

SOUTH AFRICA / JUDGMENT

National Empowerment Fund v Public Protector and Others (12349/15) [2017] ZAGPPHC 610 (22 September 2017) [2017] ZAGPPHC 610

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Westhuizen

CASE / FILE NUMBER

12349/15

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 12349/15

Reportable

Of interest to other judges

Revised.

NATIONAL EMPOWERMENT FUND APPLICANT

and

THE PUBLIC PROTECTOR FIRST

RESPONDENT

NAOMI NGWENYA SECOND

RESPONDENT

BEST CARE MEDICAL SUPPLIES CC THIRD

RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] This application concerns a report by the Public Protector, the first respondent, in which she made certain findings against the applicant, and further made recommendations in that regard. The applicant, the National Empowerment Fund, seeks a review of that report and the setting aside thereof, in particular with reference to the recommendations that were made in the report. It is trite that the actions and decisions of the first respondent are administrative actions.[1]
- [2] The investigation that led to the report followed upon the lodging, with the first respondent, of the second/third respondent's complaint against the applicant. The third respondent is Best Care Medical Supplies CC, the vehicle through which the second respondent conducts her business. The report is entitled "Stringed Along" and is reported under Report No: 5 of 2014/15.
- [3] The complaint lodged against the applicant related to allegations of maladministration on the part of the applicant that allegedly resulted in prejudice to Ms Ngwenya, the second respondent.
- [4] The applicant further seeks that the late filing of the supplementary and replying affidavits be condoned. The primary explanation for the delay relates to the filing of the first respondent's answering affidavit on 18 May 2015, before the applicant could finalise its supplementary affidavit on receipt of the Rule 53 record on 17 March
2015. The applicant thereafter filed its supplementary and replying affidavits. It is explained that the delay in finalising the said affidavits was exacerbated by the fact that the applicant's deponent was involved in performance moderation during the relevant period and furthermore certain issues raised internally in respect of the report required consideration by other members of the applicant. That took time and exacerbated the delay of finalising the two affidavits. I am satisfied that the delay was not intentional and that an appropriate explanation for the delay has been provided. The respondents could not have suffered any prejudice. The application for an order that the late filing be condoned stands to be granted.
- [5] It will suffice to provide a chronology of events that eventually led to the lodging of the aforesaid complaint before considering the issues raised in respect of the first respondent's report. The chronology is as follows:
- (a) During April 2010 the second respondent, the sole member of the third respondent, applied for a loan of R6 000 000.00.
 - (b) The applicant declined the application during July 2010 because of a pending dispute between the third respondent and its major supplier.
 - (c) More than a year later, during November 2011, the second/third respondent submitted a further application for an amount of R4 400 000.00. That application was also declined due to the unresolved litigation between the third respondent and its major supplier.

- (d) On 20 February 2012, the second/third respondent resubmitted its financial statements that were amended to the applicant for consideration, the aforesaid dispute having been settled. By filing the amended financial statements, the application of November 2011 was apparently "revived".
 - (e) The "revived" application was declined due to the fact that the third respondent's business structure as well as the fact that the contract issuer (a third party with whom the third respondent had an arrangement), declined to cede the proceeds of sale to a joint account proposed to be operated by the applicant and the third respondent. An additional factor was that the third respondent's banker was in the process of reducing the third respondent's overdraft facility substantially over a period. The second respondent was advised of the rejection of the "revived" application on 24 May 2012.
 - (f) On 21 May 2012 the second respondent lodged the complaint and supplemented the complaint on 25 May 2012.
 - (g) A complaint was also lodged against the applicant at the Department of Trade and Industry (DTI) during May 2012. The premise being that the applications were declined and there were delays in processing the applications. That complaint resulted in negotiations between the applicant, the Department of Trade and Industry and the second/third respondent in an attempt to assist the second/third respondent. It did not follow on a further application for funding on the part of the applicant after the "revived" application had been declined.
 - (h) Following on discussions with the DTI during July 2012 to secure cession of proceeds for the Departments of Health and Defence that proved difficult, the second/third respondents were requested to open a new bank account with another bank. The second and third respondents refused to do so. A new bank account with a different bank would have prevented the monies being advanced by the applicant to the second/third respondents being utilized for settling the third respondent's debts with its current bank.
 - (i) In a further attempt at assisting, the applicant on 3 August 2012 made a proposal to the second/third respondent in respect of a bridging facility subject to additional conditions that were to be met by the second/third respondent. One further requirement that had to be met before the proposal would become binding was the completion of a due diligence inquiry.
 - (j) The second/third respondent was advised during September 2012 that the transaction could not proceed due to the fact that the second respondent did not meet the requirement of "black people" in the definition in terms of the 8-88EE Act. Accordingly the proposed facility was withdrawn. This became apparent only after the undertaking of a due diligence inquiry.
- [6] The important findings of the first respondent as recorded in her report were the following:

- (a) There was undue delay on the part of the applicant in processing the second respondent's application that constituted maladministration as envisaged in s 6 of the Public Protector Act.
 - (b) The approval of the funding to the third respondent in the amount of R5 000 000.00 was not subject to a verification of the second respondent's identity document. Hence, the applicant's conduct in first approving the application and thereafter retracting the approval constituted maladministration on the part of the applicant and improper conduct as envisaged in s 182 of the Constitution.
 - (c) The second respondent was prejudiced by not being informed timeously that she did not qualify for funding because she was not a black person as defined in the 8-BBEE Act.
- [7] The recommendations for remedial actions to be undertaken by the applicant recorded in the report were the following:
- (a) The CEO of the applicant must, within 14 days of the report, tender a written apology of behalf of the applicant to the second respondent for the inconvenience she suffered as a result of the delay to discover the second respondent's identity status .
 - (b) The CEO of the applicant must, within 30 days of the report, submit to the first respondent a copy of the written apology.
 - (c) The CEO of the applicant must ensure that the applicant must, before the end of its current financial year, revise its due diligence procedures and remedy such deficiencies as identified therein.
 - (d) The CEO of the applicant must within 30 days of the report consult with the second respondent in the determination of what the United Kingdom Parliamentary and Health Services ombudsman calls "sorry money" which money is given to a person as consolation for mishaps caused and experienced.
- [8] The crux of this application relates to the issue whether there has been an undue delay in processing the second/third respondent's

application for funding with particular reference to the determination of the second respondent's "identity status",

i.e. whether she complies with the definition of "black people" in the B-BBEE Act. The latter encompasses the stage when the due diligence inquiry is to be undertaken. The further issue to be determined is whether the foregoing constitutes maladministration and/or improper conduct as envisaged in the Constitution and in s 6(5) of the Public Protector Act respectively. The latter section provides:

"(5) In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged -

- (a) maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999);
- (b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);
- (c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or
- (d) act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person."

[9] The applicant alleges a fundamental flaw in the first respondent's approach by regarding the second respondent's application as a single application, lodged during April 2010 and rejected during September

2012. The said approach ignores the fact that applicant had received two separate applications that were rejected due to the pending litigation recorded earlier. The alleged "revived"

application in February 2012 was declined due to the third respondent's precarious financial position. The applicant states that

these applications were declined for cogent reasons that were apparent from an initial consideration on the merits.

[10] An important factor that seems to have escaped the parties, relates to the date of the complaint and the basis thereof. The complaint was lodged on 21 May 2012 and supplemented on 25 May 2012. The revived application of February 2012 was declined on 24 May 2012. The complaint that was to be investigated related to circumstances prior to the lodging of the complaint on 21 May 2017, albeit supplemented on 25 May 2012. That could be the only basis upon which the complaint could have been lodged and consequently considered. That complaint did not concern any of the events or circumstances post the complaint, which however, form the very basis of the report.

[11] The relevant actions or lack thereof on the part of the applicant are to be considered with reference to the circumstances and facts prior to the lodging of the complaint. Strictly speaking, facts that arose after the lodging of the complaint are irrelevant to a consideration of the complaint.

[12] However, for the purposes of this judgment, I shall give due consideration to all the facts and circumstances that arose before

and after the lodging of the complaint. In my view it is prudent to do so within the context of the report, its findings and recommendations.

[13] Prior to the lodging of the complaint, there were two different and distinct applications for funding. The first was lodged in April 2010 and the second in November 2011. The latter was "revived" during

2012. Having regard to the facts and circumstances that arose prior to the lodging of the complaint, the applicant duly considered the application lodged on behalf of the third respondent in 2010. The applicant considered and dealt with the second application, i.e. that of November 2011 and reported back to the second/third respondents within a reasonable time. At 26 January 2012, the applicant determined that the financial status of the third respondent was precarious. The litigation in which the third respondent was involved had not been finalised. A stress test of the financial position of the third respondent had shown that the third respondent lacked economic merit. The consideration of the "revived" second application was similarly dealt with within a reasonable time. The applicant reported back albeit three days after the complaint was lodged. The time span of report back in respect of the first application was three months. The application was lodged in April

2010 and the report back was in July 2010. In respect of the second application, i.e. that of November 2011, the time span is also three months. On 20 February 2012 the second/third respondent "revived" the application of November 2011 by submitting amended financial statements. The report back on the "revived" application occurred in May 2012. The report back occurred within a three-month period.

[14] In view of the foregoing, it cannot be found that the applicant had been remiss in that regard. The reasons for refusing the

applications, recorded above, are cogent. When the applicant's conduct is considered against that background, there could hardly be a finding of maladministration or improper conduct. There was no undue delay in processing the second/third respondent's respective applications.

[15] It follows that the complaint in that regard could not have been upheld in that there had been no undue delay. The first respondent

should have found in favour of the applicant. Consequently, it follows that when the complaint was lodged, the applicant's conduct

did not constitute maladministration or improper conduct as intended in s 6(5)(a) of the Public Protector Act.

- [16] Considering the approach adopted by the first applicant in respect of considering the whole period, i.e. from April 2010 to September 2012 as "one application", that approach resulted in a compromised approach. In that regard, the first respondent committed a material error of fact. Over that period there were at least three distinct and different applications (accepting the "revived" application to be a separate application), a fact that is borne out by the different amounts that were requested in each application.
- [17] The compromised approach adopted on the part of the first respondent is exacerbated in that the negotiations following on the complaint lodged with the Department of Trade and Industry did not follow on the lodging of a further application for funding. The applications to the applicant for funding were finalised by 24 May 2012. The negotiations thereafter, as recorded earlier, could not and did not form part of the complaint lodged with the first respondent. Those negotiations followed on a complaint lodged with the Department of Trade and Industry. That much was clear to the first respondent when the investigation was undertaken in respect of the complaint that was lodged.
- [18] In my view, the first respondent committed a further material error of fact in the foregoing regard. The applicant's proposals following on the said negotiations are distinct and separate from the applications that were finalised by 24 May 2012. Those proposals were subject to clearly stipulated conditions that the second/third respondent was to comply with. The second/third respondent was acutely aware that the offer made in the proposals was not a final offer and that it was further subject to a favourable due diligence investigation. As recorded earlier, all of the foregoing was known to first applicant when the report was compiled.
- [19] From all of the foregoing, the finding of maladministration or improper conduct is premised upon material errors of fact and
- fundamentally flawed reasoning. The first respondent's findings, and the reasoning therefor, in respect of the issue of alleged undue delay is thus irrational. It follows that the report of the first respondent stands to be reviewed in respect of rationality and legality.
- [20] The subsequent findings of the first respondent were indeed flawed for what follows.
- [21] The first respondent contends that the due diligence investigation is to be undertaken prior to the application being considered on its merits. In that regard, it would thus have been discovered earlier that the second respondent did not qualify for funding in that she did not comply with the requirement of "BEE".
- [22] From the first respondent's report it is gleaned that the applicant is criticised for leaving the undertaking of a due diligence
- investigation until much later. The first respondent thus concludes that the applicant's approach in that regard amounts to maladministration or improper conduct. It is that alleged flawed approach of the applicant that lies at the heart of the first respondent's report.

- [23] Although it may be sensible to undertake the due diligence investigation upfront, logic dictates that due to the vast number of applications for funding directed to the applicant, such approach may be cumbersome and irrational. It would add to the delay in processing an application for funding when it can summarily be declined on the merits. A due diligence investigation involves the participation of other State Departments and/or other institutions.
- [24] The applicant contends that by undertaking the due diligence upfront, it would result in the application being drawn out unduly for a decision on the merits when at the end it is discovered that the application cannot succeed on the merits. By considering the merits of the application as a first approach, even on a cursory approach, thus submits the applicant, would save time and resources where it is found on such approach that the application has no merit. That approach is laudable in particular when the following is considered.
- [25] The relevant form for funding requires an applicant to supply specific information. *Infer alia*, an applicant is to supply:
- (a) Details of the business in respect of which funding is sought;
 - (b) Details of the applicant;
 - (c) Details of a director or member's interest.
- [26] In the latter regard, specific details are to be supplied relating to whether the director/member is "BEE or Non-BEE2". Further in this regard, immediately below that section that is to be completed, the attention of the person applying is drawn to what the term "Black people" comprises. The note reads:
- "Black people" are, African, Coloured and Indian natural persons who are citizens of the Republic of South Africa by birth or by descent as well as natural persons who acquired citizenship by naturalisation prior to 27 April 1994."
- [27] The applicant is required to make a declaration that the information provided in this document is a true and correct reflection of the facts and that consent is given to a background verification of such information.
- [28] In the present instance, the second respondent clearly indicated that she is "BEE", female and holds a 100% shareholding/membership in the third respondent. The second respondent furthermore made the aforementioned declaration, apparently without hesitation.
- [29] It is gleaned from a cursory reading of the application form in the present instance, that the second responding clearly indicated that she complies with the requirement in respect of "BEE".
- [30] In my view, to expect the applicant to indeed do the verification of the information supplied, although sensible, prior to considering the application for funding on the merits thereof, would unduly add to the work load of the applicant and delay a determination on the merits.

Where the merits of the application for funding clearly militates against a favourable entertaining of the application prior to the verification process, it is more sensible to decline the application summarily before engaging in a cumbersome and time consuming process that would impact upon the resources available.

- [31] Requiring the verification process to be conducted upfront, implies that every application is to be approached with circumspection, and renders the declaration required ineffective, of no consequence and nugatory. In my view, the very purpose of the declaration is to obviate an immediate verification investigation.
- [32] In my opinion, failure to follow the approach suggested by the first respondent, namely that the verification process, or due diligence investigation, is to be undertaken prior to a consideration of the merits, does not constitute maladministration on the part of the applicant. The very issue of an unmeritorious application is determined forthwith.
- [33] The first respondent's criticism of the applicant's practical approach is unfounded. The second/third respondent's applications for funding was dealt with within a reasonable time and declined for cogent reasons on the merits. The applications were found to be lacking in merit.
- [34] In respect of the first respondent's third finding under consideration, i.e. that the second respondent was prejudiced by the

failure to undertake the verification process or due diligence investigation immediately on receipt of the application for funding

requires consideration. In my opinion, there is no merit in the first respondent's contention for what follows.

- [35] It is apparent from the relevant application form that the true applicant for funding is the third respondent. In my view, any prejudice that may have followed should the first respondent's criticism be upheld, would befall the third respondent and not the second respondent. Any prejudice that the second respondent may have suffered, would have been of an indirect nature as a director/member

of the third respondent.

- [36] However, should the provisions of s 6(5)(d) of the Public Protector Act be interpreted to include a person such as the second respondent, i.e. indirectly prejudiced, it is to be determined what would constitute unlawful or improper prejudice.

- [37] I have already found that failure to comply with the first respondent's criticism in respect of the time when the verification

process is to be undertaken does not constitute maladministration. It follows that no prejudice could have been suffered, either on the part of the first respondent, or by extension, the second respondent.

- [38] The second respondent was acutely aware of the requirements for "BEE" compliance. The second respondent was further acutely aware that she did not fall within the definition of "Black people". It follows that any prejudice that the second respondent may have suffered, which has not been shown, would have been of her own doing.
- [39] It is not appropriate to lay down categories of unlawful or improper prejudice as contemplated in s 6(5)(d) of the Public Protector Act. Such unlawful or improper prejudice would by necessity depend upon the particular facts of a matter.
- [40] Applying the canons of interpretation of an Act,[2] and in the present instance the Public Protector Act, the act or omission contemplated in the aforesaid section would in my view be an act or omission other than the instances referred to in s 6(a), (b) and (c) of the Public Protector Act.
- [41] It is not alleged that the applicant, through its employees, committed any act or omission that could be said to be unlawful or improper. The conduct of the applicant's employees complained of does not constitute a transgression of the provisions of any Act or regulation applicable in casu. Further in that regard, I have already found that the applicant's conduct does not amount to maladministration as contemplated in s 6 of the Public Protector Act. I have also found that there has not been any undue delay in processing the second/third respondent's application for funding. I have also found that any prejudice that the second respondent may have suffered was not due to any conduct on the part of the applicant. I have further held that the second/third respondent applications were finalised by 24 May 2012 and that the subsequent proposals or offer flowed from negotiations post 24 May 2012, i.e. after the finalisation of the "revived" application. It follows that the provisions of s 6(5)(d) of the Public Protector Act do not apply.
- [42] In this regard, the first respondent should have found that the applicant's conduct did not cause any prejudice to the second/third respondent.
- [43] The applicant alleges that the first respondent's report and findings are irrational and unreasonable and further premised upon manifest errors of fact or law and falls to be reviewed under s 6(2)(e)(iii), (f)(ii) and (h) of Promotion of Administration of Justice Act (PAJA).[3]
- [44] The first respondent's aforesaid findings constitute errors that are all material. Those errors clearly render the findings of the first respondent irrational and unreasonable in view of the common cause facts recorded earlier. The irrationality and unreasonableness is further compounded by the following:
- (a) The applicant responded to the applications reasonably expeditiously;
 - (b) The applications were declined on cogent reasons in respect of the merits of the applications;

- (c) The subsequent approval in August 2012, following on the aforementioned negotiations, was conditional. The second respondent was acutely aware of the conditions. The conditional approval cannot be held to be binding between the parties. That was made clear to the second/third respondent. It was common cause that a due diligent inquiry was to be undertaken;
- (d) The applicant is obliged under the Public Finance and Management Act, No. 1 of 1998 to take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, etc. and to manage and safeguard the assets for the management of the revenue, expenditure and liabilities of the applicant among other obligations enumerated in that Act.

[45] In my view, it is quite apparent from all of the foregoing that the first respondent has misconstrued the provisions of s 6(4){a} and (5) of the Public Protector Act.

[46] It follows that the first respondent's findings stand to be reviewed and set aside.

[47] In respect of the first respondent's recommendations, as recorded earlier, those equally stand to be reviewed and set aside for what follows.

[48] The first respondent is empowered by the provisions of s 182(1)(c) of the Constitution of the Republic of South Africa to take appropriate and remedial action as regulated by National Legislation. The Public Protector Act does not have a similar provision. What constitutes "remedial action" is not defined in the Constitution, or in the Public Protector Act.

[49] In *Sudumo et al v Rustenburg Platinum Mines Limited et al*[4] it was held that adjudicative functions are judicial in nature. The empowerment of the first respondent to investigate, report and to take remedial action does not fall within an adjudicative function and hence is not judicial in nature. The office of the first

respondent is an office modelled on the institution of the ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption and prejudice.[5]

[50] When the first respondent recommended that the applicant pay "sorry money" to the second respondent, the first respondent exercised adjudicative powers which the first respondent is not empowered to do. Furthermore, no adjudicative process was followed. No process of the adversarial system, the heart of adjudicative function, was followed. It was left to the parties to determine the "sorry money". In terms of the provisions of the PFMA the applicant is not authorised to comply with the said recommendation and to make payment of "sorry money" allegedly due to prejudice suffered by a third party. Should the applicant have complied with that recommendation, it would be in breach of its obligations and authority provided in the PFMA

[51] Furthermore, the first respondent is ill-suited to conduct an adjudicative function. Neither the Constitution, nor the Public

Protector Act empowers the first respondent in that regard.

[52] It follows that the first respondent's recommendation that the applicant pays "sorry money" to the second respondent is ultra vires.

[53] The first respondent's recommendation relating to the apology to be given to the second respondent is in view of all of the foregoing inappropriate, unreasonable and irrational. I have found the applicant's conduct not to be questionable and hence does it not require an apology.

[54] The logic of the first respondent's third recommendation is hard to follow. The first respondent recommends that the applicant review its system of processing applications for funding within a specified period. In that regard, the first respondent appointed a task team to investigate the applicant's system. Despite concluding on the report of the task team that there is no systemic deficiency in the applicant's process in respect of processing applications for funding, the first respondent directs the applicant to review its system process. The high water mark of the first respondent's observation on the manner in which the applicant processed the second/third respondent's applications, is stated to be that it suggests a possible systemic deficiency in the applicant's processing of applications for funding. As recorded earlier, no such systemic deficiency was found.

[55] In my view, the recommendation to review the system of processing applications for funding is unfounded, unreasonable and irrational.

It would impact negatively on the resources of the applicant.

[56] It follows that the recommendations of the first respondent stand to be reviewed and set aside.

[57] I am satisfied that the applicant has proven why the first respondents' report is to be reviewed and that it stands to be set

aside in its entirety.

I grant the following order.

- (a) The late filing of the applicant's supplementary and replying affidavits is condoned;
- (b) The first respondent's Report titled "Stringed Along" on an investigation into alleged maladministration by the National Endowment Fund which allegedly resulted in prejudice to N Ngwenya

(Report No 5 of 2014/15 issued on 30 September 2014) is reviewed and set aside;

- (c) The first respondent is ordered to pay the costs.

C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: V Maleka SC; B Makela

Instructed by: Hogan Lovells (South Africa) Inc

On behalf of Respondent: A D Stein

Instructed by: Bowman Gilfillan Inc

[1] See Minister of Home Affairs et al v Public Protector et al 2017(2) SA 597 (GP)

[2] See Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA).

[3] See in this regard, Pharmaceutical Manufacturers Association of SA et al; In re ex parte President of the Republic of South Africa et al/ 2000(2) SA 674 (CC); Bato Star v Minister for Environmental Affairs and Tourism et al 2004(4) SA 490 (CC)

[4] 2008(2) SA 24 (CC) at [235]

[5] Ex parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa

1996 1996(4) SA744 (CC) at 161

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