

✓ 29/08/2018
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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 99246/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>24/8/2018</u>	
DATE	<u>[Signature]</u> SIGNATURE

In the matter between:

MUZIKAYIFANI ANDRIAS GAMEDE

Applicant

and

THE PUBLIC PROTECTOR

Respondent

JUDGEMENT

DE VOS J:

- [1] This is a review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), resulting from a refusal by the respondent to furnish information and documents requested by the applicant during the preliminary investigation process. The applicant also seeks further and ancillary relief.

[2] The applicant, Muzikayifani Andrias Gamede, is the Member of the Executive Council (MEC) for the Department of Agriculture, Rural Development, Land and Environmental Affairs for the Mpumalanga Province. The respondent, the Public Protector, received a complaint against him in his official capacity, regarding certain allegations of maladministration, corruption and irregularities in the Department of which he is the MEC. The Public Protector undertook a preliminary investigation, in the course of which she informed the applicant about the allegations, and asked him to make certain information available to her.

[3] The applicant brought this application as a result of the investigation. The relevant factual background will be dealt with later in this judgement. The applicant seeks a review of the Public Protector's refusal to provide certain information and documents requested by him. The application is brought in terms of PAJA and the principle of legality, on the basis that the Public Protector's refusal is an administrative decision and subject to review.

In addition to setting aside the purported administrative decision the applicant seeks an order substituting the Public Protector's refusal with an order directing her to produce the requested information and documents within 30 days of the date of the order.

[4] The Public Protector opposes this application on the basis that no reviewable 'decision' has been taken in the preliminary stage of the investigation. Therefore, the request for information and its subsequent refusal does not constitute administrative action for the purposes of PAJA and is not subject to review. Alternatively, and even if the refusal is reviewable, the respondent contends that the

applicant has not made out a case for a decision to be set aside. It is further contended that substitution is an extraordinary remedy to be used in exceptional circumstances and the applicant has laid no basis for this court to grant such relief.

- [5] The prayers in this application are limited to the founding affidavit and the affidavits filed in opposition thereto. The applicant did not file any replying affidavit. The application is not based on any real dispute of facts. The issue before me is thus, strictly speaking, one of law. To the extent that any factual issue may arise, as with all motion proceedings, the *Plascon-Evans*-rule applies; see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). Final relief may therefore only be granted if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavit, justify the granting of such relief; see *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892H-J; *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) at 40E-H.

Background to the Application:

- [6] In June 2015 an anonymous complaint was lodged with the Office of the Public Protector against the applicant in his capacity as a Member of the Executive Committee for the Department of Rural Development, Land and Environmental Affairs: Mpumalanga Provincial Government. The applicant was accused of maladministration, corruption, tender irregularities and infringement of the Department's procurement processes and procedures.
- [7] A lead investigator was assigned by the Public Protector to assist in the investigation of the complaints as envisioned by section 3 of the Public Protector Act 23 of 1994 (the Act).

- [8] The respondent, upon receiving the complaint, instituted a preliminary investigation to determine the merit of the complaint and how best to conduct the investigation. This is the respondent's usual procedure. Only after the preliminary investigation is complete, and the complaint is found to be substantive, will a full-scale investigation be launched.
- [9] The investigator allocated to the matter undertook an information gathering exercise, including the collation and procurement of information, and interaction with the complainant, the applicant and factual witnesses.
- [10] On 17 June 2015 the respondent wrote to the applicant as per annexure 'AG2', wherein the applicant was informed that:
- [a] the respondent was investigating a complaint lodged against him in his official capacity in connection with allegations of maladministration, corruption, tender irregularities and infringement of procurement processes and procedures;
 - [b] the investigations were being conducted in terms of section 182(1) of the Constitution of the Republic of South Africa 1996, read with sections 6 and 7 of the Public Protector Act;
 - [c] in essence, the allegations against the applicant are set out in paragraph 3 of 'AG2' and are:
 - [i] that he used his position as MEC to influence the awards of countless contracts and/or tenders to a company only known as Lwati, which was allegedly owned by an entrepreneur known as Nunu McDonald, in contravention of the Department's Supply Chain Management

- processes and procedures; and that he had a romantic relationship with Ms McDonald, and has a child with her;
- [ii] that he disregarded the Departmental procurement processes and procedures and directed that contracts in the Department be awarded to his friends and associates;
 - [iii] that he unduly interfered with the appointment of personnel to serve in the bid committees and directed that his friends and associates be prioritised ostensibly to ensure that he is in control of those bid committees;
 - [iv] that he removed a competent, honest, and efficient chief financial officer, Mr Cyril Dlamini, and replaced him with a more compliant CFO, Ms F.A. Ngobeni; and also removed the head of the SCM unit, Mr Monareng, and replaced him with a more compliant head, Mr O.B. Magagula;
 - [v] appointed his associate, Mr Henry Ndlovu, to head the Masibuye eMasimini programme for his own benefit, and that during the Christmas period of 2014, Mr Ndlovu used State resources within the programme to plough and plant on applicant's farms;
 - [vi] that he bestowed upon a certain Mr Venti Mahlangu strategic powers and authority which in law, and according to his job description, he did not possess, and promising him an appointment as chief director and curtailed the powers and responsibilities of Mr I.L. Silinda, who was the chief director, and bestowed upon Mr Mahlangu the powers and authority with the view of furthering his alleged corrupt and improper practices within the Department;

Public Protector in terms of this right. Such a request was never made to the respondent, neither in the applicant's letter dated 30 September 2015, nor in his letter dated 02 November 2015. The applicant is thus not seeking to set aside and substitute the decision of the respondent in this regard. Accordingly, this order cannot be granted.

[70] **ACCORDINGLY, THE FOLLOWING ORDER IS MADE:**

The application is dismissed with costs.

A handwritten signature in dark ink, appearing to read 'De Vos', is written over a horizontal line.

DE VOS J

**JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA**

Date of Hearing: 25 April 2018

Date of Judgement: 29 August 2018

Appearances:

For the Applicant: Adv. A den Haartog

Instructed by: Ranamane Mokalane Incorporated
c/o Matshego Ramagaga Attorneys

For the Respondent: Adv. S Yacoob

Instructed by: Bowman Gilfillan Incorporated
c/o Macrobert Attorneys