

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: 46739/2021

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |

02 July 2024

DATE

SIGNATURE

NTABOZUKO NOMLALA

Applicant

And

CHAIRPERSON: PUBLIC SERVICE COMMISSION

First Respondent

MINISTER IN THE PRESIDENCY

Second Respondent

DIRECTOR GENERAL: DEPARTMENT OF
PLANNING, MONITORING AND EVALUATION

Third Respondent

JUDGMENT

GWALA AJ

[1] The applicant approached this court seeking an order reviewing and setting aside an investigation report prepared by the Public Service Commission (the Commission). In the alternative, and if the report is not reviewed and set aside in its entirety as prayed

for, the applicant seeks an order reviewing and setting aside certain paragraphs of the report which, in essence, contain the findings and recommendations made by the Commission upon its investigation. The applicant asserts that the report constitutes an administrative action within the meaning of section 1 of the Promotion of Administrative Justice Act¹ (“PAJA”).

[2] The application is opposed by the first and third respondents. They appeared in court represented by the same counsel. Only the first respondent filed an answering affidavit though. The third respondent did not submit any version. The upshot of the opposition is that the impugned report, including its findings and recommendations, does not constitute an administrative action within the meaning of section 1 of PAJA.

[3] The impugned report was prepared by the Commission pursuant to its investigation into allegations of irregularity that occurred in the process leading to the filling of certain vacant posts, including the post of Chief Director: Human Resources and Corporate Services (“CD: HR and CS”) at the Department of Planning, Monitoring, and Evaluation (“the Department”). The applicant was one of the candidates who had applied for this post and whose candidature was successful.

[4] The applicant impugns the report on various grounds. First, he contends that the report is unlawful in that the Commission made findings against him in circumstances where it had not afforded him a right to a hearing. This relates to the finding that the Commission made to the effect that the applicant had not included, in his application for the post, proof that he had a driving licence.

[5] In this regard the applicant contends, and this much is common cause, that before the final report was issued, the Commission submitted a preliminary report to which the applicant was called upon to make representations, and he did. In the preliminary report, the Commission did not raise the issue concerning a driving licence. This too is common cause. As such, the applicant did not make any comment in regard thereto. However,

¹ Act 3 of 2000.

the Commission proceeded to make a finding in its final report regarding the issue of the driving licence.

[6] Second, the applicant takes issue with the fact that the Commission found that the department had failed to adhere to the provisions of Regulations 14(J)² of the Public Service Regulations 2016, in that whilst the applicant was one of the candidates for the post CD:HR and CS, he was permitted to sign an internal memorandum which established the selection committee that would compile a short-list of the candidates. It further found that the applicant gave advice to the department on the processes leading up to the appointment of successful candidates whilst he too was a candidate. The Commission concluded that the aforesaid conduct constituted a conflict of interest on his part and a breach of the Code of Conduct.

[7] For his part, the applicant contends in this regard that the Commission failed to take into account the relevant considerations. He says the Commission failed to take into account the fact that the selection committee proposed in the internal memorandum that he signed was changed twice by the Director General after the applicant had approved it. Eventually, the selection panel that conducted the shortlisting was constituted differently from the one that he had approved.

[8] Third, the applicant impugns the findings that the department failed to adhere to the Departments' HOD Delegation of Powers in terms of the Public Service Regulations 2016. In this regard, the Commission found that the Acting Director General incorrectly delegated his powers to the Deputy Director General to approve the appointment of the successful candidate(s). The applicant contends that this finding was influenced by an error of law because in terms of section 42A³ of the Public Service Act, 1994 ("The PSA"),

² An employee shall-

(j) promote sound, efficient, effective, transparent and accountable administration.

³ 42A (5) "The head of a department or any other functionary may-

(a) delegate to any employee of the department any power-

(i) conferred on that head by this Act; or

(ii) delegated to that head in terms of subsection (4); or

(b) authorise that employee to perform any duty-

(i) imposed on that head by this Act; or

(ii) that that head is authorised to perform in terms of subsection (4)."

the Acting Director General was authorised to and indeed properly delegated further the powers delegated to him.

[9] A truncated factual background leading to the dispute between the parties is the following. The applicant is employed by the Department as a Senior Manager and as such, a member of the Senior Management Service. By April 2017, a post of CD: HR and CS in the Department became vacant. The applicant occupied that post in an acting capacity. On 29 March 2018, the applicant, whilst acting as aforesaid, gave approval that the said post, together with others, be advertised so that it could be filled permanently. It was advertised accordingly. The closing date for the submission of applications was 28 April 2018.

[10] On 16 April 2018, the applicant submitted his application for consideration for permanent appointment to the post. On 10 July 2018, whilst the recruitment process was underway, the applicant signed an internal memorandum in terms of which he approved a panel that would constitute a selection committee, which in turn would consider the shortlisting of the candidates for, *inter alia*, the post he had applied for. This, the Commission found, constituted a conflict of interest on the part of the applicant.

[11] Explaining this away, the applicant contends that he was not part of the recruitment process and did not approve any of the selection panels in relation to the process. The selection panels, according to him, were approved by the Director General. His role, so he says, was merely to “administratively” sign the “letter of approval” – the internal memorandum – after the Director General had approved the names of the people who would constitute the selection panel. Whilst this contention is made, it appears though from the internal memorandum that the applicant signed that he was the only functionary that approved the memorandum concerned.

[12] The applicant was shortlisted and participated in the interviews for the CD:HR and CS post. The interviews were chaired by the Acting Director General because at the time the Director General who had started the recruitment process had since left the

Department.

[13] Upon the conclusion of the interviews, the Acting Director General consulted the applicant for an advice regarding the recruitment process. He sought to be advised as to which functionary would have authority to approve the appointment of the recommended candidate. Apparently, the Acting Director General found himself conflicted because he participated in the recruitment process by chairing the interviewing panel whilst he is the repository of the power to appoint a recommended candidate. For this reason, he could not approve the recommendations by himself. The applicant gave the advice as sought notwithstanding the fact that he too was a candidate. The Acting Deputy Director General acted in accordance with the advice given by the applicant.

[14] The applicant was recommended for appointment to the CD:HR and CS post. Eventually, he was appointed on 09 March 2020.

[15] Pursuant to his appointment, a grievance was lodged with the Commission. It was alleged that the filling of the post was tainted by irregularities, *inter alia*, that the post was advertised as far back as February 2018, but the interviews were conducted two years later and only on 17 February 2020, with the successful candidate appointed only in March 2020. In this regard, there was a delay in filling the post. The Department, so goes the complaint, had contravened the provisions of Regulations 65(7) of the Public Service Regulations 2016, which at the time provided that a funded vacant post shall be advertised within six (6) months and must be filled within twelve (12) months after becoming vacant.⁴ It was alleged that other vacant posts that were advertised together with the post of CD:HR and CS were re-advertised upon realisation that the recruitment would be in breach of the Regulations, but the present post was not.

[16] The Commission is established in terms of section 196 of the Constitution. In terms of Section 8 of the Public Service Commission Act⁵ ("PSCA"), the Commission

⁴ Regulation 65(7) has been amended and now provides as follows:

"65(7) A funded vacant post shall be filled within eight months after becoming vacant."

⁵ Act 46 of 1997.

may exercise the powers and shall perform such duties entrusted to it by or under the PSCA, the Constitution or the PSA. It is empowered in terms of section 196(4)(f)⁶ of the Constitution to conduct investigations into the grievance lodged by the employees in the public service concerning official acts or omissions. Upon investigations, it makes recommendations on appropriate remedies.

[17] In the present matter the Commission investigated the compliant and, as it is expected, made certain findings and recommended that certain actions be taken. The sum total of the findings was that indeed there had been irregularities in the process leading to the filling of the post of CD:HR and CS.

[18] It recommended, *inter alia*, that corrective disciplinary action be taken against the applicant in terms of the disciplinary code and procedure applicable to members of Senior Management Service for the role he played. It also recommended that the irregularity in the filling of the post CD:HR and CS be ratified by complying with the provisions of section 5(7)⁷ as well as section 16A⁸ of the PSA.

⁶ (4) The powers and functions of the Commission are-

- (f) either of its own accord or on receipt of any complaint-
 - (i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;
 - (ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
 - (iii) to monitor and investigate adherence to applicable procedures in the public service; and
 - (iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service;

⁷ This section provides as follows:

- "5(7)(a) A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission.
- (b) The relevant executive authority shall in the prescribed manner keep record of and report to the Minister any correction by a functionary of a department within the portfolio of that executive authority."

⁸ This section provides, in part:

"16A Failure to comply with Act

- (1) An executive authority shall-
 - (a) immediately take appropriate disciplinary steps against a head of department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;
 - (b) immediately report to the Minister the particulars of such non-compliance; and
 - (c) as soon as possible report to the Minister the particulars of the disciplinary steps taken.
- (2) A head of a department shall-

[19] The applicant was not happy with the findings and the recommendations of the Commission, hence, he approached the court for a relief that the report be set aside.

[20] As alluded to above, the first and third respondents oppose the relief on the basis that the report as well as the findings and the recommendations of the Commission do not constitute an administrative action and therefore are not reviewable under PAJA. It is contended that the Commission did not make any decision, let alone a decision reviewable under PAJA. The findings and the recommendations of the Commission, so goes the argument by the respondents, are not final nor binding. The report merely makes recommendations to the Executive Authority and the applicant shall be afforded an opportunity to deal with the findings and recommendations once the Executive Authority has taken a decision based thereon.

[21] The issue for determination turns on whether the report, with its findings and recommendations, constitutes an administrative action and thus reviewable under PAJA. It is trite that in order for a conduct to be reviewable under PAJA, it must fall within the definition of an administrative action as set out in section 1 of PAJA.⁹

[22] The issue whether a conduct is administrative action must be determined with regard to the facts of each case.¹⁰ In *President of the Republic of South Africa and*

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- (a) immediately take appropriate disciplinary steps against an employee of the department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;
 - (b) immediately report to the Director-General: Public Service and Administration the particulars of such non-compliance; and
 - (c) as soon as possible report to that Director-General the particulars of the disciplinary steps taken.
- (3) The Minister may report to the Cabinet or, through the relevant Premier, to the Executive Council of the relevant province any non-compliance by an executive authority with a provision of this Act or a regulation, determination or directive made thereunder."

⁹ Section 1 of PAJA defines an administrative action as follows:

"administrative action" means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, . . ."

¹⁰ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) (*Viking Pony Africa Pumps*) at para 37.

Others v South African Rugby Football Union and Others,¹¹ the Constitutional Court held that a determination of whether action is administrative action or not should be decided on a case-by-case basis. It held further that the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related to policy matters (which are not administrative) or to the implementation of legislation (which is characteristic of administrative action), are all relevant considerations to be considered in the analysis. The court stated:

“What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not . . . The focus of the enquiry as to whether conduct is administrative action is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.”¹²

[23] For his part, the applicant contends that the findings and recommendations in the report constitute an administrative action and thus are reviewable under PAJA because the Constitution and the PSA make it plain that the report of the commission and its findings have direct and external legal effect. To buttress this contention, the applicant relies on the provisions of Section 5(8)(a) and (b) of the PSA.¹³ He says, in terms of the provisions of section 5(8), the directions issued by the Commission may not be ignored because this section makes implementation thereof obligatory on the part of the Executive Authority or head of the department.

[24] The applicant ultimately submits that since the commission sources its powers for performance of its functions from the provisions of Section 194 of the Constitution, its report constitutes an administrative action. He contends that Section 196 (4)(d) of the

¹¹ 2000 (1) SA 1 (CC) at para 141.

¹² See also *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA) at para 14.

¹³ Section 5(8) provides as follows:

“5(8)(a) The Commission may investigate compliance with this Act and may issue directions contemplated in section 196(4)(d) of the Constitution in order to ensure compliance with this Act and in order to provide advice to promote sound public administration.

(b) If the Commission issues a direction contemplated in paragraph (a), the relevant executive authority or head of department, as the case may be, shall implement the direction as soon as possible after receipt of the written communication conveying the direction but, in any event, within 60 days after the date of such receipt.”

Constitution requires the Commission to make directions which the executive authority must, in terms of Section 5(8)(b) of the PSA, implement.

[25] In asserting his point that the findings and recommendations of the Commission, constitute an administrative action, the applicant draws comparison to the powers of the Public Protector as set out in Section 182(1) of the Constitution.¹⁴ This then set the stage for his reliance on the matter of the *Economic Freedom Fighters vs Speaker, National Assembly and Others*¹⁵ where the Constitutional Court said for the remedial action of the Public Protector to be effective in addressing the investigated complaint, it often has to be binding¹⁶ and when remedial action is binding, compliance is not optional.¹⁷ I will return to this aspect later.

[26] Whilst it is correct that in terms of section 5(8)(b) of the PSA, directions issued by the Commission shall be implemented, reliance on that section in this matter is mistaken. The applicant loses sight of the fact that when conducting the present investigation and making the findings and recommendations, the Commission was not acting in terms of section 196(4)(d)¹⁸ of the Constitution. Its findings and the recommendations were not those directions that the Commission would make in terms of that section.

[27] The investigation was conducted in terms of section 196(4)(f)¹⁹ of the Constitution. This section empowers the Commission to make recommendations as opposed to directions. Recommendations in their nature, even if made under that

¹⁴ Section 182(1) of the Constitution provides:

“182 Functions of Public Protector

(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.”

¹⁵ 2016 (3) SA 580 (CC).

¹⁶ Id at para 68.

¹⁷ Id at para 73.

¹⁸ Section 196(d) provides:

(4) The powers and functions of the Commission are-

(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195.

¹⁹ Footnote 6 above.

section, are not a decision.

[28] The other difficulty is that the findings and recommendations as they stand do not directly affect any of the applicant's existing rights, let alone affecting them adversely. The applicant did not plead any such right that is directly affected thereby. What would directly affect the applicant's rights is what the department would decide to do about the findings and or the recommendations. As to what it does about the findings or recommendations will naturally follow another decision – a decision to implement them. Such decision becomes an intervening course in the chain of action. It is that decision or the implementation thereof that would potentially affect applicant's rights.

[29] The Constitutional Court in *Viking Pony Africa Pumps*²⁰ said:

“[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of State decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.”

[30] I accept, as I must, that since the power to make recommendations is sourced from the Constitution itself, the recommendations may not be ignored willy-nilly by those to whom they are made. For instance, if this were to happen, the decision to ignore the recommendations would be unlawful as it would amount to undermining the Constitution itself. Such a decision could be challenged on judicial review because no function that has its foundation in the Constitution may be disregarded at whim without consequences.

[31] However, this still does not make the findings and recommendations a decision, let alone a decision that adversely affects the applicant's rights or having external legal effect. Even if the findings and recommendations of the Commission would amount to a

²⁰ *Viking Pony Africa Pumps* above n 10 at para 38.

decision, they do not have any external legal effect. The applicant does not have a right not to be disciplined nor does he have a right to have a maladministration not reported and corrected. What the applicant surely has is a right to a fair hearing if his rights are to be affected, for instance, in case the department decides to institute a disciplinary inquiry.

[32] The other aspect is that the findings and recommendations in this matter are not final nor are they finally determinative of any of the applicant's rights. If implemented as recommended, they lead to another process such as, in this case, a disciplinary inquiry. It is only the disciplinary inquiry that would bring finality in the matter and determine the applicant's rights. His rights remain protected by the very fact that another process, such as the disciplinary enquiry, would be undertaken. It stands to reason that where a right remains protected, it cannot be said that it is affected adversely.

[33] To put it plain, recommendations are not reviewable since they are not a decision. In *Legal Practice Council v Mkhize*,²¹ the court said:

“[98] In any event, this is all distraction. The LPC's recommendation to refer the matter to court is not reviewable. There was no hearing before a quasi-judicial or administrative tribunal that preceded the recommendation. The recommendation is not a decision as it does not have a direct external legal effect. In *Carte Blanche Marketing CC and Others v Commissioner for SARS*, Carte Blanche sought to review a decision to refer a company for an audit. The court dismissed the review on the basis that there was no decision to review.” [Footnote omitted.]

[34] The comparison that the applicant draws between the powers of the Commission under section 196 and those of the Public Protector under section 182 of the Constitution is not sustainable. The two are not comparable. In terms of section 182(1)(a), (b) and (c) of the Constitution, the Public Protector has power 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 impropriety or prejudice, to report on that

²¹ 2024 (1) SA 189 (GP) at para 98.

conduct, and in particular, to take appropriate remedial action.

[35] On the contrary, the language used in section 196(4)(f) of the Constitution makes it plain that the Commission, upon investigation, makes recommendations. To make recommendations is different from taking appropriate remedial action as in the case of the Public Protector.

[36] I conclude that the report is not an administrative decision that it may be reviewable under PAJA. Far from it. The report merely gives an account on the investigation that was conducted. It follows that where there was an investigation, there must be a report. In its investigation report the Commission must make recommendations. These are final in the sense that they finally determine any of the applicant's rights. Applicant's rights remain protected. Equally, the findings made in the report do not constitute a decision, less of all an administrative decision that is reviewable under PAJA. The findings merely constitute the opinions of the person or body conducting the investigation. Accordingly, the Commission did not make a decision reviewable under PAJA. It did no more than simply detect certain irregularities in the process of filling the post.

[37] For all these reasons, the applicant has not made out a case for review. Consequently, the application must be dismissed.

[38] The next question relates to costs.

[39] The respondents urged me to award costs, including costs of two counsel, on a higher scale. It is trite that costs are at the discretion of the court, which must be judicially exercised. I have considered the submissions on costs by both counsel. I am of the view that there is no basis to depart from the normal rule that costs follow the events. I considered the fact that the matter is not that complex, although it is of importance to the Commission. Be that as it may, I am disinclined to award costs of two counsel. In my view, it is just in the circumstances of this matter to award costs, including costs of one

counsel, on scale B.

[39] Consequently, I make an order in the following terms:

1. The application is dismissed.
2. The applicant is ordered to pay costs, including costs of counsel, on Scale B.


M GWALA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 02 July 2024.*

Date of Hearing: 06 May 2024

Date of Judgment: 02 July 2024

APPEARANCES

For the Applicant: Adv MS Manganye

For the first and third Respondents: SM Mphahlele SC with Adv NS Mteto