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

REPUBLIC OF SOUTH AFRICA

Case Number: 39589/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 9 OCTOBER 2020

SIGNATURE: .....

In the matter between:

FINANCIAL SECTOR CONDUCT AUTHORITY — First Applicant

DUBE PHINEAS TSHIDI N.O. — Second Applicant

And

PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA: ADVOCATE BUSISIWE MKHWEBANE N.O. — Respondent

THE ECONOMIC FREEDOM FIGHTERS — Intervening Party

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

Introduction

[1] On 7 June 2019 the applicants issued this application, claiming the following relief against the respondent:

*"1. **The Report** of the Public Protector No. 46 of 2018/19, dated 28 March 2019 ("the Report") is reviewed and set aside, and declared constitutionally invalid, for lack of jurisdiction.*

2. In the alternative to paragraph 1:

2.1 The conclusions and findings in paragraphs 5.1.38 to 5.1.39, 5.2.22, 5.3.28 to 5.3.29, 5.4.74 and 6.1 to 6.4 of the Report, and the summary thereof in paragraphs (x) (a) to (d) of the Report, are reviewed, set aside and declared invalid, unlawful and unconstitutional; and

2.2 The remedial action in paragraphs 7.1 and 7.3 of the Report, and the summary thereof in paragraphs xi (aa) and (cc) of the Report, are reviewed, set aside and declared invalid, unlawful and unconstitutional.

3. The costs of this application are to be paid on an attorney-client scale by the respondent in her personal capacity, alternatively in her official capacity." (own emphasis)

[2] On 13 June 2019 the respondent filed a notice of intention to oppose the relief claimed by the applicants. The record of proceedings in terms of rule 53 of the Uniform Rules of Court was duly filed and on 19 August 2019 the applicants served their supplementary founding affidavit.

[3] Having considered her position the respondent proposed the following consent order in an e-mail dated 1 November 2019:

3.1 That **the report** be reviewed and set aside and remitted to the respondent.

3.2 That the costs of the application be paid by the respondent in her official capacity on a party and party scale. (own emphasis)

[4] The applicants responded on 13 November 2019, with the following counter proposal:

"2. It is our client's considered view that there is no special circumstances as required by Section 6(9) of the Public Protector Act 23 of 1994 which justified the Public Protector entertaining the complaints.

3. We therefore do not agree that ***the report*** *be remitted to the Public Protector as set out in your draft order.*

4. Our instructions are that our clients are prepared to agree to the following order:

4.1 The report of the Public Protector No. 46 of 2018/19, is reviewed and set aside.

4.2 The costs of the application be paid by the Respondent in her official capacity." (own emphasis)

[5] Notwithstanding the applicants' view as set put in paragraph 2 *supra*, the counter proposal accords with the essence of the relief sought in the applicants' notice of motion.

[6] In the result, one would have expected the matter to be finalised on the aforesaid basis.

[7] This was not to be. The respondent did not accept the counter proposal.

Further conduct of the matter

[8] In the introduction, I have emphasised the words "the report" to distinguish between the respondent's report, the subject matter *in casu* and the complaints received by the respondent which resulted in the report. The reason for the distinction will become clearer *infra*.

[9] On 2 December 2019 the respondent served an answering affidavit, averring that the following issues remain alive:

"... whether:

10.1 the applicants are entitled to seek the remainder of the relief sought in prayer 1 of the applicant's notice of motion, i.e. that ***the report*** *is declared constitutionally invalid for lack of jurisdiction.*

10.2 ***the report*** *can be remitted back to the Public Protector.*

10.3 the costs of the application should be paid by me on a punitive scale, in my personal capacity, alternatively in my official capacity.

10.4 the applicants are liable for the costs incurred post the tender having been made to the applicants formally on 1 November 2019."

[10] In view of the applicants' proposal of 13 November 2019, the issues, which according to the respondent, remained in dispute, is difficult to grasp.

[11] Firstly, the applicants did not persist in the remainder of the relief claimed in prayer 1 of the notice of motion. Secondly, the question whether the report should be remitted back to the respondent does not make sense. The report is by agreement reviewed and set aside, consequently there is no report to be remitted back to the respondent. Furthermore, the applicants did not claim any relief consequent upon the report being reviewed and set aside.

[12] Thirdly, the 13 November 2019 proposal proposed costs on a party and party scale to be paid by the respondent in her official capacity.

[13] Lastly, the counter proposal was made on 13 November 2019. To determine whether the applicants should be liable for costs from 1 November 2019, in view of their proposal, is nonsensical.

[14] Notwithstanding the aforesaid, the applicants proceeded to file a replying affidavit on 22 January 2020. Surprisingly and without amending the relief claimed in its notice of motion, the applicants for the first time alleged that the respondent *"contests the declaratory order the Applicants seek in respect of her jurisdiction to investigate* ***the complaints****"*. (own emphasis)

[15] The parties clearly had at that stage, strayed far from the relief claimed in the notice of motion.

[16] The difference in declaring the report constitutionally invalid for a lack of jurisdiction and issuing a declaration that the respondent lacks jurisdiction to investigate the complaints, pertains to the future conduct of the respondent in respect of the complaints. The latter order entails that the respondent will be barred from investigating the complaints.

Intervention of the second respondent

[17] On or about 17 February 2020 the intervening party filed an answering affidavit to the applicants' founding affidavit. Although the intervening party stated in its affidavit that, in view of the in principle agreement reached between the applicants and the respondent, there is no longer a dispute between the parties, the intervening party still chose to intervene.

[18] According to Mr Premhid, counsel for the intervening party, the opposition was aimed at protecting the intervening party's interest in the investigation of the complaints. The intervening party was the complainant in the matter. The in principle agreement that the report be reviewed and set aside does, however, not affect the investigation of the complaints and as a result there was no basis for the intervening party to intervene.

Hearing

[19] During argument Mr Theron SC, counsel for the applicants and Mr Smith SC, counsel for the respondent, addressed me at length, with reference to the merits of the matter, on the *"declarator"* the applicants seek in respect of jurisdiction.

[20] Mr Premhid confirmed during his address that the intervening party does not oppose the relief set out in prayer 1 of the notice of motion. The basis for this submission is the intervening party's view, as expressed in its affidavit, that the relief is aimed at the **report** and **not the complaint.** The intervening party's stance that there was no longer a dispute between the applicants and the respondent is patently correct.

[21] In reply, Mr Theron in an about turn agreed that the relief only pertains to the report. Mr Theron conceded that the notice of motion does not contain a prayer aimed at prohibiting the respondent to investigate the complaints in future.

[22] Responding to this concession, Mr Smith emphasised that the respondent had to oppose the application due to the applicants' insistence that the relief is aimed at barring the respondent from investigating the complaints in future.

[23] This is, however, not the relief that was sought by the applicants in their notice of motion and as set out aforesaid, the matter should have become settled on or about 13 November 2019.

[24] In view of the aforesaid, the insistence of all the parties to proceed on an opposed basis is perplexing and only resulted in unnecessary costs being incurred.

Conclusion and costs

[25] The applicants were successful in the relief it claimed against the respondent and normally costs should follow the result.

[26] The question however arises, whether the proposal and counter proposal has any effect on the cost order.

[27] The respondent's proposal that the report be remitted to her was not acceptable to the applicants. As set out *supra* the proposal does, in any event, not make sense.

[28] It appears that the applicants' stance that the report should not be remitted to the respondent because the respondent did not have jurisdiction to investigate the complaints, as set out in the applicants' counter proposal letter dated 13 November 2019, prompted the respondent not to accept the counter proposal.

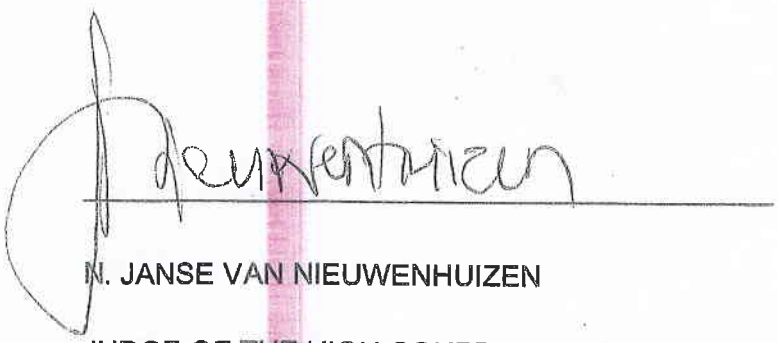
[29] Acceptance of the counter proposal would have been the end of the present dispute between the applicants and the respondent and any costs incurred by the applicants and the respondent from 13 November 2019 should be for their own pockets.

[30] The costs of the intervening party still need to be considered. It is clear from the discussion *supra* that the relief to which the applicants were entitled was clearly set out in the notice of motion. At the time that the intervening party intervened there was no longer a dispute between the applicants and the respondent. Consequently the intervening party did not contribute to resolving an issue *"in dispute"*, but merely restated the correct legal position. In the result, I am of the view that it should bear its own costs.

ORDER

[31] In the premises, I grant the following order:

1. The Report of the Public Protector No. 46 of 2018/19, dated 28 March 2019 ("the Report") is reviewed and set aside, and declared constitutionally invalid, for lack of jurisdiction.
2. The respondent is ordered to pay the costs of the applicants until 13 November 2019, which costs include the costs occasioned by the employment of two counsel.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 21 September 2020

DATE DELIVERED PER COVID19 DIRECTIVES: 9 October 2020

APPEARANCES

Counsel for the Applicants:	Advocate E. Theron SC, Advocate J. Bleazard and Advocate M. Mbikiwa 082 412 0531/079 126 6096/079 126 6096
Instructed by:	Rooth & Wessels Incorporated 012 452 4000 Ref: L Groome/MAT33298
Counsel for the Respondent:	Advocate H. Smith SC and Advocate B. Shabalala 083 254 3996/083 974 7489
Instructed by:	VZLR Incorporated Ref: MAT135965/R MOHAMED
Counsel for the Intervening party:	Advocate K. Premhid 071 6763 878 011 784 3310
Instructed by:	Ian Levitt Attorneys Ref: I Levitt/A Charalambous/LDP/MAT1638