SACHS J ABRIDGED JUDGMENT (CONCURRING)

Masetlha v President of the Republic of South Africa and Another

226. I support the order proposed by Moseneke DCJ and much of his reasoning. I agree that the power both to appoint and to dismiss the head of the National Intelligence Agency (NIA) is derived from the Constitution. I differ, however, in relation to the extent to which his judgment applies ordinary incidents of contract law to the consequences of the breakdown of the relationship between the President and Mr Masetlha. To my mind, the relationship between the President and the head of the NIA is at all times suffused with a constitutional dimension. I do not believe that the scant contractual details in this matter govern the issues raised, but rather that the case must be decided in the context of a constitutionally-controlled public power having been exercised.

227. The relationship at issue is different from that which the President would have with, say, his private secretary, or his gardener, where the ordinary incidents of contract law within a public administration legal regime could play a major role. It is a relationship created in a constitutional setting; its fundamental content is dictated by performance of identified constitutional responsibilities; its possible modes of termination are governed by constitutional criteria; and, I believe, the consequences of termination should be regulated by constitutional requirements. In this respect, I agree with the broad approach to legality adopted by Ngcobo J, though I do not accept his finding that the contract with Mr Masetlha was unlawfully terminated because of a lack of prior consultation.

228. The starting point of my enquiry is the sui generis (of its own special kind) nature of the relationship between the President and the head of the NIA. The

Constitution expressly empowers the President, as the head of the national executive, directly to appoint three functionaries, each with a leading role to play in security: the National Director of Public Prosecutions, the National Commissioner of Police and the head of the NIA. It will be noted that in contrast to the President's power in relation to Cabinet Ministers, the power to appoint these three functionaries is not coupled with an express power to dismiss. This suggests a qualitative distinction based on the fact that the three are not purely political appointees placed in positions of governmental leadership. Rather, they are important public officials with one foot in government and one in the public administration. Members of Cabinet know that they are hired and can be fired at the will of the President; and if fired, they can mobilise politically, go to the press, even demonstrate outside Parliament, and hope to muster support for themselves at the next congress of their party.

229. As public officials the three special appointees do not have any equivalent political remedies. Nor can they invoke the Promotion of Administrative Justice Act (PAJA), which excludes them from its reach. The Labour Relations Act (LRA) shuts out the members of the NIA from its protection. Presumably it would be regarded as invidious in their case to employ the processes concerning unjust administrative action or unfair dismissal under the LRA; secrets of state would be in jeopardy of being uncovered. The provisions of the Intelligence Services Act (ISA), and regulations made under them, appear not to be helpful. Many of the regulations are in fact so secret that even a court of law would not ordinarily have access to them.

230. Depending on how it is used, the Public Services Act (PSA) might or might not provide some protection against arbitrary dismissal. The PSA allows for terms and conditions of appointment to be prescribed, without laying down what these must be. In the present case the reality is that no terms and conditions were prescribed. Not even a skeleton. All that existed was a letter of appointment for an identified post for a fixed term. Yet it cannot be that in a constitutional state, the secret service is so secret that its functioning takes place outside the realm of law. Our Constitution eschews autocracy, and it is unthinkable that a senior public figure straddling the divide between the public administration and government, and expressly commanded

to work within the law, should be obliged him- or herself to function in a legal void without any rights at all.

231. Moseneke DCJ would fill the vacuum by invoking the ordinary principles of contract law. In my view, however, the equivalent of terms and conditions should be inferred in each case from the special nature of the specific relationship between the President and the appointees established by the Constitution, in this case the head of the NIA. At the very heart of the special relationship is the need for confidence on the part of the President in the dependability of the intelligence passed on to him. Once the basis of that reliance evaporates, the whole foundation of the relationship disappears. Extremely delicate matters of state might be involved. Decisions on matters of great public moment could depend on the value of the intelligence provided. A great deal of subjective discretion is therefore necessarily built in to the appreciation by the President of the work of the head of the NIA. Absent the trust, the core of the relationship is negated.

232. The issue presented by this case, then, is not based on something on which the President did not rely, namely, an allegation of breach of contract by Mr Masetlha. The basic question is whether the substratum of the relationship had vanished, entitling the President to terminate the appointment because its primary purpose and raison d'être (reason for coming into existence) had been obliterated. In my view, the facts show that it had, entitling the President to revoke the appointment.

233. In the circumstances, then, I would hold that the President was lawfully entitled to amend the terms of the appointment to bring it to an immediate end. This does not mean that Mr Masetlha had been without any protection at all. He never lost his right to a fair labour practice. Though the mechanisms established by the LRA were not available to him, he was still entitled under section 23 of the Constitution to be treated fairly. Fairness in the circumstances was largely dictated by the nature of the work to be performed and the wide discretion given to the President to determine whether the requisite degree of trust had been destroyed. Had the loss of trust been

based on wholly irrational factors unrelated to functions or performance, such as phobic horror at seeing a functionary wearing brown shoes with a dark suit, the dismissal would have been manifestly arbitrary and unfair. But short of such irrational motivation, the fairness of the termination itself must be seen as having flown from the fact that the basic confidence that the President needed for the relationship to continue had been irretrievably lost. Revocation of the appointment in these circumstances was accordingly not unfair, and the President could then lawfully terminate the relationship.

234. I would hold, then, that painful as it was for Mr Masetlha, and aggrieved as he felt that he had not had sufficient opportunity to present his side of the matter, the President acted within his powers in ending Mr Masetlha's stewardship of the NIA, even if he did so in a rather summary way. I should add, however, that had the President relied on misconduct or other forms of breach of the relationship, then, absent extreme urgency, fairness would have dictated that an appropriate form of prior hearing be given. But he did not base the termination on breach, and in this respect I differ from Ngcobo J's assessment that the principle of a right to a prior hearing applied in the circumstances of this case.

235. Fairness of the termination, however, is not the end of the enquiry. Fairness required that in the absence of fault being alleged and established, Mr Masetlha should not be deprived of the material benefits he would have received had the relationship proceeded to full term. This was in fact attended to on what were referred to as compassionate grounds. In my view, more than compassion was involved — the President was legally bound to pay out Mr Masetlha for the remainder of his term.

236. There is one extra element of fairness that needs attention. I believe that fairness required that Mr Masetlha be consulted on the manner in which the termination was to be publicly communicated. Fairness to an incumbent about to be relieved of a high profile position in public life presupposes the display of appropriate

concern for the reputational consequences. People live not by bread alone; indeed, in the case of career functionaries, reputation and bread are often inseparable.

237. And I would add that it was not only the material benefits and the standing of the incumbent that had to be considered. The general public too had an interest. Constitutionally-created institutions need constantly to be nurtured if they are to function well. This requires that those who exercise public power should avoid wherever possible acting in a manner which may unduly disturb public confidence in the integrity of the incumbents of these institutions.

238. In this regard, it is my view that fair dealing and civility cannot be separated. Civility in a constitutional sense involves more than just courtesy or good manners. It is one of the binding elements of a constitutional democracy. It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. Civility, closely linked to ubuntu-botho, is deeply rooted in traditional culture, and has been widely supported as a precondition for the good functioning of contemporary democratic societies. Indeed, it was civilised dialogue in extremely difficult conditions that was the foundation of our peaceful constitutional revolution. The Constitution that emerged therefore presupposes that public power will be exercised in a manner that is not arbitrary and not unduly disrespectful of the dignity of those adversely affected by the exercise.

239. I should stress that I make these observations in general terms in order to establish what fairness in principle requires in matters such as these. This judgment does not require us to take any position on the hotly-contested factual disputes referred to in the papers, and I expressly refrain from doing so.

240. I would conclude, then, as follows: given the loss of trust bearing on the central task of the head of the NIA, as is evident from the papers, the termination by

the President of the appointment of Mr Masetlha as head of the NIA was not unlawful; the offer to pay him out for the balance of the period of his appointment should not be characterised as an act of grace or compassion, but as compliance with a legal obligation; and to the extent that any reputational damage to Mr Masetlha might have been caused by the manner in which the proceedings unfolded, the judgments in this matter establish that the basis for the termination of Mr Masetlha's incumbency was simply an irretrievable breakdown of trust, and not dismissal for misconduct.