IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 856/2022
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
CIRCULATE TO MAGISTRATES: NO

In the matter between:

MAHLOMOLA JOHN MATLAKALA	Applicant
And	
THE OFFICE OF THE PUBLIC PROTECTOR	1st Respondent
ADV. BUSISIWE MKHWEBANE	2nd Respondent
DERPARTMENT OF HUMAN SETTLEMENTS FREE STATE PROVINCE	3rd Respondent
ADV. TSHEPO P TSUAELI	4th Respondent

HEARD ON: 20 FEBRUARY 2023

JUDGMENT BY: BOMELA, AJ

CORAM: NAIDOO, J *et* BOMELA, AJ

DELIVERED ON: 6 APRIL 2023

INTRODUCTION

[1] The applicant issued out an application in this court on 25th of August 2022 for an order in the following terms:

1. Reviewing and setting aside paragraph 7.2.1 of the Second Respondent's report, report number: 147 of 2019/2020, in so far as it affects the Applicant;

2. Reviewing and setting aside any decision and resolution taken in line with remedial action as stated on page 61, paragraph 7.2.1 of the Second Respondent's report, report number: 147 of 2019/2020, in so far as it affects the Applicant;

3. Reviewing and setting aside the Applicant's suspension implemented and taken in line with the remedial action made by the Second Respondent in her report number: 147 of 2019/2020, as contained on page 61, paragraph 7.2.1;

4. Ordering the Respondents to pay the costs of this application, jointly and severally, the one paying the others to be absolved, on a scale as between attorney and its client.

5. Granting the Applicant such further and/or alternative relief as this honourable court may deem fit.

Mr L Mokhele represented the applicant. There was no appearance on behalf of the respondents, who did not oppose this application.

[2] This application concerns the remedial action of the Public Protector against the then Head of the Department (HOD) of Human Settlements in the Free State, (the Department), directing him to investigate the conduct of the Applicant in relation to what has become known as the asbestos roof tender associated with Blackhead Consulting (Pty) Ltd. (Blackhead).

[3] The investigation and report of the public protector followed as a result of a complaint lodged with the Public Protector by Ms L Kleynhans, a member of Democratic Alliance and a member of the Free State Legislature. The complaint raised specific concerns regarding a contract awarded by the Department to Blackhead for the eradication of asbestos roofs in the Free State Province. The allegation was that the Department entered into the contract without following tender procedures when there were necessary skills within the Free State Municipalities for the eradication of asbestos roofs in the Free State Province.

[4] In order to procure the services of Blackhead, the Department participated, in terms of treasury regulation 16A.6.6, in a Gauteng Department of Human Settlements contract with Blackhead which the Gauteng Auditor General found to have been irregularly awarded in contravention of Treasury Regulations.

[5] The Free State Auditor General found the participation of the Department in the Gauteng tender to be irregular in terms of Treasury Regulation 16A.6.6 as the regulations require that the original contract of Blackhead in Gauteng should have been awarded following a competitive bidding process, as this was not the case, the payment of R 76 000 000.00 by the Department to Blackhead was identified as irregular expenditure in the 2014/2015 annual financial statements.

[6] Further complaints were that that the necessary authorization was not obtained from National Treasury before entering into this contract, the advertisement did not specify the identification and removal of asbestos roof top, the service level agreement between Blackhead and the Gauteng department was not valid at the time when the Department participated in the contact, the Service Level Agreement (SLA) between Blackhead and the Gauteng department did not refer to the removal of asbestos roofs, there was no value for money received by the Department in terms of this contract, the advance payments made to Blackhead were irregular and that the invoices submitted by Blackhead did not comply with legislative prescripts.

[7] During the course of the investigation, the First and Second Respondents conducted interviews with the HOD of the Third Respondent together with the

Applicant, although the complaint was not against the Applicant, on the 2nd July 2019. Both the Applicant and the HOD indicated that the fact that the Gauteng/Blackhead contract expired at the time the Regulation 16A.6.6 procurement process was undertaken, did not bar them from participating in terms of the requirements of the Public Finance Management Act 1 of 1999 (PFMA) or Regulations thereto. They were not aware of the court decision in respect of the interpretation of the Regulations regarding participating in a contract procured by another state institution. The then HOD of the Department indicated that there was a difference in opinion regarding the interpretation of regulation 16A.6.6 between the Auditor General and the State Law Advisors. During the meeting, the HOD was made aware of the court's interpretation of the legislative prescripts. The effect was that the contract that the Department participated in expired on the 31st of March 2013 according to the Gauteng department's appointment letter or at latest on 13 September 2013 according to the SLA signed between the Gauteng department and Blackhead.

[8] The Gauteng contract was extended by the Gauteng department on 13 May2014 for the period 01 April 2014 to August 2014. The Public Protector found the conduct of the Department to be illegal according to legislative prescripts and the Gauteng and Free State Auditor General's findings.

[9] To this end, and before a final finding was made, the Public Protector issued a notice in terms of section 7(9) of the Public Protector Act 23 of 1994 to the HOD as the person against whom the complaint was made. The HOD submitted in his response that although he held final responsibility in terms of the applicable legislation, he was unaware that Blackhead had sub-contracted the contract. This did not assist the HOD as the Public Protector was of the view that if the HOD had acted on the Auditor General's report released on 31 July 2015, the further payments of One Hundred and Thirty Nine Million Rand (R 139 000 000.00) would have been avoided. The Public Protector then found that the omission by the HOD to act on the report of the Auditor General released on 31 July 2015, amounted to gross negligence in terms of section 86 of the PFMA on the part of the accounting officer in that he did not comply with section 37 Public Finance Management Act.

[10] The Public Protector further found that the HOD failed to execute his fiduciary duties in terms of the Public Finance Management Act and the Supply Chain Management Policy of the Department. This conduct, found the Public Protector, amounted to financial misconduct as envisaged in section 82 of the PFMA and maladministration as envisaged in section 6 (4)(a)(i) of the Public Protector Act. The Public Protector further found that the invoices that were submitted by Blackhead to the Department did not comply with legislative prescripts and that amounted to financial misconduct as envisaged in section 82 of the PFMA and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

[11] The Public Protector felt that there are matters that needed further investigation that fell within the scope and ambit of the HOD. In her wisdom, she felt that it would be appropriate that she directs these to the HOD and to that end, the appropriate remedial action, among others, and in terms of paragraph 7.2.1 of the report was for the HOD to "Take the appropriate steps to ensure that the conduct of the Director Supply Chain Management and the Chief Financial Officer is investigated in terms of section 84 of the Public Finance Management Act within 60 days".

[12] This makes perfect sense to the extent that the then HOD may have shifted the blame to the Chief Financial Officer (CFO) and the Head of Supply Chain. The Public Protector was not investigating the complaint against the CFO and the Head of Supply Chain but against the HOD. If at all the CFO and the Head of Supply Chain were to carry some blame in the whole saga, it was then incumbent upon the then HOD to investigate such. That investigation would have been in terms of Section 84 of the PFMA and within 60 days of the remedial action against the HOD. Until this point, the Applicant did not challenge this remedial action and for good reason, as it was not against him but the HOD and there was no trigger for him to do so.

LEGAL FRAMEWORK

[13] In terms of section 84 of the Public Finance Management Act, a charge of

financial misconduct against an accounting officer or official referred to in section 81 or 83 of that Act, or an accounting authority or a member of an accounting authority or an official referred to in section 81 thereof, must be investigated, heard and disposed of in term of the statutory or other conditions of appointment or employment applicable to the accounting office or authority, or member or official, and any regulation prescribed by the Minister in terms of section 85.

[14] Section 6(4) of the Public Protector Act gives the powers to public protector to investigate any conduct in state affairs, or in the public administration and in any sphere of the government, that is alleged or suspected to be improper and if she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it.

[15] In terms of this section, the Public Protector has the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.

[16] In my view, the Public Protector, attended to the complaint before her against the HOD and decided that the matters affecting the Applicant did not form the subject matter of the complaint before her and are within the scope of duties of the HOD and as such must be investigated by the HOD in terms of Section 84 of the PFMA. There was therefore no trigger for the section 7(9) notice to be addressed to the Applicant, as further investigation as directed was not detrimental to the Applicant and was also not an adverse finding against the Applicant. The Section 84 enquiry would be for the Applicant.

[17] The section 7(9) notice may be issued in circumstances where it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, and such implication may be to the detriment of that person or that an adverse finding pertaining to that person

may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

[18] This said, and as was, during the hearing, conceded by Mr Mokhele, the remedial action which forms the subject matter of this review application is against the then HOD and not the Applicant. The right to a Section 7(9) notice therefore did not accrue to the Applicant.

[19] The remedial action is to the effect that the then HOD would take appropriate steps to ensure that the conduct of the applicant, if there was anything wrong pointing to his direction, is to be investigated in terms of section 84 of the Public Finance Management Act, within 60 days of the proposed remedial action. The appropriate action recommended was therefore further investigation, and was not detrimental to or an adverse finding that necessitated that the Applicant be issued with a section 7(9) notice. There is therefore no proper case made out for the reviewing and setting aside of the remedial action of the Public Protector in terms of prayer 1 of the notice of motion.

THE APPLICANT'S SUSPENSION

[20] In terms of section 84 of the Public Finance Management Act, a charge of financial misconduct against an accounting officer or official referred to in section 81 or 83 of that Act, or an accounting authority or a member of an accounting authority or an official referred to in section 81 thereof, must be investigated, heard and disposed of in term of the statutory or other conditions of appointment or employment applicable to the accounting office or authority, or member or official, and any regulation prescribed by the Minister in terms of section 85.

[21] In terms of the remedial action, the investigation by the HOD into the conduct of the Applicant ought to have been undertaken within 60 days of the remedial action and ought to have been investigated, heard and disposed of in term of the statutory or other conditions of appointment or employment applicable to the accounting office or authority, or member or official.

[22] The Applicant was suspended pending the investigation, no investigation and or hearing was undertaken as envisaged in section 84 of the PFMA, the 60 day has lapsed and the validity of the remedial action is affected.

[23] It was submitted by Mr Mokhele that the Third Respondent through the Fourth respondent took a different decision resulting in the suspension of the applicant without any intention of a hearing. The applicant remains suspended and a period of 60 days has lapsed.

[24] The Third and Fourth Respondents who took the decision to suspend the Applicant, by agreement with the Applicant, did not oppose the Application and no cost order was to be sought against them. The decision not to oppose was well founded as the period within which the investigation was to be undertaken lapsed and there was no action taken by the Department against the Applicant since his suspension.

[25] The Public Protector's remedial action is not of an administrative nature,[1] that being so PAJA does not apply to the review of exercises of power by the Public Protector in terms of s 182 of the Constitution and s 6 of the Public Protector Act. That means that the principle of legality applies to the review of the decision of the Public Protector. It however, does not matter in this case that the application for the review is based on PAJA rather than on the principle of legality. In so far as the remedial action is concerned, no procedural differences arise and the grounds of review that apply in respect of both pathways to review, derive ultimately from the same source - the common law- although, in PAJA, those grounds have been codified[2].

[26] In *Public Protector and Others v President of the Republic of South Africa and Others*[3], it was stated that administrative action comes into existence from the exercise of public power. I am satisfied that the act of suspension flows

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[1] Minister of Home Affairs v Public Protector 2018 (3) SA 380 SCA at 390E.
[2] Minister of Home affairs supra at 390E-F
[3] 2021(6) SA 37 (CC) at 74E

directly from the remedial action which forms the subject matter of this application and therefore constitutes administrative action that is reviewable.

[27] The Public Protector's recommended remedial action in respect of the HOD was properly made and is binding. The time frame within which the investigation ought to have been undertaken has come and gone and the suspension appears not to be sustainable under the circumstances.

[28] It is for this reason that I find that a proper case has been made out for the relief sought in prayers 2 and 3 of the notice of motion. As indicated earlier, the applicant did not seek an order for costs against the third and fourth respondents. In view of the finding that the decision of the Public Protector was properly made, and is binding, no order for costs will be made against the first and second respondents.

[29] In the result, the following order is made:

ORDER:

29.1. The remedial action of the Second Respondent as set out on page 61, paragraph 7.2.1 of the second respondent's report, report number: 147 of 2019/2020 stands.

29.2. Any decision and resolution taken in accordance with remedial action as stated on page 61, paragraph 7.2.1 of the Second Respondent's report, report number: 147 of 2019/2020, in so far as it affects the Applicants is reviewed and set aside.

29.3. The Applicant's suspension implemented and taken in accordance with the remedial action made by the Second Respondent in her report number: 147 of 2019/2020, as contained in page 61, paragraph 7.2.1 is reviewed and set aside.

29.4 No order as to costs is made

BOMBELA, AJ

I concur

NAIDOO, J

On behalf of the applicant:	Mr Mokhele
Instructed by:	Mokhele Attorneys Inc
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