



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 611/2021

In the matter between:

JOHN HENRY STEENHUISEN

FIRST APPLICANT

KEVIN MILEHAM

SECOND APPLICANT

and

DAVID DOUGLAS DES VAN ROOYEN

FIRST RESPONDENT

THE OFFICE OF THE PUBLIC

PROTECTOR

SECOND RESPONDENT

THE PUBLIC PROTECTOR

THIRD RESPONDENT

PRESIDENT OF THE REPUBLIC

OF SOUTH AFRICA

FOURTH RESPONDENT

Neutral citation: *Steenhuisen and Another v Van Rooyen and Others* (Case no 611/2021) [2023] ZASCA 78 (29 MAY 2023)

Coram: DAMBUZA ADP, ZONDI, PLASKET and GORVEN JJA and
SALIE AJA

Heard: 08 November 2022

Delivered: 29 May 2023

Summary: Administrative law – review of Public Protector’s decision on whether in responding to a written parliamentary question the first respondent wilfully misled parliament – Public Protector’s investigation and decision not rationally related to the question posed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J, sitting as court of first instance):

The application for leave to appeal is dismissed.

JUDGMENT

Dambuza ADP (Zondi, Plasket and Gorven JJA and Salie AJA concurring)

[1] In this application the first applicant, Mr John Henry Steenhuisen (Mr Steenhuisen) seeks leave to appeal against the judgment of the Gauteng Division of the High Court, Pretoria (the high court) in terms of which the Public Protector's report, including the remedial action directed pursuant to a complaint lodged with her by the second applicant, Mr Kevin Mileham (Mr Mileham), was declared unlawful and set aside. In her report, the Public Protector upheld a complaint that the first respondent, Mr David Douglas Des Van Rooyen (Mr Van Rooyen) made a misleading statement in response to a question asked of him during a National Assembly (Parliament) sitting, thereby violating the provisions of ss 96(1) and (2)(b) of the Constitution, together with paragraph 2.3(a) of the Executives Ethics Code (the Code).¹ Leave to appeal was refused by the high court. This application was referred

¹ The Executive Ethics Code published in terms of s 2(1) of the Executive Members' Ethics Act 82 of 1998.

for oral argument in an open court in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

[2] At the time of the complaint, Mr Van Rooyen was a member of Parliament. On 9 December 2015, the former President, Mr Jacob Gedleyihlekisa Zuma (Mr Zuma) appointed him as Minister of Finance. Four days thereafter, on 13 December 2015, Mr Zuma removed Mr Van Rooyen from the position of Minister of Finance and appointed him as Minister of Cooperative Governance and Traditional Affairs.

[3] Whilst Mr Van Rooyen was serving in the latter office, on 11 April 2016 at a Parliamentary sitting, Mr. Steenhuisen, in his capacity as a member of Parliament for the Democratic Alliance political party (DA), posed the following written question to him:

‘Has (a) [Mr Van Rooyen] and/or (b) his Deputy Ministers ever (i) met with any (aa) member, (bb) employee and/or (cc) close associate of the Gupta family and/or (ii) attended any meeting with the specified persons (aa) at the Gupta’s Saxonworld Estate in Johannesburg or (bb) anywhere else since taking office; if not, what is the position in this regard; if so, in each specified case, (aaa) what are the names of the persons who were present at each meeting, (bbb) (aaaa) when and (bbbb) where did each such meeting take place and (ccc) what was the purpose of each specified meeting?’²

[4] Mr Van Rooyen responded to the question as follows:

‘(a) (aa) (cc) (b)

The Minister and his Deputy Ministers have never met with the members, employees and/or close associates of the Gupta family in their official capacities.

(aa)(bb)(aaa)(bbb)(aaaa)(bbbb)(ccc) Not applicable’.

² Question No 927 in 2016.

[5] This exchange resulted in Mr Mileham, also a member of Parliament for the DA, lodging with the Public Protector the complaint against Mr Van Rooyen for violation of the Code. In the complaint Mr Mileham stated that: ‘It has recently been reported in several news outlets that Minister Des van Rooyen visited the Gupta family residence in Saxonworld several times in the run up to his short lived tenure as Finance Minister. The reports claim that the Minister visited the Gupta family home on consecutive days between 2 December and 8 December 2015. In contrast, (*sic*) in reply to a Democratic Alliance Parliamentary question the Minister had denied ever visiting the residence of the Gupta family. *It is thus clear that the Minister lied and intentionally misled parliament*; in so doing he has contravened the Executive Ethics Code to which all Cabinet members are bound.’ (Emphasis added.)

[6] In response to the complaint, Mr. Van Rooyen replied that during the period 4 to 11 December 2015 he was in Durban with his family. On 7 December, he travelled from Durban to Johannesburg for a meeting of the Mkhonto Wesizwe Military Veterans Association (MKMVA) where ‘they’ also met with the Gupta family. His conduct, he explained, was in his capacity as a Treasurer General of the MKMVA and in discharge of the responsibility of that organisation to enlist the support of business for its members’ programs. In later correspondence with the Public Protector Mr. Van Rooyen added that: ‘If the question [had been] phrased to include whether I visited the said family in my official capacity as a Minister OR in any other capacity, the answer would have been YES.’

[7] To reach her conclusion, the Public Protector reasoned that Mr Steenhuisen’s question was related to allegations that had surfaced in the

public domain and was aimed at ascertaining whether Mr Van Rooyen's visits to the Gupta residence were linked to his appointment as Minister of Finance. She found that there was never any reference, in the question, to Mr Van Rooyen meeting the Guptas in his capacity as a Minister. Mr Van Rooyen had deliberately distorted the meaning of the words 'since taking office', in the question, and attributed thereto a meaning that would align with his intention of misleading the members of Parliament. The nub of the question, she concluded, concerned when he had met the Guptas and had nothing to do with the capacity in which he met them.

[8] She referred to cell phone records which, according to her, revealed that Mr Van Rooyen's phone was in Saxonwold, in the vicinity of the Gupta family home, on 8 December 2015, the day prior to his appointment as Minister of Finance. She also identified more phone calls which were made from Mr Van Rooyen's cellphone 'within the Saxonwold area' in the weeks following his appointment as Minister of Finance. She, however, disavowed reliance on the cell phone records for her findings. She ultimately found that:

'...Mr Van Rooyen conveniently structured his answer to favour a distorted interpretation of the phrase "*since taking office*" to mean only in his official capacity. The Minister tailored his response in order to evade answering a question that was clear and straightforward.'

[9] In reviewing and setting aside the Public Protector's decision, the high court found that the starting point of her investigation was misguided. Whereas the words 'since taking office' referred to the period following Mr Van Rooyen's assumption of office as a Minister, the investigation incorrectly related to the period preceding his appointment as such. The high court found

that Mr Van Rooyen's response was not evasive or misleading and was relevant to the question asked. Furthermore, the complaint was not related to the parliamentary question that had been posed. In addition, the Public Protector relied on irrelevant evidence in reaching her decision. Consequently, the decision of the Public Protector was set aside as irrational.

[10] In this Court, the applicants insisted that the parliamentary question was not limited in time or capacity, it was simply an inquiry into whether Mr. Van Rooyen had ever met with the Gupta family or their associates. Instead of giving an honest answer, Mr Van Rooyen designed a response intended to conceal his interactions with the Guptas. The applicants maintained that the evidence showed that Mr Van Rooyen met the Guptas first, before his appointment.

[11] To succeed in this application the applicants must show that another court would reasonably find that the Public Protector's decision was a result of a properly conducted investigation into the complaint that Mr. Van Rooyen wilfully³ misled parliament in replying to the question. The starting point is the Public Protector's interpretation of the question, as it is fundamental to the manner in which the investigation was conducted, and the conclusion reached.

[12] Mr. Steenhuisen's question is no model of clarity. It is long and convoluted. The Public Protector interpreted it as inquiring into:

³ The Public Protector used the words 'deliberately and inadvertently misled'. Clause 2.3(a) of the Code provides that: 'Members of the Executive may not wilfully mislead the legislature to which they are accountable.' As such she applied the wrong test.

‘5.1.2.1 Whether [Mr. Van Rooyen], since taking office ever met with any member, employee or close associate of the Gupta family; and/or,

5.1.2.2 Whether [Mr Van Rooyen] since taking office, ever attended any meeting with any member, employee or close associate of the Gupta family at the Gupta’s Saxonwold Estate or anywhere else.’

[13] On the Public Protector’s interpretation, the words ‘since taking office’ are an integral part of both parts of the question. They directed both parts of the inquiry to the period subsequent to Mr Van Rooyen taking office as a Minister. Mr Van Rooyen’s response was consistent with the Public Protector’s interpretation of the question. It accounted for all the words used in the question, including the reference to his Deputy Ministers. However, the Public Protector’s investigation and conclusion, did not account for her own interpretation of the question. She ignored the words ‘since taking office’.

[14] In insisting that the Public Protector’s conclusion should be upheld the applicants interpreted the question as a two part inquiry into whether:

‘Mr. Van Rooyen and/or his deputy ministers had ever:

(i) met with any member (aa), employee (bb) and/or close association(c) of the Gupta family; and or

(ii) attended any meeting with the specified business persons (aa) at the Gupta’s Saxonworld Estate in Johannesburg....”

[15] Notably, the applicants’ interpretation of the question differed from that of the Public Protector. On the applicants’ interpretation the emphasis was on the word ‘ever’, and the words ‘since taking office’ were ignored. Such disregard of words used in a text is impermissible, except where their inclusion leads to an absurdity. The inclusion of the words ‘since taking

office’ does not lead to an absurdity in this case. Even if the applicants’ interpretation is plausible it is not the only credible one, as demonstrated in the Public Protector’s interpretation. But more importantly, for the Public Protector to reach her conclusion that there was willful misleading, she had to abandon her interpretation of the question. Her interpretation was the same as Mr Van Rooyen’s and accounted for the text, context and purpose of the question.

[16] I agree with the submission on behalf of Mr Van Rooyen that the reference, in both the complaint and the Public Protector’s report to the media reports, compounded the misdirection on the part of the Public Protector by directing the investigation to a period that was not included in the question.

[17] Much was made on behalf of the applicants, of the importance of the parliamentary question and answer procedure in promoting accountability by members of the executive. It was submitted on their behalf that the application raises a discrete issue of public importance in relation to the extent to which members of cabinet may avoid accountability by distorting parliamentary questions in order to avoid answering the substance thereof.

[18] The importance of the Parliamentary question and answer procedure cannot be overemphasised. As this Court held in *Minister of Home Affairs v Somali Association of South Africa*,⁴ the procedure, which is designed to ensure accountability, responsiveness and openness, is one of the pillars on

⁴ *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* [2015] ZASCA 35; 2015 (3) SA 545 (SCA); [2015] 2 All SA 294 (SCA) para 22.

which our multi-party system of democratic government is anchored.⁵ However, vague and ambiguous questions can only detract from the efficiency of the process, and any inquiry into the veracity of the answers given must accord with the relevant legality prescripts. The Speaker would be well advised to heed the Public Protector's advice, as expressed in the report, that care should be taken to ensure that parliamentary questions are clear before members are called upon to respond.

[19] The applicants contended that if the report is to be set aside, the matter should be remitted to the Public Protector. No purpose would be served by doing so. The complaint was founded on media reports which had not been included in the question and which related to a different period from that specified in the question. Any investigation conducted on the complaint would yield a negative result on the issue of wilful misleading of Parliament. The irregularities pertaining to the question, the complaint and the investigation thereof are irremediable.

[20] For the reasons I have given above, the application for leave to appeal must fail. But given the importance of the system of parliamentary questions for open, accountable and responsive governance, I would, on the basis of the *Biowatch* principle, make no order as to costs.

[21] Consequently, I make the following order:

⁵ Section 1(d) of the Constitution states as follows:

'1. The Republic of South Africa is one, sovereign, democratic state, founded on the following values:

...

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

The application for leave to appeal is dismissed.

N DAMBUZA
JUDGE OF APPEAL

Appearances:

For applicants: M Bishop, with M De Beer

Instructed by: Minde Schapiro Smith Inc, Bellville
Symington De Kok Attorneys, Bloemfontein

For first respondent: T Masuku SC, with M Mathipa

Instructed by: Lucky Thekiso Inc, Pretoria
McIntyre Van der Post, Bloemfontein.