

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 29760/2020

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: [REDACTED]
<u>30/1/2023</u>	

In the matter between

MEDICAL INFORMATION TECHNOLOGY SA (PTY) LTD FIRST APPLICANT

JACOB MALEME POO

SECOND APPLICANT

and

PUBLIC PROTECTOR

FIRST RESPONDENT

THE MEC FOR HEALTH,
FOR KWAZULU-NATAL PROVINCE

SECOND RESPONDENT

HEAD OF DEPARTMENT,
DEPARTMENT OF HEALTH, KWA ZULU-NATAL

THIRD RESPONDENT

KWAZULU-NATAL DEPARTMENT OF HEALTH

FOURTH RESPONDENT

THE MEC FOR HEALTH, GAUTENG

FIFTH RESPONDENT

HEAD OF DEPARTMENT,
GAUTENG DEPARTMENT OF HEALTH

SIXTH RESPONDENT

GAUTENG DEPARTMENT OF HEALTH

SEVENTH RESPONDENT

MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION

EIGHTH RESPONDENT

JUDGMENT

MANAMELA AJ

INTRODUCTION

[1] The applicants launched a review application in terms of Rule 53(1)(b) of the Uniform Rules of Court, against the specific findings and remedial actions set-out under the Public Protector Report 109 of 2019/2020 issued on 13 January 2020, entitled "*Report on an investigation into Allegations of Maladministration and Procurement irregularities by the Kwazulu-Natal Department of Health*" ("the Report"), specifically the findings made under paragraphs 6.2, 6.3, 7.2, 7.3 and 7.4 as well as all and any other, paragraphs pertaining to and/or relating to the said findings and remedial actions (including but not limited to paragraphs (viii)(b),(c), (ix)(b), (c) and (d) of the executive summary).

[2] The first respondent issued the Report subsequent an investigation

conducted in terms of section 6 and 7 of the Public Protector Act,¹ following allegations of maladministration and improper awarding and extension of procurement contracts to Medical Information Technology SA (Pty) Ltd ("the first applicant") by the Kwa-Zulu Natal Department of Health ("the fourth respondent") as well as allegations of conflict of interests between the fourth respondent and Dr Poo ("the second applicant").

[3] The first applicant is a private company which provides information technology solution software and services to health care organisations, also internationally and provided the same services to the fourth respondent. The second applicant is a medical practitioner, who is a sessional employee of the seventh respondent, permanently employed by the first applicant. The relief sought relating to the second applicant was postponed *sine die*.

[4] The first respondent is the Public Protector, a Chapter Nine institution established in terms of section 181(1)(a) of the Constitution read with section 1A(1) of the Public Protector Act. The second, third, fourth, fifth, sixth, seventh and eighth respondents are various government institutions responsible for health and public services, respectively, cited in so far as they may have an interest in the findings of this matter.

[5] In principle the first respondent made findings, in specified parts of the Report, that the allegations made were substantiated and issued recommendations in regard to remedial actions to be implemented by the second to the eighth respondents.

[6] The applicants challenge those findings and recommendations made by the first respondent based on the doctrine of legality, on the basis that, the investigation by the first respondent were conducted inadequately, that the first respondent came to an incorrect conclusion, that the first respondent failed to consider relevant information, documents or contracts relating to the second applicant's position and have made remedial directions which are

¹ Act 23 of 1994.

incomprehensible, vague, inconclusive and/or irrational.

[7] The first respondent opposed this application and contends that the applicants' case should be dismissed on the grounds that they have not made out a case for review.

[8] The second, third, fourth and fifth respondents filed notices to abide by the decision of the court. The sixth and seventh respondent have not opposed the application. The eighth respondent opposed the application in respect of the relief sought under paragraph 2.2 of the notice of motion. However, the applicants no longer persisted with this relief as they filed a notice of withdrawal and tendered costs to the eighth respondent on 10 November 2021.

FACTUAL BACKGROUND

[9] The first respondent received the first complaint around 23 June 2015. The first complaint was made by the Honourable Jerich Nkwanyana of the Inkatha Freedom Party. The second complaint was made on 5 August 2015, by the Honourable Imran Keeka of the Democratic Alliance and the third anonymous complaint was made on 16 August 2016, all the complaints pertained to allegations of the improper awarding and extension of contracts to the first applicant by the fourth respondent and the alleged conflict of interest between the fourth respondent and the second applicant.

[10] In respect of allegations of improper procurement and extension of contracts, the first respondent made findings under paragraph 6.2 of the report, that:

"6.2 Regarding whether the Department improperly procured and extended the services of Meditech SA and if so whether such conduct was improper and amounted to maladministration and irregular and/or fruitless and wasteful expenditure as contemplated by section 6(4) of the Public Protector Act, 1994 and section 1 of the Public Finance Management Act, 1999.

- 6.2.1 the allegation that the Department improperly procured the services of Meditech SA is substantiated.
- 6.2.2 the subsequent extension of contracts, with substantial extension in the scope of work, were also improper.
- 6.2.3 the Department improperly extended the 2001 contract and the subsequent extension with Meditech SA and failed to ensure that the procurement followed a process that is transparent, equitable and fair in line with Section 217 of the Constitution and Treasury Regulation 16A3.29 (a) and amounts to maladministration and improper conduct.
- 6.2.4 The expenditure incurred as a result of the irregular extension amounts to irregular expenditure in terms of section 1 of the PFMA, 1999.
- 6.2.5 By entering into the 2016 project with Meditech SA, the Department failed to follow a process that is transparent, equitable and fair in line with Section 217 of the Constitution and National Treasury Regulation 16A3.29(a) amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994.
- 6.2.6 the 2016 project to implement the licences, included and increase the scope of work procurement of hardware at a substantial cost to the Department and amounts to irregular expenditure in terms of Section 1 of the PFMA, 1994."

[11] The recommendations made by the first respondent relating to the findings in paragraph 6.2 above, as stated under paragraph 7.2 are that-

THE MEC KZN HEALTH

- "7.2.1 Take cognizance of the findings regarding the conduct and maladministration by the Department relating to the irregularities in the report;
- 7.2.2 Ensure that the HOD considers the report, and where appropriate, acts in terms of section 84 and as contemplated in section 85 of the PFMA;
- 7.2.3 Ensure that the HOD considers the acts of maladministration and improper conduct referred to in this report and takes appropriate

disciplinary action against the officials of the Department in respect of their conduct referred to therein; and

- 7.2.4 Consider commissioning a forensic investigation into all Meditech SA contracts regarding systemic administrative deficiencies allowing maladministration and related improprieties in its procurement system"

THE HOD KZN HEALTH

- "7.2.5 Considers the report and, where appropriate, acts in terms of section 84 and as contemplated in section 85 of the PFMA;
- 7.2.6 Considers the acts of maladministration and improper conduct referred to in this report and takes appropriate disciplinary action against the officials of the Department in respect of their conduct referred to herein;
- 7.2.7 The HOD, through the Provincial Treasury evaluates the effectiveness of the Department's internal controls on Supply Chain Management processes, with specific reference to the procurement of IT related goods and services, with view to take corrective action to prevent a recurrence of the improprieties referred to in this report;
- 7.2.8 The HOD reports to the Provincial Treasury and the Auditor-General, particulars of the alleged financial misconduct and the steps taken in connection with such financial misconduct, in terms of section 84 and as contemplated in section 85 of the PFMA; and
- 7.2.9 To ensure that prior to signing a formal contract or service level agreement with a contractor must (sic) that such contracts or agreements are legally sound to avoid potential litigation and to minimise potential fraud and corruption. This must include legal vetting by at least the Legal Services of the Department."

Alleged Conflict of interest that existed between the second applicant and the fourth respondent

[12] In respect of allegations of conflict of interest between the second applicant and the fourth respondent, the first respondent made the following findings in paragraph 6.3 of the report:

- "6.3 Regarding whether the Department failed to consider the conflict of Interest that existed between Dr Poo, a director in Meditech SA, and

the Department, when it appointed Meditech SA, and if whether such conduct was improper and amounted to maladministration as contemplated by Section 6(4) of the Public Protector Act, 1994.

6.3.1 the allegation that the Department failed to consider the conflict of interest that existed between Dr Poo, a director in Meditech SA, and the Department, when it appointed Meditech SA, is substantiated.

6.3.2 although Dr Poo was not employed by Meditech SA when it entered the initial contract with the Department in 1988, he was employed with Gauteng Department of Health in March 2008, as a Sessional Doctor and in March 2009 by Meditech SA. He became a Director in Meditech on 22 May 2012.

6.3.3 Dr Poo's conduct as an employee of the state is in contravention of Regulation 13 (c) of the Public Service Regulation, 2016 that prohibits and employees of the Public Service from conducting business with an organ of state or to be a director of a company conducting business with an organ of state, and creates a conflict of interest as defined by the Directive of conducting business with the state."

[13] The first respondent issued the following remedial action in paragraphs 7.3 and 7.4 ("conflict of interest directions") of the Report:

THE MEC GAUTENG HEALTH

"7.3.1 To take cognizance of the findings regarding the issue of the conflict of interest mentioned on the report.

7.3.2 Ensures that the HOD considers the report and, acts in terms of section 8 of the Directive on Conducting Business with an Organ of State and its regulations, that was issued by the Minister of Public Service and Administration in January 2017."

THE HOD GAUTENG HEALTH

"7.3.3 Take note of my findings in this report and act in accordance with his duty to report contraventions in terms of section 8 of the Directive on Conducting Business with an Organ of State and its regulations, that was issued by the Minister of Public Service and Administration in January 2017."

THE DIRECTORATE OF PRIORITY CRIME INVESTIGATION

"7.4 Consider this report and establish if any acts of impropriety identified herein amount to acts of a criminal conduct in terms of the Prevention and Combating of Corrupt Activities Act, 2004."

[14] The said findings are also contained in paragraphs (viii)(b) and (c), (ix)(b), (c) and (d) of the executive summary of the Report.

[15] The first tender awarded to the first applicant was around 1988, at Addington Hospital, as a pilot project, before being rolled out to other hospitals.

ISSUES OF DETERMINATION

[16] The issues to be considered are:

[16.1] Whether the first respondent's purporting to exercise jurisdiction over the complaint, insofar as it related to agreements concluded between the parties prior to 2016, is under section 6(9) of the Public Protector Act, unlawful and invalid, due to her failure to consider whether special circumstances exist and to make a decision in that regard first.

[16.2] Whether there is a basis for the findings and recommendations that were made by the first respondent, and whether they are unreasonable, irrational and unlawful.

[16.3] Whether the first respondent's investigations were inadequate and whether she came to incorrect conclusions based on the facts and evidence before her.

[16.4] Whether the Report contains remedial directions which are incomprehensible, vague, inconclusive and/or irrational, rendering them unenforceable.

[17] In regard to the conflict of interest findings that relate to the second applicant whether:

[17.1] insofar as they rely on the Public Service Regulations, 2016,² Regulation 13(c), they omit to take into account the transitional arrangements in circumstances where the conclusion of the Master Agreement fell into the transitional period and Regulation 13(c) was therefore not applicable;

[17.2] are therefore tainted by a material error in law and in fact are illegal having been made contrary to the law;

[17.3] were in any event made without any warning that such finding could be made and were accordingly procedurally irrational and unfair in circumstances where the Interim Report found there was no conflict of interest.

[17.4] whether the findings and the remedial actions taken by the first respondent are lawful, i.e. are within the permissible law and are rational.

[17.5] whether the challenge to the Report as raised by the applicants under the relief sought in paragraph 1 and 2, is a challenge that must be raised in terms of the Promotion of Administrative Justice Act,³ ("PAJA").

LEGAL FRAMEWORK

[18] Section 217 of the Constitution requires that when an organ of state contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.

² GG No. 40167, No. R. 877, 29 July 2016.

³ Act 3 of 2000.

[19] Regulation 13(c) of the Public Service Regulations, 2016, introduced a prohibition on employees conducting business with an organ of state or being a director of a public company conducting business with the state.

[20] Part 5 of National Treasury Practice Note 11 of 2008/2009, provides that: if the unsolicited proposal agreement is concluded, then the institution must prepare and issue bid documents. Regarding the bidding process it requires:

"5.1 Bid process.

5.1.1 The process to be followed when procuring a service provider shall include:

- (a) The preparation of a Request for Qualification (RFQ) to test the market for the existence of other private entities capable of providing the product or service;
- (b) The preparation of a draft contract for the provision of the product or service should there be no adequate response to the RFQ;
- (c) The preparation of a Request for Proposals (RFP) with a draft contract should there be one or more adequate responses to the RFQ;
- (d) Conducting a competitive bidding process in terms of the institution's supply chain management system among the firms qualified in the RFQ and the proponent; and
- (e) Reimbursing the proponent should the proponent not be awarded the contract for the provision of the product or service at the conclusion of the competitive bidding process. The quantum of reimbursement shall be those audited costs of the proponent from the point in time where the accounting office or accounting authority was solicited by the proponent to the conclusion of the competitive process, in terms of the unsolicited proposal agreement.

5.2 The foregoing bid process must –

- (a) be developed by the institution;

- (b) disclose that the bid originated from an unsolicited proposal; and
- (c) provide the agreed costs and terms of payment to the proponent, and require that all bidders, save for the proponent, make allowance for these costs and pay such costs to the proponent directly, if their bid is successful."

ANALYSIS

[21] Generally, judicial review is the principal mechanism used by the courts to guard against the exercise of public institutions, and abuse of power. Judicial review does not concern the merits of the decisions, it purely focuses on the process by which decisions were made. It is a remedy of last resort and it is only available when all alternative recourses are exhausted.

[22] The first point to address in this matter is the applicant's own jurisdiction to launch a review application. It is common cause that there is no direct findings or recommendations for remedial action against the applicants.⁴ The applicants contents that the Report negatively impacted their business, rights and reputation which is contested by the first respondent. It is apparent from the Report that the first respondent mainly seeks to protect the legal prescripts, in particular section 217 of the Constitution. It would have been worse for the applicants if the recommendations made included the blacklisting of the first appellant.

[23] The applicants filed a request for information in terms of section 18(1) of the Promotion of Access to Information Act⁵, requesting 36 records relating to the report, which were not provided. Notwithstanding that, the applicants relies on some supply chain management correspondences which granted permission for the third respondent to proceed with the procurement process. The process undertaken was not in line with the prescripts of the law and cannot be justified.

[24] One of the submission made by the applicants, is that if the relevant findings and recommendations remain unchallenged it will be prejudicial to the applicants. The level of interest held by the applicants in the Report issued by the first respondent is below that of

⁴ Paragraph 109.1, p 113, Founding Affidavit.

⁵ Act 2 of 2000.

the other respondents whom it affects. A party is entitled to join and intervene in proceedings where they have a direct and substantial interest in the matter.⁶

[25] Section 1(c) of the Constitution serves as a regulatory clause with which the state, its organs and officials are forbidden to exercise powers beyond those conferred upon them by law.

Jurisdiction and special circumstance

[26] The crux of the findings made by the first respondent is that the awarding of the contracts to the first applicant was improper, as it appears that there were no competitive bids for the service rendered, as such there was a breach of section 217 of the Constitution. The first respondent contends that when the contract concluded in 2016, between the fourth respondent and the first applicant, the fourth respondent failed to follow a transparent, equitable and fair process in line with the prescripts of section 217 of the Constitution, the National Treasury Regulations 16A3.19(a) and that this amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act.

[27] It is unclear how maladministration findings and remedial action against government and its officials adversely affect the rights of an entity that had benefitted from an uncompetitive process.

[28] The applicant cannot raise their hand from the fence, on behalf of the second, third and fourth respondents to demonstrate that the process was above board.

[29] In *Minister of Finance v Afribusiness NPC*,⁷ the Constitutional court dismissed leave to intervene in proceedings, on the basis of *ultra vires*.

Lawfulness and rationality of findings and recommendations

[30] I found the remedial directions made by the first respondent are comprehensible to the findings and are rational.

⁶ *Morudi v NC Housing Services and Development Co Limited* 2019 (2) BCLR 261 (CC) at paras 29-30. See also *Gory v Kolver N. O. and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC).

⁷ 2022 (4) SA 362 (CC).

Whether the investigation was adequate

[31] In paragraph 5.2.42 of the Report, the first respondent stated that:

"On 4 May 2016, the Chief Director, Supply Chain Management (SEM) Mr C Malaba ("Malaba"), made a submission to the HOD, Dr ST Mtshali, requesting him to grant approval for deviation from normal SCM processes to a bid for the "Appointment of a Service Provider to implement Meditech SA License for a system which is already in existence for Grey's Hospital, KwaMashu Community Health Care (CHC) and one adjoining clinic and also provide support at 3 hospitals, once CHC and one clinic for a period of 3 years ("2016 Project"). The submission was recommended by the CFO on 09 May 2016 and approved by the HOD on 11 May 2016."

[32] The above process, was not done in line with the National Treasury Practice Note 11 of 2008/2009, referred to above. The first respondent in her Report took note of the fact that only one bid was received and evaluated by the Technical Evaluation Committee (TEC), a score of 88.5 out of 100 for functionality was awarded to the first applicant, against no other competitor.

Effect of the remedial actions

[33] The first respondent does not find that the applicants should not have been appointed, the issue is rather one of process which should have been open and fair in terms of section 217 of the Constitution.

[34] Findings made by the first respondent have no negative or direct impact on the applicants. At the very least the first applicant fails to demonstrate such impact. In *Giant Concerts CC v Rinaldo Investment (Pty) Ltd*⁸ the Court held that:

"[35] ...where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities..."

[43] The own interest litigant must therefore demonstrate that his or her interest or potential interest are directly affected by the unlawfulness sought to be impugned."

⁸ 2013 (3) BCLR 251 (CC), paras 35 and 43.

[35] None of the remedial actions have any implications for the applicants. It is directed at the second and third respondents. The remedial action is of a cautionary nature relevant state departments.

Conflict of interest

[36] The applicants correctly point out that the findings and the remedial actions made by the first respondent constitute an administrative action under PAJA and that it relates to the exercise of public power which must comply with the requirements of the Constitution under the principle of legality.

[37] The findings under paragraph 6.3 of the Report illustrates that the second applicant violated Regulation 13(c). The Regulation prohibits employees of the State to do business with the State.

Applicability of PAJA

[38] On the question of legality as a ground for review and whether the first respondent acted beyond her powers when making the specific findings, the applicants contents that the first respondent made no mention of special circumstances considered to permit a complaint on incidents or matters that occurred more than two years' prior the alleged complaint, as she should have in terms of section 6(9) of the Public Protector Act, and alternatively in terms of PAJA.

[39] The applicant contents, that the legal process applicable to state contracts at the time when the contract was procured, are not the same as today.

[40] The applicants failed to prove any prejudice alleged to be suffered and have further failed to proof that the specific findings and recommendations of the first respondent should stand. It is rather the rights of the public that is affected by the exclusive and unfair advantage resulting from a perpetual arrangement with the applicants.

[41] The findings point to a failure by the fourth respondent to consider the conflict

of interest. The finding made was that the second applicant was an employee of the State and also an employee of the first applicant. A declaration of interest had to be concluded in terms of on this conflict of interest that had arisen.

[42] The Regulations remain valid as they have not been declared unlawful and unconstitutional. At the time when the first respondent made this finding, and to date the Regulation is still valid and applicable. The finding is factually correct and lawful.

[43] The section 6(9) inquiry provides the first respondent with discretionary powers. Viewing the rental Agreements, on an objective basis which were concluded in 2001 and 2016, it is apparent that there was a continuation of the rendering of services.

CONCLUSION

[44] The remedial action and the findings are rational in that the evidence relied upon justifies that a rational and reasonable conclusion exists. I find that the applicants failed to demonstrate that its potential interest or existing interest are directly affected by the findings and the recommendations.

[45] Although I have decided to consider the merits of the application, I find the review application is dismissible on the basis that the applicant lacks *locus standi*.

COSTS

[46] It would therefore, be appropriate for the applicants to bear the costs of this unnecessary application for review.

ORDER

[47] The following order is order-

- (a) The Applicants' case is dismissed,

- (b) The Applicants non-compliance with Section 7(1) of PAJA and the late institution of judicial review proceedings in respect of the relief sought under paragraph 1 and 2 of the Notice of Motion, is condoned,
- (c) The first Respondent is to liable for the costs of this application on attorney and client scale, including the costs of two counsels.



P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 30 August 2022

Judgment delivered: 30 January 2023

APPEARANCES:

Counsels for the Applicant:	Adv. A Botha SC
Attorneys for the Applicant:	Werksmans Inc. Attorneys
Counsels for the First Respondent:	Adv. B Shabalala and Adv. N Ali
Attorneys for the First Respondent:	Nompumelelo Hadebe Inc. Attorneys
Other Respondents:	No Appearance