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IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

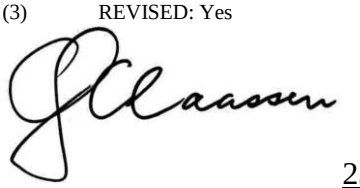
JOHANNESBURG

CASE NO: 2012/1095

DATE: 2013/06/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: Yes



23 July 2013

In the matter between:

MINISTER OF POLICE Applicant

And

HUMAN RIGHTS COMMISSION 1st Respondent

FW DE KLERK FOUNDATION CENTRE FOR CONSTITUTIONAL RIGHTS 2nd Respondent

SHUMANI MAXWELE 3rd Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] The applicant in this matter is the Minister of Police. In paragraph 1 of the notice of motion the following relief is sought:

> "1. Reviewing and setting aside the finding of the first respondent on appeal, dated 24 November 2011 in accordance with the provisions of Section 6 of the Promotion of Administrative Justice Act 3 of 2000."

[2] The notice of motion also seeks an order for the first respondent, who is the Human Rights Commission, to pay the costs of the application.

THE FACTS

[3] The background facts to this matter arise from an arrest affected by the officers in the employ of the applicant, upon the third respondent Mr Maxwele on 10 February 2010. Shortly thereafter on 3 March 2010 the second respondent, who is the FW de Klerk Foundation Centre for Constitutional Rights, filed a complaint on behalf of Mr Maxwele in terms of Section 7(1)(c) of the Human Rights Commission Act. Two newspaper articles corroborating the complaint was attached to the complaint.

[4] Since 7 May 2010 the applicant was requested to respondent to the complaint but failed to do so despite numerous requests. Only on 28 April 2011 did the applicant write to the first respondent acknowledging receipt of the latter's letter dated 6 April 2011. The latter merely indicated that the National Prosecuting Authority decided not to prosecute the criminal case instituted against the third respondent and recorded that the third respondent had instituted a civil claim against the applicant by issuing summons out of the Western Cape High Court under case number 2010/21885.

[5] On 6 July 2011 the first respondent handed down its recommendations and findings. Its first finding in paragraph 10 reads as follows:

> "Mr Maxwele's following human rights were violated by the respondents, human dignity (Section 10); freedom and security of the person (Section 12); privacy (Section 14); freedom of expression and peaceful/unarmed demonstration (Sections 16 and 17); political choice (Section 19); rights of detained persons (Section 35)."

[6] The first respondent further recommended that the applicant on behalf of all the members and employees who were involved in the incident surrounding the arrest and treatment of the third respondent, make a full written apology for their unlawful and unconstitutional conduct, which apology was to be submitted to the first respondent within thirty days. Needless to say no such apology has yet been affected by the applicant or any of his officers and/or employees in regard to the arrest.

[7] On 19 July 2011 the applicant acknowledged receipt of the findings. Subsequent thereto the applicant lodged an appeal against the findings and recommendations of the first respondent, which appeal was dismissed on 24 November 2011. Thereafter on 13 January 2012 the applicant issued the present notice of motion against the first, second and third respondents, and ultimately filed his replying affidavit some 6 months later on 2 July 2012.

[8] Another year went by and nothing was done. Thereafter, the first respondent eventually filed a further supplementary answering affidavit, and in a letter of 9 May 2013 advised the attorneys of record acting on behalf of the applicant that the respondents are intending to set the matter down for hearing on 4 June 2013. This gave the applicant ample opportunity to prepare for the hearing of this matter in this court.

THE MERITS OF THE REVIEW

[9] As to the merits of the matter, I can do no better than to refer to a portion in the second respondent's supporting affidavit wherein the following is stated:

> "The attitude of the police members involved reveals a shocking ignorance of the Bill of Rights and of their overriding duty to uphold the Constitution and the rights that it assures. It is reminiscent precisely of the attitude of intolerance, the unfettered power and the lack of accountability that characterised the conduct of the policy during the apartheid regime, and that resulted in the widespread suppression of the freedoms and rights of the people of our country."

[10] In its recommendations, the first respondent upheld that contention, and in my view quite correctly so.

[11] There is, however, a preliminary point which, in my view, disposes of this matter altogether. The question is whether the appeal is a reviewable decision pursuant to the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The definition in Section 1 of "administrative action" in the Act states the following:

> "'**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…"

[12] In my view, the appeal procedure and the subsequent dismissal of the appeal does not fall within the categorisation of an administrative act as set out in the definition referred to above. I, therefore, agree with the submission made by Ms McLane on behalf of the respondents that this matter is not properly before this court as a reviewable matter in terms of PAJA. That conclusion then dispenses with the necessity to deal with the grounds of review.

[13] Ms Makopo, acting on behalf of the applicant, actually only argued one issue. She submitted that the pending civil case for damages which has been instituted by the third respondent against the applicant might be prejudiced viewed from the applicant's point of view, by the first respondent's recommendation that the applicant and the employees involved in the arrest are to make a full written apology for their conduct during the arrest.

[14] Ms McLane quite correctly countered this submission by saying that the findings and the recommendations by the first respondent are not enforceable by law. The first respondent does have the right in terms of the Human Rights Commission Act, to come to court to seek to enforce its findings and recommendations, but only then in the manner of a retrial before the court.

CONCLUSION

[15] I am therefore of the view that there can be no actual prejudice whatsoever to the applicant if the findings and recommendations remain standing pending the conclusion of the civil matter against the applicant. There is, therefore, in my view, no case made out whatsoever for the relief sought in the notice of motion.

[16] I need to say something about the conduct of the applicant in delaying a response for almost a period of two years before reacting to the first respondent's communications. I find it disconcerting that a government officer and his department, displayed such a non-chalant attitude to the rights and duties imposed by the Constitution upon them. If it is not contemptuous of the first respondent as a constitutional institution then at the very least it shows disrespect for the first respondent's standing as a

body instituted by the Constitution, tasked with the duty to investigate incidents placed before it where constitutional rights have been violated.

[17] The applicant, as an organ or state and member of the executive, is duty-bound to give full cooperation and show respect to the first respondent to enable it to execute its functions properly, timeously and expeditiously. The conduct of the applicant in this particular matter falls far short of its constitutional duty to assist the first respondent in the exercise of its constitutional mandate.

[18] In my view this is an indication where the applicant should be made aware of the displeasure of this court by a punitive order for costs.

[19] For the reasons set out above I therefore make the following order: The application is dismissed with costs, which costs include the costs occasioned by two counsel, payable at the scale of attorney and own client.

DATED THE 23rd DAY OF July 2013 AT JOHANNESBURG

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv N. Makopo
Counsel for the Respondents: Adv McLane