IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

[redacted]

SIGNATURE DATE: 5 August 2026

Case No. 2025-000337

In the matter between:

MBUYISELO ALBERT BOTHA	Applicant
and	
COMMISSION FOR GENDER EQUALITY	Respondent

Summary

Public office bearers are not to be treated as the employees of the institutions to which they are appointed. They may not contract with those institutions for remuneration and benefits outside the statutory framework applicable to the determination of that remuneration and those benefits.

JUDGMENT

WILSON J:

1 This case is about the status of Commissioners for Gender Equality, and the extent to which they are entitled to the kind of leave from which an ordinary employee would usually benefit. Commissioners for Gender Equality are part

of a wider class of functionaries known as “public office bearers”. Their status as public office bearers has important consequences for their entitlement to leave. Accordingly, I will begin by setting out what a public office bearer is.

Public office bearers

2 Public office bearers are functionaries whose roles are defined in the Constitution, 1996 or by statute, and who perform vital constitutional functions, such as the scrutiny and implementation of legislation, the development of government policy, the investigation of human rights violations and the adjudication of disputes. A core group of public office bearers is defined in section 1 of the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997, but several other public offices are created in other statutes, most notably in the statutes which regulate the various institutions created in Chapter 9 of the Constitution.

3 The President usually appoints public office bearers, and is a public office bearer himself. But the President does not “employ” those he appoints. Nor, unless otherwise provided for, does the President’s power of appointment give him any right to supervise the work of the public office bearers he appoints. He may be responsible for setting their pay and benefits, and the state generally will be under an obligation to ensure that a public office bearer has the resources necessary to carry out their functions. But a public office bearer’s basic duty is to perform their functions professionally and independently, and the statutory scheme within which they operate is meant to guarantee them the degree of autonomy they require to do so. It follows that, save where statutorily prescribed, public office bearers are not

accountable to a “manager” or an “employer” in the ordinary sense. They derive their powers and functions from the laws which create their office, and are accountable to and under those laws, and those laws alone.

4 By way of illustration, Judges are public office bearers defined in chapter 8 of the Constitution. They are responsible for the most important adjudicative functions. Because they are public office bearers, Judges are subject to forms of accountability grounded in the Constitution and in statute, rather than in the common law duty to obey an employer. Unhappy litigants, and occasionally their lawyers, regularly misunderstand this when they complain to the Judge President of a particular court against the way a Judge on that court has decided a case, or conducted themselves in the course of handling the litigation. These complainants mistake the lawful structure of judicial accountability. Judges President do not “manage” or discipline other Judges. In the exercise of a court’s judicial functions, a Judge President is no more than the first among equals (see, by comparison, the role of the Chief Justice as defined in *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) at paragraphs 82 to 84).

5 Judges President are primarily responsible for apportioning judicial workloads, determining when and where courts sit, monitoring the flow of litigation through their courts and carrying out any other functions that the Chief Justice may delegate to them (see sections 8 (4) and (6) of the Superior Courts Act 10 of 2013). But neither they, nor the Chief Justice, have any power to instruct a Judge on the performance of their adjudicative functions. Judges President regularly provide advice and support that an individual Judge will be

slow to ignore or turn down, but, like all other public office bearers, individual Judges themselves are responsible for determining how to discharge their constitutional and statutory functions. They are held accountable through the appeals process or through a complaint to the Judicial Service Commission alleging a breach of the Code of Judicial Conduct. The Code itself and the process for engaging it are prescribed by statute (see sections 12 and 14 to 33 of the Judicial Service Commission Act 9 of 1994). The same goes for the appeals process (see sections 16 to 19 of the Superior Courts Act 10 of 2013).

6 Other public office bearers have similar structures of accountability. The Commission for Gender Equality Act 39 of 1996 comprehensively regulates the process of appointing, remunerating, resourcing and removing Commissioners for Gender Equality. Commissioners are appointed by the President on the recommendation of the National Assembly (section 3). The President determines their "salary, allowances and benefits" after he has considered the advice of the Independent Commission for the Remuneration of Public Office-bearers. The National Assembly must approve any salary, allowance or benefit so determined (section 8). Like all other public office bearers, Commissioners for Gender Equality are expected to exercise their powers and functions independently without fear, favour, bias or prejudice (section 10). They may be removed from office by way of a prescribed procedure if they fail to do this, or if they fail to discharge any other obligation placed on them by law (section 3 (5)). The Commission for Gender Equality has a Chairperson, but, as the title implies, the role of the Chairperson is not to supervise the other commissioners, but, primarily, to call and chair meetings of the Commission (section 5 (1)).

7 It follows from all of this that public office bearers are wholly different from ordinary employees. They are free from ordinary workplace hierarchies of command and control. Although section 23 (1) of the Constitution provides "everyone", including public office bearers, with the right to fair labour practices, I have my doubts about whether public office bearers are "workers" under section 23, with the general right to join a trade union, to strike and to bargain collectively for better pay and conditions. The statutory structures applicable to the determination of public office bearers' salaries and benefits seem to me to be incompatible with that proposition, but there is no need for me to decide the issue.

8 It is, though, clear to me that public office bearers may not enter into contracts with the state entities which control the institutions to which they are appointed to enhance or reduce the salary and benefits to which they are statutorily entitled. The salary and benefits which attach to a public office are determined by the Constitution or by statute, and are subject only to the ordinary legal controls placed on the exercise of constitutionally or statutorily conferred powers.

9 The President and Independent Commission for the Remuneration of Public Office-bearers may appropriately be criticised for failing to ensure that public office bearers' remuneration keeps pace with prices, or for failing to provide public office bearers with the capacity to acquire the equipment they need to discharge their functions effectively. They may even be upbraided for the way these failures may ultimately undermine the institutions of democracy and accountability they are charged with defending. But, generally speaking,

public office bearers are bound to accept the lawfully-determined salaries and benefits which attach to their office, or else resign and seek better remuneration in the ordinary labour market.

10 Holding public office is an act of service. It is not an acquisitive exercise. Most South Africans would probably consider the pay and conditions that attach to most public offices to be quite generous. But whether they are generous or not, their preservation is justified only by the need to make acts of public service practically possible for those whose qualifications and attributes make them suitable for public office. Whether public office bearers are under- or over-paid; whether their conditions of service are appropriate; and whether they have the resources they need has nothing directly to do with whether this or that salary is justified on the open market, the salary that a specific office bearer could attract on the open market, or even whether a public office bearer's salary is "fair" to the individual who receives it. The primary question is whether the salary, allowances and benefits afforded to public office bearers are appropriate to ensure that the functions of the office are discharged as well as they can be by appropriately qualified persons under the constitutional and statutory provisions governing those functions, and in the context that public office bearers do their work.

The applicant's leave entitlement

11 It is important to set all of this out because this application is based on a fundamental misunderstanding of the nature of public office, and the rights and duties that attach to it. The applicant, Mr. Botha, was until 31 May 2024, a Commissioner for Gender Equality. At the end of his period of office, Mr.

Botha claimed that he was entitled to be compensated for 67 days' worth of "leave" he had accumulated but not taken while in office. This was, Mr. Botha claimed, compensable at a rate of just over R3 700 per day, meaning that Mr. Botha was entitled, he argued, to a lump-sum payment of just over R250 000.

12 Mr. Botha's claim was based on an interpretation of two documents generated at the Commission for Gender Equality. The first is the "Commissioners Handbook" which provides that commissioners accumulate leave subject to the Commission's leave policy. The second is the Commission's leave policy, which provides that "[e]mployees shall be paid cash value in respect of unused leave credit upon termination of services, such leave payout shall be capped in line with entitled 22 working days per annual leave cycle" (paragraph 5.1.11). Mr Botha argues that, since he was not an employee, but a commissioner, the 22-day cap does not apply to him, and the value of the full 67 days of leave he accumulated must be paid out. This much is clear, he submits, from the Commissioners' Handbook itself, which provides that "[c]ommissioners' leave is not forfeited but carried over until the end of their term" (paragraph 5.3.6).

13 I need not consider whether Mr. Botha has correctly interpreted the leave policy, since in my view the policy can have no lawful effect. Mr. Vilakazi, who appeared for Mr. Botha, accepted that leave would be a "benefit" of Mr. Botha's engagement as a commissioner. He also accepted that benefits of that nature are statutorily required to be determined by the President in accordance with the provisions of the Commission for Gender Equality Act. He argued, however, that the policy represented a separate contractual

agreement between the Commission and Mr. Botha, in terms of which a leave entitlement was grafted on to the remuneration, benefits and allowances the President has determined.

14 That submission is unsustainable. The Act reserves the power to determine a commissioner's benefits for the President. A commissioner cannot bypass the statute by contracting for leave benefits with the Commission itself, which has no power to grant them to its commissioners. It must of course reimburse commissioners for out-of-pocket expenses, pay for the equipment commissioners use, fund travel undertaken in the course and scope of their duties, and do all the other things necessary to ensure commissioners can perform their functions effectively. The Commission may also implement a leave regime in respect of its employees. Its power to do so arises from its status as an employer under a labour contract, read with the Basic Conditions of Employment Act 75 of 1997. But, as everyone before me accepted, commissioners are not employees of the Commission. To the extent that the Commissioners Handbook or the Commission's leave policy purports to treat them as such, it is unlawful.

15 Unless a statute says so, public office bearers do not generally receive "leave", since leave presumes the purchase of an employee's labour power which is then granted back to the employee by way of a leave entitlement. Public office bearers are not employees, and their labour power is not "purchased" when the President appoints them. The public office bearer accepts (usually with a profound sense of honour) the responsibility to perform the constitutional and statutory functions assigned to them whenever and wherever required. When

they are not exercising those powers or performing those functions, public officer bearers are not on leave. They are simply inactive.

16 It is up to the individual public office bearer to decide, within the constraints of the legal duties that attach to their office, how best to exercise their powers and perform their functions, and when to refrain from doing so. That will obviously require co-ordination with other public office bearers (between commissioners appointed to the same commission, or between Judges appointed to the same court, for example), but the law generally leaves such co-ordination to good faith co-operation between public office bearers who are committed to performing their functions effectively. There is no compulsion involved – whether from the President or otherwise – because it is presumed that none is required between individuals who are committed, independent and capable enough to be appointed or elected to public office.

17 There is, of course, statutory provision for Judges' leave with the permission of the relevant Judge President. The President has also been known to place cabinet ministers on leave. But this leave is generally understood to be in the nature of a sabbatical or a hiatus resulting from a disciplinary proceeding or some form of incapacity, during which an office bearer will be relieved from performing most or all of the functions of their office for a particular period. But it is not "leave" in the conventional sense. In any event, since it is authorised by statute or determined by the President, whose power to determine benefits or grant leave is itself enshrined in statute, such leave presents no legal problem.

18 Neither Mr. Vilakazi, nor Ms. Mnqandi, who appeared for the Commission for Gender Equality, argued that the "leave" granted in the Commission's leave policy had been authorised by statute or by the President after taking advice from the Independent Commission on Public Office-bearers. It follows that Mr. Botha was never entitled to it, and he is certainly not entitled to be compensated for not taking it.

19 During the hearing before me, the Commission for Gender Equality repeated a previous offer to settle the litigation by paying Mr. Botha just over R80 000 – an amount notionally equivalent to 22 days' leave. The underlying dispute between the parties was settled on that basis, and I was asked to make an order by agreement that the Commission pay Mr. Botha that amount. I was satisfied that this order was competent and proper only because the Commission assured me that the payment was tendered as an *ex gratia* amount to settle the litigation, and not pursuant to any obligation to pay Mr. Botha out under the leave policy. Since the power to settle litigation in this way must be an incident of the Commission's capacity, as a juristic person, to sue and be sued in its own name (see section 17 (1) of the Commission for Gender Equality Act), I acceded to the parties' request to make the agreement an order of court. I would not have done so had the offer been made and accepted pursuant to an agreement that the leave policy was valid and binding.

20 Both parties nevertheless asked me to determine the merits of the application in order to clarify a point of some public importance, to assist the Commission in assessing the legality of its Commissioners' Handbook and leave policy, and to decide the question of costs. The Commission asked for the costs of

the application arising since its offer to settle was originally made on 15 May 2025. Mr. Botha asked that each party pay their own costs. Given that both parties have to some extent misunderstood their rights and obligations, and that the offer to settle relied upon was made subject to a reservation of rights, I do not think any costs order would be appropriate.

Order

21 Accordingly –

21.1 The settlement agreement reached between the parties on 29 July 2026 is made an order of court.

21.2 It is declared that Commissioners for Gender Equality, as public office bearers, may not lawfully accumulate leave in terms of the Commission's leave policy.

21.3 Each party will pay their own costs.

[redacted]

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 5 August 2026.

HEARD ON: 29 July 2026

DECIDED ON: 5 August 2026

For the Applicant:	M Vilakazi Instructed by Menzi Vilakazi Attorneys
For the Respondent:	N L Mnqandi (Heads of argument drawn by N Seme) Kganare Khumalo Attorneys