THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20567/2014

In the matter between:

THE NATIONAL TREASURY	**FIRST APPELLANT**
OR TAMBO DISTRICT MUNICIPALITY	**SECOND APPELLANT**

and

PUMLANI KUBUKELI	**RESPONDENT**

Neutral citation: *The National Treasury v Kubukeli* (20567/2014) [2015] ZASCA 141 (30 September 2015).

Coram: Mpati P, Mhlantla, Majiedt and Saldulker JJA and Van der Merwe AJA

Heard: **4 September 2015**

Delivered: **30 September 2015**

Summary: Constitutional law ─ rational decision-making under the rule of law ─ investigation by the first appellant of the financial management and internal control of the second appellant and recommendations in respect of improvements thereto without participation of the respondent ─ founded on reason and not arbitrary.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Mthatha (Nhlangulela ADJP sitting as court of first instance):

1 The appeal is upheld.

2 There is no order as to costs of the appeal.

3 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed.'

JUDGMENT

Van der Merwe AJA (Mpati P, Mhlantla, Majiedt and Saldulker JJA concurring):

[1] On 18 January 2013 the *Daily Dispatch*, an Eastern Cape newspaper, carried an article containing allegations of financial irregularities in respect of the hiring of motor vehicles by the executive mayor of the second appellant, the OR Tambo District Municipality (the municipality). The material allegations in the newspaper article were that within a period of two months from approximately 4 October 2012 to 5 December 2012, the office of the executive mayor hired luxury motor vehicles from Avis at an expense of approximately R500 000 and that whilst so hired, two of these vehicles were involved in accidents, resulting in liability for the municipality in the amount of R 224 827.70.

[2] In the light hereof, the council of the municipality resolved on 30 April 2013 to request the first appellant, the National Treasury, to conduct an in-depth forensic investigation into these allegations within 30 days. The

municipal manager conveyed this request to the National Treasury by letter dated 3 May 2013.

[3] In response to the request, the National Treasury mandated a team of investigators (the Treasury team) to conduct the in-depth investigation within the period 6 May 2013 to 7 June 2013. On 10 May 2013 the Treasury team provided the municipal manager and the speaker of the municipality with its investigation plan. In terms of the investigation plan it was envisaged that interviews would be conducted on 15, 16 and 17 May 2013. It was agreed that the municipal manager and the speaker would write to the executive mayor and the staff in his office to notify them of the investigation and to request them to make themselves available for interviews. The office of the executive mayor is headed by a director, Mr A M Ncube.

[4] The respondent, Mr Pumlani Kubukeli, is employed by the municipality in the office of the executive mayor, as the latter's bodyguard. The issue in this appeal is whether Mr Kubukeli was denied a right to make representations to the Treasury team. The issue arose in the following manner.

[5] On 14 May 2013 the municipal manager wrote to Mr Ncube informing him of the investigation by the National Treasury and requesting him to ensure his availability and that of all key officials in the office of the executive mayor, including the political advisor of the executive mayor and Mr Kubukeli, for interviews which were scheduled for 16 May 2013. Mr Ncube handed the letter to the political advisor of the executive mayor on 15 May 2013. The speaker also had, on the previous day, given written notice of the investigation to the executive mayor and had requested him to co-operate and avail himself and all the officials who were expected to attend, for the interviews.

[6] The political advisor responded on behalf of the executive mayor by way of a memorandum dated 15 May 2013. He complained that the office of the executive mayor had not been informed of the council resolution to

request the investigation which, he said, '. . . may at times infringe, or border on infringing on basic rights' of the executive mayor and all individuals who work in his office. He stated that the executive mayor had instructed him to initiate a process to gather information on the subject and that the process would commence with a meeting of all staff of the office of the executive mayor on 27 May 2013. He also stated that the surprise visit by the National Treasury was premature and interfered with this process. He concluded that the notice of the investigation by the National Treasury was inadequate for the executive mayor and the officials sought to be interviewed to prepare their submissions. The political advisor requested that the investigation be rescheduled to 1 July 2013. It was thus made clear in the memorandum that the executive mayor and the officials in his office would not participate in the investigation on 15 to 17 May 2013. This was conveyed verbally to Mr Ncube by the political advisor on the morning of 16 May 2013. It must be said, however, that Mr Ncube availed himself and was interviewed by the Treasury team.

[7] The Treasury team nevertheless continued with the investigation and compiled a report dated 31 May 2013. Only the executive summary thereof formed part of the record before us. The report recorded that the methodology of the investigation was mainly to interview the administrative officials of the municipality and the relevant service providers. It also stated that due to the stance taken by the political advisor in his memorandum of 15 May 2013 and the resultant unavailability of the executive mayor as well as certain officials, the Treasury team '. . . could not obtain information for clarification of certain findings'.

[8] In respect of corporate governance issues, the Treasury team reported that it viewed the current situation in the municipality to be in contravention of the fiduciary responsibilities of the accounting officer, the municipal manager, as there was no administrative accountability by the office of the executive mayor to the office of the municipal manager. The Treasury team found that financial management governance was not adhered to within the office of the executive mayor. It concluded that the municipality contravened s 63(1) and

(2) of the Local Government: Municipal Finance Management Act 50 of 2003 (MFMA) in that vehicles were not properly maintained, accounted for and safeguarded.

[9] In respect of Mr Kubukeli, the report contained the following:

'7.14.2 We also observed that when the VIP Protector of the Executive Mayor, Mr Kubukeli, was the driver of the hired vehicles the cost for a period of about 5 months was R573 073.34.

7.14.3 We observed that during the period under our investigation the hired vehicle cost of 2 months, when Mr Kubukeli was the registered driver the cost amounted to R575 797,25.

7.14.4 It was established that the vehicle hiring costs of the Office of the Executive Mayor escalated significantly since Mr Kubukeli was reflected as the driver of the hired vehicles, according to the Avis reports as the overall hiring for 7 months were over a million.

. . .

7.15.1 It is our conclusion that the cost for the damage to all the rented vehicles should be recovered from Mr Kubukeli as he was found to have been grossly negligent based on the Avis report.

. . .

7.16.4 Mr Kubukeli failed to account for an amount of R8 000 paid to him as cash advance payment for fuel usage during the period under investigation.'

[10] The Treasury team made the following recommendations:

'9.1 The Municipal Manager should implement proper systems of control over the financial resources, and safeguarding of assets by the officials within the Office of the Executive Mayor.

9.2 The Municipal Manager should institute a disciplinary process against all officials that have been found in breach of the Legislation governing the Municipality, policies and processes.

9.3 All losses incurred due to the negligence of the officials should be recovered from the officials concerned by the Municipal Manager.

9.4 The Municipality needs to provide for the contingent liability emanating from the damage of the third party vehicle (Mrs Madiba) involved in the accident with Mr Kubukeli on 7 October 2012.

9.5 The Municipality should comply with its own policy and procedures in relation to the disposal of the redundant assets.
9.6 The Council should investigate the conduct of the Executive Mayor and should any breach of the Code of Conduct be established then discipline the Executive Mayor, failing which;
9.7 It is further recommended that, the Member of the Executive Council ("MEC") for Local Government should invoke section 106 of the Municipal Systems Act.'

This section in essence provides that if there is reason to believe that non-performance by or maladministration of a municipality occurred or is occurring, the MEC must request information in respect thereof from the municipality or designate a person or persons to investigate the matter.

[11] The report was presented to the council of the municipality at an 'in committee' meeting on 7 June 2013. At this meeting the council merely noted the report. At a special meeting held on 14 June 2013, the council adopted the report and its recommendations. It mandated the municipal manager to implement the recommendations in respect of the disciplinary proceedings within 30 days. It also appointed a special committee to investigate the conduct of the executive mayor in terms of recommendation 9.6 of the National Treasury report.

[12] Mr Kubukeli maintained that he received no notice whatsoever of the request of the Treasury team to avail himself for an interview. He said that he only became aware of the investigation when the report of the Treasury team was presented to the council. There is a dispute of fact on the question whether Mr Kubukeli attended any of the relevant meetings of the council. However, it is not necessary to attempt to resolve this dispute, as counsel for both the National Treasury and the municipality were content to argue the appeal on the basis that Mr Kubukeli did not receive notice of the request for an interview.

[13] On 12 June 2013 Mr Kubukeli launched an application in the Eastern Cape Local Division of the High Court, Mthatha. He did not challenge any decision of the National Treasury or the municipality. He sought an order; (a)

that the investigations conducted by the Treasury team against him without his participation, '. . . be declared unlawful, unprocedural and unconstitutional' and (b) that the report of the Treasury team be declared unlawful and unconstitutional and accordingly set aside as a nullity. Despite opposition by the National Treasury and the municipality, the court a quo (Nhlangulela ADJP) granted the relief claimed. The court a quo reasoned that the investigation and the report of the National Treasury constituted administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and had to be set aside on review on the ground that Mr Kubukeli had been denied the right to make representations in circumstances where the report had impacted adversely on Mr Kubukeli's 'right . . . to his reputation and employment'. It granted leave to appeal to this court.

[14] The founding affidavit of Mr Kubukeli was not a model of clarity. It contained several passages in which reliance was placed on an alleged infringement of his right to just and fair administrative action. But on a reading of the founding affidavit, it must be accepted that he also relied on an alleged breach of the rule of law. In the replying affidavit Mr Kubukeli specifically disavowed any reliance on PAJA and stated that his application is founded on the provisions of s 1(*c*) of the Constitution, which provide that the rule of law is a founding value of our democracy. This was confirmed before us by counsel for Mr Kubukeli, who argued that the Treasury team could not have complied with the notion of rationality without affording Mr Kubukeli an opportunity to be heard. In view hereof the court a quo misconceived the nature of the enquiry and erred in finding for Mr Kubukeli on the basis of procedural unfairness in terms of PAJA. I should add that it was in any event inappropriate to set aside the investigation that had been completed and resulted in the report.

[15] In *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 85 Chaskalson P said the following:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be

rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.' (Footnote omitted.) See also *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 80-81.

[16] There is no general duty on decision-makers to consult interested parties for a decision to be rational under the rule of law. See *Minister of Home Affairs & others v Scalabrini Centre & others* 2013 (6) SA 421 (SCA) para 67 and 72. But there are circumstances in which rational decision-making requires consultation with interested parties. The cases of *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) and *Scalabrini* provide instances hereof.

[17] In *Albutt*, the President announced a special dispensation for applicants for pardon who claimed that they were convicted of offences that were politically motivated. What was in issue there was whether the decision to exclude the victims of these crimes from participating in the special dispensation process, was irrational. Ngcobo CJ confirmed that under the rule of law the test to be applied was whether the President's decision to undertake the process without affording the victims the opportunity to be heard, was rationally related to the achievement of the objectives of the process. If not, the decision could not pass constitutional muster. The court held that the objectives of the special dispensation process were nation-building and national reconciliation. It found that the participation of victims was crucial and fundamental to these twin objectives. The court therefore concluded that it could not be said that the exclusion of the victims from the special dispensation process for pardon was rationally related to the achievement of its objectives. In addition, the court held that in his address announcing the special dispensation, the President recognised that victim participation was the only rational means to contribute towards national

reconciliation and national unity. Subsequent disregard of victim participation without any explanation, so the court held, was therefore irrational.

[18] In *Scalabrini*, the director-general of the Department of Home Affairs took a decision to close a refugee reception office in Cape Town. The purpose of the office was to receive, process and determine applications for asylum. The decision was challenged on review as irrational for want of consultation with interested parties. After quoting the aforesaid paragraph in *Pharmaceutical Manufacturers*, Nugent JA described the nature of the enquiry in the following terms:

'But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason — in contradistinction to one that is arbitrary — which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare.' (Footnote omitted.)

[19] The director-general was pertinently aware that there were a number of organisations, including the Scalabrini Centre, with experience and special expertise in dealing with asylum seekers in Cape Town. A representative of the director-general had acknowledged the necessity for consultation with these organisations and had specifically undertaken to consult with them on any proposal to close the Cape Town office. Against this background, the court was driven to infer that the director-general's failure to hear what those organisations might have to say before deciding to close the Cape Town office, was not founded on reason and was arbitrary.

[20] The judgment in *Du Preez & another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), to which we were referred by counsel for Mr Kubukeli and upon which the court below relied, stands in contrast to these decisions. The Truth and Reconciliation Commission (TRC) and its committees were established by the Promotion of National Unity and Reconciliation Act 34 of 1995. Section 30(2) of this Act provided that if during

any investigation by or any hearing before the TRC or any of its committees, any person is implicated in a manner which may be to his or her detriment or the TRC or the committee contemplates making a decision which may be to the detriment of a person who has been so implicated, such person shall be afforded an opportunity to submit representations or to give evidence at the hearing before the TRC or the committee. For present purposes it suffices to deal with the case of the first appellant in *Du Preez*. The first appellant in fact did receive written notification that he would be implicated in evidence before the TRC's committee on human rights violations. However, the first appellant received the notice on Saturday, 13 April 1996, in respect of a hearing that would commence on Monday, 15 April 1996. The notice made reference to extremely serious allegations against the first appellant, but did so in very scant and vague terms. The question was whether the notice to the first appellant was reasonable and timeous and contained sufficient particulars to enable him to know what the case was all about. Corbett CJ found the answer to the question in the common law principle of natural justice, encapsulated in the maxim *audi alteram partem*. It was not in dispute that this principle was applicable in the circumstances of the case. The court found that in the circumstances the notice was neither reasonable nor timeous nor contained sufficient particularity. *Du Preez* therefore dealt with a fundamentally different issue, namely the content of an established right to be heard.

[21] The English case of *Re Pergamon Press Ltd* [1970] 3 All ER 535 (CA), referred to in *Du Preez*, is to the same effect. There the inspectors appointed to conduct an investigation into the affairs of a company recognised the right of the directors of the company to a fair opportunity to be heard, but the directors wanted more. They sought access to transcripts of evidence and other documents and claimed the right to cross-examine witnesses. There too, the issue was the content of the admitted right of the directors to be heard and on this issue the court found for the inspectors.

[22] Section 216 of the Constitution provides that national legislation must establish a national treasury. The National Treasury was accordingly established by s 5 of the Public Finance Management Act 1 of 1999. Section

2 of the MFMA provides that the object of the MFMA is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities. It seeks to achieve this object by establishing norms and standards and other requirements for, inter alia, ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities and the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings.

[23] In terms of s 5(1) of the MFMA the functions of the National Treasury include the promotion of the objects of the MFMA as stated in s 2 thereof. Section 5(2)(*d*) of the MFMA provides that in order to fulfil its functions, the National Treasury has the power to investigate any system of financial management and internal control in any municipality and to recommend improvements thereto. This is the power that the National Treasury exercised through the Treasury team. Thus, the question is whether on the particular facts of this case, the conducting of the investigation and the making of recommendations to the municipality without the participation of Mr Kubukeli, were rationally related to the purpose for which the power in s 5(2)(*d*) of the MFMA was given.

[24] As I have said, the National Treasury exercised the public power to investigate any system of financial management and internal control of the municipality and to recommend improvements, with the object of securing sound and sustainable management of the fiscal and financial affairs of the municipality. The purpose for which the power was given was not to investigate the conduct of any particular person and to make final findings in respect thereof. What a particular person did or did not do, was incidental to the object of the power. It follows that the request that Mr Kubukeli and others attend interviews, did not constitute recognition of a right to be heard, but was intended to assist the National Treasury to achieve its purpose. The Treasury team was in no way to blame for the absence of that assistance.

[25] Viewed objectively, the purpose for which the power was given, was achieved. The main import of the investigation and the report was to identify shortcomings in the financial management and internal control of the municipality and to recommend improvements thereto. Unlike the decisions in *Albutt* and *Scalabrini*, the National Treasury made no final or binding decision. The municipality was under no obligation to accept any of the recommendations.

[26] Although some loose language may have been used in this regard, it is clear in the context of the report, that what was said in respect of Mr Kubukeli (and other officials) was in the nature of prima facie findings. These findings are clearly not binding on Mr Kubukeli and could be challenged in any subsequent proceedings. Paragraph 7.16.4 of the report must be seen in this light, namely that in the absence of an explanation by Mr Kubukeli the Treasury team found no record of account for the amount of R8 000 advanced to Mr Kubukeli. Most importantly, objectively it was beyond doubt that if the recommendations in respect of disciplinary proceedings or recovery of losses were to be implemented, the implementation would take place in terms of processes that would afford Mr Kubukeli a full opportunity to present his case.

[27] I therefore conclude that the investigation, report and recommendations of the National Treasury without the participation of Mr Kubukeli, were founded on reason and were not arbitrary or irrational. It follows that the appeal must succeed.

[28] Mr Kubukeli sought to assert what he bona fide perceived to be a constitutional right against organs of State. His litigation was neither frivolous nor vexatious. For the reasons set out in *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 para 23, the general rule in these circumstances is that if the private party loses, each party should bear its own costs. I can find no reason to depart from the general rule in this matter, both in respect of the costs of appeal and in the court below.

[29] In the result the following order is issued:

1 The appeal is upheld.

2 There is no order as to costs of the appeal.

3 The order of the court a quo is set aside and replaced with the following:

‘The application is dismissed.’

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C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For 1st Appellant:	B R Tokota SC
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For 2nd Appellant:	V Notshe SC (with him L L Sambudla)
	Instructed by:
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For Respondent:	S Budlender
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