether they mean the same thing. I hold that they do not.

76 The expressions are to be construed with reference to their respective subject

headings. "On vacation of office" is used in relation to "Gratuity," whereas "removal from office" is used in relation to "Transport and Subsistence Allowance." It bears pointing out that an entitlement to "Transport and Subsistence Allowance" attaches to three categories of events, namely: "removal from office", "vacation [of] office", and "the death of the Public Protector."

77 I enquired from counsel for the applicant as to why both "vacation from office" and "removal from office" are used in relation to the entitlement to "Transport and Subsistence Allowance" if "removal from office" and "on vacation of office" meant the same thing. He submitted that it was surplusage. I disagree. It could not have been the intention that the two expressions meant the same thing when the Conditions of Service were drawn; more so because that would mean repeating the same description in a listing of bases for an entitlement to transport and subsistence allowance. Allowing a person who was removed from office and a person who vacated their office the benefit of a transport and subsistence allowance shows, in my view, that the Conditions of Service intended two distinct events to have transpired, namely the vacating of office and a removal from office. The expressions are not synonymous. Construing the two expressions as having different attributes makes for a sensible meaning, in the context of the Conditions of Service, that "on vacation of office" and "removal from office" differ in their meanings.

78 The nature of a "gratuity" also leads to the conclusion that "On vacation of office" and "removal from office"; in the context of the Conditions of Service, are not synonymous. "Gratuity" is to be understood as the concept is generally used in an employment context. I agree with the respondents that a "gratuity" is a "token of appreciation" as expressed by an employer towards an employee. This view has a bearing on the expression "on vacation of office." That is because clause 3.1 links the payment of a gratuity to "vacation of office." It would be absurd for an employer to be expected to pay a gratuity, being a token of appreciation, to an employee who left office in disgrace.

79 The applicant, as stated above, says "the legal issue which fall for

adjudication is quite straightforward and centred around the interpretation of the relevant clause of the Service Conditions." The applicant was removed from office on 12 September 2023. She did not "vacate" her office within the meaning of clause 3.1 of the Conditions of Service. "Vacation of office" as contemplated in clause 3.1 means the leaving of office at the end of the term of office as Public Protector. This is underscored by Clause 3.2 of the Conditions of Service.

80 Clause 3.2 refers to expiry of "term of office" as Public Protector. This underscores that the "vacation of office" referenced in clause 3.1 is in relation to the coming to an end of a Public Protector's term of office, at which point a Public Protector would "vacate" office and be paid a gratuity using the formula. Thus, the gratuity to be paid to the surviving spouse is linked to completion of the term of office.

81 I now consider the issue of costs. The parties sought adverse cost orders against each other.

82 The applicant seeks a punitive cost order against the respondents. This includes an order that Ms Gcaleka pay costs in her personal capacity. The applicant says that the decision denying her a gratuity is informed by, among others, bias, malice and vindictiveness towards her by the respondents. She says this is illustrated by, among others, being refused a copy of the opinion referenced by the Public Protector respondents as informing their view that the applicant was not to be paid a gratuity.

83 The respondents say that the applicant is the one to be saddled with costs on a punitive scale. The Speaker says that the applicant attacked a committee of the National Assembly without cause. The Public Protector respondents say the applicant made unwarranted personal attacks on Ms. Gcaleka and officials at the Office of the Public Protector; that she did not substantiate the serious allegation that the respondents were biased, and further that the applicant made reckless allegations on oath without regard for the truth.

84 There is much that is regrettable in what the applicant said about the respondents. She did not substantiate the very serious allegations that she made, both in relation to the office of the public protector and the person of Ms. Gcaleka as the Public Protector. There was no need for the applicant's intemperate comments against the National Assembly regarding events leading to her removal from office. This court is not concerned with her removal from office.

85 I have determined. however, that the court will not order costs on a punitive basis.

86 I make the following order:

(1) The application is dismissed.

(2) The applicant is ordered to pay costs.

(3) The costs of counsel are on Scale C in relation to Senior Counsel and Scale B in relation to Junior Counsel.

O MOOKI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Instructed by:	MB Tshabangu Inc.

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Date heard:	19 -20 August 2024
Date of judgement:	9 October 2024