



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1303/2021**
Heard: **22/11/2021**
Delivered: **07/03/2022**

In the matter between:

MARUPING LEKWENE

First Applicant

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH: NORTHERN CAPE**

Second Applicant

and

**THE PUBLIC PROTECTOR OF SOUTH AFRICA
BUSISIWE MKHWEBANE
PREMIER OF THE NORTHERN CAPE
MEC FOR FINANCE, ECONOMIC DEVELOPMENT
AND TOURISM**

First Respondent
Second Respondent
Third Respondent

Fourth Respondent

Coram: Mamosebo J et SL Erasmus AJ

JUDGMENT ON REVIEW

Mamosebo J

- [1] This review application is brought in terms of Rule 53 of the Uniform Rules of Court. The applicants, Mr Maruping Lekwene and Member of the Executive Council (MEC) for Health, Northern Cape, seeks to

review and set aside the remedial action in the Public Protector's Report Number 09 of 2021/2022 dated 03 June 2021 pertaining to certain findings by the Public Protector following an investigation that she had conducted in terms of s 6 of the Public Protector Act¹ (PPA). The third and fourth respondents, Premier of the Northern Cape, and MEC for Finance, Economic Development and Tourism respectively, abide the decision of the Court.

- [2] The applicants served the respondents with a Notice of Motion on 29 June 2021. On 02 July 2021 this Court granted the order in Part A unopposed, suspending the remedial action prescribed in paragraphs 7.5 to 8.1.2 of the report and further interdicting and restraining the First and Second respondents (the respondents) from enforcing the said remedial action pending the final determination in Part B of the application. The costs of Part A of the application were held over to be decided by the Court hearing Part B. The proceedings before us relate to Part B of the application.
- [3] This application is "supposedly" opposed by the Public Protector, who is cited with her office as first and second respondents, jointly referred to as the Public Protector. The Notice of Motion in relevant part informed the respondents as follows:

"Be pleased to take notice further that if you intend to oppose Part B of this application, you are required to:

- (a) *Deliver a notice of your intention to oppose within 15 days after receipt of the Notice of Motion, or any amendment thereto as contemplated in Rule 53(4) and in such notice **appoint an address within 8 kilometres from the office of the Registrar of this Court**, at which you will accept notice and service of all process in these proceedings; and*

¹ 23 of 1994

(b) *Within 30 days after expiry of the time referred to in Rule 53(4), deliver your answering affidavits, if any, in respect of Part B of this application.” (own emphasis added)*

[4] The respondents had until 20 July 2021 to file their notice of intention to oppose Part B of the application and until 10 August 2021 to file their answering affidavit. The respondents filed a Notice to oppose the main application dated 01 October 2021.

[5] On 11 October 2021, the applicants served and filed a notice in terms of Rule 30A of the Uniform Rules of Court. It is opportune at this stage to quote the rule seeing that the respondents have already, in their Notice to Oppose (above) made an incorrect reference thereto:

"30A Non-compliance with rules

- (1) *Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.*
- (2) *Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."*

[6] In the applicants' Rule 30A notice the Public Protector notified of their irregular step in failing to comply with the Uniform Rules of Court and the following is quoted in part:

"1. *The First and Second Respondents have failed to file a notice of intention to oppose the above matter as required in terms of Uniform Rule 53(5)(a) read with Uniform Rule 53(b)². The*

² Rule 53 stipulates:

"(5) Should the presiding officer, chairperson or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he or she shall –

(a) within fifteen days after receipt by him or her of the notice of motion or any amendment thereof deliver notice to the applicant that he or she intends so to oppose and shall in such notice appoint an

filing of the Rule 53(5)(a) notice on 01 October 2021 is impermissible and/or irregular.

2. *The purported Rule 53(5)(a) notice is out of time for the following reasons:*

2.1 *The founding papers in the above matter were filed on 30 June 2021.*

2.2 *The purported Rule 53(5)(a) notice was formally served on 01 October 2021, without any attempt to seek condonation for the late filing of the purported notice."*

[7] The respondents were afforded 10 days within which to remove the causes of the aforementioned complaint but failed to do so. No further documents were filed subsequent to the Rule 30A notice by the applicants. Their Notice to Oppose dated 29 October 2021, some three months later, was handed up in Court with our leave as it did not form part of the Court file. The contents of the notice are significant to note:

"Be pleased to take note that the First and Second Respondents hereby give notice of their intention to oppose the applicants' application in terms of Rule 30A and shall accept service of all documents in these proceedings at its address, situated at 48 Sydney Street, Ewing Building, Kimberley, 8300 and via email: Maletjekat@pprotect.org."

The author and signatory of this notice on behalf of the Public Protector is under signature of Ms Maletjeka Tsolo, Legal Advisor – Legal Services, Public Protector House, 175 Lennon Street, Hillcrest Office Park, Pretoria.

[8] At the commencement of the review proceedings Mr TM Sithole appeared on behalf of the Public Protector. He is an admitted

address within 15 kilometres of the office of the registrar at which he or she will accept notice and service of all process in such proceedings; and

(b) within thirty days after the expiry of the time referred to in sub-rule (4) hereof, deliver any affidavits he or she may desire in answer to the allegations made by the applicant."

attorney, on good standing with the Legal Practice Council, but not on the roll of practicing attorneys. He was not robed. He made the submission that whereas he is the Head of the Legal Division rendering, among other services, advice to the office of the Public Protector, he has an admission certificate as an attorney.

- [9] Mr Van Niekerk SC, for the applicant, invoking s 33(1) and (3) of the Legal Practice Act, challenged Mr Sithole's right of appearance. The relevant section in part provides:

"33 Authority to render legal services

- (1) *Subject to any other law, no person other than a practicing legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward –*
 - (a) *appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or*
 - (b) *draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.*
- (2) *.....*
- (3) *No person may, in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is a **practicing** advocate, attorney, conveyancer or notary as the case may be."* (own emphasis)

- [10] Mr Van Niekerk intimated that while the appearance of Mr Sithole on behalf of the respondents may seem trivial but it is not; not only is he purporting to represent the Office of the Public Protector but also Ms Mkhwebane in her personal capacity whilst not being a practicing attorney. Of importance to note is that he is an employee of the Public Protector and the services he is rendering entitle him to a salary, which can be described as "gain" or "reward". If Mr Sithole is permitted by this Court to appear on behalf of the PP what would

prohibit any other company or institution from being represented by their in-house employees instead of practicing attorneys or advocates. This could not have been the intention of the legislature when promulgating s 33 of the Legal Practice Act. Should this be allowed, legal representation in our courts will be, proverbially, a "free for all" so the argument went.

- [11] Neither Mr Van Niekerk nor Mr Sithole made reference to s 34 of the Legal Practice Act, which deals with the forms of legal practice, and is, in our view, relevant in this matter. Section 34(5) stipulates:

"(5) *Attorneys may only practice –*
 (a) *For their own account;*
 (b) *As part of a commercial juristic entity referred to in subsection (7) and as such, may only make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance, or otherwise with an attorney;*
 (c) *As part of a law clinic established in terms of subsection (8);*
 (d) *As part of Legal Aid South Africa; or*
 (e) *As an attorney in the full-time employment of the State as a state attorney or the South African Human Rights Commission."*

- [12] It was clearly not the intention of the legislature to include non-practicing attorneys and advocates in the list of practitioners. Had that been the case, s 34(5) (above), would not have specified as it does, the forms of legal practice an attorney should be affiliated to in order to qualify to practice. The text is clear and unambiguous. Having carefully considered the *point in limine* pertaining to the legal representation by Mr Sithole, and more particularly sections 33 and 34 of the Legal Practice Act, we came to the conclusion that Mr Sithole, as a non-practicing attorney, does not fall under the category of attorneys listed under s 34(5)(a) – (e) and can therefore not be permitted to represent the first and second respondents in this Court.

We were satisfied that the review application was properly before us without any satisfactory or persuasive submissions from the respondents regarding their participation. We were satisfied with the matter proceeding unopposed and permitted Mr Van Niekerk to proceed with the arguments on the merits.

- [13] In his written heads of argument, Mr Van Niekerk, invoking *Minister of Home Affairs v Public Protector*³ contended that the application is based on the principle of legality. This anomaly was set straight by the Constitutional Court in *Public Protector and Others v President of the Republic of South Africa and Others*⁴ when it held:

"[50] Recently in *Minister of Home Affairs*, the Supreme Court of Appeal has concluded that decisions taken by the Public Protector, including remedial action, do not constitute administrative action. This decision appears to be at variance with one taken by this Court in *South African Reserve Bank [Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 6 SA 253 (CC); 2019 (9) BCLR 1113 (CC)]*. This Court implicitly endorsed the application of the Promotion of Administrative Justice Act (PAJA) in the decision making process followed by the Public Protector when she takes remedial action."

Request for an investigation

- [14] The office of the Public Protector had received an anonymous request for an investigation (complaint) on 03 August 2020 in terms of s 6(1) of the PPA pertaining to the secondment of Mr Vincent Mothibi as the Chief Executive Officer (CEO) from the Northern Cape Department of Development and Tourism to the Northern Cape Gambling Board (NC/GB) over a period of three years by Mr Maruping Lekwene, then MEC for Finance, Economic Development and Tourism. The complaint alleged a violation of section 15 of the Public Service Act and Regulation 62 in asserting that Mr Mothibi's

³ [2018] ZASCA 15; 2018 (3) SA 380 (SCA); [2018] 2 All SA 311 (SCA) at para 37

⁴ [2021] JOL 50632 (CC) at para 50

secondment was improper citing the following: that whereas the prescripts prescribed a period of 12 months Mr Mothibi was seconded for three years; secondly, he did not meet the requirements or possess the competencies qualifying him for the position of CEO; thirdly, the secondment was not through any arrangement between the Gambling Board and the Department; and fourthly, no recruitment processes were followed to fill the vacancy as required by the prescripts. Simply put, the allegation is that his appointment was not competent in law.

The investigation

[15] The Public Protector, following her constitutional mandate launched an investigation in terms of s 182 (1) of the Constitution.

Section 182 stipulates:

- "(1) *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.*
- (2) *The Public Protector has the additional powers and functions prescribed by national legislation."*

[16] The applicable national legislation is the Public Protector Act (PPA) which regulates the method of investigation. Section 6(4)(a) in relevant part provides:

- "(4) *The Public Protector shall be competent –*
- (a) *to investigate, on his or her own initiative or on receipt of a complaint, any alleged –*
 - (i) *maladministration in connection with the affairs of government at any level;*
 - (ii) *abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other*

- improper conduct or undue delay by a person performing a public function;*
- (iii) *improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;*
- (iv) *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 the public administration or in connection with the affairs of government at any level or of a person performing a public function; or*
- (v) *act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person."*

[17] Section 7 (9) reads:

"(9) *If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, the Public Protector shall afford such person an opportunity to be heard in connection therewith by way of the giving of evidence, and such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section."*

[18] The Public Protector identified the following issues in her report for investigation:

- (a) Whether the secondment of Mr Mothibi to act as the CEO of the Gambling Board by Mr Lekwene, the former Northern Cape MEC for Finance, Economic Development and Tourism for a period of three (3) years with effect from 2 September 2019 was not [in] accordance with the relevant laws and prescripts regulating the secondment of employees in the

Public Service; and if yes, whether the conduct of the MEC was improper and constitutes maladministration; and

- (b) Whether the appointment of Mr Mothibi as the CEO of the Gambling Board by Mr Lekwene, the former Northern [Cape] MEC for Finance, Economic Development and Tourism with effect from 1 January 2020 to 31 December 2020 was not [in] accordance with the relevant laws and prescripts regulating the appointment of the CEO of the Gambling Board; and if yes, whether the conduct of the MEC was improper and constitutes maladministration.

[19] On 23 December 2020 the Public Protector addressed a notice to Mr Maruping Lekwene, MPL, who now holds the portfolio of MEC for Health, in terms of s 7(9)(a) of the PPA⁵, informing him that she was in the process of finalising an investigation into allegations of improper conduct and maladministration by him in his former portfolio pertaining to the secondment of Mr Mothibi as the CEO of the NC/GB. The Public Protector afforded him 10 business days from the date of receipt of the notice within which to respond.

[20] Mr Lekwene advanced the following reply to the Public Protector's notice. He conceded that the secondment of Mr Mothibi for 36 months was erroneously made and was corrected before the Public Protector launched her investigation. The correction followed the advice from the officials in the department but not because of the complaint. In as far as the appointment of Mr Mothibi by Mr Lekwene and not by the Board is concerned, the explanation is to

⁵ Section 7(9)(a) provides:

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that 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 person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

the effect that the appointment was an interim appointment pending the rationalisation process and the provincial moratorium. The NC/GB could not exercise its authority to appoint the CEO because of the moratorium. Mr Lekwene, however, consulted the Board's Chairperson, Adv. Itemogeng Steenkamp, before making the appointment because the CEO position had been vacant since 2013 when Mr Bobeje was relieved of his responsibilities. According to Mr Lekwene, his predecessor, MEC MacColleen Jack, had also intervened by seconding Ms Heidi Dipico to act as CEO. All the interventions in respect of interim CEO appointments were made in consultation with the chairperson of the Board.

- [21] Mr Lekwene contended that the Gambling Act and the CEO regulations do not prescribe minimum academic qualifications for the CEO. The requirements that a CEO candidate must be in possession of a B Commerce Law or Public Administration degree is not a prescribed requirement. He persists that the three-year diploma that Mr Mothibi possesses coupled with his extensive experience as a manager in the public service made him a suitable candidate as interim CEO. He concluded by stating that his actions were in the best interests of the Gambling Board and his intentions were aimed at good governance and administration. He denies that his actions contravened s 136(2) of the Constitution, which enjoins that an MEC must act in accordance with a certain code of ethics and may not act in a way that is inconsistent with their office etc.

The report

- [22] The Public Protector released her final report on 03 June 2021 rejecting the representations made by Mr Lekwene and made the following findings inter alia:

- "6.1.5 The decision by the MEC to second Mr Mothibi was in violation of section 15(3) of the Public Service Act, 1994 and Regulation 62 of the Public Service Regulations, 2016, and was therefore improper and amounts to maladministration.
- 6.1.4 The conduct of the MEC [in effecting the secondment] was in violation of section 136 of the Constitution and clauses 2.1 and 2.3 of the Executive Ethics Code in that it was not made in good faith, in the best interests of good governance and consistent with the integrity of his office as MEC.
- 6.2.3 The appointment of Mr Mothibi as CEO of the Board was not in accordance with the provisions of the Northern Cape Gambling Act, the regulations promulgated in terms of that act and applicable policy and was therefore improper and constitutes maladministration.
- 6.2.5 The conduct of Mr Lekwene in effecting the appointment of Mr Mothibi was in violation of section 136 of the Constitution and clauses 2.1 and 2.3 of the Code of Ethics, as it was not made in good faith, in the best interest of good governance and consistent with the integrity of his office as MEC."

[23] The Public Protector issued the following remedial orders, relevant in part, pursuant to the findings which forms the basis of this review:

"7.5 Consequently, the appropriate remedial action that the Public Protector is taking in terms of s 182(1)(c) of the Constitution is the following:

7.5.1 Premier of the Northern Cape to:

7.5.1.1 To take appropriate steps in respect of disciplinary action against Mr Lekwene for his improper conduct relating to the irregular secondment and the subsequent irregular appointment of Mr Mothibi as the Chief Executive Officer of the Northern Cape Gambling Board, in terms of the applicable legislation and prescripts, within thirty (30) days from the date of this report.

7.5.1.2 Submit a report to the Northern Cape Provincial Legislature on the action taken against the MEC as referred to in paragraph 7.5.1.1 above within 60 days from the date of this report.

7.5.2 The Northern Cape MEC for Finance, Economic Development and Tourism to:

7.5.2.1 *Institute proceedings for judicial review of the secondment and appointment of Mr Mothibi as the Chief Executive Officer of the Northern Cape Gambling Board, in terms of thirty (30) business days from the date of this report.*

7.5.2.2 *Submit a report on the progress made with instituting a judicial review proceedings to the Northern Cape Executive Council, the Northern Cape Provincial Legislature and the Northern Cape Gambling Board within 60 days from the date of this report.*

8 Monitoring

8.1.1 *The Premier of the Northern Cape and the Northern Cape MEC for Finance, Economic Development and Tourism to submit an implementation plan to the Public Protector within 30 days from the date of this report on how the remedial action referred to in paragraphs 7.5.1 and 7.5.2 will be implemented.*

8.1.2 *The submission of the implementation plans and the implementation of the remedial action taken shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector."*

[24] The applicants attack the Public Protector's decision on the following grounds:

- 24.1 She broadened the scope of her investigation outside the perimeters of the complaint received and in doing so acted *ultra vires* the Constitution and various statutes from which she derives her powers of investigation;
- 24.2 She failed to conduct a proper, full and unbiased investigation in accordance with her constitutional mandate;
- 24.3 She failed to take into account relevant evidence placed before her and her findings are therefore irrational;

24.4 She failed to give effect to the principle of *audi alteram partem* and therefore the remedial action ordered was the result of unfair procedural action, which does not accord, with the principle of legality;

24.5 The remedial action ordered by her is not authorised in law and therefore does not accord with the principle of legality.

[25] I now consider the grounds raised by the applicants in countering the remedial action recommended by the Public Protector.

Broadening the scope of investigation

[26] The constitutional mandate and duty of the Public Protector is embodied in s 182 of the Constitution referred to at para 15 (above) while her investigative powers are encompassed in s 6 of the PPA. Of importance to note are the Constitutional Court remarks in *Economic Freedom Fighters v Speaker, National Assembly and Others*⁶:

"[58] *The constitutional powers of the Public Protector are to investigate irregularities and corrupt conduct or practices in all spheres of government, to report on its investigations and take appropriate remedial action. Section 182(1) and (2) recognise the pre-existing national legislation which does regulate these powers and confer additional powers and functions on the Public Protector. This obviously means that since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. That national legislation is the Public Protector Act and would, like all other laws, be invalid if inconsistent with the Constitution. In any event s 182(1) alludes to national legislation that 'regulates' the Public Protector's three-dimensional powers.*"

⁶ 2016 (3) SA 580 (CC) at para 58

[27] The finding by the Public Protector is that Mr Lekwene violated s 136 of the Constitution and clauses 2.1 and 2.3 of the Code of Ethics envisaged in the Executive Members Ethics Act⁷. The Code provides:

- "2.1 *Members of the Executive must, to the satisfaction of the President or the Premier, as the case may be –*
- (a) perform their duties and exercise their powers diligently and honestly;*
 - (b) fulfil all the obligations imposed upon them by the Constitution and law;*
 - (c) act in good faith and in the best interests of good governance; and*
 - (d) act in all respects in a manner that is consistent with the integrity of their office or the government.*
- 2.2 *In deciding whether members of the Executive complied with the Provisions of clause 2.1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.*
- 2.3 *Members of the Executive may not –*
- (a) wilfully mislead the legislature to which they are accountable;*
 - (b) wilfully mislead the President or Premier, as the case may be;*
 - (c) act in a way that is inconsistent with their position;*
 - (d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;*
 - (e) use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;*
 - (f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;*
 - (g) receive remuneration for any work or service other than for the performance of their functions as members of the Executive; or*
 - (h) make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowances or payments."*

[28] Mr Van Niekerk contends that since there was no complaint that the Mr Lekwene has breached the provisions of the Code of Conduct, it

⁷ 82 of 1998

was not proper and competent for the Public Protector to investigate such a breach. But this contention, in my view, does not find merit. In *Economic Freedom Fighters*⁸ the Constitutional Court has already pronounced that the Public Protector carries very wide powers that leave no lever of government power above scrutiny, coincidental embarrassment and censure. Section 3(4) of the Ethics Act⁹ provides:

"When conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act."

- [29] Regard being had to the foregoing it is evident the Public Protector has made sweeping statements pertaining to the purported breach of clauses 2.1 and 2.3 of the Executive Ethics Code, resultantly lacking specificity. It is unclear whether Mr Lekwene has breached the entire list or not as the exact transgressions do not appear anywhere in her report neither are they properly analysed. The concern expressed by the Public Protector concerning the alleged irregular expenditure caused by Mr Lekwene in the appointment of Mr Mothibi has not been clearly articulated the silence in her report regarding the extension of Mr Mothibi's contract and what its repercussions are.

Failing to conduct an unbiased full and proper investigation

- [30] Mr Lekwene takes issue with the Public Protector's report and that she should have investigated to establish: first, whether or not a moratorium was placed on the filling of vacancies; secondly, whether there was a pending rationalisation process; and thirdly, it would also have been prudent for her to have investigated how Mr Lekwene's predecessors have dealt with the issue of secondment of

⁸ Id at para 53

⁹ Executive Members' Ethics Act 82 of 1998

interim CEO's since 2013. Mr Lekwene contends that his intervention to second Mr Mothibi as he did was done in consultation with the chairperson of the Board but the Public Protector's report does not shed light on whether she engaged the chairperson on this aspect.

- [31] The following is an extract from Mr Mothibi's response to the Public Protector dated 26 February 2021:

"According to my knowledge, as pertaining to my arrival on the morning of the Monday 09 September 2019 at the offices of the Board, I was warmly welcomed and introduced to the staff. I had already received a call from the chairperson of the Board Advocate Itemogeng Steenkamp who had congratulated me prior to my arrival at the office. He indicated that he would like us to have a meeting. At the meeting on the morning of the 10 September 2019, Tuesday, we met at the Kimberley Ann Hotel and discussed the issues he said the Board regarded as important and urgent, and preparations for the Board meeting that was to take place on 17 October 2019. At that meeting he phoned all the members of the Board and we had a short introductory telephonic conference. He asked all of them whether they agreed with the decision of my secondment by the MEC, there was no disapproval.

I did not get the sense of any discomfort as I could gather that he had received the notification from the Department and duly informed the members of the Board prior to our meeting. Anyway, if there was such, the issue should have been raised at the Board meeting of 17 October 2019 by the members and the Board would have resolved on the matter and informed the MEC about their disagreement [with] his decision."

The Public Protector has not recorded any evidence in her report of engaging the Board and its chairperson to ascertain the averments by both Messrs Lekwene and Mothibi. It remains inexplicable, or at least not covered in her report, why the vacant position of CEO was not filled by the Board by way of an acting appointment. If the position remained unfilled what would have been the effect thereof on the Gambling Board's operations. The issue of what informed the intervention by Mr Lekwene and whether there was any pressing

need for him to intervene does not seem to have received serious attention, if at all.

- [32] The Northern Cape Gambling Board Human Resources Policies and Procedures form part of the applicants' founding papers. Clause 2.2.6 deals with 'secondment of persons' and reads:

"2.2.6.1 *The Board may utilise the services of seconded personnel from the Provincial Administration of the Northern Cape, the South African Police Services, other government departments or a council, institution or body established by or under any law to assist it in the performance of its functions.*

2.2.6.2 *Persons who are seconded shall comply with the requirements of paragraph 4 and shall, for the duration of such secondment, be subject to the rules and regulations of all provisions applicable to the employees of the Board in respect of probity, the Board's Code of Conduct and any other rules applicable to ordinary employees of the Board applicable from time to time."*

The report does not reveal this situation. An investigation would also have shed light on the candidates selected and the processes followed.

- [33] Nugent JA in *Public Protector v Mail & Guardian Ltd and Others*¹⁰ sounded the following warning:

"[21] *...But I think there is nonetheless one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all."*

Nugent JA's instructive remarks at para 17 in *Mail & Guardian* makes it plain that the duty of the Public Protector is not only to discover

¹⁰ 2011 (4) SA 420 (SCA) at 426 para 21

the truth but also to inspire public confidence that in each investigation, the truth has been discovered.

- [34] The Public Protector wrote a letter to the current MEC for Finance, Economic Development and Tourism deduced from the MEC's response dated 07 September 2020 that starts with the para: "*Your letter dated 07 August 2020 refers.*" The question posed to the current MEC was whether the secondment of Mr Mothibi took place as a result of any 'request or concurrence of the Board'. The MEC's response was to this effect:

"As far as I can gather, the secondment was not made on the request or concurrence of the Board per se but on my predecessor's discretion to ensure the continued functionality of the Gambling Board as the entity falling within his executive authority."

- [35] Of significance is that the current MEC for Finance, Economic Development and Tourism, Mr A Vosloo, extended the fixed term contract of Mr Mothibi as Chief Executive Officer: NC Gambling Board to 31 March 2021 or until the post is permanently filled or rationalisation process has been concluded, whichever comes first. On what authority was the impugned secondment and appointment extended by the current MEC?

- [36] It would also have been prudent for the Public Protector to have obtained information from the following persons: the then Acting Head of Department, Mr GS Mabilo, as well as Mr DO Babuseng, ostensibly the official entrusted with the drafting of all correspondence in respect of the secondments and appointments who also at some stage acted as Head of Department. There were apparently no interviews conducted. The only written enquiries were directed to Mr Vosloo, the HR Manager of the Board, Mr Lekwene and Mr Mothibi. It therefore follows that the contention by

the applicants that the Public Protector has not conducted an unbiased, full and proper investigation, is substantiated.

- [37] The complainant, who has exercised the right to remain anonymous, averred that there was no agreement between the Department and the Board for Mr Mothibi's secondment. It boggles the mind how without any enquiry or any further interviews of relevant parties, the Public Protector was able to arrive at this finding:

"5.1.13 *No evidence was found of an agreement between the Department and the Gambling Board relating to Mr Mothibi's secondment.*"

- [38] The phrases "improper conduct" and "maladministration" are not defined in any of the relevant statutes. The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹ pronounced:

"[18]... *Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears;*"
*Improper Conduct means behaviour that a reasonable and sensible person would not do. It is behaviour that is unfitting and not suited to the character, time, and place.*¹²

The word "*maladministration*" means inefficient or dishonest administration; mismanagement.¹³

For an investigator to reach a conclusion that there was improper conduct or maladministration, there must have been full and proper investigation conducted. The mere fact that Mr Vosloo uttered the following:

¹¹ 2012 (4) SA 593 (SCA) para 18

¹² <https://www.lawinsider.com>> dictionary

¹³ Definitions from Oxford Languages

"As far as I can gather, the secondment was not made on the request or concurrence of the board per se, but on my predecessor's discretion to ensure the continued functionality of the Gambling Board as the entity falling within his executive authority." In the absence of any countervailing submissions the finding by the Public Protector becomes unsubstantiated.

- [39] Regard being had to these considerations it is my view that they support the contention by the applicants that the Public Protector has failed to consider relevant information. It is against this backdrop that the Public Protector's findings that the conduct of Mr Lekwene was improper and constituted maladministration is not supported by any cogent evidence. I further find that the Public Protector's findings that Mr Lekwene acted without good faith and contrary to the best interests of good governance and inconsistent with the integrity of his office was made without any supporting evidence. It therefore follows that such findings are irrational and stands to be reviewed and set aside.

Remedial action not authorised in law

- [40] Jafta J, writing for the majority, in *Public Protector and Others v President of the Republic of South Africa and Others*¹⁴ had occasion to consider whether a person against whom remedial action is contemplated by the Public Protector is entitled to a hearing, remarking that there must be certainty and fairness in the procedure followed by the Public Protector in taking decisions which adversely affect the rights of those who become the subject of her remedial action.

¹⁴ [2021] JOL 50632 (CC) at para 51

- [41] The following are instructive remarks by Jafta J pertaining to the aspect of hearing preceding remedial action¹⁵:

"[126] *For all these reasons, I conclude that when the Public Protector contemplates taking remedial action against the subject of an investigation, that subject is entitled to an opportunity to make representations on the envisaged remedial action. For a proper opportunity to be given, the Public Protector must sufficiently describe the remedial action in question to enable the affected person to make meaningful representations.*"

- [42] It is common cause that Mr Lekwene was served with a s 7(9) notice. What is patent in that notice **is that the remedial action contemplated by the Public Protector was omitted in the notice.** There was no further correspondence addressed to Mr Lekwene dealing with the investigation other than the s7 (9) notice followed by the final report by the Public Protector with adverse findings and remedial action to be taken.

- [43] The shortcomings of not affording the subject of an investigation an opportunity to make representations were not only pointed out to the Public Protector in the *President of the Republic of South Africa* judgment but also in *Gordhan v Public Protector and Others*¹⁶ where the Court held:

"[230] *This issue to be determined by this court of whether the Public Protector is obliged to afford a person implicated in her investigation a hearing in relation to the contemplated remedial action, was canvassed and decided by a Full Court of this Division in President of the Republic of South Africa [President of the Republic of South Africa & Another v The Public Protector & Others 2020 (6) BCLR 513 (GP) para 157 to 159]. That Court held that:*

¹⁵ At para 126

¹⁶ 2021 (1) All SA 428 (GP) at para 230

'157. *In addition, the right to be afforded a reasonable opportunity to make representations on matters that may detrimentally affect one's interests is a well-established principle of natural justice and of our common law. It is an important component of the right to just administrative justice and is expressly recognised as such in the Constitution. Whether or not a decision-maker has complied with this obligation or not will depend on the facts of the particular case....*

159. *Section 7(9)(a) does not expressly require the Public Protector to include her contemplated remedial action in the notice to a party under investigation. However, that does not mean that the Public Protector may not be obliged to do so. The facts may be such that in order to constitute compliance with a person's constitutional right to just administrative action, she should afford them this opportunity."*

[44] It is of significance to note that despite this aspect of affording her subjects of investigation a hearing pertaining to the remedial action to be taken being settled how, she still disregarded those pronouncements. On 23 December 2020 when she issued the s 7(9) notice to Mr Lekwene, the pronouncements in the *Gordhan* judgment were already in place as early as 07 December 2020.

[46] What stands out in her remedial action, is that the Premier of the Northern Cape must institute disciplinary proceedings against MEC Lekwene. The Premier is further ordered to submit an implementation plan to the Public Protector within 30 days from date of the report. **It is incomprehensible and not supported by any empowering legislation for the Premier to exercise such disciplinary powers. The action will not be competent because the relationship between the Premier and the MEC is not an employer-employee relationship.** In my view, the

Premier can, if not satisfied with the MEC's conduct or performance, dismiss him from office as empowered by s 132(2) of the Constitution.

- [46] The Public Protector also found that Mr Lekwene has breached his Code of Ethics. In the *President of the Republic of South Africa Jafta* J remarked¹⁷:

"[134] *Having proper regard to the scheme of the Members Act, it is doubtful that the Public Protector can herself take remedial action for the violations of the Code. In terms of section 3 of the Act, it is the President who may take action if the culprit was a member of Cabinet or a Deputy Minister. With regard to MECs, the power vests in the Premier....."*

- [47] **It remains inexplicable why the Public Protector would assume powers to order the Premier of a Province to report to her.** It is further incomprehensible why she would want to usurp the functions of the Premier **by ordering the dismissal of the MEC,** a decision completely outside her domain. Almost a similar type of remedial action was ordered in the *Gordhan* matter, which the Public Protector should be cognizant of.

- [48] Regard being had to the aforementioned shortcomings, it follows that the remedial action ordered by the Public Protector stands to be reviewed and set aside.

- [49] I am now left with the question of costs. Mr van Niekerk urged this Court to consider ordering the second respondent, Ms Busisiwe Mkhwebane, to pay the costs of this review jointly and severally from the first respondent, The Public Protector of the Republic of South Africa, based on the following submissions:

¹⁷ At para 134

- 49.1 The lack of substance in the investigation by the Public Protector coupled with her irrational findings were not far keeping with her constitutional mandate and duty.
- 49.2 Her serious and reckless dereliction of duty exacerbated by her complete disregard of the applicable legal principles as enunciated in the numerous Court judgments.
- 49.3 Her lack of following proper procedures regarding remedial action amounts to nothing more than a contemptuous disregard for the Court judgments.

[50] Counsel did not persist on a punitive attorney and client scale but sought costs to include the costs of two counsel. The costs in Part A of the judgment were also deferred to Part B of the application. There is no reason why costs should not follow the result. In my view there is no justification for Adv Busisiwe Mkhwebane to pay the costs of this application in her personal capacity.

[51] The following order is made:

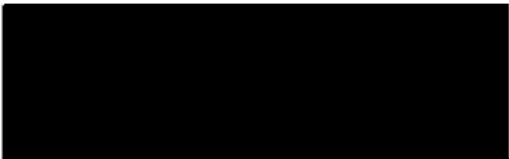
1. The Public Protector's Report No. 09 of 2021/22, dated 03 June 2021, including the findings at paragraph (x) and the remedial action at paragraphs 7.5 to 8.1.2 are declared unlawful and invalid and accordingly reviewed and set aside.
2. The first and second respondent (in her official capacity) are ordered, jointly and severally, to pay the costs of Part A and Part B of the review application, including the costs consequent upon the employment of two counsel.



M.C.MAMOSEBO

**JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

I agree



SL ERASMUS

**ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the 1st & 2nd Applicants:

Adv. JG Van Niekerk SC

Adv. B Babuseng

Instructed by:

Magoma Attorneys

For the 1st and 2nd Respondents:

Mr TM Sithole

Instructed by:

Office of the Public Protector

For the 3rd & 4th Respondents:

Office of the State Attorney
Kimberley