(REPUBLIC OF SOUTH AFRICA)

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 36050/2019

(1) REPORTABLE: NO / YES
(2) OF INTEREST TO OTHER JUDGES: NO / YES
(3) REVISED.

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MOOSA T AJ **13/12/2021**

MINISTER GUGILE ERNEST NKWINTI:

MINISTER OF WATER AND SANITATION Applicant

And

THE PUBLIC PROTECTOR OF THE REPUBLIC

OF SOUTH AFRICA: ADV BUSISIWE MKHWEBANE N. O. First Respondent

THE PRESIDENT OF THE EPUBLIC OF SOUTH AFRICA:

MATAMELA CYRIL RAMAPHOSA N. O. Second Respondent

JUDGEMENT

MOOSA AJ:

1. This is a review application by the Applicant against a final report ("the final report"), known as, "An investigation into the allegations of a violation of the Executive Ethics Code ("EEC") by the former minister of Department of Rural Development and land Reform, ("DRDLR"), the Honourable Gugile Nkwinti (currently minister of Water and Sanitation), in connection with the acquisition and lease of farm Bekendvlei ("the farm").

2. The subject matter of this review being the Public Protectors("PP") finding that the Applicant in his capacity as Minister of the DRDLR contravened the provisions of paragraphs 2.3 9(c) and 2.3(e) of the Executive Ethics Code ('EEC") as contemplated in the Executive Members' Ethics Act, 1998, by introducing two beneficiaries to an official of the DRDLR for the purposes of acquiring a farm.

3. Following the issue and delivery of the PP's report to the Applicant, the President and Mr Walters (Member of Parliament and, ("Complainant"). On 3 May 2019, the Applicant launched an interim application on an urgent basis interdicting the First Respondent from publishing or making the report known to any person as contemplated in section 8 of the Public Protector Act 23 of 1994 ("the Act").

4. It is noted that at the time of the granting of the interim interdict, the report was already out in the public for public consumption.

5. Subsequently the Applicant launched this review application on the principle of legality, this court thus having the necessary jurisdiction to entertain the review application. The legality principle having become well established in our law as an alternative pathway to judicial review where PAJA finds no application.[1]

6. The First Respondent did not dispute the issue of launching the review application on the principle of legality.

7. The Applicant's review application is based on the following:[2]

   7.1 The Public Protector's failure to exercise her discretion judicially;

   7.2 Failure to grant the Applicant an opportunity to respond to the possible conclusions included in the section 7(9) notice;

   7.3 The Public Protector's failure to engage with the Applicant;

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[1] NDPP a.o v Freedom under Law 2014(4) Sa 298 (SCA) para 28-29
[2] FA: pp 29-36

7.4 The Public Protectors bias and conflict of interest; and

7.5 The irrationality of the Public Protectors findings that the Applicant has violated the provisions of paragraph 2.3(c) and 2.3(e) of the Executive Ethics Code.

8. The common cause facts being:

8.1 The acquisition of the farm by the DRDLR for the benefit of two beneficiaries, Messrs EV Present and M Boshomane.

8.2 Investigations initiated by the Applicant in respect of the irregularities relating to the acquisition of the farm; and

8.3 The PP's investigation into the Applicant's involvement in respect of the acquisition of the farm.

Chronology:[3]

9. In 2004, the Applicant (in his capacity as ANC Regional Secretary in the Eastern Cape) met EV Present ("Present"), introduced to him as Velile Xundu at Lethuli House, Johannesburg.

10. In 2007 the Department of Land Affairs issued a land acquisition strategy.

11. In 2009 the Applicant was appointed as Minister of the Department of Rural Development and land Reform ("DRDLR").

12. In 2009 the Applicant (in his capacity as Minister of the DRDLR) and Xundu (aka Present) and Boshomane met at a Land Reform Summit.

13. In 2011, the Applicant introduced Present and Boshomane to Vusi Mahlangu (former Deputy Director of the DDLR) ("Mahlangu"), asking him "to handle the matter with them".

14. On 3 March 2011, Mahlangu requested officials of the DRDLR to prioritise the Bekendvlei project.

15. In 2011, according to Mahlangu a beneficiary selection process in respect of Present and Boshomane was done in terms of the DRDLR's land acquisition strategy.

16. In 2011 the farm was allocated by the DRDLR to Present and Boshomane.

17. On 11 October 2011, Mahlangu signed as the "approver" of the acquisition of the farm.

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[3] Applicants – Chronology: Caselines: 026-5 – 026-10

18. In 2011, The Applicant attended and spoke at Present's wedding.

Investigations initiated by the Applicant in respect of the irregularities relating to the acquisition of the farm Bekendvlei

19. Irregularities relating to the acquisition of the farm were brought under the attention of the Applicant.

20. On 13 March 2014, the lease agreement between DRDLR and Present and Boshomane was cancelled.

21. In 2014 the Applicant instructed the DRDLR's Forensic investigation Directorate to perform a scoping investigation.

22. On 10 March 2015, as a result of the scoping investigation, the Applicant issued an instruction that an external forensic Investigator be appointed to investigate the irregularities in respect of the farm.

23. On 15 December 2015 the DRDLR appointed Deloitte to do a forensic investigation in respect of the farm.

24. On 13 May 2016, Deloitte's draft forensic investigation report became available.

25. On 16 May 2016, Disciplinary proceedings by the DRDLR against Mahlangu in front of Adv Naidoo commenced.

26. On 13 June 2016, Mahlangu was found guilty on 6 of 8 charges of misconduct by Adv Naidoo.

27. In September 2016, Deloitte's draft report was discovered in a postbag of the DRDLR.

28. On 8 October 2016, Deloitte's letter to the Director-General of the DRDLR that it had not found any prima facie evidence that the Applicant was involved in irregularities.

29. On 16 October 2016, a meeting between the Applicant and Deloitte was held.

30. On 2 November 2106, the Applicant responded to Deloitte on the issues discussed.

31. On 8 November 2016, Deloitte's final report was delivered.

32. On 12 February 2017, an article in respect of Deloitte's report was published in the Sunday Times.

The Public Protector's investigation in respect of the Applicant's involvement in the acquisition of the farm Bekendvlei

33. On 12 February 2017, the Applicant requested the Speaker of the National Assembly in writing to refer the allegations in the Sunday Times to the PP.

34. On 14 February 2017, J Walters of the DA Party submitted a complaint to the PP.

35. On 16 February 2017, the Applicant, after a response from the Speaker, referred a similar letter to the PP, with copies of the various investigation reports.

36. On 9 June 2017 the Applicants referral was acknowledged by the PP.

37. On 19 June 2017, the Applicant requested the PP for a copy of the DA's complaint.

38. The Applicant informed the Speaker (after the PP's acknowledgement of receipt), that no response was received.

39. On 28 August 2017, the PP informed the Applicant that she had exercised her discretion not to provide him with a copy of the report from Walters of the DA.

40. On 5 February 2018, Mahlangu was appointed on the staff of the PP, was interviewed as a witness by the office of the PP.

41. On 27 May 2018, the Applicant informed the speaker that since the PP's acknowledgement of his referral of his complaint, he had not received any response from the PP.

42. According to LB Baloyi (a former employee of the PP) Mahlangu interfered with the PP's investigation against the Applicant.

43. On 2 April 2019, the PP served a section 7(9) notice dated, 1 April 2019, on the Applicant and requested him to respond by 20 April 2019.

44. The Applicant approached the PP in writing for an extension to respond to the PP's section 7(9) notice.

45. On 18 April 2019, the Applicant attended a consultation with his legal team.

46. On 24 April 2019, the Applicant forwarded a second request for an extension to respond, to the PP.

47. On 26 February 2019, the Applicant attended a consultation with his legal team.

48. On 26 April 2019, the Applicants second request for an extension was delivered to the Office of the PP.

49. On 26 April 2019, a telephonic discussion between an official of the Applicant and an official of the PP.

50. On 2 May 2019, the PP refused Applicant's request for an extension.

51. The Applicant's attorneys requested the PP in a letter not to publish her final report.

52. The PP delivered a final report (dated 3 May 2019) to the Applicant.

53. On 3 May 2019 the Applicant launched an urgent application in the High Court to interdict the PP from publishing her report.

54. On 6 May 2019 the PP intended a media briefing.

55. On 19 May 2019 The High Court issued an interdict pending the Applicant's review application in respect of the PP's final report.

56. On 24 May 2019. The Applicant's review application against the PP's final report was filed.

Review

57. The Applicant having filed its review application in terms of the principles of legality is therefore in law obliged to establish these grounds;

Principles of legality

58. The principle of legality requires:

    58.1 A rational connection between the finding made and the purpose for which the finding was made.

    58.2 That in order for a finding to be rational it must be founded upon reason and not be Arbitrary.

    58.3 The means by which the person making the findings must be rationally related to the purpose for making the finding;

    58.4 For the finding to be rational all relevant factors must be taken into account and failing to take into account relevant factors renders the finding or the entire process

irrational;

58.5 In order for a finding to be rational the views of affected parties must be taken into account and the process leading up to the finding being made must therefore allow for the affected person or those with specialised knowledge to be heard;

58.6 To be rational the finding must take into account all the true facts material to the finding and must be based on accurate findings of fact and on the correct application of the law.

Grounds of review:

1. The Public Protector's failure to exercise her discretion judicially

59. In terms of the provisions of section 7(1)(b)(i) and/or Section 7(9)(a) of the Act the PP has a discretion to consider a request for an extension of the time frame within which the subject of her investigation may respond to her section 7(9) notice.[4]

60. The Applicants contention being that the PP's criterium for exercising her discretion was encompassed in her letter to the Applicant dated 2 May 2019, in which she identified that it would not be in the best interest of the complainant to delay the matter further and then in her answering affidavit she "supplemented" the criteria and added a further criterion, namely that of "public interest" as an after the fact rationalization.

61. That in so doing, she did not exercise her discretion judicially and consequently deprived the Applicant of the opportunity to provide a response to her section 7(9) notice.

62. In Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another.[5], Khampepe J of the Constitutional Court in determining the extent of the courts powers to interfere on judicial review with a discretionary administrative decision, rehearsed the relevant principles as follows at para 83-88

> *[83] In order to decipher the standard of interference that an appellate court has is justified in applying a distinction between the two types of discretion emerged in our case law. That distinction is now deeply rooted in the law governing the relationship between appeals courts and the courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was the discretion in the true sense or it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate must apply.*

[4] FA: par 10.2 p 31: AA par 84, pp 300-301
[5] 2015 (5) SA 245 (CC)

[84] In Media Workers Association v Press Corporation of South Africa Ltd ('Perskor")[6] the court defined discretion in the true sense:

"The essence of a discretion in the true sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a court would have preferred him to have followed a different course among those available to him"

[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is true that the lower court has an election of which option it will apply, and any option can never be said to eb wrong as each is entirely permissible.

[86] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised-
'Judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by the court properly directing itself to all the relevant facts and principles.

[87] It was further found that the appellate court should be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court"

63. Further the court in *Trencon* found:

"... it follows that if a court is satisfied after considering all the facts and circumstances that have a bearing in the exercise of a discretion, that the discretion was not judicially exercised. The court's interference would at that stage be justified. This would be so if the discretion was capriciously exercised, was moved by a wrong principle of law or an incorrect appreciation of the facts..."

64. The Applicant talks of an" *irrational failure*" on the part of the PP to exercise her discretion but makes no case for this, there is no submission that PP exercised her discretion capriciously or that she was moved by a wrong principle of law or an incorrect appreciation of the facts.

65. There is no merit to this ground of review.

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[6] 1992(4) SA 791 (A)

2. ***Failure to grant the Applicant an opportunity to respond to the possible conclusions included in the section 7(9) notice:***

66. Section 7(9) (a) of the Act states:

> *"If it appears to the Public Protector during the course of an investigation that any person is 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 a person an opportunity to respond in connection therewith in a manner that may be expedient under the circumstances"*

67. This section was designed to ensure compliance with the principles of natural justice and the Constitution, which guarantees the application of the *audi alteram partem rule.*

68. My brother Sardiwala J, in his written judgement in the interim interdict application, correctly found that the PP is clearly entitled in terms of section 7(1)(b)(i), to conduct and determine the procedure relating to it at her own discretion.

69. Whilst such discretion is not unfettered, section 7(9)(a) talks of a discretion to be exercised, *"in any manner that may be expedient under the circumstances"*

70. The Applicant isolates the letter of 2 May 2019 which suggests that the PP's discretion was influenced solely by the fact that it would not be in the interests of the complainant and that in the exercise of a discretion it must be recorded and be pronounced.

71. As indicated above, discretionary decisions are not appealable as a general principle and in order to challenge an exercise of a discretion exceptional circumstances must be shown that it was not judicially exercised.

72. In his letters requesting extensions of the period to respond to the section 7(9)(a) notice of the Act, the Applicant cited extreme diary pressures in view of the coming elections and holidays amongst other reasons for seeking the extensions.

73. The failure to record the factors which influenced the PP's discretion and the recording of the complainant's interest are neither exceptional circumstance.

74. The contention by the PP that the Applicant showed disregard and was autocratic in relation to the office of the PP, in his request for extensions is conjecture , however the reasons proffered for the extensions requests and the fact that the Applicant was aware of the issues in as early as 2017 read together with the fact that the issues in the PP's investigation against the Applicant being all the same as the ones that the Applicant dealt with and had legal assistance in the investigation initiated by the Applicant already in 2015, suggest that the Applicant was clearly aware of and had access to all information to provide a response to the PP's section 7(9) notice.

75. The PP's final report being in respect of an investigation into the allegations of a violation of the Executive Ethics Code by the Applicant.

76. The outcome of the report turning on the question of whether the Applicant in introducing Present and Boshomane (collectively, "the beneficiaries") to Mahlangu had exploited his influence, power and proximity over Mahlangu to influence him to favour the beneficiaries in the acquisition of the farm.

77. The Applicant by his own admission, introduced the beneficiaries to Mahlangu. The beneficiaries told the Applicant that they had identified a farm and he considered their proposal and even though there was a fixed procedure to be followed by all aspiring farm beneficiaries he nevertheless introduced the beneficiaries to Mahlangu thereby ensuring that the beneficiaries bypassed the required selection procedure.

78. The Applicant at the time was acting in his capacity as Minister of RDLR and he was Mahlangu's boss.

79. The Applicants contends that the relationship between himself and Present is simply a respectful one and that based on cultural practises they refer to each as "father and son", more specifically, Present refers to him as "Tata", that this is not suggestive of a special connection or relation between them.

80. South Africans as a nation, referred to the late President Nelson Mandela as "Tata" out of respect as well. Not every South African who referred to him as such would have had the honour of him speaking at their wedding.

81. The Applicant clearly had a long standing and personal relationship with Present and this is evidenced by the fact that Present felt that he could approach the Applicant for a favour and also ask him to speak at the most special day of his life.

82. There can be no conflating of the issues, the Applicant's referral of the issues in respect of the farm related to irregularities in relation to management of the farm. The PP's investigation of the Applicant is in relation to a violation of the Ethics code.

83. In this background, the Applicant was the effective cause for the beneficiaries to acquire the farm.

84. This is what, the PP's section 7(9) notice purported to question, the Applicant had sufficient information backdating to 2015 and had 18 days from its dispatch to reply thereto but chose not to do so and instead embarked on a trajectory of delay requests.

85. Of significance further is that since May 2019 when the PP delivered her final report, the Applicant has in the interim consulted extensively with senior counsel, launched an urgent application to interdict the publishing of the PP's report and launched these review proceedings and still has not seen fit to respond to the PP's section 7(9) notice.

86. There is no merit to this ground of review.

3. The Public Protector's failure to engage with the Applicant;

87. The PP invited the Applicant to engage with her in terms of Section 7(9)(b)(i) of the Act and this section empowers the PP to determine the format and the procedure to be followed during the investigation.

88. The Applicant contends that in both his requests for extensions, he accepted her invitation and provided dates to the PP on which he was prepared to meet with her and that in spite of this correspondence the PP irrationally and unreasonably ignored these dates for engagement which the Applicant had provided.

89. The Applicant in his letters of extension dated 16 and 24 April 2019 respectively states that he would avail himself for engagement with the PP after submissions of his written responses to the PP's section 7(9) notice. He further provides dates which are in conflict with the timelines set by the PP in her section 7(9) notice and which effectively purport to happen a month after the deadline set by the PP.

90. What this effectively meant that for as long as the Applicant had not submitted his responses to the PP's section 7 (9) notice he would not engage with the PP.

91. It is apposite to note that, that at the time of launching this application for review the Applicant has still not responded to the PP's section 7 (9) notice.

92. The Applicant by his own actions made it impossible for the PP to engage with him and it is not the PP who has failed to engage the Applicant.

93. There is no merit to this ground of review.

4. The Public Protector's bias and conflict of interest;

94. The Applicant contends that the PP was biased and that there was a conflict of interest in not disclosing in her final report that Mahlangu was an informant to the PP and that he was employed by the office of the PP.

95. The Applicant further contends that the PP relied on the evidence provided by Mahlangu during the disciplinary enquiry (who had been dismissed for misconduct) to prepare her report.[7] That she failed to disclose in her final report, that at the time of finalization of her report, her office had employed Mahlangu as the CEO of the office of the PP.

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[7] Record: Bundle 4: vol 8: pp 1-29; Final report: Annexure "GEN1", para 5.1, 2-5.1.6, pp87 -88; par 5.1. 61, p 99

96. It is trite that our courts employ the reasonable suspicion test for either apparent or reasonable bias as laid down in *BTR Industries v Metal and Allied Workers Union.*[8]

97. It is common cause that Mahlangu was only employed by the office of the PP in May 2017.[9]

98. Deloitte's was appointed by the Applicants department to conduct forensic investigations on the acquisition and management of the farm on 15 December 2015.

99. The Complainant (Walters), complaint was independent to the Applicants initiated investigation, there being no evidence that the Complainant was influenced by the PP or Mahlangu.

100. The content of the draft report which implicated the Applicant was published in February 2017 by an independent newspaper.

101. During the investigations as former Deputy Director General, in charge of the land reform and his branch was responsible for buying and maintaining land assisting beneficiaries, Mahlangu was interviewed to explain how the farm acquisition process and procedures worked.

102. There being no clarity on what facts the Applicant is relying to establish a conflict of interest in relation to Mahlangu's evidence.

103. The Applicant further relies on an affidavit of Basani Baloyi, ("Baloyi") to corroborate that Mahlangu interfered with the Applicant's investigation in the PP's office.

104. The submission that the evidence by way of Baloyi's affidavit is inadmissible, is correct. This affidavit emerging for the first time attached to the replying affidavit. This is procedurally incorrect and inadmissible.

105. The Applicants suggestion that the evidence of Mahlangu during his disciplinary hearing before Advocate Naidoo is flawed. The disciplinary hearing focussed on Mahlangu bypassing the procedures for acquiring farms, it was not about the Applicant's introduction of the beneficiaries.

106. The Applicant having failed to meet the test of bias as employed by our courts.

107. There is no merit to this ground of review.

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[8] 1992(3) SA 673 (A)

[9] Bundle: Vol 1: pp89 para 5.1.20. See pp90 and 91 paras 5.1.22 – 5.1.27

5. ***The irrationality of the Public Protector's findings that the Applicant has violated the provisions of paragraph 2.3(c) and 2.3(e) of the Executive Ethics Code.***

108. The relevant provisions of the Code with which cabinet ministers must comply in performing their official responsibilities provide as follows:

*:" **General standards:***

2.1 members of the Executive must to the satisfaction of the President-

(a) perform their duties and exercise their powers diligently and honestly;

(b) fulfil all the obligations imposed upon them by the Constitution and law;

(c) act in good faith and in the best interests of good governance; and

(d) act in all respects in a manner that is consistent with the integrity of their office or the government.

2.2 In deciding whether members complied with the provisions of paragraph 2.1 above, the President must take into account the promotion of an open, democratic and accountable government.

2.3 Members may not-

(a) ...

(b) act in a way that is inconsistent with their position;

(c) using their position or any information entrusted to them to enrich themselves or improperly benefit any other person;

(d) ...

(e) Expose themselves to a situation involving the risk of a conflict between their official responsibilities and their private interests"

109. The review threshold is rationality. The test is an objective one. The question a reviewing court needs to ask is: Is there a rational objective basis justifying the connection made by the decision maker between the material made available and the conclusion arrived at?

110. In *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [10]the court held that

> *"... the applicable test in review applications is whether the decision reached by the Commissioner is one that a reasonable decision maker could not have reached in relation to the material placed before him or her".*

111. It being the Applicants contention that there was no analysis by the PP of the evidence before her both in the section 7(9) notice and the final report from which it could be informed that the Applicant had the mental attitude to abuse his power.

112. That there is nothing in the section 7(9) notice or the final report that of an indication that the PP considered the element of causation.

113. The onus is on an Applicant in judicial review proceedings to establish sustainable grounds of review upon which he relies, bare averments which are not supported by pleaded and objective facts are not sufficient, and cannot be relied upon to attack the rationality of a decision makers decision.

114. The PP's possible finding in the section 7(9) notice and the findings in the final report that the Applicant violated paragraphs 2.3(c) and 2.3 (e) of the Ethics Code are well founded on pleadings and objective fact.

115. The chain of events demonstrates that the Applicant, a former Minister acting in his official capacity, set the process in motion by introducing the beneficiaries to Mahlangu, an official responsible for buying and maintaining land by assisting beneficiaries.

116. In as much as the Applicant never filed his response to the section 7 (9) notice, in his pleadings he does not challenge the chain of events. The Applicant is therefore not prejudiced by failure to file his response to the section 7(9) notice.

117. The private relationship which the Applicant and Present enjoyed is also fully pleaded. Based on the pleaded facts and the merits that the conclusions drawn by the PP in the final report are rational and well-reasoned.

118. The argument that the evidence does not show that the Applicant instructed Mahlangu to forgo the systems and procedure is rejected, it is not relevant in meeting the rationality test.

119. It is rational to reason that had it not been for the Applicant's friendship with Present, the beneficiaries would not have been introduced to Mahlangu, that the introduction to Mahlangu helped them jump the queue, in introducing them to Mahlangu who was subservient to the Applicant and knew what to do. Mahlangu did not know the beneficiaries until after they were introduced to him by the Applicant.

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[10] 2007 12 BLLR 1097 (CC) at par 110

120. The Applicant proffered no explanation why he chose to introduce Present to Mahlangu instead of advising him to follow the normal procedure. The PP's reasoned conclusion that he wanted them to forgo the system and that is what happened. It would have been irrational for the PP to conclude otherwise.

121. The PP's findings thus being rational and well-reasoned.

122. There being no merit to this ground of review.

6. The unreasonable and irrational conclusions and findings in the First Respondents report

123. This ground of review was added in the Applicants heads of argument, this was not pleaded and accordingly the PP objected to the adjudication of this ground of review as she did not have the opportunity to deal with this in her answering affidavit.

124. I am inclined to agree with this objection, however even if this additional ground was allowed, on the facts used in support thereof, viz the four examples encompassed in the Applicants supplementary affidavit purporting to show no rational connection between the evidence before the PP and her final report. The Applicant in these examples again misses the point and emphasis the evidence in relation to the investigation initiated by the Applicant and fails to address the investigation of the PP, viz whether the Applicant in introducing Present to Mahlangu was the effective cause of favouring the beneficiaries in the acquisition of the farm.

125. All the grounds of review upon which the Applicant having no merit, the Applicant having not established a ground of review to justify the setting aside of the PP's final report.

126. The review application must fail and is accordingly dismissed.

127. Whilst an award of costs on the attorney and client scale is not granted lightly, it should be granted in circumstances where there is a lack of bona fides in defending an application (in this case instituting an application). It is not necessary to find dishonesty or a vexatious intention. Even with the most upright and most firm belief in the justice if its cause, a litigant can be vexatious by putting the other side to unnecessary trouble and expense, which it ought not to bear.[11]

128. *In Tjiroze v Appeal Board of the Financial Services Board* (CC) (unreported case no.[12] (Madlanga J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring) held:

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[11] Law on Costs. A C Celliers Issue 36 para 4.13 p -4-26

[12] CCT271/19, 21-7-2020)

"The CC explained that the case is moot *'if it no longer presents an existing or live controversy'*....

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The CC said based on the above finding the matter does not raise a constitutional issue, the principles set out in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at para 23 do not apply. The CC questioned if the punitive scale prayed for was warranted.

The CC referred to a matter between the *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8 where Mogoeng CJ noted that '[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.' The CC pointed out that although that was in the minority judgment, the CC did not read the majority judgment to differ on this. In the minority judgment Khampepe J and Theron J further noted that 'a punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke'.

Both judgments referred to *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2815 (LAC) at para 46, in which the Labour Appeal Court stated: 'The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.'

The CC said that the applicant has been litigating frivolously and vexatiously at great expense to the second respondent. In so doing, he has defamed a member of the judiciary and gratuitously accused some individuals of lying under oath without an iota of evidence in substantiation. The CC added that the litigation, which was plainly vexatious, was an attempt by the applicant to hold onto what he misguidedly perceives to be an advantage. The CC pointed out that the subtext is that an amendment will result in the applicant losing that advantage; and that it is what will cause him 'prejudice'. The CC said that has never been our law on what constitutes prejudice of the nature that may result in an amendment being denied.

The CC said the norm is always to grant an amendment if it will not cause the other side an injustice that is incapable of being compensated by appropriate award costs. The CC added that in all three applications (including the one that was brought to it), the applicant had attempted to attack the second respondent's opposition based on minor technicalities. The CC pointed out that this was purely to have the applications proceed unopposed notwithstanding the second respondent's clear intention to oppose all three applications. The court said in doing so the applicant was abusing the court process.

The CC said the cumulative effect of all this called for a punitive costs order. The CC refused leave to appeal and ordered the applicant pay the costs of the second respondent on an attorney and client scale."

129. In the premise, The Applicant in this matter having litigated based on a misguided perceived advantage with not an iota of evidence in substantiation and having litigated at the expense of the public pocket in my view warrants a punitive costs order.

130. The Applicant is ordered to pay the costs of the PP, (First Respondent) on the attorney and client scale including the costs of senior counsel.

T. MOOSA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgement 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 hand-down is deemed to be 13 December 2021

For the Applicant:	**ADV E S J VAN GRAAN**
Instructed by:	**DE SWARDT MYAMBO ATTORNEYS** 941 Jan Shoba Street Cnr. Jan Shoba & Mackenzie Streets Brooklyn, Pretoria Tel: 012 346 0050 Email: mxolisi@deswardt.co.za / michelle@deswardt.co.za REF: MR. AM Myambo/ns/N1050
For the First Respondent:	**ADV. B SHABALALA**
Instructed by:	**SEANAGO ATTORNEYS INC** **C/O SV MAHLANGU ATTORNEYS** 507 Spruy Street Sunnyside Pretoria Tel: 011 466 0442 Email: info@seanego.co.za / theo@seanego.co.za REF: TNS/PUB1/0012
DATE OF HEARING:	22 November 2021
DATE OF JUDGMENT:	13 December 2021