

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO. 294 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW.**

5 **BETWEEN**

**PROF. DR. ANTHONY KABANZA MBONYE..... APPLICANT**

**AND**

**ATTORNEY GENERAL..... RESPONDENT**

10 **BEFORE HON.LADY JUSTICE H.WOLAYO**

**RULING**

**Introduction**

By Notice of motion under section 33 and 33(1) (a) (read section 3 of the Judicature (Amendment) Act 2002 , Rules 3, 4, & 6 of the Judicature (Judicial Review) Rules and section 15 98 of the CPA , the applicant Prof. Mbonye sought the following orders:

- a) A declaration that the Inspector General of **Government ‘Report on Systemic Investigation into the Recruitment of Director General Health Services and other Senior Positions at the Ministry of Health Headquarters by the Health Service Commission ‘** is irrational, unjust, ultra vires, illegal, null and void to the extent that it adversely affects the applicant.
- b) An order of certiorari calling for the report in court and quashing the same.

- c) An order of prohibition and injunction restraining the respondent and all those responsible for implementing the impugned report from implementing it in as far as it is detrimental and prejudicial to and affects the applicant.
- d) Costs for the application.

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### **Representation**

The applicant was represented by Barya, Byamugisha & Co. Advocates while the respondent was represented by Ms. Josephine Kiyangi SSA of the Attorney General's Chambers.

### 10 **The applicant's case**

It was the case for the applicant presented through affidavits in support and in rejoinder of Prof. Mbonye that at the time of filing this application, he was the Ag. Director General Health Services (DGHS) and substantive Director, Health (Clinical & Community) Ministry of Health (MOH), Uganda. He was also assigned duties of Permanent Secretary (PS) MOH on two occasions when the substantive PS was out of office.

According to Prof. Mbonye, it was on one of these occasions when and in consultation with the Department of Human Resource and in good faith, he caused a review of the job specifications of twelve positions in the MOH inclusive of Director General Health Services with the objective of opening and attracting the best candidates .

It was Prof. Mbonye's case the revised specifications were approved by the substantive PS, and further reviewed and approved by the Health Service Commission (HSC) and then advertised.

According to Prof. Mbonye, he responded to the advert and was shortlisted together with one other person. But before the interviews, the IGG carried out a review of the process and made a report dated 11.9.2017 detrimental to him.

Prof. Mbonye in his affidavit in support is unhappy with the following Findings in the IGG report:

- *The applicant is guilty of conflict of interest in applying for the position of DGHS when he did not disclose his interest to the substantive PS ;*

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- *He did not qualify to be shortlisted for the position and the HSC erred in shortlisting him.*

Other recommendations relevant to this case, in the IGG report are as follows:

- 5 • *Review the short listing of Prof. Mbonye for the position of DGHS as he did not meet all the conditions and academic requirements for the position advertised;*
- 10 • *Require Prof. Mbonye to show cause why he should not be submitted to the HSC for disciplinary action for acting in conflict of interest when he knowingly and actively participated in determining the person specifications for the position of DGHS contrary to Public Service Code of Conduct.*

From the foregoing analysis, Prof. Mbonye's complaint is essentially that the IGG report unfairly constrains his opportunity to compete for a promotion. This finding notwithstanding, he does not deny changing the specifications for the position of DGHS when he was acting as PS to favour himself but denies wrongdoing.

### **Respondent's case**

It was the respondent's case presented through the affidavit in reply of the IGG Hon. Justice Irene Mulyagonja Kakooza that after receipt of a series of complaints, the IGG carried out a systemic investigation into the recruitment process for the position of DGHS and other senior positions at the MOH and made the following findings:

1. The PS Ministry of Public Service authorized the PS MOH to recruit staff in the Ministry including DGHS.
- 25 2. By letter dated 26.9.2016, the PS MOH made a submission of vacancies to be filled.
3. By letter dated 7.10.2016, the PS MOH assigned duties of the office of PS to Prof. Mbonye for four days from 10<sup>th</sup> to 14<sup>th</sup> October 2016.
4. As acting PS, Prof. Mbonye adjusted the submissions declaring posts and by an external advert No.3 of 2016 that contained the altered job specifications effected by the applicant, the Health Service Commission (HSC) invited candidates to fill the posts at the MOH including the post of DGHS.

5. The newly submitted job specifications for the post of DGHS were in the interests of the applicant as compared to the previously submitted specifications.
6. At the time of short listing, it was not brought to the attention of the panelists that the applicant had participated in the alteration of job specifications for the position of DGHS.

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The advert for the position of DGHS is in the New Vision newspaper dated 17.10.2016 and marked annexure A25 attached to Prof. Mbonye's affidavit in support is at page 110.

Worthy of note is that the advert is signed off by the Secretary Health Service Commission.

- 10 From the foregoing analysis, the respondent's case is essentially that in altering specifications for the position of DGHS when he was an interested party, Prof. Mbonye acted contrary to the Code of Conduct and Ethics for public officers.

#### ***Analysis of the impugned altered job specifications***

- 15 The requirements for the post of DGHS submitted by Dr. Lukwago PS MOH which are the subject of the IGG report are as follows:

- *MB ChB or its equivalent from a recognized University or Institution*
- *Master's Degree in any of the following disciplines; Business Administration, Planning and Development, Health Planning, Health Economics, Public Administration and*
- 20 *Management from a recognized University or Institution.*

The requirements for the post of DGHS submitted by Prof. Mbonye Ag .P.S MOH as were as follows:

- *MB ChB or its equivalent plus a post graduate training at a master's level in relevant Medical fields from a recognized University or Institution*
- 25 • *Training in Administration or management will be of added advantage.*
- *PhD is an added advantage.*

The final requirements approved by the Health Service Commission are as follows:

- MB ChB or its equivalent from a recognized University or Institution
- *Master's Degree in a relevant medical field*
- A postgraduate qualification in Administration or Management from a recognized University or Institution.

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The final External advert No.3 of October 2016 on job specifications incorporates the proposal by Prof. Mbonye for a Master's degree in a relevant medical field which is essentially the only recommendation adopted by the HSC . The other requirements were adopted from the Dr. Lukwago proposal while the HSC introduced the requirement for a post graduate qualification in administration or management from a recognized university or institution.

As the recruiting and appointing authority, the HSC considered all proposals and determined the final job specifications.

I have carefully considered submissions of both counsel.

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Counsel for the applicant discussed one issue, namely,

- 1) Whether in the circumstance of this case the applicant is entitled to the remedies sought.

20 Counsel for the respondent discussed two issues, namely,

- 2) Whether the IGG report is irrational, unjust, unfair and null and void to warrant any judicial writ.
- 3) What are the remedies available to the parties?

25 From my analysis of both the applicant's and respondent's cases, the key issues for determination are:

- 1) Whether this application is a proper case for judicial review.
- 2) Whether the IGG report is irrational, unfair and null and void.

3) Whether the IGG exercised authority not vested when it recommended disciplinary action and other recommendations.

4) Remedies

These four issues encompass issues discussed by both counsel in their submissions.

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**Issue No. 1: Whether this case is susceptible to judicial review.**

Counsel for the respondent submitted that this application is not properly before court because there is no decision that has been made to warrant court to review the decision making process because the Inspectorate of Government after successfully concluding its investigations, merely  
10 made recommendations as opposed to decisions.

In submissions in rejoinder counsel for the applicant submitted that the preliminary objection was misconceived and that the report amounted to a decision on what had been done by the HSC and PS MOH and that indeed the PS had implemented part of the report that was addressed and in her implementation she made direct reference to the report as her authority for doing so.

15 Counsel cited Article 230(2) of the Constitution and section 14(6) of the Inspector General of Government Act that elevate the reports of the IGG to more than mere recommendations.

Section 14(6) prescribes that

*The Inspector-General of Government may, during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are  
20 necessary and appropriate in the circumstances.*

The IGG has broad powers under Article 225 of the Constitution to investigate any act, omission, advice, decision or recommendation by a public officer made in exercise of administrative functions.

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Recommendations of the IGG carry weight and although they are recommendations, the IGG derives authority from the Constitution and the IGG Act 2002 therefore a government department is bound to respect these recommendations.

I have read the IGG report and at page 31, the IGG found that by revising person specifications for the position of DGHS, Prof. Mbonye was in conflict of interest contrary to the public service Code of Conduct principles selflessness, discipline and integrity.

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By article 42 of the Constitution, any person aggrieved by an administrative decisions has a right to apply to a court of law for redress.

In ***Kyamanywa Vs IGG MA 243 of 2008 Hon Justice Yorokamu Bamwine*** held that ‘...

10 *judicial review extends to the acts and orders of a competent statutory public authority, which has power to impose a liability or give a decision, which determines the rights of affected parties’.*

As reports by the IGG have in the past been found amenable to judicial review , the doctrine of precedent dictates that this court finds the adverse recommendations in the IGG report dated

15 11.9.2017 susceptible to judicial review.

**Issue No. 2 : Whether the IGG report is irrational, unfair and null and void .**

**Standard of fairness and rationality**

20 In ***Kasibo Joshua v Commissioner of Customs U.R.A. HCMA 44/2007***, Justice Kiryabwire cited text book on Administrative Action by Hilary Maxwell as follows:

*“It is trite law Judicial Review is not concerned with the decision in issue per se but with the decision making process.*

25 *Essentially Judicial Review involves the assessment of the manner in which the decision is made. It is not an appeal and jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality”.*

The IGG office found Prof. Mbonye in breach of the Code of Conduct for public officers, in particular the principles against conflict of interest.

Conflict of interest is defined by the Code of Conduct as one where ‘a *public officer has to make*  
5 *a decision between his or her personal interest and public interest*’.

Para 4.0 of the Code stipulates as follows:

*In the execution of official government business, a public officer shall not put himself or herself in a position where his or her personal interest conflicts with his or her duties and responsibilities as a public officer. The public officer is required to inform his or*  
10 *supervisor the nature of the interest.*

The office of the IGG found Prof. Mbonye in conflict of interest when he made changes to specifications for the post of DGHS.

My role is not to sit as an appeal court but to determine whether the recommendations of the office of the IGG in the exercise of its powers meet the standard of legality, fairness , and  
15 rationality .

The Code of Conduct for public officers is enforced by the Health Service Commission as prescribed by para. 6 of the code in the following terms:

*‘Unethical conduct by public officers shall not be accepted in the public service. Sanctions for any breach shall be those prescribed by Service Commissions...’.*

20 Other penalties that apply depending on the gravity of the breach are the following:

*Warning or reprimand; suspension , withholding or stoppage of increment; surcharge or refund; making good the loss or damage of public assets; interdiction without pay; reduction in rank; removal from the public service in the public interest; dismissal.*

I have reproduced para. 6 of the Code to show that there is a prescribed process for dealing with  
25 breaches of the code.



This means that while the IGG is empowered by article 225 (1) (e) of the Constitution to

*‘investigate any act, omission, advice, omission, decision, or recommendation by a public officer or any other authority...taken, made, given or done in exercise of administrative function’,*

5 the finding of conflict of interest was only a finding of a prima facie case of breach of the code after investigations. This is because it is the HSC to preside over the disciplinary proceedings and observe the principles of natural justice in the process.

In **MC No. 303 of 2013, Ojangole Patricia and others v AG**, Justice Musota found the IGG’s directive to the board of directors illegal as the directive was intended to exert influence on the  
10 board in the exercise of its discretionary powers.

As submitted by counsel for the respondent, the IGG has recommended disciplinary action against Prof. Mbonye. That is true except the IGG finding of conflict of interest is only a statement that there is evidence of breach of the code but it is not a final finding of fact by the appropriate disciplinary body.

15 I do not find any irrationality in the recommendation to the HSC to take out disciplinary proceedings against Prof. Mbonye but I emphasize that the finding there was conflict of interest was merely a preliminary finding and not final. To hold otherwise would be to tie the hands of the HSC in the exercise of its mandate.

While the IGG was entitled to make findings after investigations, the finding there was conflict  
20 of interest is not conclusive as Prof. Mbonye is entitled to due process before the authority mandated to enforce the Code.

**Direction to review the short list on the basis that Prof. Mbonye was not qualified to sit interviews.**

This recommendation is a form of sanction that would only be imposed after due process by the  
25 appropriate disciplinary body authorized to enforce the Code of Conduct and Ethics for public officers. Moreover, the sanctions are prescribed in an ascending order with the most severe

sanction being dismissal. Para. 6.0 of the Code of Conduct for public officers stipulates penalties for breach of the code, depending on the gravity of the offence or misconduct.

Therefore, the recommendation to review the shortlist on the grounds Prof. Mbonye did not qualify to be on that list is premature firstly because he has not undergone disciplinary process before the Health Service Commission which is the body authorized to enforce the Code of Conduct , secondly it is not one of the prescribed sanctions for breach of the Code of Conduct .

### **Issue No. 5: Remedies**

Having considered that Prof. Mbonye has not been subjected to the appropriate disciplinary process which would have led to any of the sanctions stipulated by the Code of Conduct , it is fair that he be allowed to sit the interviews . In the result, I make the following orders.

1. A writ of certiorari will issue quashing the following recommendations:

*(a) Prof. Mbonye did not qualify to be shortlisted for the position and the HSC erred in shortlisting him.*

*(b) Review the short listing of Prof. Mbonye for the position of DGHS as he did not meet all the conditions and academic requirements for the position advertised;*

2. The following recommendation remain in force:

*(a) Require Prof. Mbonye to show cause why he should not be submitted to the HSC for disciplinary action for acting in conflict of interest when he knowingly and actively participated in determining the person specifications for the position of DGHS contrary to Public Service Code of Conduct and Ethics for the Uganda Public Office.*

3. The finding Prof. Mbonye was in conflict of interest is a statement that there is some evidence of conflict of interest but is not a conclusive finding of fact.

4. Prof. Mbonye will be allowed to sit interviews for the post of DGHS unless the HSC defers the exercise until disciplinary process is concluded.

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5. The interim order issued on 12<sup>th</sup> October 2017 is accordingly vacated.

6. Each party will bear its own costs.

**DATED AT KAMPALA THIS 31<sup>ST</sup> DAY OF JANUARY 2018.**

**HON. LADY JUSTICE H. WOLAYO**

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