

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 15 March 2018

STATUS Immediate

Minister of Home Affairs v Public Protector (308/2017)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (the SCA) today dismissed an appeal against a judgment that had held that the Public Protector had committed no irregularity when she had found the Department of Home Affairs to have been guilty of maladministration and had directed that it take certain remedial action.

Mr R A Marimi had been employed by the Department of Home Affairs at the South African embassy in Cuba. As a result of complaints made by the Cuban government to the South African ambassador to Cuba, Marimi was recalled from Cuba and informed that he was to face a disciplinary enquiry. This did not materialise and payment of the cost of living allowance (COLA) that he had been paid while in Cuba was stopped. He made a complaint to the Public Protector.

She found that the procedure followed by the Department in recalling Marimi was flawed, that a disciplinary enquiry ought to have been held within a time specified in the Public Service Disciplinary Code and Procedures, that, in terms of the Foreign Service Dispensation, he was entitled to be paid his COLA and that these maladministration amounted to maladministration. The Public Protector directed that the Department pay Marimi his COLA, investigate the reasons for the maladministration and apologise to him.

The SCA considered whether the review of the powers of the Public Protector constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). It was held that it did not because the unique powers exercised by the Public Protector were not administrative in nature. As a result, her powers were subject to review, not in terms of the PAJA, but in terms of the principle of legality that arises from the founding constitutional value of the rule of law.

It was argued by the Department in the appeal that the Public Protector's findings and remedial action ought to be reviewed and set aside for a number of reasons. First, it was argued that the complaint had not been made on oath. This ground failed because the Public Protector Act 23 of 1994 permitted the Public Protector to investigate a complaint that had not been made on oath. Secondly, it was argued that, the complaint being about a labour relations matter, the Labour Court had exclusive jurisdiction and the Public Protector's jurisdiction had been excluded. It was held that the Public Protector had wide powers of investigation, reporting and remedial action. The only exclusion from her jurisdiction was decisions of courts. Thirdly, it was argued that the Public Protector should not have entertained the complaint because Marimi had other remedies which he had not exhausted. It was held that s 6(3) of the Public Protector Act gave the Public Protector a discretion to investigate a complaint even though the complainant had not exhausted his or her remedies. That is precisely what

she did in this case. Finally, it was argued that directing the Department to pay Marimi's COLA was vitiated by an error of law and was unreasonable. It was held that no evidence established either of these grounds.