



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO.	
(2) OF INTEREST TO OTHER JUDGES: NO.	
(3) REVISED.	
2024-10-02	[REDACTED]
<u>DATE</u>	<u>SIGNATURE</u>

Case Number: 24980/2022

In the matter between:

RICHARD NAGGIE MDLULI

Applicant

and

THE NATIONAL COMMISSIONER OF SOUTH

AFRICAN POLICE SERVICE

Respondent

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 email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 2 October 2024.

JUDGMENT

POTTERILL J

Introduction

[1] The applicant, Richard Naggie Mdluli [Mr Mdluli], is seeking an order to review, set aside and correct the decision taken on 13 January 2022 by the respondent, The National Commissioner of the South African Police Service [SAPS] refusing to provide legal representation to Mr Mdluli at state expense. Furthermore, to order the SAPS to provide legal representation to Mr Mdluli. The SAPS opposed the application.

[2] The matter was set-down for hearing on 20 September 2024. On the morning of the hearing the legal representative of Mr Mdluli informed me that he could not proceed with the matter because he has to attend a funeral and had through the night returned from assisting the family. He is not in the right frame of mind to do justice to his client's case and argument. He requested that the matter be rolled over. This was however not possible.

[3] Counsel for the SAPS and the attorney for Mr Mdluli then agreed that I decide the matter on the papers, however affording the attorney for Mr Mdluli to amend his heads of argument within 5 court days from the 20th of September 2024. If no further heads from the attorney were received the matter was to proceed on the papers as they stand. I received further heads and have taken these heads into account. Counsel for the SAPS informed this Court that they stand by their heads as handed to me on 20 September 2024.

The factual matrix

[4] Mr Mdluli was the Divisional Commissioner: Crime Intelligence in the SAPS holding the rank of Lieutenant General. He retired on 31 January 2018 with full benefits.

[5] Mr Mdluli has been charged in the High Court with charges of *inter alia* corruption, fraud, theft and defeating the ends of justice during the period 2009 and 2010.

[6] Relevant to this review is that on 20 September 2011 Mr Mdluli was arrested with charges of corruption and fraud levelled against him. He was also placed on "continued suspension" by the SAPS. Pursuant to making representations to the Director of the Specialised Commercial Crimes Unit the charges were withdrawn against him on 14 December 2011. Furthermore, after representations pertaining to his suspension was made, his suspension was lifted and he was reinstated to his previous position.

[7] On 15 May 2012 Freedom Under Law launched an application in this High Court seeking *inter alia* Mr Mdluli's suspension and reinstatement of the charges. The Court reviewed and set aside the withdrawal of the charges and ordered the National Prosecuting Authority [NPA] to reinstate the charges and prosecute the charges to finality. Appeals were lodged against this decision and the Supreme Court of Appeal made an order that the NPA must decide whether or not to reinstate the fraud and corruption charges within a period of two months.

[8] The NPA reinstated the fraud and corruption charges against Mr Mdluli and he appeared on these charges again on 15 April 2015. Pursuant to several appearances the matter was struck off the roll on 6 July 2015.

[9] The matter was re-enrolled on 27 August 2020 and transferred to this Court. On 6 May 2021 Mr Mdluli applied to the SAPS for assistance with the funding of his legal representation.

A formal notification that this application was denied was received by his attorney on 21 February 2022.

[10] Mr Mdluli in terms of the NI policy applied for legal assistance to defend the charges against him. The application was completed on a standard form in accordance with the NI and had attached all the necessary documents. This form was submitted to his commander at the time [Lieutenant General Mfazi]. He considered the application and did not recommend its approval.

[11] The application was also considered by the Acting Head: Legal Support, Litigation and Administration, Brigadier PFP de Kock who also did not recommend the approval. Deputy National Commissioner: Support Services, Lieutenant General FN Vuma also considered the application and did not recommend the approval. On 7 September 2021 the National Commissioner approved the recommendation to not approve the application. On 14 January 2022, the Acting Division Commissioner: Legal and Policy Services, Major General Mpomane communicated this decision to Mr Mdluli's attorney.

[12] The NI relevant to these proceedings reads as follows:

"In terms of paragraph 4(1) of the NI, an employee may subject to sub-paragraphs (2) and (3), only be provided with assistance if at the time of the alleged commission of the offence, such an employee acted or omitted to act when he or she should have acted in the execution of his or her duties."

In terms of paragraph 4(2) of the NI, "an employee does not qualify for assistance paid for by the Service, if he or she at the time of the alleged commission of the offence:

- (a) intentionally exceeded his or her power;
- (b) acted recklessly or intentionally;
- (c) was under the influence of intoxicating liquor or drugs;

- (d) without prior consultation with a legal official made a confession, admission or pointing-out with regard to the commission of the alleged offence, that is detrimental to the defence of his or her case;
- (e) failed to comply with any official directive of the Service.”

In terms of paragraphs 4(4) of the Instruction, “an application may be refused in the event of information showing that –

- (a) the State is the complainant in the case;
- (b) it would be against State or public interest to do so; or
- (c) a conflict of interest exists due to different version of facts offered by employees involved in the same incident.”

[13] The reasons for not approving the application are clearly spelled out on page 94, paragraph 3 of the review record where the following is said:

“It must be noted that in terms of paragraph 4(4)(a) and (b) of the National Instruction 1 of 2017, an application for assistance may be refused where the State is the complainant, and it will be against the State and public interest to provide legal representation at State cost. Legal representation was not provided for the initial trial as it cannot be stated that Lieutenant General (Ret) R.N Mdluli acted within the course and scope of employment when the criminal acts were committed, he was not furthering the interest of the South African Police Service and thus, it is not in the State’s interest to provide assistance. Furthermore, the State is also the complainant herein.”

Submissions made on behalf of Mr Mdluli

Incorrect Legal Framework was used

[14] The NI reflects that the effective date it came into operation is 3 February 2017. The NI cannot apply retrospectively because of the general rule against retrospectivity. It is retrospective because Mr Mdluli’s employment commenced on 31 July 2009.

Procedural Unfairness

[15] On behalf of Mr Mdluli the Court is referred to sections 7, 8 and 9 of the Constitution which in general provides that the Bill of Rights is the cornerstone of democracy in South Africa and it applies to all organs of state and that every person is equal before the law and has the right to equal protection.

[16] Sections 35(3)(h) of the Constitution entitles every accused person to a presumption of innocence and furthermore that every accused person has a right to a fair trial.

[17] The SAPS did not comply with these provisions in that when considering Mr Mdluli's application for assistance the contents of the docket was not considered. The SAPS did not do a comparison and distinction between why SAPS afforded colleagues of Mr Mdluli with comparable status legal assistance. The refusal by the SAPS to provide the full record of the proceedings due to confidentiality renders the process unfair.¹ This refusal to provide the complete record amounts to failure to provide adequate reasons for the decision as envisaged in PAJA.²

[18] The SAPS merely ticked the boxes of the policy and came to conclusions without following any due process to test the veracity thereof. This fact coupled with the fact that it ignored the presumption of innocence and the content of the docket

¹ *The Municipal Manager: The City of Johannesburg Metropolitan Municipality and Others v San Ridge Heights Rental Property (Pty) Ltd* (517/2022) [2023] ZASCA 109 (11 July 2023); *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) and *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020); *Murray and Others NNO v Ntombela and Others* (729/2022) [2024] ZASCA 24 (14 March 2024) and *Johannesburg City Council v The Administrator Transvaal and Another*.

² *Naidoo v Director of Public Prosecutions and Others* (12180/2017) [2020] ZAKZDHC 39 (13 August 2020); *Helen Suzman Foundation v Judicial Service Commission and Dart v Chairperson of the DAC of Stellenbosch University and Others* (6501/2020) [2021] ZAWCHC 8; [2021] 2 All SA 141 (WCC) (1 February 2021); *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26.

coupled with the refusal to compare why other applicants were granted assistance renders the whole process irrational and unreasonable.

The SAPS's decision was based on a wrong fact or irrelevant considerations

[19] The SAPS had based its decision on the belief that Mr Mdluli was tried by a court of law, convicted and sentenced to 5 years imprisonment. In fact, Mr Mdluli had not been found guilty in any tribunal.

Lack of policy or directives

[20] The SAPS failed to consider the unwritten policy that it accorded its members funding when accused of criminal charges. It also did not consider the policy that afforded Mr Mdluli the authority to act.

[21] No reasons were provided why it could not recover the legal fees if paid, because Mr Mdluli receives a monthly pension.

The SAPS' argument

Alleged incorrect legal framework

[22] The NI of 2017 is the only relevant policy. This instrument was applicable when the application for the funding was made. Mr Mdluli in fact applied in terms of this policy he now avers is not applicable. There is no other policy and Mr Mdluli does not set out what policy should have been utilised.

[23] The argument that the policy cannot have retrospective application is misguided because that is the instrument regulating the internal affairs between an employer and employee at the time the application was made. It is not legislation.

Alleged procedural unfairness

[24] There was no procedural unfairness. The procedure set out in NI was followed. The application was submitted with all the relevant documents and on those documents the application was considered.

[25] The review record included the summons, J175 and the indictment containing a summary of the allegation of facts. From these facts the allegations are that the crimes are committed against the SAPS in that Mr Mdluli had fraudulently benefitted from his conduct and the SAPS suffered financial prejudice or potential prejudice. Therefore he could not have acted within the course and scope of his employment. The policy does not cater to grant assistance under these circumstances.

Alleged unreasonable and irrational decision

[26] For the review ground to succeed Mr Mdluli must show that the decision is so unreasonable as to lead to the conclusion that the official failed to apply his or her mind. Mr Mdluli cannot show that.

[27] The decision is rational and reasonable. Mr Mdluli was a senior officer in the SAPS and the allegations that he committed the offences against the State disqualified him from receiving assistance. The financial benefit accrued to Mr Mdluli personally. It is not in the public interest that the SAPS should fund his legal defence when the SAPS is the complainant.

[28] The decision is rational as it is in line with the NI and seeks to prevent further financial prejudice against the State. The alleged charges have nothing to do with Mr Mdluli's line of duties, but rather the deliberate intent to commit criminal acts against

the State. There is no connection between Mr Mdluli's conduct and his function as Divisional Commissioner: Crime Intelligence.

The comparison with other applications

[29] To compare with other applications for funding is ill-conceived because each application is determined on its own facts. But, in any event none are comparable. General Bheki's approval was granted because no offence was committed, it was an enquiry into his fitness to hold office as the National Commissioner of the SAPS. Likewise Mr Selebi and Minister Nhleko did not commit offences against their very employer and the Minister was acting within the course and scope of his employment.

[30] Lieutenant Phahlane's application was not approved and former Deputy National Commissioner Mgwenya did not apply for legal assistance.

[31] As for Major General Mabula and his team, they were acting within the scope of their employment with the SAPS and accordingly the charges they were facing emanated from their performance of duties as members of the SAPS. The same applies to Sergeant Rodrigues.

Allegations that the decision was made on the wrong facts

[32] There is no basis to support this contention and it is rejected as incorrect.

Alleged ignorance of the relevant facts

[33] The record of review reflects that all relevant facts had been considered. The fact that Mr Mdluli was convicted and sentenced to five years imprisonment is of no moment as that was not a reason for not approving the application for legal assistance. In any event, it is factually correct.

Alleged non-existence of a directive or policy

[34] This is ill-founded as the NI is the relevant policy that applies nationally. No other directive for assistance of legal fees of its members is necessary.

[35] The policy that an employee can sign an undertaking to reimburse the SAPS in the event of conviction is only applicable to employees still in the service of the SAPS. Since Mr Mdluli has retired the policy is not applicable to him.

Reasons for decision

[36] In the founding affidavit the review is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 [PAJA]. The grounds of the review are based on certain provisions of section 6 of PAJA. Where the founding affidavit refers to the principle of legality, this is not applicable as the review is brought under PAJA.

[37] The decision to be reviewed is the decision taken on 7 September 2021 in terms of NI 1 of 2017. Paragraph 1 of this instruction is specifically to “regulate the payment by the Service for legal representation of employee in criminal matters or at inquiries ...” [par 1].

[38] The reason provided for not granting the approval was:

“Kindly be advised that after perusal of the documents attached to the application, this office is of the view that the charges proffered against your client could not have been done in the execution of his duties, and thus it is not in the interests of the State, nor the public interest, to provide legal representation at state cost to your client.”

[39] From this it is clear that in terms of paragraphs 4.1 and 4.4 of the NI the approval was denied.

Alleged incorrect legal framework

[40] Just as the alleged lack of authority was abandoned, this ground has no merit. It is quite clear that NI 1 of 2017 is the applicable policy. To look at the date of the appointment of Mr Mdluli as a guideline is quite astonishing and misguided. That would entail that any policy that the SAPS takes after the appointment of any of its members would not be applicable to them. This is simply asinine. The policy was applicable at the time that he applied for assistance and the correct legal framework was applied. This review ground is unsound and is rejected.

Alleged procedural unfairness

[41] PAJA was enacted to address section 33 of the Constitution. Direct reliance now on sections of the Constitution is in terms of the constitutional principle of subsidiary impermissible.

[42] The policy does not require that the docket be called for; the charge sheet and the summary of facts for the High Court was before the decision makers. That is all that is required; no fair procedure was not followed.

[43] As for the assertion that paragraph 5(4) of the NI was not adhered to, this was not raised in the founding or supplementary affidavit and cannot be raised in the heads of argument for the first time and must be disregarded as having no foundation in the application. The SAPS had no opportunity to answer thereto as it was not raised in the application. But, in any event, even if it was considered, it could not render the procedure unfair because a summary of facts of the matter was before the decision maker.

Unreasonableness and irrationality

[44] I have to remark that I found the submissions made that where the SAPS is the complainant in a criminal matter, it must fund the very person who the complainant is against simply intelligible. That is why the policy specifically provides that this policy is to assist members who may have committed conduct in the line of duty, but not when acts were committed with no connection to their functions as members. The decision to not approve the application was rational because it would not be in the public interest to utilise public funds to assist Mr Mdluli. If regard is had to the object of this NI the decision is rationally connected to the purpose for which the power was conferred.³

[45] The decision-makers applied their minds and the decision is reasonable. The attempt to compare this application with other such applications fails dismally for two reasons. The court cannot compare those applications as those facts are not before me. But more importantly, that is not what is to be done; each application must be reviewed on its own facts and circumstances. Also, the SAPS set out cogent reasons as to why those applications, that were in fact granted, was in line with the policy; the members were in fact acting in the course and scope of their employment.

Allegations of wrong facts and relevant facts ignored

[46] The decision of the SAPS was not based on any previous alleged conviction and this ground is baseless. No relevant facts were ignored.

Lack of policy

[47] There is no lack of policy; NI 1 of 2017 is the relevant policy. This NI is in writing, no unwritten policy is applicable. An organisation like the SAPS with many,

³ *DA v President of RSA* 2013 (1) SA 248 (CC) para [36]

many members would be hard-pressed to have unwritten policies on which reliance could be placed.

Policy to reimburse fees in the event of conviction

[48] This policy is only applicable to members who are active police members, which Mr Mdluli is not. This ground of review must be rejected. But, in any event, even if this policy was relevant this is not a factor to grant the approval against public interest.

Denial of full record

[49] This ground is to be dismissed. The information sought was related to other members and Mr Mdluli is not in law entitled to this information.

[50] Lastly, the presumption of innocence is not a consideration for this application and any such contention is dismissed. I cannot word it better than the Supreme Court of Appeal in *Zuma v Democratic Alliance and Another* 2021 (5) SA 189 (SCA) par [40]:

“I dare say the government and the public can hardly have a legitimate interest in supporting a defence against criminal charges by an incumbent or former public office bearer and especially not in respect of charges of dishonesty and corruption. Allowing officials to resist being held accountable, by drawing on state resources to obstruct or delay a prosecution, subverts the government’s (and the public’s) interest. In that regard, much has been sought to be made of the presumption of innocence.”

[51] The following order is made:

The application is dismissed with costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 24980/2022

HEARD ON: 20 September 2024

FOR THE APPLICANT: MR. I. MOTLOUNG

INSTRUCTED BY: Maluleke Seriti Makume Matlala Inc c/o Ledwaba Inc

FOR THE RESPONDENT: ADV. M.S. PHASWANE

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 2 October 2024