IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 75594/2019

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

[redacted]

26 January 2022
DATE

L.B. Vuma

Heard on: 15 October 2021
Delivered on: 26 January 2022

In the matter between:

MAKHOSINI MSIBI	**Applicant**
and	
THE OFFICE OF THE PUBLIC PROTECTOR	**First Respondent**
BUSISIWE MKHWEBANE	**Second Respondent**
ROAD TRAFFIC MANAGEMENT CORPORATION	**Third Respondent**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] The Office of the Public Protector is an institution created in terms of Chapter 9 of the Constitution and is aimed at strengthening our constitutional democracy independently, impartially and effectively. In order to achieve its objective to strengthen constitutional democracy, this Chapter 9 Institution is required to be subject only to the Constitution and the law. In the same vein, the Public Protector is further required to exercise the powers and functions vested in her without fear, favour or prejudice.

[2] Alive to the above, this Rule 53 review application follows a Part A and B urgent application launched by the applicant on 11 October 2019. Part A of the Notice of Motion sought an interim interdict of the remedial action directed by the Public Protector contained in paragraph 7 of the Public Protector's Report No. 69 of 2019/20 dated 16 September 2019 ("the report") pending the final determination of this review application as set out in Part B of the Notice of Motion.

[3] Part B of the Notice of Motion seeks an order in the following terms:

> "*1. The remedial action directed by the Public Protector in paragraph 7 of the Report No. 69 of 2019/20 ("the Report") dated 16 September 2019 is reviewed and set aside in its entirety;*
>
> *2. The findings in the Report related to the following issues are reviewed and set aside:*
>
> *2.1 Whether Ms. Julia Manamela was improperly appointed in the Supply Chain Management Unit;*

2.2 Whether the bodyguards assigned for the protection of the CEO were paid excessive overtime; and

2.3. Whether lawyers and legal firms were improperly appointed.

3. It is declared that, in terms of section 172(1)(a) read with section 181(2) of the Constitution, that the Public Protector failed to comply with her constitutional obligations;

4. The First Respondent is ordered to pay the costs of this application including the costs of two counsel, which costs shall also be paid jointly and severally by the Third Respondent in the event that it opposes the relief sought and;

5. Further and/or alternative relief".

[4] Effectively, Part B of the Notice of Motion seeks to review and set aside the Report of the Public Protector in its entirety.

[5] To give context, the applicant is the Chief Executive Officer of the third respondent, the Road Traffic Management Corporation.

[6] The first respondent is the Office of the Public Protector of the Republic of South Africa, an institution established by sections 181 and 193 of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter "the Constitution").

[7] The second respondent is Busisiswe Mkhwebane who is the Public Protector (hereinafter "the Public Protector") and is cited in her personal capacity. The personal costs order initially sought against her was withdrawn mid-hearing by agreement between the parties.

[8] The third respondent is the Road Traffic Management Corporation, (hereinafter "the RTMC") a state-owned juristic entity as provided for in terms of section 3 of the Road Traffic Management Corporation Act 20 of 1999.

[9] To the extent that RTMC did not oppose the relief sought, the applicant seeks no relief against it considering that it has in fact been cited herein because it has been directed to implement the remedial action by the Public Protector in her report and/or because it may have an interest in the proceedings.

[10] For what it's worth, may I take this opportunity and thank both Counsel for extending themselves and indulged me pertaining to my request for their assistance in regard to the meaning and/or definition of 'maladministration', in light of the fact that all the Acts relied on by both parties are silent in this regard. I am truly indebted.

[11] Of chief importance is the confirmation of the 'concession' made by the first and second respondent at the outset of the hearing to the relief sought by the applicant in paragraph 1 of Part B in terms of the Notice of Motion in respect of the proposed remedial action that same may indeed be ordered by this court in light of the ***President of the***

Republic v Public Protector decision cited below herein. That concession accordingly disposes of this issue for purposes of determination.

[12] Lastly, the applicant submits that given that the grounds of his review application are both procedural and substantive in nature, once this court finds in his favour in respect of his procedural grounds of review, such a finding should be made to be dispositive of the entire application entitling him to the relief he seeks.

FACTUAL BACKGROUND

[13] The events outlined hereinafter are the precursor to the impugned report published by the Public Protector on 16 September 2019 in terms of section 182(1)(b) of the Public Protector Act 23 of 1994 entitled: "*Report on an investigation into allegations of procurement irregularities, maladministration and nepotism within the Road Traffic Management Corporation (RTMC) by the CEO, Advocate Makhosini Msibi".*

[14] On or about 18 November 2016 the first respondent directed a letter to the Chairman of the Board of the RTMC regarding the investigation into allegations of a complaint that was lodged anonymously on 4 April 2016. Of the original nine issues that speak to the allegations of procurement irregularities, maladministration and nepotism within the RTMC that were perpetrated and/or furthered by the applicant which are raised in the report, the Public Protector found that only three thereof were substantiated. In the letter to the RTMC Board, the Public Protector listed the issues under investigation and requested a response

to same as well as specific documentation that would assist her office with the investigation.

[15] On or about 2nd December 2016 the RTMC delivered its first response to the allegations in the complaint, which response it supplemented on 28 February 2018.

[16] On or about 26 March 2019, the Public Protector issued a notice in terms of section 7(9)(a) of the Act to the RTMC and the applicant. The RTMC responded to the aforementioned notice on 2nd April 2019 indicating that it takes note of the preliminary findings contained therein.

[17] The applicant delivered his first response to the notice to the Public Protector on or about 10 April 2019 and met with her in person on 12 April 2019, after which he supplemented his 10 April 2019 response in a letter dated 16 April 2019. The applicant received the 16 September 2019 report a day after its release.

[18] As already stated above, of the nine issues identified in the complaint, the Public Protector found six to be unsubstantiated, thus finding that the following three have been substantiated:

18.1 That an employee named Ms. Julia Manamela was improperly employed to a position in the Supply Chain Management Unit and that the appointment amounted to maladministration as contemplated by section 6(4) of the Act;

18.2 That the bodyguards assigned to the applicant for his protection were paid excessive overtime and their appointment amounted to maladministration as per section 6(4) of the Act; and

18.3 That the lawyers and/or legal firms were improperly appointed to conduct disciplinary cases against employees and that their appointment amounted to improper conduct and maladministration in terms of section 6(4) of the Act.

[19] Following her investigation of the above three complaints, the Public Protector in her report found that the applicant as a public official, had failed to adhere to the standard as is required in section 195 of Constitution and proposed a remedial action in her report.

THE APPLICANT'S GROUNDS OF REVIEW

[20] The applicant raises two grounds of review, *viz*, procedural and substantive.

20.1 *In re* the procedural grounds, the applicant argues that the Public Protector violated his right to procedural fairness in that:

20.1.1 in conducting her investigations she failed to hear him (the applicant); and

20.1.2. she failed to disclose the proposed remedial action to the him prior to issuing the impugned report, thus violating his right to be afforded a reasonable opportunity to make representations on matters that detrimentally affect his interests.

20.2 *In re* the substantive grounds, the applicant argues that the Public Protector's findings and conclusions and the remedial action that she prescribed are either:

20.2.1. Based on material errors of law and/or fact in the conclusions that she reached;

20.2.2. Irrational;

20.2.3. Not rationally connected to the evidence that served before her; or

20.2.4 A combination of the above.

[21] In this regard the applicant submits that all of the above grounds of review bear the potential to overlap and that all six of them can be accommodated under PAJA and the principle of legality as the applicant relies on both.

THE LEGAL PRINCIPLES

[22] Section 7(9)(a) of the Public Protector Act 23 of 1994 provides that:

"*If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to*

respond in connection therewith in any manner that may be expedient under the circumstances".

[23] Section 33(1) of the Constitution provides that:

"*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*"

[24] Section 172(1)(a) of the Constitution provides:

"*(1) When deciding a constitutional matter within its power, a court –*

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[25] Section 181 of the Constitution provides:

"(1) The following state institutions strengthen constitutional democracy in the Republic:

(a) The Public Protector....

(b) ……

(2) These institutions are independent, and subject only to the Constitution and the law, ……".

[26] Section 182 of the Act provides:

"*(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 result in any impropriety or prejudice;

(b) to report on that conduct; and to take appropriate remedial action."

[27] Section 195(1)(a) of the Constitution provides that:

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) a high standard of professional ethics must be promoted and maintained.

(b) …".

[28] In ***President of the Republic of South Africa v Public Protector and Others (Information Regulator as amicus curiae) 2020 (5) BCLR 513 (GP) at 156 -)***, the Full Court held:

"*156.* Section 7(9)(a) of the Act *obliges the Public Protector to afford a hearing to persons implicated in any investigation. It provides that:*

'If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person

an opportunity to respond in connection therewith in any manner that may be expedient under the circumstances".

157. *In addition, the right to be afforded a reasonable opportunity to make representations on matters that may detrimentally affect one's interests is a well-established principle of natural justice and of our common law. It is an important component of the right to just administrative justice and is expressly recognized as such in the Constitution. Whether or not a decision decision-maker has complied with this obligation or not will depend on the facts of a particular case.*

158. *The Public Protector's stance is that section 7(9)(a) does not oblige her to give a person being investigated a hearing on her contemplated remedial action. She says that in her notice to the President she forewarned him that the remedial action could be a referral of the matter to the relevant authorities. She contends that this was sufficient compliance with her obligations under the audi alteram partem principle.*

159. *Section 7(9)(a) does not expressly require the Public Protector to include her contemplated remedial action in the notice to a party under investigation. However, that does not mean that the Public Protector may not be obliged to do so. The facts may be such that in order to constitute compliance with a person's constitutional right to just administrative action, she should afford them this opportunity.*

160. In this case, the remedial action directed by the Public Protector has potentially serious implications for the President…..

162. Given these serious implications of the remedial action, the President's right to just administrative action placed an obligation on the Public Protector to be forewarned of them, and to be given an opportunity to make representations. She failed to comply with this obligation. In the circumstances, the remedial action she included in her report falls to be reviewed and set aside."

[29] In regard to section 195 of the Constitution, the Constitutional Court in ***Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC) at para 176*** stated that:

"*Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of state contract for goods and services*".

[30] In ***South African Reserve Bank v Public Protector [2017] 4 All SA 269 (GP); 2017 (6) SA 198 (GP)*** Murphy J stated:

> "*It is disconcerting that [the Public Protector] seems impervious to the criticism, or otherwise disinclined to address it. This court is not unsympathetic to the difficult task of the Public Protector. She is expected to deal with at times complex and challenging matters with limited resources and without the benefit of rigorous forensic techniques. It is easy to err in informal-alternative dispute resolution processes. However, there is no getting away from the fact that the Public Protector is the constitutionally appointed custodian of legality and due process in the public administration. She risks the charge of hypocrisy and incompetence if she does not hold herself to an equal or higher standard than that to which she holds those subject to her writ. A dismissive and procedurally unfair approach by the Public Protector to important matter placed before her by prominent role players in the affairs of state will tarnish her reputation and damage the legitimacy of the office.*"

[31] To be lawful, the Public Protector's exercise of power must be both non-arbitrary and rational. The test for rationality is explained by Navsa ADP in the Supreme Court of Appeal in the matter of ***Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another 2018 (1) SA 200 (SCA) at para 82***:

> "*Rationality review is concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between*

the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Rationality review also covers the process by which the decision is made and the decision itself must be rational (my emphasis). *If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose*."

[32] In ***Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC) at paras 39 - 40***, it was held that all public power can also be challenged that the decision-maker failed to take into account relevant considerations.

[33] In ***Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd …***, Plasket J stated that:

"*In order to be rational, the decision must be 'based on accurate findings of fact and a correct application of the law*."

[34] The first and second respondent submit that the following are requirements of procedural fairness in multi-staged decisions which they further argue, accords with an investigation in terms of section 7 and what is stated by De Ville states in ***Judicial Review of Administrative Action in South Africa, Revised first Edition, p 239***:

"*Administrative decisions are often taken at various stages….The question that arises is at which point in the process the requirements of procedural fairness (and especially the audi alteram rule) should find application. The more recent approach of the courts is to hold that one must enquire into the context of the whole decision-making process. What fairness requires is to be determined with reference to administrative efficiency, the prejudice suffered at a specific stage of the process and the opportunities given to minimize or everse such prejudice at any later stage*."

[35] In ***Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) paras 81 – 85***, the Constitutional Court held that in exercising judicial review, a court must declare conduct that is inconsistent with the Constitution to be unlawful, before exercising its remedial discretion to grant a just and equitable order.

ISSUES FOR DETERMINATION

[36] As already stated in paragraph 11 above, the issue in regard to prayer 1 of Part B of the Notice of Motion, namely, that the remedial action directed by the Public Protector in paragraph 7 of the Report No. 69 of 2019/20 ("the Report") dated 16 September 2019 be reviewed and set aside in its entirety have since become moot for determination purposes in light of the first and second respondent's concession. Consequently the issues remaining for determination are the following:

36.1 Whether the applicant's right to procedural fairness was infringed upon and more particularly, whether:

36.1.1 It is required in terms of the provisions of section 7 the Public Protector Act to grant the applicant an opportunity to respond to the complaint in the preliminary stages of the investigation, that is, before the section 7(9)(a) notice is issued.

36.1.2 The Public Protector was required to provide the applicant with the evidence that the Public Protector used in arriving at the preliminary findings as recorded in the section 7(9)(a) notice, under circumstances where the applicant provided the evidence to the Public Protector.

36.2. Whether the Public Protector's failure to disclose the intended remedial action in the section 7(9)(a) notice renders the entire report reviewable or whether the omission to grant the applicant that opportunity is severable from the remainder of the report.

36.3. Whether the employment or recruitment of Ms Julia Manamela in the Supply Chain Management unit of RTMC met the requirements of fairness and transparency set out in section 195(1) of the Constitution; or put differently, whether she was improperly employed in the position of Admin Assistant: Travel.

36.4 Whether the overtime worked and claimed by bodyguards assigned for the protection of the applicant was in excess of the requirements of the BCEA and RTMC's Policy on conditions of service.

36.5 Whether the appointment of Senior Counsel was unnecessary and contrary to the obligations of RTMC to utilize state resources efficiently, effectively and economically as required by section 195(1) of the Constitution.

SUBMISSIONS BY THE APPLICANT

[37] Despite the Public Protector's 'concession' in regard to the reviewing and setting aside of the report, the applicant contends that the impugned report and the adverse findings contained therein is demonstrative of the Public Protector's blatant disregard of her constitutional mandate and her failure to conduct herself in an objective manner as would be expected of a person occupying her office, arguing further that the report is plagued with factual inaccuracies, illogical conclusions and errors of law. It is plainly irrational, unreasonable and unlawful, thus making it liable to be reviewed and set aside on multiple grounds, including on the principle of legality and several other grounds as set out in section 6 of the Promotion of Administration of Justice Act 3 of 2000 ("PAJA").

[38] The applicant states that his contention is premised on the fact that despite him being the subject of the investigation, the Public Protector never afforded him the same opportunity as the RTMC to provide a response to the allegations and that already on or about the 26th March 2019 when the Public Protector issued the section 7(9)(a) notice to both the RTMC and himself in which he was requested to provide a response in relation to the allegations, his reputation was damaged. The applicant was being requested to provide a response almost three years after the anonymous complaint was allegedly lodged. The applicant further argues that the Public Protector mischaracterizes his complaint as being

about him not having knowledge of the allegations made against him or investigations that were underway whereas in fact his complaint has always been about the Public Protector's failure to engage him directly prior to releasing her adverse preliminary findings, which he contends, is what is at the heart of the infringement of his administrative and constitutional right to be heard.

[39] Whilst acknowledging the Public Protector's competence to determine the format and procedure of the investigation in terms of section 7 of the Act, the applicant argues that such format and process must conform to a procedure that is ultimately rational and procedurally fair to an accused party. The applicant submits that *in casu* the Public Protector has breached the *audi alteram partem* principle in this regard in that he was not afforded the opportunity to exercise his right to be heard before the preliminary findings were made and the section 7(9)(a) notice issued, including the proposed remedial action to which he was never afforded an opportunity to make representations before the release of the report. Thus, the applicant cites ***President v Public Protector*** above and argues that the report of the Public Protector be reviewed and set aside in its entirety in that she acted in a procedurally irrational and unfair manner, thus failing to adhere to her statutory mandate, both in respect of her preliminary findings and the proposed remedial action.

[40] The applicant further argues that the Public Protector was required to provide him with the evidence that she used in arriving at the preliminary findings as recorded in the section 7(9)(a) notice, this, despite him being the person who provided such evidence to the Public Protector *via* the RTMC Board in response to the Public Protector's request. He argues that she was administratively duty-bound nevertheless.

[41] The applicant makes extensive submissions in regard to the substantive grounds of review as outlined in paragraphs 36.3 to 36.5 above. However, as already stated above, he argues that to the extent that the court upholds the procedural grounds of this review as set out above, that same should be dispositive of this matter in its entirety.

SUBMISSIONS BY THE RESPONDENT

[42] In rebuttal of the issues raised by the applicant, the Public Protector argues that the applicant's grounds to review and set aside the report are unmeritorious if regard is had to both section 195(1)(a) of the Constitution and ***Glenister*** above and further states the following:

42.1. That since the Board of the RTMC was requested to provide a response to the complaint and whereas the applicant is a member of the Board, he had knowledge of the complaint;

42.2. Second to para 42.1 above, the applicant, in his capacity as an *ex officio* Board member assisted with the compiling of documentation to her office and that since all of the evidence that served before her office was furnished by the RTMC, the request for information was disingenuous;

42.3. That since no additional documentation was later provided by the applicant, it evidences that the applicant had nothing to add to the investigations;

42.4. That section 7 of the Public Protector Act confers upon her the right to determine the format and procedure to be followed in an investigation and

only requires her office to seek a response to the complaint once it appears that the applicant is implicated in the matter, which she purportedly did. Following on from this, as the Public Protector contends, there is no statutory obligation on her to seek the applicant's response or input during the investigation prior to releasing her preliminary findings;

42.5 That over and above paragraph 36.4 above, the need to engage the applicant only arises when the requirements set out in section 7(9)(a) have been met and which provides the applicant with an opportunity to respond and furnish his side of the story in compliance with the *audi alteram partem* rule. This requirement, the first and second respondents argue, the Public Protector met.

42.6 That any prejudice that the applicant may have suffered in not being granted a hearing prior to the Public Protector issuing the notice *vis-à-vis* the preliminary investigations, was cured by the Public Protector granting him ample opportunity after the determination in terms of section 7(9)(a) of the Act, to respond to the contents of the notice. In response to the section 7(9)(a) notice, the applicant filed two written responses (on 10 and 16th April 2019 respectively) and further attended an in-person meeting with the Public Protector on 12 April 2019. The Public Protector took the applicant's responses into consideration before publishing the report.

42.7 That the applicant, being aware of the complaint, could have been proactive even before being formally requested to do so when he received the notice. Instead, he elected not to do so but only responding in his personal capacity

after the completion of the preliminary investigation and after receipt of the notice.

[43] Applying what is known as the “no difference” argument, the Public Protector argues that an accused person’s right to a fair procedure may be dispensed with if it can later be demonstrated that affording him a fair process would not have aided him in any event and then asked for the dismissal of the applicant’s case with costs, including costs of two counsel.

[44] In regard to the question whether the Public Protector’s failure to disclose the intended remedial action in the section 7(9)(a) notice renders the entire report reviewable or whether the omission to grant the applicant that opportunity is severable from the remainder of the report, the Public Protector argues for the latter.

[45] Regarding the alleged delay in inviting the applicant for a hearing by the Public Protector in regard to the preliminary findings, she argues that the reason why the applicant could not be heard as early as when the initial nine complaints were received and subsequently reduced to the three which were found to be substantiated was a cost-cutting measure on her the part.

ANALYSIS

[46] It is common cause that sections 7 and 7A of the Act describe the extensive investigative powers the Public Protector enjoys. It cannot be gainsaid that in fulfilling these

functions, the Public Protector plays an important role in establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public, as was held by the Constitutional Court in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at paras 133 – 134***.

[47] The principle of legality is evidently applicable in this matter given that the impugned findings, decision and/or the report involve the exercise of public power. It is trite that "*every exercise of public power, including every executive act*" must comply with the principle of legality, (see ***Minister of Defence & Military Veterans v Motau 2014 (5) SA 69 (CC) at para 69)*.** It is further trite that whenever the Public Protector exercises her statutory powers, she is constrained by the principle of legality which applies to all who exercise public power. The principle allows for a review on the grounds of irrationality and also on the basis that the decision-maker did not act in accordance with the empowering statute.

[48] Whereas the applicant argues that the Public Protector violated his right to be heard by not hearing him prior to her release of her preliminary findings in respect of the section 7(9)(a) notice, the Public Protector contends that section 7(9)(a) does not create any statutory obligation on her part to seek the applicant's response or input during the investigation prior to releasing her preliminary findings. Leaning on what is known as the "no difference" argument, the Public Protector argues that an accused person's right to a fair procedure may be dispensed with if it can later be demonstrated that affording him fair process would not have aided him in any event.

[49] It is common cause that the Public Protector invited the applicant in his personal capacity to give a response to the complaint only after the release of her preliminary findings in March 2019, to which the applicant provided two written responses in April 2019. In determining this issue, one borrows from the *ratio* held by the Full Court in ***President of the Republic v Public Protector*** above. Just as was the case in the above matter, this issue under consideration relates to an expectation by the applicant to be heard by the Public Protector before the release of her preliminary findings. It is common cause that this 'obligation', as correctly contended by the Public Protector, is not specifically enacted in the Act. However, in my view, the applicant's expectation is legitimate when regard is had to the principles of natural justice and the Constitution itself, namely, section 33(1) thereof. Furthermore, on closer scrutiny and interpretation of section 7(9)(a) of the Act, the only reasonable deduction and interpretation one arrives at is that the section tacitly creates an obligation on the part of the Public Protector to afford any person against whom '*an adverse finding pertaining to that person **may** result*'…… '*during the course of an investigation*' with '*an opportunity to respond in connection therewith*'.

[50] This 'unlegislated' obligation on the part of the Public Protector to hear an implicated person arises as a matter of course even if her argument was found to have credence, given that her Act is subject to the Constitution which enshrines every person's right to fair administrative actions, which includes the right to be heard. In *casu*, the proper enforcement of the applicant's right to be heard could only have been correctly applied either before the release of the preliminary findings (even to the RTMC) or the making of such findings altogether. Glaringly and contrary to the Public Protector's argument, when one considers section 7(9)(a), what comes out is the expectation by the Legislature that

the engagement by the Public Protector with the implicated person shall take place and precede the making and/or release of any such adverse finding that ***may*** (my emphasis) result'. Furthermore, section 7(9)(a) envisages a situation where the Public Protector hears the implicated person **during the course of the *investigation*** and ***not after*** the release of the so-called preliminary findings as the Public Protector has done *in casu*. For the Public Protector to invite the applicant to hear his version after the release of her preliminary findings is therefore in stark contravention of section 7(9)(a). I rest on this view because the word '*may'* specifically relate to the findings, to the which the applicant's response was only sought after the fact or post their making and/or release. Effectively, the horse had already bolted and any invitation for a hearing with the applicant can arguably be seen as a whitewash. This can only be seen in a dim view against the spectrum of the Constitution, resulting in unlawfulness and thus invalidity.

[51] Further to the above, to minimize her disregard of the Constitution and what I have found as the Legislature's unscripted yet assumed obligation on the Public Protector as created by section 7(9)(a) of the Act, the Public Protector argues that the findings were only preliminary and that the responses by the applicant, which she did consider, could still have persuaded otherwise. I am none the wiser even after this argument given her misinterpretation of section 7(9)(a) of the Act, section 33(1) of the Constitution and the rules of natural justice which enjoin her to hear the applicant in line with the *audi alteram partem* rule. This she failed to do. As was held by Plasket J in ***Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd*** that in order to be rational, the decision must be 'based on……a correct application of the law'. In the premises I find that her decision not to hear the applicant during the course of her investigation of the 'substantiated' three

complaints and also before her preliminary findings were released and/or made was indeed based on her incorrect application of the law, which renders same to be irrational and thus unlawful, competent to be reviewed and set aside.

[52] In considering further what the Constitutional Court held in ***Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*** above, I am satisfied that given that the Public Protector's conduct is inconsistent with the Constitution, that same stands to be declared unlawful as I hereby do. The right of a party to be 'meaningfully' heard in administrative actions is an integral part of our democracy to which the Public Protector has to put a high premium and thus avoid to be seen to exercise her powers arbitrarily outside and/or above her constitutional mandate.

[53] To the extent that the Public Protector's contention is that but for the fact that the Act creates no such obligation on her part to hear an accused or implicated person before the release of her preliminary findings, in my view the applicant's argument that her processes are flawed given their inconsistencies with Constitution is tenable. It is trite that the power which the Public Protector enjoys is subject to the Constitution and in this instance, her failure to comply with her own Act, that is section 7(9)(a) and even misinterpreting its purport, renders such conduct both unconstitutional and irrational. For the Public Protector to argue that the applicant cannot escape blame for him not having been heard since he could have approached her office uninvited before the release of the preliminary findings is assailable because between the Public Protector and the applicant, the person on whom the legislative burden and obligation to hear the other is created is the Public Protector and not the applicant or the implicated person.

[54] The minute the Public Protector found that the three complaints she found to be meritorious detrimentally implicated the applicant and that an adverse finding may result therefrom, she was enjoined to grant him a hearing, which she failed and/or neglected to do. Even her “no difference” argument that an accused person’s right not a fair procedure may be dispensed with if it can later be demonstrated that affording him fair process would not have aided him in any event is assailable given that no person or administrator is permitted to second guess with impunity what the outcome of their investigations and findings may have been but for their neglect to put paid to section 33(1) of the Constitution in regard to procedural fairness to a party.

[55] In regard to issue regarding the neglect by the Public Protector to provide the applicant with the evidence she used in arriving at her preliminary findings as recorded in the section 7(9)(a) notice, I am of the view that given the uncontroverted argument that the applicant was the main person who availed same to the RTMC Board for the attention of the Public Protector, I find that the request by the applicant was illogical and thus this issue lacks substance.

[56] In so far as his substantive grounds of review are concerned, the applicant refutes all the findings of the Public Protector. He argues that to the extent that this court upholds his argument in respect of the procedural fairness, it should follow therefore that the second prayer in Part B of the Notice of Motion be granted, thus reviewing and setting aside the Public Protector’s findings. This, he argues, should make dispositive of this matter in its entirety and bring mootness to his substantive grounds of review.

[57] In regard to whether the Public Protector's failure to disclose the intended remedial action in the section 7(9)(a) notice renders the entire report reviewable or whether the omission to grant the applicant that opportunity is severable from the remainder of the report, I find in favour of the former and that the Public Protector's omission is thus not severable from the remainder of the report which effectively renders the entire process and her conduct unlawful and thus invalid.

[58] Taking into all of the above and in view of the fact that the Public Protector failed to hear the applicant during her investigation of the three 'substantiated' complaints and prior to the release of the preliminary findings, including the fact that she failed to afford the applicant an opportunity to make representations prior to releasing same nor included same in the section 7(9)(a) notice since same were fundamentally detrimental to him, I am therefore satisfied that her report is flawed, irrational, unreasonable, unlawful and invalid, thus making it liable to be reviewed and set aside on multiple grounds, including on the principle of legality and several other grounds as set out in section 6 of the Promotion of Administration of Justice Act 3 of 2000 ("PAJA").

[59] In my view, the conspectus of the facts *in casu* are such that this court, just as it found favourably for the applicant in regard to his procedural grounds of review, that by the same token and since both the procedural and substantive grounds of review in the main share a common thread, namely, failure by the Public Protector to hear the applicant in line with the Constitution and not arbitrarily, that the Public Protector's substantive findings be reviewed and set aside. Effectively, this ruling disposes of this matter in its entirety and

brings to mootness the substantive issues raised by the applicant. The reason for this ruling is simply because the impugned procedure is the bedrock upon which the Public Protector's findings are premised. Logically-speaking, it will be irrational to impugn the procedure but the consequential findings.

[60] In regard to the question whether the Public Protector has failed to comply with her constitutional obligations *vis-à-vis* section 172(1)(a) read with section 181(2) of the Constitution, I am satisfied that she has failed in that whereas section 181(2) recognizes and cement the independence of her office, such empowerment does not in any way make her office's investigative processes independent of and/or above the Constitution. However, section 7(1) of the Public Protector Act's failed to enact legislating provisions that will obligate the Public Protector's processes to give full effect to section 7(9)(a) by 'unpacking' what it envisages to achieve, namely, the object of the principles of natural justice *in re* the *audi alteram partem* principle. This in itself shows that the Public Protector failed and/or neglected to bring into effect the object of the Constitution and the law to the prejudice of the applicant. The argument that her investigative processes are in line with section 7(1) of the Act does not take away from the unassailable obligation she has towards the Constitution, namely, to tailor-make her processes such that they are within the scope and ambit of the Constitution, even reflecting its purposes and spirit. Given the above finding and pursuant to section 172(1)(a) of the Constitution, this court is enjoined to declare that the Public Protector's conduct is inconsistent with the Constitution, thus invalidating her findings resultantly in their entirety.

[61] In the premises I am satisfied that in exercising her power, the Public Protector failed to pass the non-arbitrary and rationality muster as explained by Navsa ADP in ***Zuma v Democratic Alliance*** above in that her exercise of public power is informed by mistake of law. She did not act in accordance with her empowering statute, namely section 7(9)(a) which enjoins her to engage with the implicated party during the course of her investigations and not after her preliminary findings are made, as she has done *in casu*. What these findings mean for the public Protector is that both her findings and conclusions are based on material errors of law and procedural irrationality in relation to her prejudicial and unfair process of investigation. As already stated above, the fact that the Public Protector advances the 'no difference' argument cannot be countenanced. By the time the applicant was invited to respond to the Public Protector's preliminary findings and it is safe to say that despite the latter's protestations, the applicant's response was already on the back foot.

[62] In conclusion, I am satisfied that the Public Protector's Report and the remedial action dated 16 September 2019 stands to be reviewed and set aside for the following procedural grounds:

62.1 The Public Protector failed to hear from the applicant in conducting her investigations, even prior to her release of the preliminary findings, which she was constitutionally and by operation of law obligated to; and

62.2 The Public Protector failed to disclose the proposed remedial action to the applicant prior to issuing the impugned report, thus violating the applicant's

right to be afforded a reasonable opportunity to make representations on matters that detrimentally affect his interests.

[63] In the result, I am further satisfied that the applicant has made out a case entitling him to the relief he seeks.

[64] In the premises I make the following order:

ORDER

1. The remedial action directed by the Public Protector in paragraph 7 of the Report No. 69 of 2019/20 ("the Report") dated 16 September 2019 is reviewed and set aside in its entirety.

2. The findings in the Report related to the following issues are reviewed and set aside:

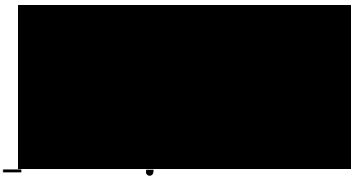
    2.1 Whether Ms. Julia Manamela was improperly appointed in the Supply Chain Management Unit;

    2.2 Whether the bodyguards assigned for the protection of the CEO were paid excessive overtime; and

    2.3. Whether lawyers and legal firms were improperly appointed.

3. It is declared that, in terms of section 172(1)(a) read with section 181(2) of the Constitution, the Public Protector failed to comply with her constitutional obligations.

4. The First Respondent is ordered to pay the costs of this application including the costs of two counsel.



Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

Head on: 15 October 2021
Judgment delivered: 26 January 2022

Appearances:

For Applicant: Adv. P. Strathern SC
Assisted by: Adv. Kameel Magan
Instructed by: Selepe Attorneys

For 1st & 2nd Respondent:
Adv. H. Smith
Assisted by: Adv. S. Nhantsi
Instructed by: VZLR Inc.

For 3rd Respondent: None