

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised Yes

Date: 20/09/2024

A Maier-Frawley

CASE NO: 2023/076030

In the matter between:

THE SOUTH AFRICAN ROADIES ASSOCIATION

Applicant

and

**THE NATIONAL ARTS COUNCIL OF SOUTH AFRICA
THE MINISTER OF SPORTS, ARTS & CULTURE
THE PUBLIC PROTECTOR OF SOUTH AFRICA**

First Respondent
Second Respondent
Third Respondent

J U D G M E N T

MAIER-FRAWLEY J:

1. The applicant is The South African Roadies Association ('SARA'), a non-profit organization, which has, at all times relevant to the subject matter of this case, been represented by its president, Mr Freddie Nyathela ('Mr Nyathela').

2. The first respondent is The National Arts Council of South Africa ('the NAC'), a juristic entity incorporated in terms of the National Arts Council Act, 56 of 1977 ('the NAC Act').
3. The second and third respondents did not participate in these proceedings.
4. SARA wanted to introduce youth empowering activities through its staging and lighting equipment training project, which was aimed at empowering young people (especially black youth) to acquire technical and production skills through technical equipment and production training for use within the cultural and creative arts industries. To this end, in 2014, Mr Nyathela submitted an application on behalf of SARA to the NAC for flagship funding to enable it to purchase the necessary technical equipment, which application was unsuccessful.
5. Aggrieved by the NAC's decision not to fund SARA's contemplated project, Mr Nyathela lodged a formal complaint with the office of the Public Protector in which he made allegations of maladministration, corruption, nepotism and abuse of power by the NAC. The Public Protector investigated the complaint and issued a report, which provided for certain remedial action to be undertaken by the NAC.
6. The applicant seeks an order declaring that the NAC has not complied with the remedial directives set out in the Public Protector's report of 15 June 2020,¹ together with ancillary relief aimed at enforcing compliance, and costs.

¹ The Public Protector issued certain directives concerning a proposed amendment to the NAC's *Expired Projects and Surplus Funds Policy*, which included actioning the following:

7. As regards the ancillary relief sought, the applicant complains in these proceedings that the NAC has: (i) failed to provide it with *cogent* reasons for rejecting its application in 2014 for funding to it; and (ii) failed to amend its Expired Projects and Surplus Funds Policy to bring it in line with applicable legislation and regulations. The applicant thus seeks orders directing the NAC to issue it with a letter advising it of the outcome of its 2014 application, such letter to contain cogent reasons therefore, and an order that the NAC amend the policy in line with the Public Protector's directives.

8. It is common cause on the papers that pursuant to the Public Protector's report:
 - 8.1. The NAC sent two letters of apology to Mr Nyathela containing its reason/s for declining the applicant's request for funding;
 - 8.2. The NAC attended to amend its Expired Projects and Unclaimed Funds Policy, with an amended policy having being adopted on 7 March 2022;²

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- (i) That a standard operating procedure be promulgated to cure inconsistencies in the implementation of the policy;
 - (ii) To amend and strengthen the Policy to 'close the gaps that exist in it' so as to prevent NAC staff and NAC stakeholders from exploiting the policy contrary to the ethos of fairness, equity, transparency, competition and cost effectiveness;
 - (iii) To generally align the policy with the relevant legislative framework set out in the report;
- Further salient directives included that the NAC:
- (iv) Ensures that a "Declaration of Interest Register" be put in place for all NAC employees in respect of all projects they initiated from 2015 to date, so as to manage any prevalent conflict of interest; and
 - (v) Issues a letter of apology to Mr Nyathela for the manner in which he was treated by the NAC, including a formal letter 'on the outcome of his (*sic*) 2014 application' and cogent reasons for its rejection.

Despite the Public Protector referring to '*his* 2014 application' it was not Mr Nyathela acting in his personal capacity when applying to the NAC for funding, rather, he was acting in a representative capacity on behalf of SARA in so doing.

² The amended policy is contained in annexure 'PP10' to the founding affidavit.

- 8.3. The Public Protector herself ultimately sanctioned the effected amendment/s when she confirmed in writing to the applicant, on 16 March 2023, that the NAC *"has fully implemented the remedial action of the Public Protector as taken in the report cited above"*.³
9. In its letter of 23 June 2021, the NAC indicated that SARA's application was declined as the *'NAC does not fund capital/infrastructure costs as per its funding policy'*. The NAC's funding policy is also referred to in the papers as the NAC's *'Grant Award Policy'* or the *'Grant Awarding Policy'*.⁴
10. In his written response to that letter, Mr Nyathela accused the NAC of being dishonest and took issue with the fact that the NAC's funding policy did not provide for capital/infrastructure costs to be funded, *inter alia*, on the basis that this violated the objects of the NAC Act.
11. On 13 July 2021 the NAC addressed a follow-up letter to Mr Nyathela wherein it repeated its earlier apology and further explained that *"Whilst the NAC acknowledges that the National Arts Council Act (56 of 1997) provides at section 3(g) that one of the objects of the Council is to 'Address historical imbalances in the provision of infrastructure for the promotion of the arts', the NAC has been unable to implement this objective due to insufficient budget resources and this is the rationale for the express exclusion of capital/infrastructure projects in the NAC Funding Policy"*.
12. The applicant remains disgruntled and dissatisfied with the veracity of the NAC's decision, contending that the reasons provided for the decision are untrue and invalid, and further alleging that the NAC has failed to prove that capital/infrastructure projects have been lawfully excluded in terms

³ The Public Protector's letter in question is contained in annexure 'PP7' to the founding affidavit..

⁴ Nothing turns on this as it is one and the same funding policy.

of any valid policy or that there is, or ever has been any budgetary restrictions prohibiting the funding of these projects.

13. The applicant essentially relies on 2 complaints vis a vis the amended Expired Projects and Unclaimed Funds Policy, namely: (i) that the amended policy provides no safeguards against employees of the NAC acting in conflict of interest with the (NAC) in the disbursement of funds; and (ii) that the Grant Award policy remains an open ended, arbitrary, discretionary and irrational model, not complying with the relevant prevailing legislation, the further contention being that 'no policies are worked in on how an aggrieved applicant for funding is to be dealt with, and the procedures available in the event of an application being unsuccessful'.

14. These complaints were countered in the answering affidavit, as follows. As to the first, one of the remedial directives of the Public Protector required the NAC to ensure that a 'Declaration of Interest Register' be put in place for all NAC employees in respect of all projects they initiated from 2015 to date, so as to manage any prevalent conflict of interest. The applicant has not alleged any non-compliance therewith. The NAC points out that it formulated, approved and implemented a 'Declaration of interest in Expired Projects' document, which requires each NAC employee, who is still employed by the NAC, to sign an undertaking declaring inter alia, that: *"I understand that if I, my family members and close relatives and personal friends have any direct or indirect interest in any organization or beneficiary that were funded from the Expired Projects and Surplus Funds-Annexure A listed below of the National Arts Council, I shall make a declaration to the Management Committee."* The declaration of interest included specific reference to projects relevant to expired

projects and surplus funds during the years 2014 up to 2017, and provided a list of the details of each of these projects. The NAC thus contends that the now peremptory declarations of interest signed by each NAC employee in respect of the policy do provide the necessary safeguards against employees of the NAC acting in conflict of interest with the NAC in the disbursement of funds.

15. As to the second, the NAC points out that the Grants Award Policy never formed part of the Public Protector's investigation and report and that no remedial action was either suggested or required in relation to the NAC's Grant Award policy. Thus, any consideration of its arbitrariness or the discretions provided for therein is wholly irrelevant for the purposes of this dispute. In any event, the execution by the NAC of its mandate in terms of the NAC Act is dependent on a limited allocation to it of funds by the fiscus. The decision not to fund capital/infrastructure projects is a decision which is policy-laden and polycentric, given the fiscal constraints applicable in the just and equitable distribution of benevolent funding to a wide range of activities and initiatives that fall under the umbrella of the NAC's mandate in terms of the NAC Act. More particularly, the applicant has never previously challenged the NAC's funding guidelines, where this policy decision not to fund capital/infrastructure projects, derives from. Nor has it demanded or suggested a review or reconsideration of the NAC's decision not to fund capital/infrastructure projects.
16. As the NAC further explains in the answering affidavit, the NAC's Expired Projects and Unclaimed Funds Policy provides guidelines within which the NAC must consider and find previously approved and allocated funds to have become expired or unclaimed. This policy contains no alternative or different process in the consideration of the re-allocation or

redeployment of such expired or unclaimed funds, but in fact stipulates that these funds simply go back into the proverbial pot, when providing that 'Unclaimed funds will be reallocated and administered through a *call for* project applications in terms of the Grant Awarding Policy.' Accordingly, once these funds again become available to the NAC, they are dealt with in the same manner as other funds allocated to the NAC by the fiscus.

17. In the replying affidavit, the applicant sought to challenge the merits of the NAC's decision not to fund capital/infrastructure projects by disputing the validity of the NAC's funding policy (i.e., the Grant Award Policy).

Discussion

18. As these are motion proceedings, the Plascon-Evans Rule applies. The well-known Plascon-Evans test,⁵ as adumbrated in *National Director of Public Prosecutions v Zuma*,⁶ requires the court to accept the version of the NAC in so far as there is any dispute of fact and its version is not far-fetched, not credible or implausible.
19. The existence of a valid funding policy and the legitimacy of such policy was challenged by the applicant under the guise of the NAC having failed to provide *cogent* reasons for its decision to exclude funding in respect of capital/infrastructure costs, contrary to its mandate under the NAC Act to address historical imbalances in the provision of infrastructure for the promotion of the arts. The applicant contends that the Public protector's directive to provide it with *cogent* reasons for the refusal of the

⁵ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635D.

⁶ National Director of Public Prosecutions v Zuma [2009] ZASCA 1 2009 (1) SACR 361 (SCA) para 26.

applicant's funding application meant that the NAC had to provide a clear, logical and convincing reason therefore.

20. In terms of the Public Protector's report, the NAC was obliged to provide *cogent* reasons for its decision to reject the applicant's funding application. The intention behind this requirement must be determined by means of an interpretative exercise, by applying the well-known triad of text, context and purpose. The process is objective. The context is to be gleaned from the backdrop the applicant's complaint, namely, that in 2014 and 2015 two inconsistent reasons had been given for the NAC's refusal of the funding application, which the NAC later recognized were inexact. The purpose of providing reasons was to enable the recipient (Mr Nyathela on behalf of SARA) to understand clearly why the funding application had not succeeded, so as to put him in the position to challenge the merits (soundness) of the decision by means of further action, if so advised. In that sense, the *merits* of the decision, namely, the rights or wrongs of the decision taken, ought not to be confused with the provision (act of informing the recipient) of the reason for the decision taken. The word *cogent*, in context, denotes the provision by the NAC of clear, coherent, and not inconsistent *reasons* for its decision not to provide funding. The word 'cogent' cannot relate to the subjective or inherent convincibility, plausibility or acceptability to the applicant of the NAC's *decision* as such, as Mr Nyathela seems to believe. The intention was for the NAC to provide reasons that are clearly articulated, in order to be understood – in other words, reasons that are not vague or contradictory, but transparent.
21. Put differently, it was not intended for the respondent, in providing reasons, to convince the applicant as to the legitimacy or validity of its

decision. If, upon receipt of reasons, the applicant wished to challenge the merits of the decision (for example on the basis that the decision to decline the application for funding was based on arbitrary, unconvincing, unreasonable or illegitimate grounds), he had redress in the form of an internal appeal to the Minister in terms of section 12 of the NAC Act, or the right under PAJA to seek a review of the decision by the court after exhausting internal remedies. The applicant did neither. He now complains that the reasons furnished pursuant to the remedial action recommended by the PP, are unconvincing, untrue and unsubstantiated, which, as indicated above, relates to the legitimacy or validity of the decision, and not to the clarity or lucidity of the reasons furnished. Seen from that perspective, the applicant's challenge to the validity of the decision pursuant to being furnished with the reason therefor, is, as the NAC contends, indeed an impermissible attempt at a belated review of the NAC's decision via the back door.

22. Had a different procedure been followed, the result could well have been different for the applicant.
23. As the applicant itself concedes in its replying affidavit, the Expired Projects and Unclaimed Funds Policy does not per se authorize NAC employees to allocate funds. The award of funds occurs through the process provided for in the Grant Award Policy, which policy did not form part of the Public Protector's investigation or report. In so far as the applicant conflated these two distinct policies, it erred.
24. The respondent's version cannot be rejected as implausible. Having regard to the common cause facts, and the respondent's version, I am not persuaded that the Applicant has established non-compliance by the NAC

with the remedial directives of the Public Protector. In the result, the application falls to be dismissed.

25. As regards costs, the general rule applies, namely, that the successful party is entitled to its costs.

26. Accordingly, the application is dismissed with costs.



AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 02/05/2024
Judgment delivered 20/09/2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 15 March 2024.

APPEARANCES:

Counsel for Applicant:	Adv ZF Kriel
Instructed by:	Mthembu Inc Attorneys
Counsel for First Respondent:	Adv WJ Bezuidenhout
Instructed by:	Moodie & Robertson Attorneys