

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

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED
DATE: 8 July 2024
SIGNATURE: [REDACTED]

APPEAL CASE NO: A235/2022  
CASE NO A QUO: 36050/2019

In the matter between:

MINISTER GUGILE ERNEST NKWINTI:  
MINISTER OF WATER & SANITATION

APPELLANT

AND

THE PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA: ADV  
BUSISIWE MKHWEBANE NO

FIRST RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA: MATAMELA CYRIL  
RAMAPOSA NO

SECOND RESPONDENT

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**Coram:** Ntuli AJ, Millar J et Ceylon AJ

**Heard on:** 22 May 2024

**Delivered:** 8 July 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 8 July 2024.

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## ORDER

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**It is Ordered:**

- [1] The appeal is upheld.
- [2] The first respondent is ordered to pay the costs of the appeal on the scale as between attorney and client. The costs are to include the costs consequent upon the employment of counsel, and which are to be taxed on scale C.
- [3] The order of the Court *a quo* is set aside and replaced with the following:
- “1. *The application for review is granted.*
  2. *The report of the first respondent dated 3 May 2019 is reviewed and set aside.*

3. *The first respondent is ordered to pay the applicant's costs on the scale as between attorney and client, which cost are to include the costs consequent upon the employment of senior counsel."*

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## JUDGMENT

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### **NTULI AJ, (MILLAR J et CEYLON AJ CONCURRING)**

- [1] This is an appeal against the dismissal of an application to review and set aside a report issued by the erstwhile Public Protector (PP) in which adverse findings were made against Mr. Ernest Gugile Nkwinti (Mr. Nkwinti), the then Minister of Rural Development and Land Reform (MRDLR). The findings included that Mr. Nkwinti had breached the Executive Ethics Code (EEC). Leave to appeal to this Court was granted by the Supreme Court of Appeal<sup>1</sup>.
- [2] This appeal is unopposed, and the PP has filed a notice to abide the decision of the Court.
- [3] The investigation by the PP was triggered at the instance of Mr. Nkwinti after alleged irregularities in the acquisition and lease of the farm, Bekendvlei in 2011. The farm had been leased to Mr. Present and Mr. Boshomane, who it had been alleged were "introduced" by Mr. Nkwinti to Mr. Mahlangu, the then Deputy Director General (DDG) of the department responsible for concluding such leases.

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<sup>1</sup> Leave having been granted on 27 July 2022.

[4] The facts that were considered by the PP in preparing her report are as follows<sup>2</sup>:

[4.1] Mr Nkwinti, at the time when he was the ANC Regional Secretary in the Eastern Cape, met Mr. Present, who was apparently a relative of the late Reverend Mcebisi Xundu. The meeting took place at Luthuli House where he was employed.

[4.2] Later, when the Department of Rural Development and Land Reform (DRDLR) was preparing for a Land Reform Summit, Mr. Nkwinti and Mr. Present met again. Mr. Nkwinti was now the MDRDLR. He was asked by Mr. Present to speak at his wedding and mentioned that he and a partner, Mr. Boshomane had applied for a farm in Limpopo.

[4.3] During 2011, when the Summit took place, Mr. Present attended and introduced Mr. Boshomane to Mr. Nkwinti. It was at this time that Mr Nkwinti introduced both of them to Mr. Mahlangu. When he introduced them, this was for the purpose of him to "*take them through the due process*". This process was the departmental process for the screening of beneficiaries for the allocation of land for farming as provided for in the Provision of Land and Assistance Act<sup>3</sup> and the Proactive Land Acquisition Strategy Policy.<sup>4</sup>

[4.4] In terms of the Policy, the DRDLR would invite persons interested in farming to be placed on a database and thereafter once farmland had been acquired, allocations would be made to beneficiaries.

[4.5] In the case of the farm Bekendvlei, Mr. Present and Mr. Boshomane had themselves identified this farm and negotiated all

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<sup>2</sup> Counsel for the appellant provided a lucid and succinct summary of these in his heads of argument on which I have drawn liberally.

<sup>3</sup> 126 of 1993.

<sup>4</sup> The PLAS Policy Version 201 published in July 2007.

the terms of acquisition with the owners. They had approached the DRDLR with a “packaged” transaction and because they had done so, there was some flexibility in considering them as beneficiaries even though they had not previously been placed on the database.

- [4.6] In 2011, the farm was acquired and thereafter allocated by the DRDLR to Mr. Present and Mr. Boshomane. Subsequently, Mr Nkwinti also spoke at Mr. Present’s wedding.
- [5] On 28 February 2014, irregularities relating to the acquisition of farms were brought to the attention of Mr. Nkwinti. He instructed the DRDLR’s Forensic Investigation Directorate to perform scoping investigations into the acquisition of farms, including the farm Bekendvlei.
- [6] Neither the scoping nor the preliminary report contains any finding that Mr. Nkwinti had been involved in irregularities, but it does state that Mr. Present, who was one of the beneficiaries and while negotiations were still being conducted with the previous farm owner, had allegedly wanted an amount of R2 million to be paid to Mr. Nkwinti for “facilitation”.
- [7] In 2015, and in consequence of the scoping report, Mr. Nkwinti issued an instruction that an external forensic investigator be appointed to investigate the acquisition of the farm Bekendvlei. On 15 December 2015, Deloitte was appointed by the DRDLR to conduct the investigation.
- [8] On 13 May 2016, Deloitte’s draft report was made available to the DRDLR. The draft report contained a recommendation that Mr. Nkwinti be charged with possible corruption and included a finding that he was guilty of abusing his position as Minister to influence the acquisition of the farm Bekendvlei for purposes of allocating it to Mr. Present and Mr. Boshomane. It was also recommended that disciplinary steps be taken against Mr. Mahlangu.

- [9] Mr. Mahlangu, was charged and attended an internal disciplinary hearing on 13 June 2016. During the hearing, he testified that he was introduced to Mr. Present and Mr. Boshomane by Mr. Nkwinti. He had been asked him to assist them as they wanted “*assistance with regard to land for farming*”. Mr. Mahlangu introduced them to the relevant provincial officials and directed them “*to take them through the due process*”. He at no stage implicated Mr. Nkwinti at all in any matter relating to the acquisition of Bekendvlei or in respect of any dealings with either Mr. Present or Mr. Boshomane.
- [10] The record of Mr. Mahlangu’s evidence was available to the PP.
- [11] Mr. Mahlangu was found guilty on 5 charges of misconduct relating to the farm Bekendvlei.
- [12] The investigation continued. On 8 October 2016, Deloitte exonerated Mr. Nkwinti of any wrongdoing. Its finding was that it “*has not to date found any prima facie evidence*” which implicated Mr. Nkwinti in any irregularities.
- [13] On 8 November 2016, Deloitte served its final report on the DRDLR. No adverse findings of any nature were made against Mr, Nkwinti in this report.
- [14] On 12 February 2017, an article (which contained information from Deloitte’s draft report of 13 May 2016) was published in the Sunday Times. The article dealt with the adverse comments made against Mr. Nkwinti.
- [15] On the same day, Mr. Nkwinti requested the Speaker of the National Assembly in writing to refer the allegations in the Sunday Times to the PP for investigation. This was followed shortly thereafter by referrals made by both Mr. Nkwinti himself and Mr. Thomas Walters of the Democratic Alliance.
- [16] The referrals were acknowledged by the PP and Mr. Nkwinti subsequently requested a copy of the referral submitted by Mr. Walters.

- [17] On 5 February 2018, the PP's investigators, Mr. Kock and Mr. Mathebula, interviewed Mr. Mahlangu. On the date of the interview, Mr. Mahlangu was "not working". He informed the investigators that he "was fired because of *Bekendvlei*". He made the charges that he had faced available to them. He also informed them that he had his "own file" which would give them "a better picture". The most damning statement made by Mr. Mahlangu was that when he had been introduced to Mr. Present and Mr. Boshomane, he understood it to be "*Ministerial instructions and therefore required prioritisation*". This is the high watermark of any allegations made against Mr. Nkwinti.
- [18] On 17 May 2018, Mr. Nkwinti informed the Speaker that since the PP's acknowledgment of receipt of his referral, no further response had been received by him.
- [19] Subsequently, Mr. Mahlangu, joined the Office of the PP. This was after he was first interviewed by Mr. Kock and Mr. Mathebula. His presence in the office of the PP then cast a shadow over subsequent events in the matter although there was no direct evidence before the Court that his presence in the office had in any way influenced the process or the report of the PP.
- [20] On 2 April 2019, approximately two years and two months after the referral of the allegations against Mr. Nkwinti to the PP, a notice in terms of a section 7(9)<sup>5</sup>, was issued to him. The notice informed him of the possibility of adverse findings against him.

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<sup>5</sup> 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 to 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.*"

- [21] The appellant was requested to respond by 20 April 2019 to the Public Protector's possible findings that he had allegedly violated the provisions of the Executive Ethics Code.
- [22] On 16 April 2019, Mr. Nkwinti requested an extension of the time within which to respond. He furnished the reasons for the request. He also furnished the PP with dates when he was available to meet with her. Mr. Nkwinti immediately began preparing his response. When by 24 April 2019, he had heard nothing from the PP, he sent a second motivated request for an extension. He again furnished dates when he was available to meet.
- [23] On 2 May 2019, the PP informed Mr. Nkwinti that his requests for extension had been declined. The reason proffered was that: *"as it would not be in the interest of the complainant, Mr Thomas Walters, to delay the matter any further"*.
- [24] On the same day and thereafter, Mr. Nkwinti requested that the PP neither finalise nor publish her Final Report prior to reconsidering her refusal of his request for an extension. No response was received. The PP delivered her Final Report. Although it was delivered under cover of a letter dated 30 April 2019, the report itself was dated 3 May 2019. The PP informed Mr. Nkwinti that it would be released to the public at a media briefing on 6 May 2019.
- [25] On 6 May 2019, the release of the report was interdicted pending the institution of review proceedings. This was subsequently done, and the review heard and dismissed on 13 December 2021.
- [26] The question for decision in this appeal is whether on the facts before the PP she could have come to the conclusion that she did or whether it is reviewable under the principle of legality. This is because the PP's investigative report and remedial powers are not of administrative nature, and as such, may only be reviewed in terms of the principle of legality.



[27] It is by now trite that for a review in terms of the principle of legality to succeed, the decision must withstand scrutiny of whether:

[27.1] a rational connection between the finding made and the purpose for which the finding was made;

[27.2] that in order for a finding to be rational it must be founded upon reason and all relevant factors must be taken into account and a failure to do so may render the decision not only irrational but also arbitrary;

[27.3] natural justice demands that in order for a finding to be rational the views of affected persons must be taken into account and the process leading up to the finding being made must therefore allow for this;

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

[28] The attack by Mr Nkwinti on the PP's report was advanced on a number of grounds, the most pertinent of which are:

[28.1] Failure to grant him an extension of time given the circumstances.

[28.2] Failure to give him an opportunity to respond to the possible conclusions included in the section 7(9)(a) notice.

[28.3] The PP's failure to engage with him.

[28.4] The PP's bias and conflict of interest.

[28.5] The irrationality of the PP's findings that Mr. Nkwinti violated the provisions of paragraph 2.3(c) and 2.3(e) of the Executive Ethics Code.

- [28.6] The unreasonable and irrational conclusions and findings in the PP's report.
- [29] Of the 6 grounds, it is convenient to deal with the first 3 together as they all emanate from the refusal by the PP to grant Mr. Nkwinti the extension he requested to "*adequately respond*" to the section 7(9)(a) notice or to engage with him. The second 3 grounds will also be dealt with together as they relate to the evaluation of the evidence that was before the PP and the rationality of her decision based on that evidence.
- [30] In regard to the first 3 grounds set out in paras [28.1] to [28.3] above, section 7(9)(a) was designed to ensure compliance with the principles of natural justice.
- [31] While section 7(1)(b)(i) entitles the PP to conduct and determine the procedure to be adopted in the circumstances of a particular matter, this must be done in a fair manner. In this regard, the PP has a discretion, but that discretion must be exercised in a manner that is consonant with the principles of natural justice.
- [32] Mr. Nkwinti contends that the PP failed to exercise her discretion properly when she refused him the extension to prepare his response to the section 7(9)(a) notice. There is no explanation before the Court for the delay in the investigation of the matter from the time that it was referred to the office of the PP on 12 February 2017 until Mr. Mahlangu was first interviewed a year later. Furthermore, notwithstanding that he had also referred the matter to the PP, no effort was made to engage with him or to arrange any interview with him.
- [33] It is inexplicable that after the lapse of a period of 26 months from the lodgement of the complaint and a year after Mr. Mahlangu had been interviewed that the matter now became one of such urgency that the PP was unable to agree to the short extension of time within which Mr. Nkwinti would

not only have responded to the notice but also have made himself available to be interviewed.

[34] It is not disputed that the subject matter of the complaint related to matters that had occurred some 8 years earlier. All records relating to the transactions in question were in the custody and control of the DRDLR and it is not unreasonable that Mr. Nkwinti as a Minister, required some time to collate and consider those documents before having to respond to the PP.

[35] There is on the facts no cogent reason why the PP refused the request for an extension. The ostensible and sole reason provided<sup>6</sup>, so as not to prejudice the complainant Mr. Walters, leaving aside that both Mr. Nkwinti and the Speaker of Parliament were also complainants, is entirely contrived and without any rational basis. Given the seriousness of the matter, it was incumbent upon the PP to have afforded Mr. Nkwinti the requested extension and to have furthermore engaged with him before issuing and announcing the intention to release any report in which findings adverse to his good name and reputation were made. For this reason, on the first 3 grounds, the review succeeds.

[36] In regard to the second 3 grounds, it was also not disputed that the role of Mr. Nkwinti in the entire process was limited to his introduction of Mr. Present and Mr. Boshomane to Mr. Mahlangu.

[37] It is inexplicable that the PP was able to come to the conclusion, based on the single statement, made almost a decade after the fact that Mr. Mahlangu understood the introduction of Mr. Present and Mr. Boshomane as being "*Ministerial instructions and therefore required prioritisation*" as being evidence of the breach by Mr. Nkwinti of the Executive Ethics Code.

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<sup>6</sup> *Toyota SA Motors (Pty) Ltd v CCMA and Others* [2016] 3 BLLR 217 (CC).

[38] It is readily apparent that the PP's report was based entirely on the interim report of Deloitte together with the interview with Mr. Mahlangu. Since the Deloitte report was only an interim report and the final report exonerated Mr. Nkwinti, all that was left is the statement of Mr. Mahlangu which in its terms casts neither aspersion nor attributes any wrongdoing to Mr. Nkwinti.

[39] There is simply no rational connection between the information that was before the PP and the conclusions reached by her and for this reason, on the second 3 grounds, the review also succeeds.

[40] On the question of costs, counsel for Mr. Nkwinti argued that a punitive order for costs on the scale as between attorney and client should be ordered. He also argued that given the importance of the matter to Mr. Nkwinti personally and that he was personally prosecuting this appeal, the scale of costs should reflect this. I agree.

[41] In the circumstances, I propose the following order:

[42.1] The appeal is upheld.

[42.2] The first respondent is ordered to pay the costs of the appeal on the scale as between attorney and client. The costs are to include the costs consequent upon the employment of counsel, and which are to be taxed on scale C.

[42.3] The order of the Court *a quo* is set aside and replaced with the following:

*"1. The application for review is granted.*

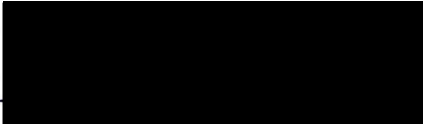
*2. The report of the first respondent dated 3 May 2019 is reviewed and set aside.*

3. *The first respondent is ordered to pay the applicant's costs on the scale as between attorney and client, which cost are to include the costs consequent upon the employment of senior counsel."*

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**M.O. NTULI  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**I agree, and it is so ordered**

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**A. MILLAR  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**I agree**

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**B. CEYLON  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

HEARD ON:

22 MAY 2024

JUDGMENT DELIVERED ON:

8 JULY 2024

COUNSEL FOR APPELLANT:

ADV ESJ VAN GRAAN SC

ADV PA VENTER

INSTRUCTED BY:

VZLR INC.

NO APPEARANCE FOR THE RESPONDENTS

THE FIRST RESPONDENT FILED A NOTICE TO ABIDE THE DECISION OF THE COURT ON 7 OCTOBER 2022.