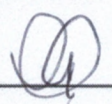


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



CASE NO.: 27609/2019

(1)	REPORTABLE	YES	NO
(2)	OF INTEREST TO OTHER JUDGES	YES	NO
(3)	REVISED	YES	NO
31/5/2019 DATE  SIGNATURE			

In the matter between:

MINISTER GUGILE ERNEST NKWINTI
MINISTER OF WATER AND SANITATION

APPLICANT

and

THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA:
ADV BUSISIWE MKHWEBANE N.O

FIRST RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
MATAMELA CYRIL RAMAPHOSA N.O

SECOND RESPONDENT

JUDGMENT

SARDIWALLA J:

- [1] This is an urgent application in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court resulting from a refusal by the first respondent to grant the applicant an extension to respond and comment on the first respondent's report. The applicant seeks to interdict or restrain the first respondent from publishing her report.
- [2] The applicant, Guguile Ernest Nkwinti, is the former Minister of the Department of Rural Development and Land Reform (DRDLR) and the current duly appointed Minister of Water and Sanitation. The first respondent, the Public Protector, received a complaint from the applicant after a draft report from Deloitte was leaked regarding certain allegations of maladministration, corruption and irregularities in the acquisition of the Bekendvlei Farm which was purchased as a going concern which formed part of the DRDLR's PLAS Version 2 Policy. The Public Protector undertook an investigation, at the conclusion of which she informed the applicant about the allegations, and asked him to respond to her report dated 1 April 2019 by no later than 20 April 2019. The applicant requested an extension to respond to the report which was scheduled for release on 6 May 2019 to which the first respondent refused.
- [3] The applicant brought this application as a result of the first respondent's refusal. The relevant factual background will be dealt with later in this judgement. The applicant seeks an interdict or mandamus against the first respondent prohibiting her from making her report public pending the review application against the findings of the Public Protector's report in terms of the provisions of Promotion of Access to Justice Act¹ (PAJA) and or in terms of Rule 53 of the Uniform Rules of Court.

Background to the Application:

- [4] In February 2017, the applicant lodged a complaint with the Office of the Public

Protector against the leaked content of Deloitte's draft report for the purpose of an investigation.

- [5] It is alleged that the first respondent, upon receiving the complaint, only informed the applicant 2 years later of her findings of the investigation and invited him to respond to her final conclusions which she shared with the applicant for the first time in a section 7(9)(a) notice dated 1 April 2019.
- [6] On 16 April 2019 and 24 April 2019, the applicant wrote to the first respondent as per annexure 'GEN1' and 'GEN2' requesting an extension to 10 May 2019 to adequately respond to her letter. On 30 April 2019 the first responded wrote to the applicant as per annexure 'GEN4', wherein the applicant was informed that:

- '1. Reference is hereby made to your correspondence to the writer hereof dated 16 April 2019 and 24 April 2019, the contents of which are noted.*
- 2. Regrettably, I cannot accede to your request for a further extension to 10 May 2019, in which to provide your response to the notice in terms of section 7(9) of the Public Protector Act, 1994², dated 1 April 2019 as it would not be in the interest of the complainant, Mr. Thomas Walters to delay the matter any further.'*

Applicant's Argument

- [7] The applicant attacks the Public Protector's refusal to grant an extension claiming that it was irregular and unlawful. It submits that the refusal to grant the applicant an opportunity to adequately respond to the report in terms of section 7(9)(1)(a) of the Act will have an adverse effect on the applicant and is unreasonable and irrational. Further that the applicant has established a clear right in terms of section 7(1)(b)(i) and section 7(9)(a) of the Act to respond to the first respondents notice. The first respondent's failure to allow the applicant an opportunity to comment on the findings of her report will result in irreparable harm being caused to the applicant's reputation and therefore warrants the interim relief.

¹ Act 3 of 2000.

First Respondent's Argument

- [8] The Public Protector opposes this application on the basis that the application lacks urgency and is without merit as the applicant cannot interdict the Public Protector from publishing or in any manner disseminating her findings in respect of the complaint lodged with her in terms of the Constitution³ and the Act for the following reasons:

"3.2.1 the applicant seeks to interdict me from publishing the report and/or making the report available to any person as contemplated in section 8(1) of the Public Protector's Act of 1994 and the Constitution of the Republic of South Africa, which is a Constitutional imperative under the circumstances where the applicant has failed to respond to my notice in terms of section 7 (9)(a) of the Act ("the notice");

3.2.2 section 182(1) of the Constitution confers powers on the Public Protector to (a) investigate, (b) report and (c) take appropriate remedial action. These powers are complimentary;

3.2.3 section 7(1)(b) (i) states that the format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case."

The Public Protector

- [9] The Office of the Public Protector was first created by the interim Constitution .⁴ Section 181(1) of the Constitution established a number of institutions, generally referred to as Chapter 9 institutions, which were to strengthen constitutional democracy. They are the Public Protector, the South African Human Rights

² Public Protector Act 23 of 1994. Hereinafter referred to as the Act.

³ Constitution of the Republic of South Africa, 1996.

Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.

[10] In terms of section 181(2) all of the Chapter 9 institutions are '*independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice*'. Section 181(3) places an obligation on other organs of state to '*assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions*'. Section 181(4) prohibits persons or organs of state from interfering with the functioning of any Chapter 9 institution. Section 181(5) provides that they are accountable to the National Assembly and that they are each required to report to it on the fulfilment of their mandates annually at least.

[11] Sections 182 and 183 of the Constitution deal specifically with the Public Protector. Section 182(1) provides:

'The Public Protector has the power, as regulated by national legislation-

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.'

[12] Section 182(2) allows for these powers to be supplemented by national legislation. Section 182(3) places only one limit on the Public Protector's power:

⁴ Constitution of the Republic of South Africa, Act 200 of 1993 at Section 110.

she may not investigate ‘*court decisions*’. Section 182(4) places an obligation on the Public Protector: her office must be ‘*accessible to all persons and communities*’. Section 182(5) requires the Public Protector’s reports to be ‘*open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential*’.

[13] While the primary source of the Public Protector’s powers is the Constitution, the Public Protector Act is the legislation contemplated by section 182(2) that supplements her powers.⁵

[14] Section 7 of the Act gives the Public Protector extensive investigatory powers. On receipt of a complaint the Public Protector has the power to conduct a preliminary investigation for the purposes of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.⁶ The Public Protector has the power to determine the format and procedure to be followed in conducting any investigation.⁷ The Public Protector is, furthermore, entitled to subpoena persons and require them to give evidence.

[15] **In *Public Protector v Mail and Guardian Ltd & others***⁸ Nugent JA stressed the importance of the office of the Public Protector, which he described as an “*indispensable constitutional guarantee*”, stating that it “*provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the*

⁵South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others 2016 (2) SA 522

⁶Section 7 (1)(a) of the Act:

"Investigation by Public Protector

(1) (a) The Public Protector shall have 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."

⁷Section 7(1)(b) of the Act:

"(b)(i) The format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

(ii) The Public Protector may direct that any category of persons or all persons whose presence is not desirable, shall not be present at any proceedings pertaining to any investigation or part thereof."

⁸2011 (4) SA 420 (SCA); [2011] ZASCA 108 para 6.

nation”.

Interim Interdict

- [16] An interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the following:⁹

*“An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo .”*¹⁰

- [17] The requirements for the granting of an interim interdict are the following: a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim relief, and that the applicant has no other satisfactory remedy.¹¹ In this regard Holmes JA¹² said the following:

⁹ In *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC

¹⁰ At page 730 – 731 para 49.

¹¹ See *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973(3)SA 685 (A) *Knox D Arcy Ltd v Jamison and Other* 1996(4) SA 348 (A) at 361

¹² In *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another*, *supra*, at 691.

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are –

- (a) a right which, 'though prima facie established, is open to some doubt';*
- (b) a well grounded apprehension of irreparable injury;*
- (c) the absence of ordinary remedy.*

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic Passenger Service (Pty.) Ltd. v Ramlagan, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration.”

[18] Where the right is clear “... the remaining questions are whether the applicant has also shown:

- (a) an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement;*
- (b) the absence of any other satisfactory remedy;*
- (c) that the balance of convenience favours the granting of an interlocutory interdict.”¹³*

[19] In this case the applicant seeks an interdict pending the determination of the review application against the findings of the first Respondent. There is a dispute

about whether the applicant has a right to engage with and respond to the findings of the Public Protector's report prior to it being published. The question therefore is whether it has established a *prima facie* right. The approach to be adopted in considering whether an applicant has established a *prima facie* right has been stated to be the following:¹⁴

*"The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."*¹⁵

The Audi Alteram Partem Rule

[20] It is prevalent in a number of court decisions in South Africa, such as *South African Football Union v President of South Africa (SARFU)*¹⁶ and the *South African Roads Board v Johannesburg City Council*¹⁷ the view was expressed that the *audi alteram partem* rule should not necessarily depend on whether proceedings were administrative, quasi-judicial or judicial.

[21] In *Du Preez and another v Truth and Reconciliation Commission*¹⁸ (*Du Preez*), the court held that the Commission was under a duty to act fairly towards those implicated by the information received during the course of its investigations or hearings.

¹³ *Knox D'Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (W) at 592 – 593.

¹⁴ *In Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA).

¹⁵ At 228; See also *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 and *Manong & Associates (Pty) LTD v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) at 180.

¹⁶ 1998 (10) BCLR 1059.

¹⁷ 1991 (4) All SA 722 (AD).

¹⁸ 1997 (3) SA 204 (A).

[22] The court in *Du Preez* further indicated that it was instructive that the Committee's findings in this regard and its report to the Commission could accuse or condemn persons in the position of the appellants. The court also noted that, subject to the granting of amnesty, the ultimate result could be criminal or civil proceedings against such persons. The court noted that the whole process was potentially prejudicial to them and their rights of personality. They had to be treated fairly. Procedural fairness meant they had to be informed of the substance of the allegations against them, with sufficient detail to know what the case was all about.

[23] In the case of *SARFU*, *supra*, the question was whether the President, in appointing the Commission, acted in accordance with the principles and procedures which in that particular situation or set of circumstances were right and just and fair. Accordingly, the principle of natural justice should have been enforced by the court as a matter of policy irrespective of the merits of the case.

[24] The Commission emphasized that the fact that a Commission is an advisory body does not, detract from the fact that it is likely in the ordinary course of events, to make findings which would cause prejudice to *SARFU*, and its officials.

[25] A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment¹⁹. Peach sums up the *audi* rule as follows:²⁰

"The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial

¹⁹ See De Smith, SA (1955) "The right to a hearing in English Administrative Law" 68(4) *Harvard Law Review* 569-599, 569.

²⁰ See Peach, VL (2003) "The application of the audi alteram partem rule to the proceedings of commissions of inquiry" Thesis (LL.M. (Public Law))—North-West University, Potchefstroom Campus (Accessed at <http://hdl.handle.net/10394/58>), 8.

facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party."

- [26] The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins.
- [27] In general terms, the principles of natural justice consist of two component parts, *to wit*; the first is the hearing rule, which requires decision-makers to hear a person before adverse decisions against them are taken. The second and equally important component is the principle which provides for the disqualification of a decision-maker where circumstances give rise to a reasonable apprehension that he or she may not bring an impartial mind to the determination of the question before them. The latter aspect is not relevant in this matter.
- [28] The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration. Natural justice contributes to the accuracy of the decision on the substance of the case.
- [29] The rules of natural justice help to ensure objectivity and impartiality, and facilitate the treatment of like cases alike. Natural justice broadly defined can also be seen as protecting human dignity by ensuring that the affected individual is made aware of the basis upon which he or she is being treated unfavourably, and by enabling the individual to participate in the decision-making process. The application of the principle of natural justice has proved problematic.
- [30] The challenge is always how to strike the right balance between public and private interest. Whilst this court, in the circumstances of this matter seems compelled to respond to the vulnerability of the applicant facing the pervasive power of the Public Protector, I am at the same time aware that the court has to avoid a

situation where the unconstrained expansion of the duty to act fairly threatens to paralyse its effective administration.

- [31] In my respectful view, the public interest necessarily comprehends an element of justice to the individual. The competing values of fairness and individual justice on the one hand and administrative efficiency on the other hand, constitute the public and the private aspects of public interest.
- [32] It seems plain to me that the principles of natural justice are intended to promote individual trust and confidence in the administration. They encourage certainty, predictability and reliability in government interactions with members of the public, irrespective of their stations in life and this is a fundamental aspect of the rule of law.
- [33] In a delicate balancing act, it is the duty of the courts to uphold and vindicate the constitutional rights of the applicant to his good name this cannot have the effect of precluding the Public Protector from discharging duties and responsibilities exclusively assigned to it by the Constitution. However, such an inquiry may only proceed in a manner which strictly recognises the right of the applicant to have the inquiry conducted in accordance with natural justice and fair procedures.
- [34] In a matter involving similar facts as the applicant's case De Vos J in Gamede v The Public Protector²¹ held that;

“When it appears to the respondent, during the course of an investigation, that a person is implicated by the investigation and that such implication may be to his/her detriment, or that an adverse finding may be made against such person, the respondent will inform the affected person of the implication and provide him/her with an opportunity to respond. Taking into account that the complaint was lodged in June 2015..., it must be accepted as a fact that the applicant was informed of- and requested to respond to- the complaint very soon after it was

received. Therefore, I can safely conclude that on 17 June 2015 the investigation process was in a preliminary stage before any provisional or final decision was taken. The respondent, will after completion of the preliminary investigation and if it appears to her that the applicant may be implicated to his detriment, by way of a letter communicate her preliminary findings based on the information sourced during the investigation process, and will propose remedial action in light of these findings. The affected individuals are thereby provided with a further opportunity to present any additional evidence to the respondent. The respondent also provides the complainant with an opportunity to submit any further comments on the matter being investigated, should he/she wish to do so.

After considering the comments and/or additional information received, the respondent, with the assistance of her staff, integrate the comments and evaluates them, following which the respondent edits and completes the final report. Subsequent to that event the final report is published and made accessible to the public, unless there are special considerations that require that it be kept confidential.

The investigation process is still in the preliminary stage and essentially comprises of an information gathering exercise. The investigative process is a fact finding mission which includes personal interaction and engagement with the complainant, the applicant, and factual witnesses...”

Analysis and findings

- [35] It is common cause between the parties that the first respondent’s report directly implicates the applicant and implies that he violated the Executive Ethics Code. It is important to note that the first respondent despite the complaint also being lodged by the applicant, never sought it fit to engage the applicant at any stage during the preliminary or investigative process. The first respondent although

²¹ (99246/2015) [2018] ZAGPPHC 865; 2019 (1) SA 491 (GP) at para 51,52 and 53.

clearly entitled in terms of section 7(1)(b)(i) of the Act to conduct an investigation and determine procedures relating to it at her own discretion, it is also prudent in a fact finding investigation to inform and interact with a person whose rights may be adversely affected. In the present matter the first respondent did not at any stage of her investigation find it necessary to engage with the applicant, who was clearly implicated, until the issuing of the section 7(9) notice of the Act on 1 April 2019. This goes against the principles of natural justice and fair procedure.

[36] At this stage, I am satisfied that the applicant has a *prima facie* right more particularly to challenge and present his version or evidence relating to the first respondent's conclusions of his conduct in the acquisition and lease of the Bekendvlei Farm. It cannot be disputed that the first respondent's refusal to afford the applicant an opportunity to respond is threatening the applicant's aforesaid right to natural justice and fair procedures. It cannot be denied that if the applicant is not granted the relief that he seeks that the first respondent will submit the report to the second respondent for remedial action and publish the report to the media, the results of which will interfere with the rights of the applicant. I am also satisfied that if the aforesaid publication goes ahead and decisions are taken the applicant will suffer irreparable harm. Furthermore, I am satisfied that the balance of convenience favours the granting of the interim order. The applicant will suffer prejudice if the interim interdict is not granted and on the other hand the respondent will suffer a mere delay if the interim interdict is granted.

[36] It is important to note that the proceedings that the applicant seeks to institute is against the findings and recommendations that the first respondent which include the remedial action to be taken by the second respondent. There are strong prospects of succeeding in the review wherein the applicant will be granted the opportunity to respond to the scathing allegations set out in the report. However, should the interdict not be granted the damage to the applicant's reputation would be irreversible. The applicant in these circumstances has no other remedy except the interim relief that he seeks.

[37] Accordingly, the following order is made:

1. An interim interdict or *mandamus* against the first respondent prohibiting her from:

- 1.1 making her report (Report No.20 of 2019/20) “An investigation into the allegations of a violation of the Executive Ethics Code by the former Minister of Rural Development and Land Reform, the Honourable Guile Nkwinti, MP (currently Minister of Water and Sanitation) in connection with the acquisition and lease for the Farm Bekendvlei: purportedly signed on 3 May 2019 known to any person as contemplated in section 8(1) of the Public Protectors Act, 1994**
- 1.2 submitting the aforementioned report to the National Assembly as contemplated in section 8(2)(b) of the Act;**
- 1.3 making the aforementioned report available to the public as contemplated in the provision of section 8 (2A)(a) of the Act;**
- 1.4 making the aforementioned report available to the complainant Thomas Walters;**
- 1.5 submitting the aforementioned report to the second respondent with the purpose of taking any remedial action against the applicant and submitting to the National Assembly, and from**
- 1.6 releasing the aforementioned report on 6 May 2019 or thereafter to the Media**
- 1.7 Pending the outcome of the review application by applicant against the findings by the Public Protector in her aforementioned report in terms of the provisions of PAJA and/or in terms of Rule 53 of the Uniform Rules of Court.**

2. An order in terms of which the applicant is directed to launch the review proceedings against the first respondent, referred to in paragraph 2 above, within 1 (one) month calculated from the date of this order;

3. An order, in the event that the aforementioned review proceedings are not launched within 1 (one) month from the date of the granting of this order, that this order shall lapse;
4. An order of costs against any of the respondents, only in the event of opposition to the relief sought herein and in the event of the first respondent opposing the application a cost order on a punitive basis against her.
5. Costs to be costs in the cause.



C M SARDIWALLA
JUDGE OF THE HIGH COURT

Date of Hearing: 06 May 2019

Date of Judgement(Reasons) 31 May 2019

Appearances:

For the Applicant:	Adv. E S J VAN GRAAN
Instructed by:	De Swart Myambo Attorneys
For the First Respondents:	Adv.: B TSHABALALA
Instructed by:	Seanego Attorneys Inc.
For the First Respondents:	
Instructed by:	State Attorney Pretoria