

SOUTH AFRICA / JUDGMENT

Sesoko and Others v Office of the Public Protector and Others (74427/19) [2022] ZAGPPHC 390 (1 June 2022)

[2022] ZAGPPHC 390**COURT**

North Gauteng High Court, Pretoria

BEFORE

Kooverjie

CASE / FILE NUMBER

74427/19

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE NO: 74427/19****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 1 June 2022

In the matter between:-

MATTHEWS

SESOKO

First Applicant

ROBERT

MCBRIDE

Second Applicant

NOMKHOSI

NETSIANDA

Third Applicant

MARIANNE

MOROASUI

Fourth Applicant

BAATSEBA

MOTLHALE

Fifth Applicant

INNOCENT

KHUBA

Sixth Applicant
DAVID
DE
BRUIN
Seventh Applicant
THEREZA
BOTH
Eighth Applicant
V
THE
OFFICE OF THE PUBLIC
PROTECTOR
First Respondent
BUSISIWE
MKHWEBANE
Second Respondent
INDEPENDENT
POLICE INVESTIGATIVE DIRECTORATE
Third Respondent
FIDELITY
SECURITY SERVICES (PTY) LTD
Fourth Respondent
MINISTER
OF
POLICE
Fifth Respondent

JUDGMENT

KOOVERJIE J

A REVIEW APPLICATION

- [1] The applicants seek to review and set aside the findings as well the remedial action imposed by the Public Protector in her final report titled “Report No. 41 of 2019/2020 – Report on an investigation into allegations of procurement irregularities, irregular appointment and maladministration relating to the appointment of Ms TH Botha as Deputy Director: National Specialized Investigation Team” dated 16 September 2019 (“the Report”).
- [2] In addition, the applicants sought a punitive cost order against the Public Protector.

B THE PARTIES

- [3] The main role players in these proceedings are set out below. The eight applicants held official positions at the time with the Independent Police Investigative Directorate (“IPID”) and were implicated in the Public Protector’s report. More specifically, the first applicant, Mr Sesoko, held the position as National Head of Investigation at IPID and the second applicant, Mr Robert McBride, held the position as the Executive Director of IPID. The

eight applicant, Ms Thereza Botha, was appointed as Deputy Director, National Specialized Investigation Team (“NSIT”) in IPID.

- [4] The Office of the Public Protector, and Ms Mkwabane are cited as the first and second respondents. She is cited in her official capacity as the person appointed in terms of Section 1A of the Public Protector Act 23 of 1994 (“the PPA”) read with Section 193 of the Constitution (“the Constitution”). The first and second respondents will be referred to as the respondents or the “Public Protector” in this judgment.
- [5] The third respondent is the Independent Police Investigative Directorate (“IPID”), established in terms of Section 3 of the Independent Police Investigative Directorate Act 1 of 2011.
- [6] The complainant is Mr Nkabinde, a previous IPID employee.

C GROUNDS FOR REVIEW

- [7] On the papers, the decision of the Public Protector, the findings and the remedial action imposed were broadly challenged on the following basis, namely:

- (a) Irrational process

The Public Protector followed an irrational process that prevented her from making impartial and informed decisions.

- (b) The failure to give reasons

The Public Protector failed to disclose reasons for rejecting large portions of the applicants’ representations, together with material evidence challenging the preliminary findings. The absence of reasons created an inference of irrationality.

- (c) The findings are irrational

The report findings were arbitrary as they were not rationally connected to the evidence disclosed in the report and other evidence that the applicants presented to the Public Protector during the investigation (which evidence was not considered in the report).

- (d) The remedial action was based on irrational findings and is unlawful as the Public Protector was not authorized to direct IPID to take remedial steps that are vague, legally impermissible and violate the separation of powers.

D LEGALITY REVIEW

- [8] The Public Protector’s core powers and functions are derived from the Constitution and the rule of law and is reviewable on the principle of legality^[1]. The principle of legality requires that the exercise of public power and the performance of a public function must be rational.

- [9] Although this review was initially premised on both procedural and substantive aspects, during the hearing the applicants have, in the main, persisted only with a procedural review of the Public Protector's decision. It has been argued that the process in arriving at the decision was irrational. Procedural rationality requires that there be a rational connection between the exercise of power in relation to both the process of arriving at the decision as well as the purpose sought to be achieved through the exercise of such public power[2].
- [10] The applicant submitted that the said procedural rationality issue should be deliberated separately from the substantive issues. Consequently, if the court finds procedural irregularities then it would not be necessary to make a finding on the substantive issues.
- [11] It is worth noting and as the respondents correctly pointed that this court may review findings if they are material and affects the outcome of the decision. A mere mistake does not constitute an irregularity. In this regard, reference was made to Johannesburg Municipality v Gauteng Development Tribunal 2010 (6) SA 182 CC par 91 the court held:
- "However a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of the Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is materially influenced by an "error of law". An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision maker would have reached the same decision, despite the error of law."*

E CONDONATION

- [12] On the papers, both parties have sought condonation for the late filing of their respective answering and replying affidavits. At the hearing the parties submitted that they would not be opposing each other's condonation applications. Having considered both condonation applications, I am satisfied that good cause has been shown by virtue of the explanations set out in the respective affidavits. Furthermore, I find that it is in the interests of justice that condonation be granted. For the purposes of this judgment I do not find it necessary to further extrapolate on this aspect.

F THE BACKGROUND

- [13] It is necessary to sketch the salient facts in order to understand the Public Protector's findings and the basis on which the Report was challenged. The issues between the parties arose from an emergency procurement which led to the appointment of Ms Botha. Mr Nkabinde, the complainant alleged that Ms Botha's appointment was irregular and that there was maladministration on the part of IPID officials.
- [14] The Public Protector's findings emanated from three investigations, namely:
- (i) the external contractor investigation where the Public Protector found that IPID did not comply with the procurement laws and policies when it appointed an external contractor;

(ii) the employment investigation where it was found that IPID did not comply with the employment laws and policies which led to appointment of Ms Botha was advertised; and

(iii) the Protected Disclosure Investigation. The Public Protector found that IPID suspended and instituted disciplinary charges against a complainant in order to penalize him for reporting IPID's officials' the unlawful conduct to the Minister of Police. Such conduct contravened the Public Protector Disclosures Act.

(a) Services rendered without an SLA being in place

- [15] Prior to Ms Botha's appointment, IPID sought services from Fidelity Security Services (Pty) Ltd (fourth respondent "Fidelity"). During December 2016, discussions with Fidelity on the possibility of procuring a cell phone and data specialist from Fidelity ensued.
- [16] On 9 December 2016 IPID obtained the quotation from Fidelity. Around 22 December 2016 it was recommended that Fidelity be appointed to provide services of a "cellular data interpretation specialist" for three months at R57,000 per month, totaling to R171,000.00.
- [17] A memorandum ("deviation memorandum") was prepared to this effect recommending a deviation from the normal procurement process on the basis that the procurement was considered to be an emergency. Clause 8.1 of the National Treasury Instruction Note 3 of 2016-2017 defines "emergency" as "a serious and unexpected situation that possesses immediate risk to health, life, property or environment that calls an agency to action ..." In this case it was alleged that procurement was necessary, as IPID's investigators were subject to threats due to the cases they were investigating at the time. Such threats placed their lives at risk.
- [18] It is common cause that no other service provider was invited to provide a quotation for these services and that the aforesaid memorandum was not signed by the chief financial officer. The respondents, however, pointed out that clause 19(d) of IPID Supply Chain Management Policy ("the SCM Policy") prescribed that emergency purchases should be approved by the executive through the CFO. This provision was contravened[3].
- [19] The appointment of Fidelity was approved on the same date as the "deviation memorandum". Ms Botha was formally appointed by Fidelity to provide the services to IPID from 9 January 2017.
- [20] The Public Protector's report however revealed that prior to December 2016, Ms Botha had rendered services to IPID, without a written agreement concluded between IPID, Fidelity and Ms Botha. Furthermore, there was no written agreement concluded between 9 January to June 2017. The agreement was only signed in June 2017. IPID paid R171,000.00 to Fidelity for services rendered for the period 1 January to 31 March 2017.

(b) The Service Level Agreement (SLA)

- [21] The Service Level Agreement (“SLA”) was prepared together with an Addendum for the signature of Mr McBride (the Executive Director of IPID). The respondents contended that the SLA should have been signed in accordance with the SCM Policy provisions.
- [22] The applicants contested this finding and particularly proffered an explanation to the Public Protector that the SLA had been signed by Mr McBride and submitted to Fidelity for its signature. Since Fidelity misplaced such signed agreement, it signed a second agreement and forwarded it to the applicants. Due to an administrative oversight in Mr McBride’s office, the second SLA was not furnished to Mr McBride for his signature.
- [23] It was further pointed out that Fidelity only signed the SLA on 6 June 2017. This portrayed an irregularity as the SLA stated that the commencement date was 9 December 2016. Fidelity further signed the Addendum to the SLA. The Addendum recorded that the agreement would commence on 31 March 2017 and be terminated on 30 June 2017.
- [24] On 4 August 2017, IPID gave Fidelity written notice of intention to terminate the SLA and Addendum. This meant that the contract period was extended to 6 September 2017.
- [25] On 20 February 2019 Mr McBride approved a further payment of R342,000.00 to Fidelity for services rendered between April 2017 to September 2017. The respondents again pointed out that the payment was made for a period outside of the stipulated termination date. By virtue of the SLA and Addendum, Ms Botha should only have been entitled to payment until 30 June 2017.
- [26] In addition, IPID also paid R102,123.15 to Fidelity for Ms Botha’s travel and accommodation. It was argued that these expenses were not included in the quotation which was submitted with the deviation memorandum and that such memorandum was approved without the inclusion of the said expenses.
- [27] The respondents also argued that IPID in extending the SLA to September 2017, exceeded the threshold for contract extensions under National Treasury Regulations and the variation of the contract period should have been approved by National Treasury.
- (c) Advertisement of post – Deputy Director NSIT
- [28] During this time, more particularly on 21 April 2017, IPID advertised the post of Deputy Director NSIT on the Department of Public Service and Administrations (DPSA’s website) with reference no. QS/2017/25. An annual salary of R657,558.00 was offered. The qualification and experience requirements for the position was advertised as follows:
- “Relevant NQF6 undergraduate or equivalent qualification involved or law enforcement as recognized by SAQA; a minimum of four (4) years’ experience in a Criminal Justice System is required of which at least three (3) years’ should have been in a supervisory position...”*

[29] Another post under reference no. QA/2017/29 was also advertised, offering an annual salary of R612,822.00 was advertised shortly thereafter. The qualification and experience requirements for this position were:

“Relevant Bachelor’s Degree or equivalent qualification in law or law enforcement as recognized by SAQA; A minimum of four

(4) years’ experience in a Criminal Justice System is required and/or ten (10) years’ experience as an Investigation Analyst...”

Ms Botha’s application was successful and she was appointed in the post as Deputy Director NSIT.

[30] The report went at length in illustrating that Ms Botha not only did not qualify but that there were blatant irregularities in her appointment. In relation to her qualifications, it was argued, inter alia, that she had not met the requirements for the post, in that:

(i) she held only a matric certificate and not a degree;

(ii) she was an administrative clerk and not as she described herself as a “director: private priority crimes investigations”;

(iii) the panel recommended her to be appointed on the annual salary of R612,822.00. It was later established that she was in fact appointed on a higher salary of R657,558.00.

(d) The complaints

[31] The appointment of Ms Botha caused the complainant, Mr Nkabinde, to firstly lodge a grievance with the office of the President. An investigation ensued where it was found that Ms Botha’s appointment was irregular and the recommendations for corrective action was issued against the applicants and the panel members involved in the shortlisting of Ms Botha. Despite IPID and Mr McBride being directed to approach the Labour Court to review and set aside the appointment of Ms Botha., such corrective actions were not adhered to.

[32] The complainant thereafter lodged a second complaint (grievance) with IPID regarding the appointment of Ms Botha. On 28 April 2018, the complainant further lodged a third complaint of unethical conduct with the Minister against Mr McBride. Such complaint contained allegations of improper conduct on the part of Mr McBride which included, inter alia, the irregular appointment of Ms Botha and Mr McBride’s involvement in an investigation to tarnish the images of specific officials and particularly to bring down the National Commissioner.

[33] On 4 June 2018 IPID placed the complainant on suspension. A disciplinary process against Mr Nkabinde was due to commence in September 2018. The charges levelled against him, included, inter alia, that he was responsible for; compromising the investigations conducted by IPID; leakage of information to external people and media; bringing IPID, its executive director and other senior managers into disrepute. His conduct prejudiced the administration of IPID.

(e) Public Protector's involvement and Report

[34] On 14 May 2019 the Public Protector issued notices in terms of section 7(9)(a) of the Public Protector Act inviting implicated officials of IPID to respond to the allegations against them. The applicants, through their legal representative, submitted

representations in writing on 12 June 2019.

[35] On the substantive issues, the Public Protector found that IPID failed to follow proper procurement processes. The findings, in the main, illustrated non-compliance with IPID's SCM policy. In particular, that:

- (i) the chief financial officer was not involved in the deviation of the procurement process;
- (ii) there was no confirmation that the expenditure was in accordance with the vote of the finance division;
- (iii) the SLA between IPID and Fidelity was not signed by the Executive Officer, Mr McBride, as required by the SCM Policy;
- (iv) the extension or variation of the SLA exceeded the 15% threshold of the original contract value and furthermore was not considered by the BSC, BEC and BAC as required by the SCM Policy;
- (v) the payment of R513,000.00 to Fidelity was made without a valid and signed contract in place;
- (vi) the expense of R102,123.15 for Ms Botha's travel and accommodation was neither included in the deviation memorandum nor was it approved separately.

[36] The Public Protector consequently found that Mr McBride and Ms Moroasui, the fourth applicant, contravened various provisions of the Constitution, more particularly section 195 and section 217 of the Constitution, Section 38 and 39 of the PFMA, National Treasury Regulations, the IPID Act and the SCM Policy. The Public Protector concluded that such conduct amounted to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

[1] Minister of Home Affairs and Another v Public Protector 2018 (3) SA 380 SCA at para 37 and 64

[2] Public Protector v President of the Republic of South Africa 2021 (6) SA 37 CC

[3] Clause 19(d) stipulates:

"All emergency purchases will be approved by the executive through the CFO."

[4] On issue of bias: founding affidavit p01-60, para 103, 104, 105, replying affidavit p 07-04, para 7.3.1., supplementary founding affidavit 3-9, 3-24 issue of the recordal of evidence: supplementary founding affidavit- P3-7 to 3-11

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- [5] Report p 01-132
- [6] Answering Affidavit p 06-58, para 7
- [7] Annexure PP8
- [8] The respondents relied on *Staufen Investments v Minister of Public Works* 2020 (4) SA 78 SCA par 73
- [9] Page-8-385 of the record
- [10] Page 1-157 of the record
- [11] S182
- (1) reads, the Public Protector has the power, as regulated by national legislation –
- (a) To investigate any conduct in state affairs, or in the Public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- (b) To report on that conduct; and
- (c) To take appropriate remedial action.
- [12] Section 3(14) reads: “No person ..., shall conduct an investigation ... in respect of a matter in which he or she has any pecuniary interest or any other interest which might preclude him or her from performing his or her functions in a fair unbiased and proper manner.”
- [13] S3(15) reads: “If any person fails to disclose an interest contemplated in subsection (14) and conducts on renders assistance
- with regard to an investigation contemplated in Section 7, while having an interest in the matter being investigated, the Public
- Protector may take such steps ... to ensure a fair, unbiased and proper investigation.”
- [14] *President of the Republic of South Africa v South African Rugby Football Union*
- [1999] ZACC 9; 1999 (4) SA 147 CC at par. 148 (SARFU matter)
- [15] *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers’ Union* [1992] ZASCA 85; 1992 (3) SA 673 A at 691 E-F and 694 G-J
- [16] [1923] All ER 233 (Sussex Justices matter)
- [17] *BTR Industries* matter at p 693 I-J
- [18] *SARFU* matter at p 175
- [19] *South African Commercial Catering and Allied Workers Union v I&J Ltd*
- [2000] ZACC 10; 2000 (3) SA 705 CC (SACCAWU matter)

- [20] SACCAWU matter at par 56-58, dissenting judgment
- [21] Liebenberg v Brakpan Liquor Licensing Board 1944 WLD
- [22] Democratic Alliance v Public Protector and Another [2019] 3 All SA 127 GP at par 30 to 31
- [23] Annexure PP8
- [24] P 1-95 of the record
- [25] GN 945 in GG 41903 14 September 2018 and amended in GN 1047 in GG 43758 on 2 October 2020
- [26] Zuma v Democratic Alliance; Acting Director of Public Prosecutions v Democratic Alliance 2018 (1) SA 200 SCA par. 82
- [27] The Law Society of South Africa v President of the Republic of South Africa 2019 (3) SA 30 CC at par 64 where the court distinguished

between procedural fairness and procedural rationality.

Procedural fairness has to do with affording an opportunity to be heard before an adverse decision is rendered

- [28] “The state of mind is one open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly

suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. It at first they do then it asks questions and seeks out information until they do. It is also not a state of mind that remains static ... It must always start and is one that is open and enquiring”.

- [29] The Public Protector v Mail And Guardian matter par 19

- [30] Erasmus

- Superior Court Practice, D\5-5 to 6

- [31] At par 46

- [32] Public Protector v South African Reserve Bank 2019 (6) SA 253 CC

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