

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

ORIGINAL

CASE NUMBER:

13386/19

PUBLIC PROTECTOR
RECEIVED
2019-02-28
PRETORIA
OPENBARE BESKERMER

In the matter between:

MINISTER OF FINANCE

First Applicant

and

PUBLIC PROTECTOR

REGISTRAR OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2019-02-27
L. W. MOTAU
GRIFPIER VAN DIE HOË HOF VAN
SUID AFRIKA GAUTENG AFDELING, PRETORIA

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Second Respondent

DONDO MOGAJANE

Third Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE that the applicant intends to apply to the above honourable court on a date and time to be determined by the Registrar for an order in the following terms:

1. Reviewing and setting aside the findings and remedial action set out in the report of the first respondent of 12 December 2018 titled: "Report on an

REGISTRAR PRETORIA-OOS
714 PRETORIA 0001
A 2019-02-27
012 342 7240 / 1 / 4 / 38
SHERIFF PRETORIA EAST

Investigation into Allegations of Improper Conduct Regarding Mr Dondo Mogajane's Application for the Position of Director-General at National Treasury and his Subsequent Appointment to the Same Position by National Treasury" attached to the founding affidavit as annexure "TM1";

2. Granting costs of the application in the event of opposition;
3. Granting further and/or alternative relief.

TAKE NOTICE that the accompanying affidavit of **MINISTER TITO TITUS MBOWENI** will be used in support of this application.

TAKE NOTICE that the applicant has appointed the State Attorney Pretoria as its attorney of record in this matter at which address they will accept notice and service of all documents and proceedings in this matter.

TAKE NOTICE that the first respondent is required to dispatch to the Registrar, within 15 days of receipt of this notice of motion the record of its decision and any documents relied on in compiling the impugned report of December 2018.

TAKE NOTICE that once the Registrar has made the record of decision available to the applicant, he may, in terms of Rule 53(4), amend his notice of motion and supplement his founding affidavit within 10 days.

AND TAKE FURTHER NOTICE that if any of the respondents wish to oppose the application they must:

- a) Within 15 days after receipt of this notice of motion, or any amendment thereof, file a notice of their intention to oppose and, in the notice appoint an address within 15 kilometres of this court at which they will accept notice and service of all documents and proceedings in this matter; and
- b) Within 30 days of the expiry of the period within which the applicant may supplement their founding affidavit, deliver their answering affidavits, if any.

AND TAKE FINAL NOTICE that if the respondents do not oppose the relief claimed by the applicants, this application will be heard on a date to be determined by the Registrar.

Dated at Pretoria on this *27th* day of February 2019.



**STATE ATTORNEY
APPLICANT'S ATTORNEYS**
SALU Building
255 Thabo Sehume (Andries) Street,
cnr Francis Baard(Schoeman) Street
Private Bag X91, PRETORIA, 0001
Docex: 298, PTA
Ref: 5148/18/Z32
Ref to: MS T M NHLANZI
Tel: (012) 309 - 1575
Fax: (012) 309 - 1549/50

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

**AND
TO:**

FIRST RESPONDENT

Hillcrest Office Park

175 Lunnon Street

Brooklyn

Pretoria

**AND
TO:**

SECOND RESPONDENT

Union Buildings

Government Avenue

Pretoria

C/O THE STATE ATTORNEY PRETORIA

SALU Building

316 Thabo Sehume (Andries) Street

Pretoria

**AND
TO:**

THIRD RESPONDENT

Old Reserve Bank

40 Church Street

Pretoria

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

CASE NO:

In the matter between:

MINISTER OF FINANCE

Applicant

and

PUBLIC PROTECTOR

First Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Second Respondent

DONDO MOGAJANE

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

TITO TITUS MBOWENI

do hereby make oath and say as follows:

Introduction

1. I am the Minister of Finance and the applicant in this matter. I am also the executive head of National Treasury situated at 40 Church Square, Pretoria.
2. The facts contained herein fall within my personal knowledge save where the contrary appears from the context and are to the best of my belief both true and correct.
3. Where I make legal submissions, I do so on the advice of my legal representatives.

DM *TTM*

The Parties

4. I am the applicant and I bring this application in my capacity as Minister on behalf of the National Treasury. My details are as set out above.
5. The first respondent is the Public Protector ("PP"), established in terms of section 181(1)(a) of chapter 9 of the Constitution as well as section 1A(1) of the Public Protector Act, 23 of 1994. The head office and principal place of business of the PP is at 175 Lunnon Street, Hillcrest Office Park, Brooklyn, Pretoria.
6. The second respondent is the President of the Republic of South Africa. In the report at issue in this application, the President was directed by the PP, as part of her remedial action, to institute disciplinary action against the third respondent. In view hereof, the President is cited for any interest he may have in the outcome of this matter. No direct relief is sought against him.
7. The third respondent is Dondo Mogajane, the Director-General ("DG") of National Treasury ("NT"). His address and principal place of business is 40 Church Square, Pretoria.

These proceedings

8. This is an application to review and set aside the findings and remedial action made by the PP in her report dated 18 December 2018 titled '*Report on an Investigation into Allegations of Improper Conduct Regarding Mr Dondo Mogajane's Application for the Position of Director-General at National Treasury and his Subsequent Appointment to the Same Position by National Treasury*'. The report is attached hereto as annexure "TM1".
9. As I discuss fully in this affidavit, the PP concluded in her report that the third respondent was dishonest and that he made himself guilty of gross negligence

when he applied for the post of DG in 2017 by failing to disclose that he has a criminal conviction. This conviction relates to a traffic infraction in 2011, for which the third respondent paid an admission of guilt fine. The remedial action directed by her is that the President should institute disciplinary steps against the third respondent. At the same time, the PP found that the third respondent's appointment as DG is improper.

10. I demonstrate in this affidavit that the findings of the PP are arbitrary and irrational in that:
 - 10.1. There is no rational basis on which she could have arrived at these findings;
 - 10.2. The PP failed to have due regard to relevant factors and instead considered irrelevant factors;
 - 10.3. There is no rational connection between the findings and remedial action and the evidence before her at the time.

11. The remedial action is inappropriate in that it infringes on the doctrine of separation of powers in that:
 - 11.1. The remedial action directed against the President requires that he submits an implementation plan for approval prior to implementing the remedial action directed by the PP;
 - 11.2. To the extent that prior approval by the PP of the implementation plan is required, the remedial action amounts to an unconstitutional breach of the separation of powers, in that it effectively usurps the President's executive constitutional powers to appoint and discipline Directors-General and arrogates this power to the PP;

AM
TSM

- 11.3. This is untenable and undermines the very fabric of our constitutional democracy. In this regard, National Treasury has a material interest in correcting this state of affairs.
12. I therefore seek an order that the PP's findings and remedial action is declared to be irrational, alternatively unreasonable, and set aside.

The Material Facts

The complaint

13. The investigation by the PP stemmed from a complaint that was lodged against the third respondent anonymously on 22 August 2017. The complainant alleged that when the third respondent applied for the post of DG on 26 April 2017, he provided false information on his Z83 application form because he failed to disclose that he had been found guilty of contravening the Road Traffic Act of 1996, sometime during 2011.
14. In "TM1" hereto, the PP articulates the complaint as follows: *"[i]n essence, the complaint is that Mr Mogajane misrepresented facts about his personal record thereby concealing pertinent information which reflected on his suitability or otherwise for the position of Director-General at National Treasury, to which he was appointed by the former Minister of Finance, Mr Malusi Gigaba MP (former Minister Gigaba)"* (page 3 of the report).
15. From the contents of her report, it appears that, in response to the anonymous complaint, the PP investigated three distinct issues:
- 15.1. Firstly, whether the third respondent failed to disclose his criminal record on the Z83 application form when he applied for the post of DG in 2017;

15.2. Secondly, whether, if there was such a non-disclosure, it amounted to improper or dishonest conduct within the meaning of section 6(4) of the Public Protector Act; and

15.3. Whether the conduct of former Minister of Finance in appointing the third respondent was proper.

The investigation

16. The PP carried out her investigation in terms of section 182 of the Constitution and in terms of section 6 and 7 of the Public Protector Act. The first phase was a preliminary investigation. Thereafter she conducted a formal investigation by sending letters to my predecessors, Minister Gigaba and Minister Nene. She also exchanged correspondences with the third respondent.

The outcome

17. The PP found that the third respondent had failed to disclose his criminal record in the Z83 application form for the post of DG.

18. She found further that the third respondent has a duty in law to act honestly and in good faith towards National Treasury. She found that this duty required that he disclose his criminal conviction on the Z83 application. She found that he did not disclose his conviction in 2015 and after he was made aware thereof, acted dishonestly when he did not disclose it in his Z83 application form for the position of DG in 2017. She found ultimately that the third respondent acted without integrity and that he acted dishonestly. She concluded that his conduct was improper as contemplated in section 6(4) of the Public Protector Act.

19. In relation to the conduct of former Minister Gigaba, the PP found that he knew or ought to have known of the third respondent's failure to disclose his criminal record in his Z83 application form. She held that then Minister Gigaba proceeded to

approve the third respondent's appointment, thereby "tacitly condoning the impropriety".

20. She does however make the finding that the third respondent's appointment remains valid or legally binding.
21. The remedial action ordered by the PP is that the President is ordered to, within 30 days of her report, take appropriate disciplinary action against the DG for blatantly and dishonestly making false representations of material facts in his Z83 application form for the post of DG.
22. According to the PP's report, this remedial action is based on section 16A of the Public Service Act of 1994 which, in relevant part, provides that:

"16A Failure to comply with Act

- (1) An executive authority shall-
 - (a) immediately take appropriate disciplinary steps against a head of department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;
 - (b) immediately report to the Minister the particulars of such non-compliance; and
 - (c) as soon as possible report to the Minister the particulars of the disciplinary steps taken.
- (2) A head of a department shall-
 - (a) immediately take appropriate disciplinary steps against an employee of the department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;
 - (b) immediately report to the Director-General: Public Service and Administration the particulars of such non-compliance; and

- (c) as soon as possible report to that Director-General the particulars of the disciplinary steps taken."

The third respondent's explanation

23. In his responses to the PP, the third respondent fully explained how it came about that his Z83 application form did not disclose a criminal record. The explanation from the third respondent is attached marked "TM2". His confirmatory affidavit is attached marked "TM3". In essence, the explanation is the following:
- 23.1. When he applied for the post of DG in April 2017, he was holding the post of Deputy DG in National Treasury.
- 23.2. Given the severe work pressure that he was under at the time, he decided to apply for the position of DG on the eve of the closing date.
- 23.3. At his request, the Z83 form was completed by his divisional support manager, Ms Mmatshupo Maudi. Ms Maudi clearly assumed that he did not have a criminal record and hence reflected this on the form. A confirmatory affidavit by Ms Maudi is attached marked "TM4".
- 23.4. She brought the form to the third respondent to sign whilst he was in a meeting. The third respondent signed the form without reading it.
- 23.5. The third respondent was interviewed sometime in May 2017. Thereafter, he had a discussion with former Minister Gigaba who asked him about the conviction for the traffic offence.
- 23.6. The third respondent disclosed that this was already part of his employment record since he was appointed as Deputy DG in 2015. At the time, this was raised with the third respondent by the Security Manager at National Treasury, Ms Faith Leeuw. The third respondent was requested to file forms fully disclosing the details of the conviction, which he duly did.

23.7. The third respondent accepted in his submission to the PP that he ought to have checked the accuracy of the form before he signed it. He fully accepted responsibility for not doing so. This however did not mean that he was dishonest as a result of the misstatement reflected in his form.

Grounds of review

24. The PP's finding that the third respondent acted blatantly dishonestly and improperly is irrational and arbitrary, alternatively unreasonable, in light of the following:

24.1. The PP accepted the third respondent's explanation that the Z83 form was completed by the divisional support manager and that he did not check the form for accuracy. In the face of these findings, the finding that he acted dishonestly is palpably irrational.

24.2. There was no evidence before the PP to show that the third respondent acted dishonestly.

24.3. The PP disregarded evidence before her which demonstrated that there was no intention on the part of the third respondent to mislead his employer. Crucially, when he was appointed as Deputy DG in 2015, National Treasury and the SSA were made aware of the third respondent's conviction for the traffic offence. Once the existence of his criminal record was drawn to his attention, the third respondent made full disclosure of all the relevant facts.

25. In short, what the facts show is that the third respondent simply omitted to record on his Z83 application form that he had a conviction. The form was completed by the third respondent's divisional support manager and he failed to ensure its accuracy

before he signed. This was an oversight on the part of the third respondent for which he rightly accepts full responsibility.

26. There was self-evidently no intention to mislead National Treasury or to be dishonest. This is demonstrated by, among others, the following facts:

26.1. In his previous application for the post of Deputy DG, the SSA vetted the third respondent's appointment and discovered the conviction for the traffic offence. At the time the third respondent was unaware of the existence thereof. As soon as he was made aware of it, he fully disclosed the details pertaining thereto.

26.2. The PP herself finds that: "*Evidence presented before me confirm that information of Mr Mogajane's criminal conviction was on record with National Treasury by virtue of the outcome of security screening in relation to his appointment as Deputy Director-General in 2015 and should have been availed to the Selection Committee during the screening and selection process in 2017.*" (para 6.2.2 of the PP's report)

26.3. National Treasury and the SSA were thus fully aware of the existence of the conviction. This alone renders the PP's finding that the third respondent intended to mislead his employer by withholding that information irrational.

26.4. Two former Ministers of Finance, Minister Nene and Minister Gigaba both confirmed to the PP that the third respondent's failure to disclose was inadvertent and that he had no intention to mislead National Treasury.

27. The PP's finding that the conduct of the former Minister of Finance in the appointment of the third respondent is irrational and arbitrary in light of the following:

- 27.1. As the PP records, on 24 May 2017, about one month after the third respondent applied for the post (but prior to his appointment) former Minister Gigaba received a pre-employment screening letter from the SSA indicating that the third respondent had a criminal record because he had been found guilty of an offence under the Road Traffic Act.
- 27.2. The PP disputes the authenticity of the letter notwithstanding the fact that there was not an iota of evidence to support her misgivings. She acted irrationally in not accepting the authenticity of the letter.
- 27.3. Furthermore, her remarks about the role played by Ms Faith Leeuw were entirely unwarranted. In impugning the integrity of Ms Leeuw, an employee of National Treasury, the PP:
- 27.3.1. Failed to afford Ms Leeuw an opportunity to respond to these adverse observations prior to recording them in her report;
- 27.3.2. Made observations and findings which were not rationally connected to the evidence before her; and
- 27.3.3. Failed to have regard to the proper role played by the SSA in the appointment process. In this regard, I refer to the attached supporting affidavit of Ms Faith Leeuw marked "TM5".
- 27.4. Having been satisfied about the third respondent's explanation for the failure to reflect the criminal record in the Z83 application form, the Minister was entitled to recommend the third respondent for position of DG. The criminal record was drawn to the attention of cabinet who confirmed his appointment notwithstanding the existence thereof. The PP's finding that this did not happen is inconsistent with the evidence before her and therefor irrational.

28. In directing that the President has to compile an implementation plan which has to be approved by her prior to being executed, the PP has breached the carefully entrenched separation of powers in that:

28.1. First, the power to appoint and manage career incidents of the HoD vests in the President in terms of section 12(1) of the Public Service Act. In terms of the expanded interpretation accorded to *career incidents* they include the power to suspend and discharge. The President is empowered by section 42A(3) to delegate to a Minister the power conferred on him under the Act. In this case he has conferred the power to the Minister of Higher Education.

28.2. There is no room in the legislative or constitutional framework for the President to report pre-emptively to the PP prior to the exercise of these executive powers and the requirement by the PP that he does so is an unlawful breach of the separation of powers.

The implications of the findings and 'observations' made by the PP

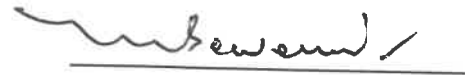
29. National Treasury has a material interest in the finding of the PP that the third respondent was 'blatantly dishonest'. As its operational head, the third respondent is responsible for ensuring it carries out its obligations under Chapter 13 of the Constitution and the PFMA. These obligations include strategising to responsibly manage South Africa's national government finances. The third respondent is required, in his role as DG and, in his interaction with the Minister of Finance to implement and report on efficient and sustainable public financial management. It is through the leadership of his office and that of the Deputy DG's who report to him that the promotion of economic development, good governance, social progress and a rising standard of living for all South Africans is implemented. The Constitution requires that National Treasury carry out its mandate transparently and

that it conducts itself with accountability and implement sound financial controls in the management of public finances.

30. Treasury's legislative mandate is also described in Chapter 2 of the PFMA as being to promote government's fiscal policy framework; to coordinate macroeconomic policy and intergovernmental financial relations; to manage the budget preparation process; to facilitate the Division of Revenue Act, which provides for an equitable distribution of nationally raised revenue between national, provincial and local government; and to monitor the implementation of provincial budgets. As mandated by the executive and Parliament, Treasury also supports the optimal allocation and utilisation of financial resources in all spheres of government to reduce poverty and vulnerability among South Africa's most marginalised.
31. The findings of the PP are thus damaging to National Treasury. Not only must it implement sound fiscal policy as the custodian of the national fiscus, but it must be seen to do so with fit and proper leadership directing its mandate.
32. As a result of the report of the PP irrationally concluding that the third respondent was dishonest, the reputation and image of National Treasury, domestically and internationally, stands to be severely impacted.
33. I am advised that whilst the PP is clothed with extensive investigative powers and empowered to recommend binding remedial action, she is nevertheless constrained, in the execution of her mandate, to take appropriate remedial action, because it is only where her findings are proper and capable of implementation that our constitutional democracy is truly strengthened.
34. Thus, it is trite that the findings and remedial action of the PP must facilitate good governance, accountability and the rule of law. Her role is eroded where she acts irrationally.

Conclusion

35. In all of the above circumstances, I seek an order in terms of the Notice of Motion that the findings of the PP that the third respondent is dishonest and lacks integrity; that the former Minister of Finance acted improperly in appointing the third respondent and the remedial action directed against the President is set aside.



DEPONENT

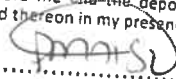
I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at CAPE TOWN JOHANNESBURG on this the 21st day of FEBRUARY 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS



I certify that the deponent has acknowledged that he/she knows and understands the contents of this declaration which was sworn to/affirmed before me and the deponent's signature/thumbprint/mark was placed thereon in my presence.



Commissioner of Oaths

Name: MAJOR GENERAL SABS

Designation (Rank):

Date: 2019-02-21 Place: CAPE TOWN

