

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No.107/18

High Court case number: 52883/17

In the matter between:

THE SOUTH AFRICAN RESERVE BANK

Applicant

and

THE PUBLIC PROTECTOR

First Respondent

**AFFIDAVIT IN SUPPORT OF CONDITIONAL APPLICATION
FOR LEAVE TO CROSS APPEAL**

I, the undersigned,

JOHANNES JURGENS DE JAGER

do hereby make the following statements under oath:

- 1 I am an admitted advocate of the High Court of South Africa. I hold the position of General Counsel in the Legal Services Department of the South African Reserve Bank.
- 2 I am duly authorised to represent the Reserve Bank in this application and to depose to this affidavit on its behalf.

3 The facts to which I depose are true and correct and are within my personal knowledge except where it is apparent from the context that they are not.

4 The submissions of law I make in this affidavit are made on the advice of the Reserve Bank's lawyers.

Introduction

5 Ms Mkhwebane has lodged an application for leave to appeal against a personal costs order that a full bench of the North Gauteng High Court granted against her. She also seeks direct access to this Court for essentially the same relief as she seeks in her application for leave to appeal.

6 The Reserve Bank opposes the application for leave to appeal and direct access. In addition, the Reserve Bank seeks conditional leave to cross appeal against that part of the judgment and order of the full bench of the High Court that dismissed the Reserve Bank's application for a declaration that the Public Protector abused her office during the investigation that led to Report 8 of 2017/2018 into the "Alleged Failure to Recover Misappropriated Funds".

7 A copy of the High Court judgment has already been attached to Ms Mkhwebane's application for leave to appeal and so I do not attach it again here.

8 The Reserve Bank only seeks leave to cross appeal conditionally. In other words, it only pursues this application for leave to cross appeal in the event that the Court grants Ms Mkhwebane leave to appeal or direct access.

9 The High Court dismissed the application for a declarator on three primary grounds:

9.1 It held that the request for a declaratory order should have been accompanied by an application for an amendment to the notice of motion (paragraphs 119 and 122 of the judgment).

9.2 It held that the circumstances of the matter might have warranted an application for a declaratory order but that it should not be granted when it is raised for the first time in the replying affidavit (paragraph 122 of the judgment).

9.3 It held that an amendment should not be granted where it will cause prejudice to the other party that cannot be cured by an order for costs or a postponement (paragraph 119 of the judgment).

10 In essence, the High Court refused the declaratory relief on procedural grounds. It did not refuse it on substantive grounds. It could not, because many of the findings it made in support of the *de bonis propriis* costs order against Ms Mkhwebane showed that Ms Mkhwebane breached the terms of her office in the conduct of the investigation.

11 In its procedural rejection of the application for a declarator, the High Court overlooked the fact that the Reserve Bank's supplementary founding affidavit already called on the Public Protector to account for her abuse of office. The supplementary founding affidavit made specific reference to section 181(2) of the Constitution and called on the Public Protector to explain her conduct in the light of what has been disclosed in the record of proceedings she filed.

12 There was accordingly no prejudice to the Public Protector as a result of the request for the declarator being addressed in Reserve Bank's replying affidavit. The grounds for it, and the demand for an account of her conduct, already appeared in the founding papers.

13 This Court has also recently held in *Economic Freedom Fighters v Speaker of the National Assembly* Case CCT 76/17 at paragraph 211 that:

"The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution".

14 A formal amendment to the Reserve Bank's notice of motion was therefore not required and ought not to have been a reason for refusing the declarator.

15 I therefore respectfully submit that the High Court erred in dismissing the declaratory relief sought by the Reserve Bank. As I shall set out in more detail below,

15.1 This application raises a constitutional matter;

15.2 There are good prospects of success in the cross appeal; and

15.3 The interests of justice support leave to cross appeal being granted.

16 The Reserve Bank's conditional application for leave to cross appeal has been launched together with the filing of its answering affidavit in Ms Mkhwebane's application for leave

to appeal and direct access. The answering affidavit sets out in detail the chronological background to the High Court proceedings. I therefore request that that background be read as if specifically incorporated herein. I shall set out below only those additional features of the chronology that are pertinent to the Reserve Bank's application for a declarator.

Constitutional matter

17 The Public Protector is required under section 181(2) of the Constitution to conduct her investigations independently and impartially. A declaration that her conduct breached that obligation goes to the heart of her constitutional powers and therefore raises a constitutional matter within this Court's jurisdiction.

Prospects of success in the cross appeal

18 Section 172(1)(a) of the Constitution requires courts to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. This Court has described the section as an injunction to courts to vindicate the supremacy of the Constitution.¹

19 Section 181(2) of the Constitution says that the Public Protector must be independent and impartial and must exercise her powers and perform her functions without fear, favour or prejudice.

¹ *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) para 33

20 This independence is a key feature of the role that the Public Protector plays in our constitutional scheme. She is supposed to be a bulwark against abuses of power. The Supreme Court of Appeal has described the institution as follows:

*“the office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee”.*²

21 If the Public Protector conducts herself in a manner inconsistent with this obligation, a court is required under section 172(1)(a) of the Constitution to declare that conduct inconsistent with the Constitution.

22 The Public Protector’s investigation was an abuse of her power. She failed to conduct the investigation in accordance with her obligations under section 181(2) of the Constitution to be impartial and independent. This was clear from the following undisputed facts in the review.

22.1 She met with the Minister of State Security in the month before publishing her final report to discuss the vulnerability of the Reserve Bank. When the Reserve Bank found evidence of this meeting in the record of proceedings filed by the Public Protector, it called on her to explain this interaction and to meet the challenge that it showed that her investigation was “aimed at undermining the Reserve Bank”.

² *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) para 6

22.2 The Public Protector's answering affidavit did not answer this serious accusation.

22.3 The Public Protector met with the Presidency on two occasions.

22.3.1 Neither of these meetings was disclosed in her final report. The Public Protector has an obligation under section 195 of the Constitution to be accountable and transparent. She was required to disclose these meetings in her Report and she did not. Instead, she presented a lengthy list of all the other meetings and interviews that were conducted during the investigation. But omitted to include the meetings with the Presidency.

22.3.2 They were conducted after the President had already commented on the provisional report. The Public Protector's answer to the procedural unfairness complaints of ABSA and the Reserve Bank in the review was that she did not need to afford anyone a hearing after the provisional report was provided for comment. But if that is correct, then there was no basis at all for her to have met with the Presidency when she had already resolved not to meet with anyone else.

22.3.3 The first meeting with the Presidency in April 2017 was not even disclosed in the record of proceedings. This means material documents (which were later attached as annexures to the answering affidavit) were not included in the rule 53 record prepared by the Public Protector.

22.3.4 The Public Protector's explanation of what was discussed at the meeting with the Presidency was demonstrably false. Ms Mkhwebane said in her answering affidavit in the High Court that

"from the discussion during our meeting, I became concerned that my draft remedial action to direct the President to establish a Judicial Commission may face similar difficulties as currently faced in the State of Capture report" (emphasis added).

22.3.5 But the Public Protector's provisional report did not direct the President to establish a commission of inquiry. It did no more than require him to *consider* whether to establish a commission of inquiry. The Public Protector had therefore already taken account of the litigation pending on the State of Capture report (or had independently come to appreciate this legal issue) when she issued her provisional report for comment in December 2016.

22.3.6 It therefore could not have been "from the discussion during a meeting" with the Presidency on 25 April 2017 that she became concerned about directing the President to appoint a commission of inquiry. By the time she met with the Presidency in April 2017, she had already ensured that her remedial action did not direct the President to appoint a commission of inquiry but rather to consider whether to do so.

22.3.7 During her second meeting with the Presidency in June 2017, the Public Protector discussed stripping the Reserve Bank of its primary function through a constitutional amendment. There is no conceivable

basis on which this was an appropriate topic for discussion with the Presidency. The mere fact that it was discussed with the Presidency compromised the independence of her office and gravely undermined the impartiality of the investigation.³

22.3.8 At this meeting, too, she discussed her new remedial action which was to have the President to amend an SIU proclamation to direct the SIU to investigate the various apartheid era crimes identified in the Ciex report and to recover R1.125 billion from ABSA. She did not offer any other party affected by this new remedial action an opportunity to comment on it.

22.3.9 The Public Protector gave no explanation at all of this meeting with the Presidency in her answering affidavit. She therefore did not meaningfully place in dispute the recordal of what was discussed at that meeting that was disclosed in the handwritten notes of it that appeared in the rule 53 record.

22.3.10 There were no transcripts of any of these meetings despite it being common practice for the Public Protector's office to record and transcribe the meetings held during the course of an investigation. The Reserve Bank highlighted this glaring discrepancy in its supplementary founding affidavit and called on the Public Protector to respond to it. She failed to do so.

³ SARB Supp FA pages 607 and 608 paras 26 and 27

23 This conduct is inconsistent with the constitutional duty placed on the Public Protector to be independent and impartial. The investigation was severely compromised by this lack of independence.

24 In the Reserve Bank's answering affidavit in this Court, I have shown that many of Ms Mkhwebane's attempts now to explain some of these glaring deficiencies in her investigation are misleading and false.

25 I respectfully submit that her affidavit before this Court again shows that Ms Mkhwebane does not understand the duties of her Office. She breached those duties during the investigation and she continues to breach them now.

26 I do not, however, spend time on those further breaches in this affidavit because whether leave to cross appeal should be granted, must be determined on the basis of the facts before the High Court.

27 As I have set out above, those facts showed that Ms Mkhwebane conducted her investigation:

27.1 without regard for the basic requirements of procedural fairness;

27.2 with the ulterior purpose of undermining the Reserve Bank; and

27.3 in a secretive manner.

28 This conduct is an abuse of the important office that Ms Mkhwebane holds in our constitutional scheme.

29 The High Court ought, accordingly, to have issued a declarator to that effect.

30 Instead, the High Court dismissed the application for a declarator on procedural grounds. It erred in doing so because the court overlooked the fact that the Reserve Bank's supplementary founding affidavit had already called on the Public Protector to account for her abuse of office. The supplementary founding affidavit made specific reference to section 181(2) of the Constitution and called on the Public Protector to explain her conduct in the light of what had been disclosed in the record she filed.

31 I have set out above how the record of proceedings showed that:

31.1 the Public Protector had had undisclosed meetings with the Presidency and the SSA.

31.2 these meetings were never recorded and no transcripts of them were produced.

31.3 before she issued her final report, the Public Protector discussed the vulnerability of the Reserve Bank with the SSA and her intended remedial action to amend the Constitution to remove the Reserve Bank's powers with the Presidency

32 The Reserve Bank called on the Public Protector to explain the apparent impropriety of these meetings because they indicated that her independence during the investigation, as required under section 181(2) of the Constitution, had been compromised. The Public Protector was therefore afforded an opportunity to answer the allegation that she had abused her office and breached section 181(2) of the Constitution.

- 33 When the Public Protector filed her answering affidavit, she failed to offer any cogent explanation for her conduct and in fact provided evidence of further breaches of section 181(2) of the Constitution. In those circumstances, the Reserve Bank sought a declaration that her conduct breached the obligation placed on her under section 181(2) of the Constitution to act independently and to be impartial.
- 34 A formal application for amendment under Rule 28 of the Uniform Rules of Court was, in any event, not required because, as I have highlighted above, in *Economic Freedom Fighters v Speaker of the National Assembly*, this Court has held that courts are empowered to formulate orders that do not follow the prayers in a notice of motion or other pleading. They do this in order to ensure that the true dispute between the parties is ventilated and appropriate relief is granted.
- 35 There was not procedural bar to the High Court granting the declaration that the Reserve Bank sought. It erred in not doing so. I therefore respectfully submit that there are good prospects of success in the cross appeal.

Interests of Justice

- 36 It is also in the interests of justice for leave to cross appeal to be granted. The conduct of the Public Protector is a matter of constitutional importance. Courts are enjoined under the Constitution to declare any conduct that is inconsistent with the Constitution, invalid. In doing so, they assert and vindicate the supremacy of the Constitution.
- 37 The Public Protector's conduct in the ABAS investigation was inconsistent with the constitutional duties placed on her. It is in the interests of justice that this breach of the

Constitution be identified and censured.

Conclusion

38 In the event that the Public Protector is granted leave to appeal or direct access, the Reserve Bank seeks leave to cross-appeal against the dismissal of the declarator that the Public Protector abused her office during the ABSA investigation. The Reserve Bank therefore asks for an order in terms of the Notice of Application to which this affidavit is attached.

DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at on this the day of 2018 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

EX OFFICIO: