

SOUTH AFRICA / JUDGMENT

Tshabalala v Mahlango and Others (22991/2020) [2021] ZAGPPHC 594 (16 September 2021)

[2021] ZAGPPHC 594

COURT

North Gauteng High Court, Pretoria

BEFORE

Réan Strydom

CASE / FILE NUMBER

22991/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED: YES/NO

Date:

16/09/2021

CASE NO: 22991/2020

In the matter between : SHADRACK
MOTLAKAJENO TSHABALALA
Applicant
and
OUPA MAHLANGO
First Respondent
DAVID RAMATHOKGA
Second Respondent
MARKS _____
Third Respondent
MR GIFT LEDWABA
(Chairperson of the
Vukosi
Primary School
Governing
Body)
Fourth Respondent
MS NTSWAKI
MALIMABE
Fifth Respondent
MS PAULA
GALEGO
Sixth Respondent
(DIRECTOR : TSWANE
WESTERN
DISTRICT)
HEAD OF THE DEPARTMENT
DEPARTMENT OF
EDUCATION, GAUTENG
Seventh Respondent
SOUTH AFRICAN POLICE
SERVICES
(NATIONAL
COMMISSIONER)
Eighth Respondent

JUDGMENT

STRYDOM J :

- [1] On or about 26 May 2020 the applicant, the Head of Vukosi Primary School (“the school”) brought an urgent application against eight respondents.
- [2] The respondents consist of three individuals as the first, second and third respondents. The fourth respondent was cited as the Chairperson of the School Governing Body (SGB), a statutory body of parents, educators, non-teaching staff and learners who seek to work together to promote the wellbeing and effectiveness of the school community.
- [3] The relief which the applicant sought was in the following terms:

“1. An order dispensing with the normal forms, service and time periods prescribed in terms of the Uniform Rules of Court and directing that the matter be heard as one of extreme urgency in terms of Rule 6(12) of the Uniform Rules of the Court;

2. An order is issued dispensing with the citation requirements in terms of Rule 6.2 in respect of the respondents;
3. That a rule nisi be issued herewith in terms of which the respondents are called upon to show cause on the 8th of July 2020 why an order in the following terms should not be made a final order of the above Honourable Court for interdicting and restraining the first to third respondents, including any persons acting on their instructions, from :
 - 4.1 being physically situated within 200 (two hundred metres) of any of the applicant’s workplace premises interfering with, threatening, harassing, intimidating and/or in any way the applicant at his workplace, being the Vukosi Primary School.
 - 4.2 Physically damaging, interfering with or in any way physically coming into contact with the applicant’s property or assets at or near the premises.
 - 4.3 Causing, directing, inciting or permitting any other persons to conduct themselves as set out in paragraphs 4.1 to 4.2.
 - 4.4 Directing the fifth to seventh respondents to retract or provide a copy of the purported Forensic Audit Report to the applicant. In the event of retraction of the said Forensic Audit Report and apology by publicly made to the applicant.
 - 4.5 Further directing the fifth to seventh respondents to communicate, to all the parents of the pupils / learners of the Vukosi Primary School, that a retraction of the said Forensic Audit Report authored by the sixth respondent.
5. The respondents other than the eighth respondent, are directed to pay the costs of this application on the attorney and own client scale only if they oppose this application.
6. The orders in paragraphs 4, 4.1, 4.2, 4.3, 4.4 and 4.5 above shall operate as interim orders with immediate effect, pending the final determination of this application.
7. The eighth respondent be ordered to take all steps reasonably given its available resources, to give effect to this order.
8. Further and/or alternative relief.”

- [4] The seventh and eighth respondents gave notice of their intention to oppose the application. The other respondents did not file notices to oppose.
- [5] On 28 May 2020 the urgent court granted final relief interdicting and restraining the first to third respondents, including any person acting on their instructions, as per paragraphs 4.1, 4.2 and 4.3 of the notice of motion. The court postponed prayers 4.4, 4.5 and 7 sine die. The costs of the urgent application were reserved.
- [6] The order was only made against the first, second and third respondents and was final. No order against the fourth respondent was made. The relief which was postponed sine die was relief only aimed against the fifth to eighth respondents.
- [7] What gave rise to the application was a financial assessment report also referred to as a forensic audit report (hereinafter referred to as “the report”) authored by the fifth respondent. This report was requested after allegations of suspicious payments being made of moneys belonging to the school into accounts controlled by the applicant.
- [8] When the contents of the report became known to the parents at the school this caused a reaction from the first to third respondents and others aimed against the applicant. When the applicant came to the school he was confronted by them, sewerage was poured over him and he was intimidated. Posters were placed at the gate of the school referring to the report which, inter alia, stated that he must pay back the money.
- [9] This gave rise to the relief the applicant sought and the order granted against the first and third respondents.
- [10] In prayer 4.4 of the notice of motion the applicant requested a copy of a report or the retraction thereof. The main aim of the application, considering the founding affidavit, was to obtain a copy of the report.
- [11] It has become common cause that about two weeks after the postponement of part of the application, on or about 12 June 2020, the applicant was provided with the report. The matter however did not end there.
- [12] In a letter dated 20 June 2020, the applicant’s attorneys, inter alia, wrote to the State Attorney, representing the fifth to the eighth respondents, as follows:
- “5. We want to state categorically that even the very ‘Financial Assessment Report’ you have attached to your letter is misleading, riddled with falsehoods, inconsistencies and not worth the paper it is written on. It is our instructions that we prepare a review application it Rule 53 of the Uniform Rules of the High Court to review and set aside this so-called Financial Assessment Report with punitive costs.”*
- [13] After the report was handed to the applicant, the relief sought in paragraph 4.4 became moot. The reason for this is that the applicant sought a retraction of the report or to be provided with a copy of the report.

[14] Nothing came of the review application. It is only in the founding affidavit that a request was made for the retraction of the report. No legal basis has been shown for such order.

[15] In the answering affidavit filed on behalf of the fifth to eighth respondents, on or about 29 June 2020, a summary of the findings

contained in the report was provided. This summary indicated payments from the school's account to that of the applicant.

The report concluded with the recommendation about how the school's account should be operated. These were not final findings nor was any decision taken against the applicant.

[16] Consequently, no case has been made out for the retraction of the report. As such, it will also be difficult for the applicant to review the report in terms of the Promotion of Administration of Justice Act, 1 of 2000 ("PAJA"). Particularly, as the drafting of this report did not constitute "administrative action" as defined in section 1 of PAJA. As no decision was taken.

[17] As stated, the applicant never launched his review application but rather opted to amend his notice of motion and now for the first

time, relief is sought against the fourth respondent and by deletion of the word "or" and substituting it with the word "and" in both paragraphs 4.4 and 4.5 of the notice of motion.

[18] The amended notice of motion dated, 11 August 2020, a date after the answering affidavit was filed on 29 June 2020, now required a copy of the report and a retraction thereof coupled with a public apology. Further paragraph were also added which read as follows:

"4.6 It is declared that the failure of the sixth respondent to afford the applicant an opportunity to be heard during the assessment phase is unlawful and unconstitutional in that it violated the applicant's rights in terms of section 34 of the Constitution.

4.7 It is declared that the failure of the fifth respondent to afford the applicant the right to procedural fairness (audi alteram partem) prior to the release of the report titled 'FINANCIAL ASSESSMENT REPORT' is unlawful and unconstitutional."

[19] After this amendment, the applicant filed a replying affidavit. In this affidavit the applicant denied any wrongdoing concerning the funds of the school. The applicant complained of not being given an opportunity to state his version pertaining to the

accounts. He admitted that only after the request was made he received a letter stating the allegations against him in which letter he was requested for his comments. This letter referred to as the "audi letter" was provided to applicant on 13 November 2019 and he replied thereto on 16 January 2020.

[20] In the replying affidavit, for the first time, the applicant attempted to make out a case that his reputation and good name was tarnished as a result of an allegedly false report.

- [21] As stated the applicant never brought a formal Rule 53 review application but rather by way of an amendment sought declaratory relief that his right to be heard was violated when the report was drafted. He persisted that the report should be retracted. The reason advance for not commencing with a new application was that this would leave him “expose to the special pleas *res judicata* or *lis pendense* (sic)”.
- [22] This view taken is without merit. The original relief was not a review application and a subsequent review application would have been competent not saying it would have been successful.
- [23] A case for the review and the retraction of the report in terms of PAJA has not been made out on the papers before this court. Even if the court was to consider the review the record of the proceedings was not placed before the court.
- [24] If the review is to be considered on the papers as they stand a case for review was not made out.
- [25] In the applicant’s heads of argument, reliance was placed on the fourth to seventh respondents’ alleged breach of the *audi alteram partem* principle.
- [26] As far as the applicant’s complaint concerning his allegation that he has not been provided with an opportunity to state his side of the story, this allegation should be considered in context.
- [27] The report provided evidence of certain transactions whereby school funding was transferred to accounts belonging to the applicant. The report concluded by making suggestions how the accounts of the school should be administered. It made no finding against the applicant. Despite this, after the report was compiled, the sixth respondent wrote a letter, the “audi letter” dated 13 November 2019 to the applicant in terms of which the applicant was given an opportunity to respond to the facts set out in the report dated 2 October 2019. According to the applicant it replied to this letter on 16 January 2020.
- [28] This principle would not apply if an investigation is conducted concerning school finances without taking any decision against the applicant.
- [29] The investigation, culminated in the report, was conducted in terms of section 43(6), 42(a), 59(1) and 59(2) of the South African Schools Act, 84 of 1996, and any allegation that the investigation was conducted beyond those sections has been left wanting and the legality ground has not been established. Section 46(6) states that the governing body of a school must make the financial records referred to in section 42(a) available for inspection and section 59(1) and (2) which places a duty on the school to make information available for inspection by any person insofar as such information is required for the exercise and protection of that person’s right and is reasonably required by the Head of the department.

- [30] Moreover, the applicant has made out no case that the report falls within the definition of administrative action which adversely affected the rights of the applicant and which has a direct, external legal effect and furthermore the applicant has not made out a case that it is a decision of an administrative nature relating to the making, suspending, revoking of an order, award of determination or any of the other descriptions of decision in terms of section 1 of PAJA. The applicant has therefore failed to make out a case that the report constituted a decision by an administrator which can be reviewed and set aside in terms of PAJA and prayer 4.7 of the applicant's amended notice of motion stands to be dismissed.
- [31] Findings made in a report do not constitute administrative action for the purpose of PAJA, but constitutes an exercise of public power and therefore the principle of legality may apply (See *Gordhan v Public Protector* [2020] ZAGBBHC 777 (17 December 2020) (2019) JOL 45246 (GP)).
- [32] The applicant in his attempt to bring the relief he is seeking in his amended notice of motion within the ambit of a legality review

against the report relied on the case of *Pharmaceutical Manufacturing Association of South Africa & Another In re: Ex Parte President of the Republic of South Africa and others* [2000] ZACC 1; 2000

(2) SA 674 (CC) at paragraph 85. In this case it was found:

- [85] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

- [33] The applicant failed to provide any evidence or legal argument for a finding that the report was compiled contrary to the empowering

provisions in the Schools Act.

- [34] The applicant has not made out a case that the report is contrary to the principle of legality and the founding affidavit is completely silent and only deals with the requirements for interim relief. The replying affidavit is equally silent and in any event the principle laid down in *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974
- (4) SA 362 (T) at 369 A-B has not been adhered to. The applicant had to make out his case in his founding affidavit and not in the subsequent affidavits.

- [35] The applicant's reliance on section 34 of the constitution for the relief he is seeking in prayer 4.6 for a declaratory that he was not granted a fair hearing during the assessment phase rendering the assessment unlawful and unconstitutional is also misplaced.
- [36] This section provides that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".
- [37] The process whereby the report was compiled was not during or pursuant to a hearing. There was no dispute which was to be decided before a court or other tribunal. The report came about after an investigation where no findings were made against applicant. The assessment (investigation) is not a dispute that can be resolved before a court, tribunal of forum.
- [38] The relief contained in prayer 7 is aimed at the eighth respondent, The Commissioner of the South African Police Service. This relief is connected to the relief granted in the urgent court against the first to third respondents not to act in a certain way and has nothing to do with the current relief sought by the applicant in prayers 4.4 to 4.7. This relief should not be granted.
- [39] What transpired here is that the applicant, by way of amendment, introduced a whole new cause of action not substantiated by the papers in this matter.
- [40] The applicant failed to make out a case for the relief in the amended notice of motion and the application stands to be dismissed with costs. The fifth to eighth respondents were represented by the State Attorney and the same counsel. The respondent were seeking a punitive cost order. I am of the view that despite the applicants persistence to pursue this application in the way he did a punitive costs order should not be made.
- [41] As far as the reserved costs of the urgent application are concerned, the first to third respondents should be ordered to pay those costs on an unopposed scale. A final order was granted against them.
- [42] The following order is made:
- (1) The application is dismissed.
 - (2) The applicant is to pay the costs of the fifth to eighth respondents on the opposed scale.
 - (3) The first to third respondents are ordered to pay the costs of the urgent application heard on 29 May 2020 on the unopposed scale.

RÉAN STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

Date of Hearing: 30 August 2021

Date of Judgment: 16 September 2021

Appearances:

For the Applicant:

Adv. A. Baloyi

Instructed by:

NK Ledwaba Attorneys

For the 5th – 8th Respondents: Adv. HC Janse van Rensburg SC

Adv. W. Lusenga

Instructed by:

State Attorney, Pretoria

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