

SOUTH AFRICA / JUDGMENT

Maru and Others v MEC for Transport and Community Safety Eastern Cape and Others (272/2024) [2025] ZAECBHC 9 (5 April 2025)

[2025] ZAECBHC 9

COURT

Eastern Cape High Court, Bhisho

BEFORE

Beyleveld

CASE / FILE NUMBER

272/2024

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FLYNOTES:

ADMINISTRATIVE – Investigative report – Audi
alteram partem –
Report
made definitive findings of misconduct against applicants –
Use of terms such as "irregularly or fraudulently"
implicated applicants – Pronounced on their culpability –
Not given a meaningful opportunity to respond to allegations
before report was finalized – Violation of rule –
Investigation report procedurally unfair and exceeded scope
of
investigator's mandate – Procedurally tainted –
Report reviewed and set aside.
IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE DIVISION
– BHISHO)
Case No: 272/2024
OF INTEREST
In the matter between:-
NOXOLO
MARU
First
Applicant
NOSIPHO
SOMDYALA
Second
Applicant
THULISA
SONJANI

Third
Applicant
and
MEC
FOR TRANSPORT AND COMMUNITY SAFETY
EASTERN
CAPE
First
Respondent
HEAD
OF THE DEPARTMENT OF TRANSPORT
EASTERN
CAPE
Second
Respondent
DEPARTMENT
OF TRANSPORT, EASTERN CAPE
Third
Respondent

JUDGMENT

Beyleveld AJ:

- [1] This is the revised judgement of the ex tempore judgement that I handed down on the 27th of March 2025.
- [2] This application has its genesis in an investigation report of a Mr Tshaka,[1] a Deputy Director: Security of the Department of Transport, Eastern Cape titled “Investigation Report into Alleged Fraudulent activities at Scholar Transport”, dated 28 October 2022 together with a Supplementary Report dated the 16th January 2023.[2]
- [3] The Applicants seek an order declaring the Report unlawful with consequential relief which is to the effect that the Report should be set aside.
- [4] Further relief sought in the prayers relates to a prohibition on implementing the Report and declaring certain disciplinary proceedings against Applicants, as a consequence of the Report, unlawful and of no force and effect.
- [5] A conditional order is also sought relating to any delay in instituting the present application.
- [6] The Applicants contend in the founding papers that the relief sought is essentially a review in terms of the Promotion of Administrative Justice Act[3] (‘PAJA’) alternatively a legality review.
- [7] The main relief, on a proper analysis of the papers, does fall within the framework of administrative review, but certainly some of the other relief clearly does not.[4]

[8] The salient facts are the following:

8.1 The Applicants are employed in the Scholar Transport Unit of the Third Respondent.[5]

8.2 Tshaka was appointed to investigate allegations relating to allocation letters that some officials in the Scholar Transport Unit had amended. Tshaka was to determine whether certain claims had merit. Tshaka compiled and issued the Report.

8.3 It was contended by the head of the Department in the appointment letter of Tshaka, that he had received information that certain Scholar Transport service providers inflated their invoices or that there appeared to be a sudden increase in routes or kilometers.

8.4 It is further alleged that allocation letters were amended by some officials.

8.5 Tshaka was requested to investigate allegations of nefarious activities, and to determine whether or not such claims were meritorious and whether or not remedial action was required to be taken.

8.6 Tshaka's appointment letter, which is dated 23rd August 2022, concludes as follows:

"You are requested to respond to the above allegations by Monday 31 October 2022 at 16h00 but please note that there's (sic) no obligation to do so, if you wish, as its within your constitutional right to do so."

8.7 The Applicants were placed on precautionary suspension on the 9th September 2022.

8.8 As previously indicated, the first Report was delivered on the 28th of October 2022.

8.9 Although the above suspension lapsed after two months, the Applicants were not allowed to return to work.

8.10 In March 2023, the Applicants were placed on precautionary transfers.

8.11 Thereafter, the First and Second Applicants obtained relief from the chairperson of the disciplinary enquiry. Such relief was to the effect that the precautionary transfers be uplifted before a specified date.[6]

8.12 The Department failed to comply with the above-mentioned ruling but, instead, placed the First and Second Applicants on forced special leave.

8.13 The MEC,[7] after receipt of a letter from the Applicant's attorneys, rescinded the decision to place the First and Second Applicants on special leave, and such Applicants were then allowed to return to work.

8.14 Although the First and Second Applicants returned to work they were not permitted to perform their usual work functions; for instance, they were excluded from strategic meetings and participating in "any such related activities". They were also denied the use of their laptops. The Respondents, in answer to these allegations in the Founding Affidavit, simply deny the contents without any explanatory examples of what the Applicants' duties now entailed (as

opposed to what they formerly entailed). This bald and unsubstantiated denial can therefore, for the purposes of applying the Plascon-Evans rule[8] be disregarded.

8.15 On the 27th of October 2022 the First Applicant received an email from Tshaka inviting a response to certain findings that Tshaka had already

made.[9] Although a finding had already been made by Tshaka, four days were offered to the First Applicant to respond to the above allegations; significantly, however, the first Report is dated the 28th October 2022 and was either completed on that date or (on the probabilities) completed prior to that date and finalized on the 28th October 2022.

8.16 On the 28th October 2022 the First Applicant, in writing, responded by requesting relevant documentation and information prior to the anticipated response on or before 31 October 2022.[10]

8.17 The letter penned by the First Applicant concluded as follows:

“All the above information is requested as soon as possible as it will make it easy for me to respond thoroughly to your questions.”

8.18 Tshaka responded by forwarding certain documents[11] which the First Applicant contended were not the major portion of the information requested and it was therefore of no assistance in formulating any meaningful response to the already made findings by Tshaka.[12]

8.19 There was also a written communication by the First Respondent to the Head of the Department imploring the furnishing of the outstanding information requested from Tshaka. Significantly, there was no response from the aforesaid functionary.

8.20 It does not appear whether the Department intends proceeding with any disciplinary enquiry, notwithstanding the MEC having indicated in a letter that disciplinary proceedings (if relevant) must take its course.

8.21 What is stated above with regards the First Applicant's interaction with Tshaka and the MEC, was to a large extent mirrored in the interactions between the Second Applicant and the aforesaid functionaries. The Second Applicant was also charged in disciplinary proceedings, but the Second Applicant had initiated proceedings before the General Public Service Sector Bargaining Council (which made an award in favour of the Second Applicant, which award was based on an unfair labour practice and included compensation).

8.22 The Second Applicant has returned to work but suffers the same disability restrictions as encountered by the First Applicant.

8.23 In so far as the Third Applicant is concerned, her disciplinary proceedings and ancillary events were slightly different, but it in no way detracts from the overall picture enumerated in respect of the other Applicants; no disciplinary proceedings have been completed and the same uncertainty as to the status of the disciplinary proceedings in respect of the First and Second Applicant are also apposite in respect of the Third Applicant.

[9] The Respondents oppose the application and the grounds of opposition as set out in Counsel for the Respondents' Heads of Argument may conveniently be paraphrased as follows:

9.1 The relief sought, although declaratory in form, appears to be a PAJA or legality review which is not foreshadowed in the Notice of Motion.

9.2 If the relief is for a review, Tshaka's internal investigation did not constitute administrative action (or any action subject to a legality review) as Tshaka was not a fact-finder and was merely expressing an opinion. His investigative function did not include any determination of culpability, and therefore did not adversely affect the rights of the Applicants.

9.3 Declaratory orders are in the discretion of a court and, because the matter is moot by virtue of the investigation having been completed and disciplinary proceedings instituted, the Applicants should be non-suited.

9.4 The lateness of the application brought by the Applicants militates against them being heard on the merits.

CONDONATION

[10] At the hearing of this application, Respondents Counsel abandoned any reliance on the delay issue.

[11] The concession to abandon reliance on the question of delay was appropriate under the circumstances.

[12] Essentially, the Respondents contended that the Applicants' application had no prospect of success and that condonation should therefore be refused.

[13] In any event, the application papers were served on the Respondents on the 18th April 2024 and the 180 days referred to in PAJA could, at the earliest, only have commenced running when the Applicants became aware of the content of the Report. In the Founding Affidavit it is alleged that the Third Applicant only became aware of the contents of the Report on the 29th November 2023 when an indexed and paginated bundle for the disciplinary hearing was delivered, which bundle included the Report.

[14] On a conspectus reading of the Answering Affidavit, it seems to me that the Report was initially not made available to the Applicants, but only attached to the bundle that was prepared for the purpose of the disciplinary enquiry.[13]

[15] It is however, not necessary to further debate the issue of delay as it has been conceded that the application was initiated timeously.

A PAJA REVIEW OR A LEGALITY REVIEW

[16] The substance for Applicant's review is contained in the Founding Affidavit. The order sought in the Notice of Motion is a declarator that the Report is unlawful, but there is also a prayer that the Report be set aside; this in essence is the basis for a review.[14]

[17] The Respondents, in written and oral argument, rely on paragraph 38 of the Viking Pony Africa judgement.[15]

[18] A significant qualification to paragraph 38 of the Viking Pony Africa judgement is formulated in paragraph 39 which reads as follows:

"[39] If the City were about to pronounce on the culpability or otherwise[16] of Viking, Hidro-Tech and Viking would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they

may wish to make. Similarly, if Viking were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City.

[19] This case has not,[17] however, reached that stage.

[20] Tshaka's appointment letter itself contemplates engagement with affected parties.[18]

[21] On a proper reading of the Report,[19] adverse findings of culpability on the part of the Applicants were made. The findings are conclusive in relation to contended for

misconduct by the Applicants. Factual findings are made and legal conclusions drawn. Indicative of this are words and/ or phrases used in the Report such as "irregularly or fraudulently", "complicit or accessories in the perpetration of the fraudulent transactions", and "Ms Sonjani and Maru acted irregularly, without authorization and probably in cahoots with the operator".

[22] Somewhat bizarrely, Tshaka in the Report asserts that the Applicants were afforded the right to respond to these findings. In this regard he refers to his letter dated the 27th October 2022 which has been dealt with above.

[23] The audi alteram partem rule is embedded in our law even prior to the advent of our Constitutional dispensation.[20]

[24] In *Nortje en 'n Ander v Minister van Korrektiewe Dienste and Andere*, [21] Brand AJA (as he then was) commented that the application of the audi rule is an elastic concept and that specific definition for the requirements are neither practical nor appropriate.

[25] There exists a legitimate expectation that the right to be heard prior to a decision or finding will be honoured.[22] The question whether a legitimate expectation will confer a right to substantive relief is uncertain, but in the present instance it has no practical consequence. [23]

[26] The term legitimate expectation was first verbalized in the context of administrative law in the decision handed down by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*. [24] In this regard, Lord Denning observed:

“...an administrative body may, in a proper case, be bound to give a person who is affected by the decision an opportunity of making

representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.”[25]

[27] In *Walele v City of Cape Town and Others*, [26] the Constitutional Court confirmed that the common law doctrine of legitimate expectation remains part and parcel of procedural fairness in post-1994 administrative law. In this particular instance it is of no significance whether the review is a PAJA review or a legality review. As was stated in *Minister of Home Affairs v Public Protector*, [27] it does not matter [28] that the application for the review is based on the principle of legality rather than PAJA. [29] The Constitutional Court reiterated procedural differences between the two types of review [30] but concluded that on the facts it was unnecessary to pigeon-hole the review in one or the other of the two types review.

[28] In *Judicial Services and Another v Cape Bar Council and Another* [31] it was held that:

“...it has by now become axiomatic that the doctrine or principle of legality is an aspect of the rule of law itself which governs the

exercise of all public power, as opposed to the narrow realm of administrative action only. The fundamental idea expressed by the

doctrine is that the exercise of public power is only legitimate when lawful.”

[29] Another important consideration in assessing whether the Report is reviewable as an overreach of public power, and, therefore unlawful, [32] is whether Tshaka in exercising his powers in terms of his appointment letter dated 23rd of August 2022 exceeded his powers. [33]

[30] From the nature and content of the Report the answer to the foregoing must be in the affirmative. It, however, is once again of minimal importance whether Tshaka exceeded his powers or not; it is indisputable that his investigations went much further than the investigative process envisioned in *Viking Pony Africa*. [34] He made definitive findings and pronounced on the culpability of the Applicants. [35]

- [31] I accordingly disagree with Counsel for the Respondents' contention that Tshaka's investigative functions "...did not include the determination of culpability...".
- [32] The authorities relied upon on behalf of the Respondents are not applicable to the specific facts of this case.[36]
- [33] In the premises, the Report is procedurally tainted for the reasons set out above and requires to be set aside.

MOOTNESS

- [34] The Respondents contend that the issue of mootness arises by virtue of the fact that the investigation has been completed. This is a startling proposition; the natural consequence of such a submission is that no decision can ever be reviewed because it has already been taken. Perhaps cynically one can only ponder what the meaning of decisions such as *Oude Kraal Estates (Pty) Ltd v City of Cape Town*[37] and *MEC for Health, Eastern Cape and Others v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute*[38] is.
- [35] Secondly, and ancillary to the above, it is also alleged on behalf of the Respondents that disciplinary proceedings have been instituted.
- [36] Besides the fact that a Court has a discretion to hear a matter even although it is moot[39] the issue in the present matter is very much alive.
- [37] If the disciplinary proceedings do reconvene, the Report, undoubtedly will feature as an exhibit and claim will be laid to its probative value. This will adversely affect the Applicants' rights.
- [38] If the Report is set aside, however, it will have no evidentiary value and the Applicants' rights will not have been jeopardized. Another relevant consideration is the present prejudice suffered by the Applicants who are in a state of uncertainty as to their work functions and whether or not a disciplinary hearing will be continued with or not. The delay in prosecuting the disciplinary enquiry timeously is alarming.
- [39] Whilst in such a state of flux, the Applicants face further prejudicial consequences in respect of promotion, workplace and social stigma.
- [40] Accordingly, the subject matter of the present application is not moot. A judgment on the merits will indeed, if in favour of the Applicants, have a practical effect.[40]

ORDER

- [41] I therefore make the following order:

41.1 The investigation Report of Mr Tshaka, a Deputy Director: Security of the Department of Transport, Eastern Cape titled "Investigation Report into Alleged Fraudulent activities at Scholar-Transport" dated 28 October 2022 and the supplementary report thereto, dated 16 January 2023, is reviewed and set aside.

41.2 The Respondents, jointly and severally, are ordered to pay the Applicants' costs of the application including Counsel's fees on Scale C.

A BEYLEVELD

Acting Judge of the High Court of South Africa

Date heard:

27 March 2025

Ex tempore delivered: 27 March 2025

Revised:

5 April 2025

Appearances:

For Applicants: Adv. M. Salukazana, instructed by Sakhela Inc.

For Respondents: Adv. L.L Ngumle, instructed by The State Attorney, East London

[1] 'Tshaka'.

[2] Hereinafter referred to as the Report, save where the context requires the reference to any of the two specific reports.

[3] 3 of 2000.

[4] For instance, the interdictory relief and the declaration of unlawfulness as well as the order sought relating to the disciplinary charges. As to the applicability of PAJA, the Constitutional Court in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro- Tech Systems (Pty) Ltd and Another* 2011

(1) SA 327 (CC) ("Viking Pony Africa judgement") at [37] defined the meaning of administrative action as contained in PAJA as follows: "PAJA defines administrative action as a decision or failure to take a decision that adversely affects a) the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must also be had to the facts of each case" (footnotes omitted).

[5] The 'Department'.

[6] This ruling did not affect the Third Applicant, whose disciplinary chairman was someone else.

[7] The First Respondent.

[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984

(3) SA 623 (A).

[9] The findings made by Tshaka were formulated as follows: § Irregular appointment of non-bidders in respect of the Joe Gqabi District to the value of R 9,889,064.00. § Poor performance regarding inability (sic) to ensure that irregular expenditure was avoided during the contracting of operators in 2020 in all the districts whilst you were acting chief director -Scholar Transport § Poor performance regarding the inability to ensure avoidance of irregular amendments which were made to the Scholar Transport database during the period July 2022.

[9] The findings made by Tshaka were formulated as follows:

§ Irregular appointment of non-bidders in respect of the Joe Gqabi District to the value of R 9,889,064.00.

§ Poor performance regarding inability (sic) to ensure that irregular expenditure was avoided during the contracting of operators in 2020 in all the districts whilst you were acting chief director -Scholar Transport

§ Poor performance regarding the inability to ensure avoidance of irregular amendments which were made to the Scholar Transport database during the period July 2022.

[10] Some of the information requested included the following; a) the closing register of all operators per district, b) the attendance registers of the briefing sessions per district, c) the list of non-bidders per district and their irregular expenditure, d) the minutes recorded and signed from the BEC, BAC, and IBAC respectively per district e) a copy of the signed performance agreement between the First Applicant and his supervisor for the period 1 April 2020 (including quarterly performance reviews from that date onwards), f) copies of the results of any assessments by the supervisor in respect of the First Applicant for the period 1 April 2020 to present date, g) a list of all amendments per district which were made on the Scholar Transport database from 1 April 2021, and h) the payments made per district. It was also pointed out that Tshaka's contention that the documents are so voluminous that it is impossible to scan and forward them, that a request is made that all information in detail for each district of all non-bidders and all non-responsive bidders be furnished. There was also a request details of the contended for irregular expenditure in the sum of R9,889,064.00.

[11] Described as follows: a) combined report by the BEC/BAC on Chris Hani, b) Memorandum from head of dep approving that yourself and others proceed with signing of SLA's, c) the information on the first bullet above covers most of the issues raised in your request.

[12] It is to be emphasized that by this time the Report had already been finalized.

[13] This inference follows naturally from assertions made in the Answering Affidavit that the Report was for internal purposes only.

- [14] See the definition of administrative action in PAJA. See further *Grey's Marine Hout Bay Ltd and Others v Minister of Public Works and Others*
- [2005] ZASCA 43; 2005
- (6) SA 313 (SCA) at [33]; *Tswane City and Others v Nambiti Technologies (Pty) Ltd* 2016
- (2) SA 494 (SCA) at [22] to [25]. The formulation of administrative action has already been alluded to above in [37] of the *Viking Pony African* judgement supra.
- [15] “[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the Organ of State decides to do and actually does with the information it has become aware of, which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability which could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.”
- [16] Own emphasis.
- [17] Own emphasis.
- [18] The relevant portion reads as follows: “Please engage with all relevant parties and make findings [own emphasis] and recommendations to my office.”
- [19] Perhaps even a cursory reading thereof.
- [20] *Administrator of Transvaal v Traub* [1989] ZASCA 90; 1989
- (4) SA 731 (A). See also *Masethla v President of the RSA* 2008
- (1) 566 (CC) at [74] and [75]; *Malan v City of Cape Town* 2014
- (6) SA 215 (CC) at [135]; *FirstRand Bank Ltd (t/a Rand Merchant Bank) and Another v the Master of the High Court, Cape Town and Others* 2014
- (2) SA 527 (W) at [40] and [44].
- [21] 2001
- (3) SA 472 (SCA) at [18].
- [22] A legitimate expectation to be heard entitles a person to procedural fairness.
- [23] *Premier Mpumalanga, and Another v Executive Committee, Association of State-Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at [36].
- [24] [[1968] EWCA Civ 1; 1969] 2 Ch 149 (CA); [1969] 1 All ER 904. IN THIS REGARD Lord Denning observed
- [25] 170 E-F at the Ch report and at 907 C at the All ER report.

[26] 2008

(6) SA 129 (CC).

[27] 2018

(3) SA 380 (SCA) at [38].

[28] Under certain circumstances such as in the present instance.

[29] See also *Notyawa v Makhana Municipality and Others* [2019] ZACC..

[30] At [35].

[31] 2013

(1) SA 170 (SCA) at [21].

[32] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999

(1) SA 374 (CC) at [56].

[33] In other words, whether or not he acted within the powers lawfully conferred on him – *Pharmaceutical Manufacturers Association of SA and Another; in re Ex Parte President of RSA and Others* 200

(2) SA 674 (cc) AT [20].

[34] *Supra* at [38].

[35] The facts of the present matter are therefore to be distinguished from those in *National Treasury and Another v Kubukeli* [2016] 1 All SA 30 (SCA) particularly at [24] where it was stated that the power given to National Treasury was not to investigate the conduct of any particular person and to make final findings in respect thereof.

[36] Cases relied on for instance are *Viking Pony supra*; *Langa CJ and Others v Hlope* 2009

(4) SA 384 (SCA) and *Kubukeli supra*. Also relied upon by the Respondents was *The Prudential Authority of South African Reserve Bank v Mamphe Daniel Masiza and Another* Case No A294/2021 Gauteng High Court, Pretoria. Once again, the majority decision refers to a “... process of investigation which excludes a determination of culpability, is unlikely to affect the rights of a person that has a direct external, legal effect.”

[37] 2004

(6) SA 222 (SCA).

[38] 2014

(3) SA 219 (SCA).

[39] Tswana City v Nambiti Technologies 2016

(2) SA 494 (SCA) at [6].

[40] Molosi and Others v King Phahlo Royal Family and Others [2024] ZASCA 73. See also Habitat Council v City of Cape Town 2022

(6) SA 383 (WCC) where the approach adopted by the Constitutional Court towards mootness was reaffirmed- at [42] the Constitutional Court decision referred to is Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Ltd and Another 2020

(4) SA 409 (CC) [46] –[50].

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