IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case no. 208/2018

Date heard: 14/2/19

Date delivered: 7/3/19

Reportable

In the matter between:

Nomdakazana Tibelo Marion Mbina-Mthembu **Applicant**

and

The Public Protector **Respondent**

JUDGMENT

Plasket J:

[1] When the founding father of South Africa's democracy, Mr Nelson Rolihlahla Mandela, died on 5 December 2013 at the age of 94 years, hasty arrangements were made for his State funeral scheduled for ten days after his death. He was to be buried at his home in Qunu near Mthatha in the Eastern Cape province. Planning for and the implementation of the planning of the funeral involved the national, provincial and local spheres of government. On the provincial level, the Eastern Cape provincial government (the provincial government) was centrally involved, while on the local level, the King Sabata Dalindyebo Local Municipality (the KSD Municipality)

and the O R Tambo District Municipality (the ORT Municipality) had roles to play. Little prior planning of any significance was undertaken, even though Mr Mandela had been ill for some time.

[2] In order to meet the exigencies of the situation, the provincial government decided to make available R300 million to fund the funeral. This amount had been allocated to the Eastern Cape Development Corporation (the ECDC)[1] and ring-fenced for the ECDC to use for social infrastructure development. The ECDC was given the function of paymaster and by the time the funeral had been concluded and suppliers of goods and services had been paid, it had disbursed R35 963 889. The provincial government's thinking when it embarked on this arrangement was that it would re-imburse the ECDC in due course.

[3] A number of complaints were made to the Public Protector that maladministration had occurred during the process. She investigated the complaints and produced a report entitled 'Report of the Public Protector on an Investigation into Allegations of Misappropriation of Public Funds, Improper Conduct and Maladministration by the Eastern Cape Provincial Government and Other Organs of State in Connection with the Expenditure Incurred in Preparation for the Funeral of the Late Former President Nelson Rolihlahla Mandela, *"Aah! Dalibhunga"*.

[4] The report contained four adverse findings against the applicant, Ms Nomdakazana Mbina-Mthembu, who was, at the time, the head of the provincial treasury in the provincial government. The remedial action of relevance to this matter that was directed by the Public Protector was that the 'Provincial Treasury of the Eastern Cape conduct an investigation into the financial misconduct of Ms Mbina-Mthembu referred to in this report, in terms of Treasury Regulation 4.1.3, and to take the appropriate action'.

[5] Ms Mbina-Mthembu has applied for an order in the following terms:

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[1] The ECDC is a corporation created by the Eastern Cape Development Corporation Act 2 of 1997 (EC). Its principle objects are to 'plan, finance, co-ordinate, market, promote and implement the development of the Province and all its people in the fields of industry, commerce, agriculture, transport and finance' (s 3).

'reviewing and setting aside Report No 29 of 2017/2018 titled: "MANDELA FUNERAL: REPORT OF THE PUBLIC PROTECTOR ON AN INVESTIGATION INTO ALLEGATIONS OF MISAPPROPRIATION OF PUBLIC FUNDS, IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHER ORGANS OF STATE IN CONNECTION WITH EXPENDITURE INCURRED IN PREPARATION FOR THE FUNERAL OF PRESIDENT NELSON ROLIHLAHLA MANDELA" which was released by the respondent on or about 4 December 2017, either in whole or to the extent that such report makes certain findings against or concerning the applicant and/or the Eastern Cape Provincial Planning and Treasury and setting aside certain remedial action taken by the respondent against the applicant as contained in the said report.'

[6] It was accepted by Mr Ntsaluba who, together with Mr Mapoma, appeared for Ms Mbina-Mthembu, that if the application was to succeed, Ms Mbina-Mthembu was not entitled to the setting aside of the whole report: she would only be entitled to the setting aside of the adverse findings made in respect of her and the remedial action ordered against her.

Review of decisions of the Public Protector

[7] Our Constitution is based, inter alia, on the values of constitutional supremacy and the rule of law.[2] Any conduct that is inconsistent with the Constitution is invalid.[3] All public power is subject to review by the courts.[4]

[8] Different 'pathways'[5] to review are recognised by the law. In this case, reliance was initially placed on s 6 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) as the pathway to the review of the Public Protector's decisions in respect of Ms Mbina-Mthembu.[6] In the alternative, the principle of legality that flows from the founding value of the rule of law was relied upon.

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[2] Section 1(c).
[3] Section 2.
[4] Section 172.
[5] The term is used by Hoexter *Administrative Law in South Africa* (2 ed) at 114-115 to describe the various mechanisms by which exercises of public power are taken on review.
[6] Section 6(1) of the PAJA provides that '[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action'. Section 6(2) codifies the grounds upon which administrative action may be reviewed. See *Joubert Galpin Searle Inc & others v Road Accident Fund & others* 2014 (4) SA 148 (ECP) para 58.

[9] After the application had been launched, however, the issue as to which pathway to review applies to the investigative, reporting and remedial powers of the Public Protector was determined by the Supreme Court of Appeal. In *Minister of Home Affairs & another v Public Protector*[7] it was held that the PAJA did not apply 'to the review of exercises of power by the Public Protector in terms of s 182 of the Constitution and s 6 of the Public Protector Act [23 of 1994]' but that the principle of legality applies to the review of these exercises of power.

[10] This case concerns an application for the review of the exercise of power by the Public Protector, and not an appeal. This distinction is of importance. Wade and Forsyth[8] explain the difference between the two as follows:

'The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is "right or wrong"? On review, the question is "lawful or unlawful"?

The authors describe judicial review as a 'fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law'.

[11] Maintaining the distinction between review and appeal is of great importance because, as Baxter has said, '[w]ithout statutory authority, the court may not venture to question the *merits* or wisdom of any administrative decision that may be in dispute', that if it was to do so, 'it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation' and, what is more, it 'would be moving beyond its special area of expertise'.[9] These ideas were captured pithily by Lord Hailsham LC in *Chief Constable of the North Wales Police v Evans*[10] when he said that the 'function of the court is to see that lawful authority is

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[7] *Minister of Home Affairs & another v Public Protector* 2018 (3) SA 380 (SCA) para 37.
[8] Wade and Forsyth *Administrative Law* (10 ed) at 28-29. See too Hoexter (note 5) at 113.
[9] Baxter *Administrative Law* at 305.
[10] *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 143h-i. See too *Sinovich v Hercules Municipal Council* 1946 AD 783 at 802-803. Endicott *Administrative Law* para 9.1.6 says: 'All public authorities ought to make the best possible decisions (and Parliament can be presumed to intend that they should do so). But that does not mean that the judges have jurisdiction

not abused by unfair treatment and not to attempt itself the task entrusted to that authority by law'.

[12] At common law, the justification for the power of courts to judicially review exercises of public power stems from the rule of law.[11] The grounds of review that were developed over the centuries fell within three broad categories – unlawfulness, unreasonableness and procedural impropriety.[12] It is from this source that the fundamental right to just administrative action arose – the right to administrative action that is lawful, reasonable and procedurally fair.[13]

[13] The grounds of review that are set out in s 6(2) of the PAJA are, in essence, a codified form of the common law grounds of review (with one or two having been developed, to an extent, and others having been omitted, by mistake) that are applicable to all exercises of public power.[14] (Prior to 1994, no distinction was drawn between administrative action as it is now defined and other forms of public power, such as executive action.) As a result, and generally speaking, the same grounds of review that apply to reviews in terms of s 6 of the PAJA now apply to reviews in terms of the principle of legality.[15] The common law grounds of review that apply in reviews in terms of the principle legality have, however, now been 'subsumed under the Constitution' and 'gain their force from the Constitution'.[16]

The factual background

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to hold that a decision was *ultra vires* on the ground that it was not the best decision that could have been made.'

[11] Woolf, Jowell, Donnelly and Hare ***De Smith's Judicial*** *Review* (8 ed) paras1-019-1-025.

[12] *Council of Civil Service Unions & others v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 950h-951a.

[13] Constitution, s 33(1).

[14] Hoexter (note 5) at 118-119; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 25; *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign and another as amici curiae)* 2006 (2) SA 311 (CC) para 95.

[15] *Minister of Home Affairs & another v Public Protector* (note 7) para 38.

[16] *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 33.

[14] The material facts are, by and large, common cause. Where there are disputes of fact, on the basis of the *Plascon-Evans* rule,[17] the Public Protector's averments will prevail over those of Ms Mbina-Mthembu.

[15] When Mr Mandela died, the provincial government was expected to coordinate the arrangements for the funeral. A meeting of the province's top management, attended by seven heads of department, was held on the morning of 6 December 2013 to discuss planning for the funeral. Ms Mbina-Mthembu's role in the meeting, according to her founding affidavit, was to 'advise how funds would be made available for the final Eastern Cape leg of the State Funeral as well as the Provincial memorial services as per the 10-day programme of the mourning period culminating in the funeral'.

[16] She told the meeting that there were two options available. The first option was to obtain emergency funding in terms of s 25 of the Public Finance Management Act 1 of 1999 (the PFMA). Section 25(1) provides:

'The MEC for finance in a province may authorise the use of funds from that province's Provincial Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest in the province, be postponed to a future appropriation by the provincial legislature.'

[17] The second option was to use funds that had already been appropriated to a public entity or department, and to re-imburse it later from the Provincial Revenue Fund. She favoured this option.

[18] Ms Mbina-Mthembu then drafted a memorandum which was to be placed before the executive council of the provincial government (the EXCO). It was dated 6 December 2013, was entitled 'Co-ordination and Variation of Use of Funds for an Emergency' and was signed by her. Its purpose, according to paragraph 1, was to advise the EXCO 'on the proposed variation of use of funds to incur any expenditure to support the funeral arrangements of the late State President' and to identify 'controls to be implemented to ensure the three spheres of government work in a co-ordinated way in the delivery of this project'.

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[17] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I.

[19] In her discussion of the problem facing the provincial government, Ms Mbina-Mthembu pointed out that there was no provincial auxiliary services budget for the province to be used in a case such as this, with the result that 'it is necessary that funds be identified to support this initiative'. She then said that R300 million for social infrastructure development had been voted to the Department of Economic Development, Environmental Affairs and Tourism (DEDEAT) for transfer to the ECDC, and that it 'will be necessary to utilise some of these funds for any costs related to the funeral preparations and related logistical arrangements'. She continued to say that the ECDC 'has been appointed by the province as the project host' and it 'is to requisition these funds from DEDEAT timeously'.

[20] Before the funds were committed, however, an 'endorsement must be received from the HOD of Provincial Treasury in terms of S 6.3.1(c) of Treasury regulations as "allocations earmarked by the relevant treasury for a specific purpose may not be used for other purposes, except with its approval"'. She undertook that the provincial treasury would support the ECDC in this regard. She made the point that the costs involved were unknown at that stage but once the amount was established, 'the MEC for Planning and Finance will defray these costs from the [Provincial Revenue Fund] if necessary (ie the funds voted to ECDC have been depleted, etc) – this will be done in line with section 25 of the PFMA'.

[21] Having identified the financial implications as involving the variation of the use of funds from 'Social infrastructure to infrastructure relating to funeral support' she made the following recommendations:

'It is recommended that EXCO:

12.1 Supports that ECDC will be the Project host/paymaster;

12.2 Support that some of the funds earmarked for Social Infrastructure in ECDC will be utilised to defer (sic) the cost of funeral arrangements.

12.3 Supports the control that all expenditure must be endorsed by a Provincial Treasury official after consultation with project coordinators and that any expenditure incurred by both

the Provincial Government and National Government must first be communicated to Provincial Treasury to limit duplication of costs.

12.4 As the project costs are unknown at this stage, the MEC for Planning and Finance may defray these costs from the PRF if necessary (ie the funds voted to ECDC have been depleted, etc) – in line with section 25 of the PFMA.'

[22] On the same day, the EXCO passed a resolution that:

'1) The Eastern Cape Development Corporation be the project host/paymaster;

2) The funeral arrangement costs be defrayed from some of the funds earmarked for social infrastructure in ECDC.

3) The control measures proposed by Provincial Planning and Treasury be endorsed;

4) The MEC for Provincial Planning and Finance is mandated to defray the funeral costs from the Provincial Revenue Fund in line with Section 25 of the Provincial Finance Management Act 1 of 1999.' (sic)

The premier at the time, Ms N Kiviet, told the Public Protector that the EXCO had, in passing the resolution, relied on the advice it had received from the provincial treasury, and Ms Mbina-Mthembu in particular.

[23] The first issue that the Public Protector dealt with in relation to Ms Mbina-Mthembu concerned the advice she had given the EXCO in the memorandum. That issue was whether the provincial government had 'improperly diverted public funds amounting to R300 000 000 placed in the custody of the ECDC, which were appropriated for purposes of accelerating social infrastructure delivery in the province, to use them for the memorial service and funeral of President Mandela and if so; whether such conduct was improper and constituted maladministration'.

[24] The provincial treasury continued to play an active role in the procurement process leading up to the funeral. This was the focus of the second aspect of the Public Protector's investigation in relation to Ms Mbina-Mthembu. She enquired into

whether ‘the procurement process followed by the Eastern Cape Provincial Government was in accordance with a system that is fair, equitable, transparent, competitive and cost effective’.

[25] The third aspect of the investigation that was relevant to Ms Mbina-Mthembu concerned a specific incident in which public funds were transferred by the treasury into the personal bank account of the MEC for Provincial Planning and Finance, Mr P Masualle. The question that the Public Protector asked in this respect was whether this transfer was irregular.

[26] The fourth enquiry was whether ‘the ECDC acting in its official capacity as Project Host and Paymaster caused the ECPG to incur irregular, fruitless and wasteful expenditure of public funds for the memorial services and funeral of President Mandela and if so; whether such conduct was improper and constituted maladministration’.

The Public Protector’s findings

Finding 1: The funding of the funeral

[27] It is not in dispute that Ms Mbina-Mthembu drafted the memorandum for the EXCO in which she proposed that the funeral be funded with the funds already allocated to the ECDC for the purpose of providing social infrastructure, and that the ECDC would act as paymaster in respect of the procurement of goods and services. It is also common cause that the EXCO accepted the advice given to it by Ms Mbina-Mthembu by passing a resolution that reflected that advice.

[28] The key finding made by the Public Protector was that the provincial government’s diversion of the ECDC’s funds from social infrastructure development to paying for the funeral was improper. She found that Ms Mbina-Mthembu recommended the arrangement and believed that Treasury Regulation 6.1.3(c) allowed for it. The Public Protector concluded, however, that Ms Mbina-Mthembu was wrong in her view of the law. She held that Ms Mbina-Mthembu had thus ‘misdirected’ the EXCO, that her proposal was ‘irrational and unlawful’, that it

resulted in an irrational decision by the EXCO that 'culminated in expenditure by the ECDC that was unauthorised as contemplated by the PFMA' and that Ms Mbina-Mthembu's 'conduct was improper and constituted maladministration'.

[29] In her founding affidavit, Ms Mbina-Mthembu said that the EXCO acted constitutionally and lawfully when it passed its resolution and that the diversion of the funds was not improper. She expressed the view that that the conclusion reached by the Public Protector was influenced by an error of law and was not rationally connected to the information before her.

[30] Ms Mbina-Mthembu argued that the Public Protector misconstrued the applicable statutory provisions, with the result that her conclusions were materially influenced by an error of law and were also 'not rationally connected to the information that served before her'. Had she interpreted the law correctly, she would have concluded that the diversion of the funds was lawful, with the result that Ms Mbina-Mthembu could not be found to have been guilty of maladministration.

[31] In *President of the Republic of South Africa & others v South African Rugby Football Union & others*[18] the Constitutional Court identified one of the aspects of the principle of legality as being that, in exercising public power, functionaries may not misconstrue their powers. In *Hira & another v Booysen & another*,[19] in strikingly similar terms, Corbett CJ had, in posing the question whether errors of law were reviewable, described an error of law as being constituted by a decision-maker misconstruing the statutory provisions in terms of which his or her decision had to be made.[20] He answered the question he had posed affirmatively: unless the legislature has clearly left the interpretation of the law entirely in the hands of the functionary, errors of law, as long as they are material, are reviewable.[21] At common law,

[18] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 148. See too *President of the Republic of South Africa & another v Hugo* 1997(4) SA 1 (CC) para 29.
[19] *Hira & another v Booysen & another* 1992 (4) SA 69 (A).
[20] At 85A-B.
[21] At 93C-I.

therefore, a material error of law is a ground of review.[22] It is, therefore, also a ground of review in terms of the principle of legality.

[32] In order to determine whether the Public Protector committed an error of law, it is necessary to consider the process that regulates virements – the 'process of transferring items (esp. public funds) from one financial account to another'.[23] (I have no doubt that if the Public Protector did indeed commit an error of law, that error would be material, given the important effect it had on her findings.)

[33] Ms Mbina-Mthembu argued that Treasury Regulation 6.3.1(c) applied and that it authorised the diversion of the funds. This regulation provides:

'For purposes of section 43(1) of the Act –

. . .

(c) allocations earmarked by the relevant treasury for a specific purpose (excluding compensation of employees) may not be used for other purposes, except with its approval.'

[34] The Public Protector argued, however, that one has to begin the enquiry with s 43 of the PFMA as the Treasury Regulations are subordinate legislation made in terms of the PFMA, and are thus subject to it. Section 43 provides:

'(1) An accounting officer for a department may utilise a saving in the amount appropriated under a main division within a vote towards the defrayment of excess expenditure under another main division within the same vote, unless the relevant treasury directs otherwise.

(2) The amount of a saving under a main division of a vote that may be utilised in terms of subsection (1), may not exceed eight per cent of the amount appropriated under that main division.

(3) An accounting officer must within seven days submit a report containing the prescribed particulars concerning the utilisation of a saving in terms of subsection (1), to the executive authority responsible for the department and to the relevant treasury.

(4) This section does not authorise the utilisation of a saving in-

(a) an amount specifically and exclusively appropriated for a purpose mentioned under a main division within a vote;

(b) an amount appropriated for transfer to another institution; and

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[22] Section 6(2)(d) of the PAJA codified Corbett CJ's formulation of error of law as a ground of review. It provides that administrative action may be set aside on review if 'the action was materially influenced by an error of law'.

[23] *The New Shorter Oxford English Dictionary*.

(c) an amount appropriated for capital expenditure in order to defray current expenditure.

(5) A utilisation of a saving in terms of subsection (1) is a direct charge against the relevant Revenue Fund provided that, in the case of a province, that province enacts such utilisation as a direct charge.

(6) The National Treasury may by regulation or instruction in terms of section 76 regulate the application of this section.'

[35] What is clear from s 43(1) of the PFMA is that a lawful virement can only occur in respect of a saving, on the one hand, and excess expenditure, on the other, 'within the same vote'. Furthermore, it is initiated by the accounting officer of the department concerned. It is not clear how the funds that were diverted can be regarded as a 'saving' and how the expenditure that it was meant to cover could be regarded as 'excess expenditure', particularly as it had not been incurred when the diversion of the funds occurred.

[36] Treasury Regulation 6.3.1(c) could not extend the scope of s 43(1) as it is subordinate to s 43(1). In other words, it could not have authorised Ms Mbina-Mthembu to do something that s 43(1) did not permit. In my view, Treasury Regulation 6.3.1(c) did not authorise the diversion of funds appropriated for purposes of social infrastructure development to the funding of the funeral. The transfer was in conflict with s 43(1) of the PFMA.

[37] In the result, the Public Protector was correct in arriving at the conclusion that Ms Mbina-Mthembu's advice to the EXCO was erroneous and that the diversion of the funds, in reliance on that advice, was unlawful. The Public Protector concluded that Ms Mbina-Mthembu 'misdirected' the EXCO; that this resulted in an irrational decision being taken by the EXCO 'that culminated in expenditure by the ECDC that was unauthorised as contemplated by the PFMA'; and that Ms Mbina-Mthembu's conduct 'was improper and constituted maladministration'.

[38] The Public Protector's key finding – that the scheme for the diversion of the funds was unlawful – was legally correct. The contention that she committed an error of law is thus untenable. Once it is established that no error of law was committed,

the Public Protector's findings cannot be said to be irrational: there is a rational connection between her finding, on the one hand, and the evidence before her, the law and her reasons.[24] The review of the first finding must fail.

Finding 2: The regularity of the procurement process

[39] The Public Protector found that the allegation had been established that the procurement process followed by the provincial government was not fair, equitable, transparent, competitive and cost effective.

[40] It was common cause that Ms Mbina-Mthembu had been involved, since 2011, in a limited number of meetings concerning planning for Mr Mandela's funeral. This was a project titled Project X. Despite this, by the time Mr Mandela died, there was no budgetary provision made for funding the funeral that everyone knew would take place in the Eastern Cape. There was also no costed plan in place for the procurement of goods and services necessary for the funeral.

[41] The result was the decision taken by the EXCO, on Ms Mbina-Mthembu's advice, to appoint the ECDC as paymaster for the funeral. This also resulted, the Public Protector found, in Ms Mbina-Mthembu 'addressing an *instruction* to the Heads of Provincial Departments and the Municipal Managers of the KSD and OR Tambo and the Nelson Mandela Bay Metropolitan Municipalities on the procurement process that had to be followed'. She decided that all procurement would have to be made in terms of a deviation from the normal process (as a result of urgency) 'to be approved by the respective accounting officers and that all invoices had to be submitted to the Provincial Treasury for approval, upon which it would be presented to the ECDC for payment'. She thus remained centrally involved in the process.

[42] A number of additional requirements were stipulated by Ms Mbina-Mthembu. These included that '[w]here possible three (3) written quotations must be solicited from suppliers or services providers registered on the supplier database of the department or institution'; that the 'appointment of the successful service providers

[24] *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC); *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA).

must be approved by the Accounting Officer/Authority or delegated official or institution'; that the 'selection process must be clearly documented for audit purposes; that the 'appointed service provider must have a valid Tax Clearance Certificate issued by SARS'; and that '[a]ll relevant documentation but not limited to as indicated in the attached checklist must be properly filed and safely stored' and that '[**n**]**o payment will be effected without the minimum documents indicated in the checklist**'. The checklist contains six items. They are; '[a]pproved request for deviation'; quotations; '[v]alid SARS Tax Clearance Certificate'; a memorandum that approves the appointment of a service provider; proof of delivery (of goods, I assume); and invoices.

[43] The Public Protector found that this system was not adhered to but despite this, Ms Mbina-Mthembu instructed the ECDC to make payments. Two examples and a general observation will suffice to illustrate the point.

[44] The first example concerns the provision of food for marshals. On 6 December 2013, the head of the Department of Safety and Liaison wrote to Ms Mbina-Mthembu for 'approval for the deviation in the normal procurement processes'. The request related to the provision of food for 3 000 safety marshals. It was said that due to the urgency of the matter, it was not possible to either obtain quotations or engage in a bidding process. Instead, two suppliers were identified as the entities that would provide the meals at a total cost of R775 950. The letter stated that 'the food outlets were selected as the best alternative to provide the massive number of meals within a short period of time instead of selecting the suppliers that are registered into the provincial database'.

[45] On 9 December 2013, R334 350 was paid by the ECDC to McDonalds in Mthatha. On 10 December 2013, R441 600 was paid by the ECDC to UBM Company, which appears to run the Kentucky Fried Chicken franchise in Mthatha. While the letter does not bear the signature of Ms Mbina-Mthembu to signify her 'approval' of the deviation, that can be inferred from the fact of payment. Not only were these service providers not on the database of service providers but payments were made despite the absence of tax clearance certificates and proof of delivery.

[46] Much the same process was followed in respect of the procurement of 5 130 safety reflective bibs for the 3 000 marshals (R263 169), food for 25 000 people (R183 900), utensils related thereto (R48 500) and branding for the KSD Municipality (R6 365 470.60). In each instance, payments were approved and payments were made on request with little or no compliance with Ms Mbina-Mthembu's requirements.

[47] The second example concerns the funding of a memorial service held in Port Elizabeth. It would appear that the MEC for Human Settlement wanted a memorial service to be held in Port Elizabeth. This led Ms Mbina-Mthembu to write a letter, dated 11 December 2013, to the chief executive officer (CEO) and chief financial officer (CFO) of the ECDC with instructions concerning its funding. In stark contrast to her earlier instructions concerning procurement, she wrote:

'Please effect payments for the following today not later than 11 am

1 For the provincial event –
Transportation and mobilization truck is approximately R10million. Details will come from MEC August and I have forwarded your email addresses.

2 Apparel for the day approximately R2.5 to R3.0M –
Balance payable by Saturday

3 Stage and sound approximately R1.7million

All paperwork will be officially signed on Tuesday and Wednesday as it is impossible now to be in PE and Mthatha all operational venues.

I will be signing off infrastructure memo and other things for KSD today. It is imperative that after the event we get a team to check the actual infrastructure work and verify the prices linked to these things. Even if we cannot reverse some of these payments where govt is taken for a ride we do need to raise but backed by facts and evidence. I get the sense that some people are taking chances but we are in trouble as a province. It does not look like we were prepared.

The number for MEC Sauls-August is [deleted] – she will be forwarding email.
Kindly forward the ECDC team all you have for them to effect payment for the stage.
Let us stand together now, this will pass too.'

[48] In general, it may be concluded that even the unlawful system put in place by Ms Mbina-Mthembu was not followed in a procurement process that appears to have become a free for all – a fact that Ms Mbina-Mthembu appeared to recognise in her letter. In particular, even the requirement of obtaining three quotations appears to have been routinely abandoned in favour of simply identifying a preferred service provider, who may or may not have been on the relevant database of service providers; and the requirement that valid tax clearance certificates be provided by service providers also appears to have been routinely ignored. Yet payments were authorised by Ms Mbina-Mthembu and payments were effected by the ECDC. She also purported to authorise officials in both the local and provincial spheres of government (other than her department) to deviate from their normal procurement processes. She had no lawful authority to do so.

[49] Ms Mbina-Mthembu's conduct in approving and authorising the procurement of goods and services was found by the Public Protector to have violated s 217 of the Constitution,[25] s 38 of the PFMA[26] and Treasury Regulations 8.1, 16A3.2 and 16A6.4.[27] The Public Protector concluded:

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[25] Section 217(1) of the Constitution provides: 'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

[26] Section 38(1) of the PFMA imposes obligations on accounting officers of departments, trading entities and constitutional institutions. These obligations include ensuring that the body concerned has and maintains:

'(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project.'

[27] Treasury Regulations 8.1 places an obligation on an accounting officer to 'ensure that internal procedures and internal control measures are in place for payment approval and processing'; Treasury Regulation 16A3.2 requires that a supply chain management system must, inter alia, be 'fair, equitable, transparent, competitive and cost effective'; and Treasury Regulation 16A6.4 provides that if it is 'impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority'.

'There is no provision in any of the said legislation and other prescripts that allows for a situation where procurement of goods and services becomes the responsibility of the Provincial Treasury (except its own) and that it would be paid for by a Public Entity from funds that were appropriated for a different purpose.'

[50] Once again, Ms Mbina-Mthembu alleged that the Public Protector, in making this particular finding against her, had committed a material error of law. She added, however, that the Public Protector's conclusions 'leave a bad taste in my mouth and ground my suspicion that the Public Protector was biased against me or that her conclusions are just outright capricious'. I shall first consider the bias point, then the argument that the Public Protector committed an error of law and finally the submission that the finding was capricious.

[51] In order for an exercise of public power to be set aside on account of the bias or perceived bias of the decision-maker, the person attacking the decision is required to establish either actual bias – for instance, a prejudice against him or her,[28] or a disqualifying interest of some sort[29] – or a reasonable apprehension that the decision-maker is biased.[30] No allegation is made of actual bias on the part of the Public Protector. No facts that I can find in the papers justify a conclusion that a reasonable, objective and informed person in the position of Ms Mbina-Mthembu, who is apprised of the correct facts, would reasonably apprehend that the Public Protector was biased.[31] The mere fact that she made findings against Ms Mbina-Mthembu does not lead to an inference of bias.[32] In order to succeed with such an attack, Ms Mbina-Mthembu would first have to established that the factual findings were wrong and then that they were material facts and that the errors were so

[28] See for instance, *Patel v Witbank Town Council* 1931 TPD 284.
[29] See for instance, *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 (W); *Liebenberg & others v Brakpan Liquor Licensing Board & another* 1944 WLD 52.
[30] *BTR Industries South Africa (Pty) Ltd & others v Metal and Allied Workers' Union & another* 1992 (3) SA 673 (A) at 693I-J; *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) paras 37-38.
[31] *President of the Republic of South Africa & others v South African Rugby Football Union & others* (note 30) para 48; *South African Commercial Catering and Allied Workers Union & others v Irwin and Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) para 11; *S v Shackell* 2001 (4) SA 1 (SCA) para 19.
[32] *Commissioner, Competition Commission v General Council of the Bar of South Africa & others* 2002 (6) SA 606 (SCA) para 16*; Sizani v Mpofu & another* [2017] ZAECGHC 127 para 45.

unreasonable that they are inexplicable except on the basis of bias, a formidable onus indeed.[33] She has come nowhere close to discharging this onus.

[52] The crux of the Public Protector's finding is that Ms Mbina-Mthembu was a central figure in an unlawful procurement process. From the examples I have cited, it is clear that the procurement process did not meet the requirements of being fair, equitable, transparent, competitive and cost-effective.

[53] The Public Protector's conclusion that the procurement process did not comply with, inter alia, s 217 of the Constitution cannot be faulted. The facts establish a lack of fairness, a lack of transparency and a lack of competitiveness, at the very least. On the basis of the letter that Ms Mbina-Mthembu wrote to the ECDC on 11 December 2013, it is clear that she had doubts as to the cost-effectiveness of the payments she had authorised, because the provincial government was being 'taken for a ride' and because some people were 'taking chances'.

[54] As a result, Ms Mbina-Mthembu has not established the grounds of review that she relied upon: it cannot be said that the Public Protector's decision-making has been distorted by an error of law as the facts establish a violation of s 217 of the Constitution; furthermore that there is a rational connection between the facts, the law and the conclusion of maladministration on the part of Ms Mbina-Mthembu; and the rationality of the finding puts paid to the bald allegation of caprice on the part of the Public Protector. The review of the second finding must fail.

Finding 3: The transfer of public funds to a private account

[55] It is common cause that, on 7 December 2013, R250 000 was transferred by provincial treasury officials into the private bank account of the MEC for Provincial Planning and Finance, Mr Masualle. The funds were intended for 'unforeseen expenses' related to the funeral. When it was realised that the transfer was irregular, it was reversed. But, on 10 December 2013, R250 000 was transferred into a special

[33] *De Lacy & another v SA Post Office* 2011 (9) BCLR 905 (CC) para 72.

cheque account and a debit card was issued to Mr Masualle with which to access the funds.

[56] It is also common cause that no loss was occasioned by the initial transfer of money. Ms Mbina-Mthembu as head of the provincial treasury took 'full responsibility for the error'.

[57] The Public Protector found that the transfer of the funds by the provincial treasury was irregular; that Ms Mbina-Mthembu, who was the provincial treasury's accounting officer, 'approved an irregular payment of public funds into the personal bank account of the MEC and subsequently the opening of a special departmental account with a debit pay card issued to him, which gave him access to public funds'; that neither of these transactions were allowed in terms of the PFMA, the Treasury Regulations and the Ministerial Handbook; and that Ms Mbina-Mthembu's conduct was in violation of these instruments and resulted in irregular expenditure. The Public Protector concluded that Ms Mbina-Mthembu's conduct was 'improper and constitutes maladministration'.

[58] Ms Mbina-Mthembu argued, however, that the finding of maladministration was 'exceedingly harsh and disproportional and the respondent's exercise of her power in this regard is so unreasonable that no reasonable person could have so exercised the power'.

[59] The attack on the Public Protector's finding is misconceived. Ms Mbina-Mthembu admitted that she was responsible for what she accepted was an irregularity. On these common cause facts, the Public Protector concluded that she was responsible for maladministration. That finding appears to me to be justified. It is true that, in the greater scheme of things, this was not a very serious instance of maladministration but no basis has been set out upon which it can be concluded that the finding is unreasonable on account of disproportionality.[34] The gravity of the maladministration will no doubt be a factor to be taken into account when the remedial action ordered by the Public Protector is implemented.

[34] Compare *Medirite (Pty) Ltd v South African Pharmacy Council & another* [2015] ZASCA 27.

[60] I conclude that it has not been established by Ms Mbina-Mthembu that the Public Protector's finding of maladministration is unreasonable, whether on account of irrationality or on account of disproportionality. The review of the third finding must fail.

Finding 4: The incurring of irregular, fruitless and wasteful expenditure

[61] The Public Protector found that the allegation had been established that the ECDC in its role of paymaster caused the provincial government to incur irregular, fruitless and wasteful expenditure of public funds.

[62] She found that both Ms Mbina-Mthembu and the ECDC's acting CEO and CFO 'held the view that the strict provisions of the Constitution, the PFMA and the Treasury Regulations pertaining to competitive procurement and expenditure management could be overruled by a Resolution of a Provincial Executive Committee'. This had resulted in a process in terms of which the ECDC 'paid for procurement of goods and services that it had no control over, had not verified delivery of and had not approved'. Instead it relied on the provincial treasury that, in some instances, was 'not even involved in the procurement'.

[63] The Public Protector also found that expenditure incurred by the ECDC was not authorised and, even if it had been, payments would have constituted irregular, expenditure because they would not have been in compliance with the PFMA and the Treasury Regulations. Furthermore, the ECDC board was not informed of the payments made under the authority of the acting CEO and CFO and at the request of Ms Mbina-Mthembu.

[64] There was, furthermore, no indication that the ECDC had received value in respect of R5 million paid to a particular service provider, and that it 'lost more than R22 million that was originally appropriated . . . to accelerate social infrastructure development'.

[65] In effect, therefore, the finding of the Public Protector was this: the payments that were made by the ECDC were made on the basis of an unlawful scheme proposed by Ms Mbina-Mthembu, and in terms of an unlawful procurement process that had been put in place and overseen by her. As a result, payments were made unlawfully and constituted irregular, fruitless and wasteful expenditure.

[66] The Public Protector's finding in this respect flows from her earlier findings 1 and 2. Ms Mbina-Mthembu did not deal expressly with this last finding, probably because she had dealt with the findings upon which it was based. Once it is concluded, however, that no grounds of review were established in respect of findings 1 and 2, then it follows that no basis exists for the setting aside of finding 4: if the system was unlawful and the procurement process was unlawful, it follows logically that the making of payments will also be irregular. The review of the fourth finding must fail.

Conclusion

[67] I have found that Ms Mbina-Mthembu has failed to establish any ground of review in respect of any of the four findings made against her by the Public Protector. That being so, her application must fail.

[68] The application is dismissed with costs.

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C Plasket
Judge of the High Court

I agree.

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V Nqumse
Acting Judge of the High Court

APPEARANCES

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