IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No. 107/18

Court *a quo* Case No. 52883/2017

In the matter between:

PUBLIC PROTECTOR Applicant

and

SOUTH AFRICAN RESERVE BANK Respondent

PRINCIPAL SUBMISSIONS ON BEHALF OF THE PUBLIC PROTECTOR

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A. THE ISSUE

1. The only substantive issue in this case is whether the costs of litigation initiated by the South African Reserve Bank (***"the SARB"***) for the review and setting aside of the Public Protector's remedial action should be borne personally, and on a punitive scale, by the person of the Public Protector.

2. The high court, at the urging of the SARB for the first time in its replying affidavit[1], ordered that the Public Protector personally bear 15% of the costs of the SARB application for the review and setting aside of the Public Protector's remedial action.

3. No personal costs order was sought in the SARB notice of motion, founding affidavit or supplementary founding affidavit. So, the Public Protector was afforded no opportunity to deal with the issue in pleadings before the high court.

4. We submit that the high court erred in mulcting the Public Protector in personal costs that were only sought in reply. This is impermissible in motion proceedings. Although this is not a hard and fast rule, and may be relaxed in exceptional cases, the following factors apply: (a) whether all the facts necessary to determine the new matter raised in the replying affidavit were

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[1] RA in high court, vol 7, p 547

placed before the court; (b) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (c) whether the new matter was known to the applicant when the application was launched; and (d) whether the disallowance of the new matter will result in unnecessary waste of costs.[2]

5. The facts that form the basis (namely, bad faith) for the SARB's personal costs order against the Public Protector were known to the SARB when it filed the review application. This is clear from the SARB founding affidavit and supplementary founding affidavit filed in support of its review application in the high court. For example, in its founding affidavit in the review application

5.1 the SARB said *"[t]he information provided by the Reserve Bank to the Public Protector demonstrates that the financial assistance was repaid. Notwithstanding this and the interview with Dr Stals on 8 September 2016, where the Public Protector indicated that if the Reserve Bank could demonstrate that the financial assistance was repaid then that would be the end of the investigation . . . the Public Protector proceeded to find that an amount was owing by ABSA"*[3]*;*

5.2 the SARB said *"[t]he Public Protector indicated in her interview with Dr Stals on 8 September 2016 . . . that she was not investigating the*

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2 **Mostert and Others v Firstrand Bank t/a RMB Private Bank 2018 (4) SA 443 (SCA), at para 13**

3 SARB FA in high court, vol 1, p 30 para 84

issue of interest . . . yet that is precisely what the Report makes a finding on";[4]

6. These allegations of bad faith were made by the SARB in its founding affidavit. It should have included its personal costs prayer at that stage.

7. In its supplementary founding affidavit, the SARB says

7.1 it knew that the Public Protector had met with the Presidency after the SARB had already responded to the preliminary report, and that she had done so after she had decided, without notice to the SARB, substantially to change the focus and remedial action of her investigation;[5]

7.2 it knew that the Public Protector had not held similar meetings (that is, following the substantial change in focus and remedial action) with other parties affected by her remedial action;[6]

7.3 there was no legitimate basis on which the Public Protector should have discussed amendment of the Constitution with the Presidency as that destroys her independence;[7]

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4 SARB FA in high court, vol 1, p 31 para 86.2
5 Vol 2, p 100, para 24
6 Vol 2, p 100, para 25
7 Vol 2, p 100-101, para 27

7.4 the Public Protector was biased in favour of the Presidency in affording it an opportunity to discuss a change in her remedial action while affording no such opportunity to other parties affected thereby;[8]

7.5 the Public Protector was not frank about disclosing her meeting with the Presidency in her Report;[9]

7.6 in holding undocumented meetings with the Presidency to discuss her remedial action, and the State Security Agency to discuss the vulnerability of the SARB, the Public Protector's investigation was aimed at undermining or attacking the SARB and her remedial action was for an ulterior purpose.[10]

8. These are all considerations that the high court took into account in mulcting the Public Protector in punitive personal costs. They were known to the SARB when it launched its review application. Yet it sought a personal costs order against the Public Protector only in its replying affidavit. This is impermissible and prejudicial to the Public Protector. She was afforded no opportunity to deal with the personal costs issue in pleadings before the high court.

9. There was no urgency about the matter of the personal costs order against the Public Protector. None was pleaded. So, the question could have been

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8 Vol 2, p 101, para 28
9 Vol 2, p 101, para 29
10 Vol 2, p 102, paras 30-34

postponed (and the SARB tender costs of the postponement) to enable the Public Protector properly to deal with it under oath. Given the constitutional significance of this issue, it cannot be said that costs incurred by such a postponement would have been wasted.

10. The high court should have invited the Public Protector to make submissions under oath on this issue or refuse to make a personal costs order against the Public Protector until the SARB had properly amended its notice of motion.

11. The high court's approach in this regard was inconsistent with its own reasoning in respect of the declaratory order that it refused. In that regard, the high court said:

> "[121] However, the Reserve Bank failed to apply for an amendment to the prayers in the Notice of Motion, but relied strictly on the provisions of section 172 of the **Constitution** and only dealt with it in the replying affidavit and during argument.
> [122] If the court applies the dictum in **Merafong** then the challenge should have been brought explicitly by an application for an amendment and not only when the replying affidavit was filed. . ."[11]

12. For the same reason that the declaratory order was refused, we submit that the personal costs order should not have been granted.

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[11] Judgment in high court, vol 8, p 612-613

13. But there are other reasons why this order is inappropriate. Firstly, it interferes with the independence of the Public Protector and her constitutional duty to perform her powers and functions without fear, favour or prejudice. Secondly, in any event this Court in **Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)**[12] held that personal costs orders against public officials can only be made if they are found to have acted in bad faith or with gross negligence. The SARB established neither ground in the high court, leaving the high court to infer both grounds from incorrect facts. We discuss these later in these submissions. But first, the leave to appeal and direct access applications.

B. DIRECT ACCESS

14. This is an application for direct access in terms of Rule 18(1) or, alternatively, leave to appeal in terms of Rule 19(2).

15. We respectfully submit that direct access to this Court is in the interests of justice on the grounds set out in the founding affidavit at **vol 9, pages 658 to 668**. These grounds include the following:

15.1 The personal costs order against the Public Protector has far-reaching implications and poses the real risk of interference (whether perceived or

[12] At para [9]

real) with the independence of the Public Protector and the exercise of her powers without fear, favour or prejudice.

15.2 A gun-shy Public Protector (whatever his or her identity) is unlikely to exercise his or her constitutional powers without fear, favour or prejudice.

15.3 Such orders may provide an incentive to powerful and well-resourced persons against whom appropriate and effective remedial action is being contemplated by the Public Protector to attack the Public Protector and her contemplated remedial action in their responses to section 7(9) notices in the safe knowledge that a threat of personal costs orders may help stop an otherwise perfectly rational, appropriate and effective remedial action.

15.4 Such orders may also provide an incentive for the powerful and well-resourced to keep the Public Protector busy in the courts defending herself against personal costs orders and away from the constitutional job s/he was appointed by the President to do in terms of the Constitution.

15.5 The order in this case may fill the Public Protector with trepidation when next faced with another complaint against the SARB for fear of facing yet another adverse personal costs order.

15.6 There are already at least two review applications known to us in which punitive personal costs orders are being sought against the Public Protector[13] since the handing down of the high court judgment in February 2018 and refusal by the high court of the application for leave to appeal in March 2018[14]. The floodgates have already opened within hardly a month of the high court judgment.

15.7 The threat is real that more such cases may come – merit or no merit.

16. The interests of justice dictate in these circumstances that direct access be granted. The independence of the Public Protector – whatever her identity – and her ability to act without fear, favour or prejudice are in peril.

C. LEAVE TO APPEAL

17. If this Court should be disinclined to granting direct access, the Public Protector seeks leave to appeal to this Court against the judgment of the high court in the limited extent regarding the punitive personal costs order against

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13 Vol 9, p 679-683, at p 680 para 3; vol 9, p 684-686, at p 685 para 3

14 Vol 8, p 639-643

her. The order against which the appeal lies is 4.3 of the orders of the high court which reads:

> "The first respondent, in her personal capacity, is ordered to pay 15% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel, *de bonis propriis*."[15]

18. The applicable standard in applications for leave to appeal has traditionally been whether there is a reasonable possibility that another Court may come to a different conclusion than that reached by the Court of first instance. Now the position is governed by the Superior Courts Act 10 of 2013 which says leave to appeal may be granted where:

18.1 the appeal would have a reasonable prospect of success;[16] or

18.2 there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;[17] or

18.3 the decision sought will have a practical effect or result;[18] and

18.4 the appeal would lead to a just and prompt resolution of the real issues between the parties even where the decision sought to be appealed does not dispose of all the issues in the case[19].

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15 Judgment of the high court, vol 8, p 619, para 4.3
16 Superior Courts Act, s 17(1)(a)(i)
17 Superior Courts Act, s 17(1)(a)(ii)
18 Superior Courts Act, s 17(1)(b) read with s 16(2)(a)

19. The appeal meets all four requirements.

[19] Superior Courts Act, s 17(1)(c)

D. CONTEXT

20. Context in law is everything.[20]

21. The nature of this matter falls squarely within narrative of this Court in **Economic Freedom Fighters v Speaker, National Assembly and Others**[21]

> "[52] …The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.
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> [53] Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental "embarrassment" and censure. This is a necessary service because state resources belong to the public, as does state power. The repositories of these resources and power are to use them on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector. This finds support in what this court said in the *Certification* case:
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> > '(M)embers of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action.'
>
> [54] In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action. Our constitutional democracy can only be truly strengthened when: there is zero tolerance for the culture of

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[20] **Minister of Home Affairs and Others v Scalabrini Centre and Others** 2013 (6) SA 421 (SCA) para [89]

[21] 2016 (3) SA 580 (CC) at paras [50]-[55]

impunity; the prospects of good governance are duly enhanced by enforced accountability; there is observance of the rule of law and respect for every aspect of our Constitution as the supreme law of the Republic is real. Within the context of breathing life into the remedial powers of the Public Protector, she must have the resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy.

[55] Her investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw state power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated."

(our emphasis)

22. The high court's punitive personal costs order against the Public Protector has had[22] the unintended result of facilitating the very danger of which this Court has cautioned: the *"very unfriendly response"* by *"powerful public [persons]"* intent on *"repair[ing] or soften[ing] the inescapable reputational damage"* that a *"biting remedial action"* may bring to bear on them. This may not be the case in respect of the SARB in this case, but once that door is opened all comers are welcome.

23. Now, the Public Protector turns to this Court for assistance and protection of the integrity of the Office, and to ensure that the independence, impartiality, dignity and effectiveness of the Office and, with it, the person of the Public Protector who is the embodiment of that Office, are not compromised.

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[22] As the example of the main opposition party and a lobby group demonstrates.

24. At the outset, we remind this Court of the genesis of this case:

24.1 In the mid-1980s and through the creation of what became known as the *"Bankorp lifeboat"* the SARB, in the exercise of its lender of last resort function, came to the rescue of Bankorp that was then experiencing financial difficulties.

24.2 A series of back-to-back Lending Agreements was concluded between the SARB and Bankorp (which was later, together with other banks, subsumed into ABSA), with specific dates for the repayments of several loan amounts extended over almost a decade.

24.3 Justice Heath of the SIU, and Justice Davis appointed by then Reserve Bank Governor Mboweni, both of whom later investigated the *"Bankorp lifeboat"* transaction independently of each other, concluded that the transaction was, in many respects, unlawful.

24.4 This remained a concern to the public and the matter was referred to the Public Protector for investigation by a senior advocate.

24.5 The matter was duly investigated, reported on and remedial action was taken, in accordance with section 182(1) of the Constitution. The Public Protector made the following findings, among others[23]:

24.5.1 The allegation whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same is substantiated.

24.5.2 The allegation whether the South African Government and the SARB improperly failed to recover from Bankorp Limited/ABSA Bank an amount of R1.125 billion, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995 is substantiated.

24.5.3 The SARB in granting the financial aid failed to comply with section 10(1)(f) and (s) of the South African Reserve Bank Act of 1989. The Ministry of Finance had a duty as obligated by section 37 of the South African Reserve Bank Act of 1989 to ensure compliance with the Act by the SARB. The Ministry failed to comply with the obligation.

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[23] See Report, p 52-54, para 6 (Supplementary volume, p 907-909)

24.5.4 The South African Government failed to adhere to section 195 of the Constitution by failing to promote efficient and effective public administration in this respect.

24.5.5 The conduct of the South African Government and the SARB constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act 23 of 1994 (***"the Public Protector Act"***).

24.5.6 The allegations whether the South African public was prejudiced by the conduct of the Government of South Africa and the SARB is substantiated.

24.5.7 The amount given to Bankorp Limited/ABSA Bank belonged to the people of South Africa. Failure to recover the illegal gift from Bankorp Limited/ABSA Bank resulted in prejudice to the people of South Africa as the public funds could have benefitted the broader society instead of a handful of shareholders of Bankorp Limited/ABSA Bank.

25. The Public Protector then took what she believed was appropriate remedial action and in the public interest. She, personally, had no direct personal benefit

to derive therefrom and none has been alleged or proven. Despite this, the high court ordered punitive personal costs against the person of the Public Protector.

26. The adverse impact of a punitive personal costs order is continuing as it is an ever-present threat to this constitutional institution's independence, impartiality and ability to act without fear, favour or prejudice. The danger, therefore, is that these costs against the person of the Public Protector in the review of decisions that the Public Protector has made in the fulfilment of her constitutional obligations may open the floodgates for numerous similar applications for such extraordinary orders.

27. Indeed, buoyed by the judgment of the high court in this respect, the Democratic Alliance (the main opposition party that has never supported the appointment of Public Protector Mkhwebane and has been consistently critical of her, sometimes unfairly) and CASAC (an organisation that has also been unfairly critical of Public Protector Mkhwebane from the beginning) have ganged up against the Public Protector to seek costs orders, on a punitive attorney and client scale, against the person of the Public Protector in applications for the review and setting aside of the Free State Vrede Dairy Farm Project report in the high court. They do not ask that she pays personally a fraction of the costs. They want her to pay all their costs in full.[24]

[24] Vol 9, p 679-683, at p 680 para 3; vol 9, p 684-686, at p 685 para 3

28. The Public Protector is opposing both applications, including the punitive personal costs orders sought against her.

29. This is the context of this application.

E. THE IMPUGNED DECISION AND REACTION THERETO

30. On 19 June 2017, the Public Protector released Report No 8 of 2017/18 titled *"Alleged failure to recover misappropriated funds - Report on an investigation into allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover funds from Absa Bank"* (***"the Report"***).

31. In summary, the remedial action[25] set out in the Report:

    31.1 directs that the Special Investigating Unit (***"the SIU"***) approach the President to re-open and amend a 1998 Proclamation to enable the recovery of misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 Billion, and to enable the investigation of alleged misappropriated public funds given to various institutions as mentioned in the CIEX report;

[25] Report, p 54-56, paras 7 & 8 (Supplementary volume, p 909-911)

31.2 directs the SARB to co-operate fully with, and assist, the SIU in its recovery of funds from ABSA Bank and in its investigation of alleged misappropriated public funds given to various institutions;

31.3 directs the Portfolio Committee on Justice and Correctional Services (***"the Portfolio Committee")*** to initiate a process that will result in the amendment of section 224 of the Constitution;

31.4 provides the wording of the proposed new section 224 of the Constitution; and

31.5 directs the SARB, the SIU and the Portfolio Committee to submit an action plan within 60 days of the release of the report detailing initiatives that each of them has taken in compliance with the remedial action.

32. Subsequent thereto, ABSA Bank, the SARB and National Treasury each launched three separate review proceedings in the high court for the setting aside of the remedial action.

33. ABSA Bank and the National Treasury sought costs in the event of unsuccessful opposition to their respective applications. Only the SARB

sought a personal costs order against the Public Protector. The other applicants did not.

F. THE ORDER OF THE HIGH COURT

34. The Public Protector was unsuccessful in her opposition of the review applications against the remedial action.

35. Her remedial action was set aside but her findings were not.

36. The high court ordered the Public Protector to pay 15% of the costs of the SARB in her personal capacity on an attorney and client scale, including the costs of three counsel.[26]

37. The reasons provided by the high court for this order were the following:

37.1 *"[T]he Public Protector does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice."*[27]

37.2 *"She failed to disclose in her report that she had a meeting with the Presidency on 25 April 2017 and again on 7 June 2017."*[28]

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[26] Judgment of the high court, vol 8, p 619

[27] Judgment of the high court, vol 8, p 616, para 127

37.3 *"[I]t was only in her answering affidavit that she admitted the meeting on 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017."*[29]

37.4 *"She failed to realise the importance of explaining her actions in this regard, more particularly the last meeting she had with the Presidency."*[30]

37.5 *"The last meeting is also veiled in obscurity if one takes into account that no transcripts or any minutes thereof have been made available."*[31]

37.6 *"This all took place under circumstances where she failed to afford the reviewing parties a similar opportunity to meet with her."*[32]

37.7 *"[S]he pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report [when in fact such advice] was obtained after the final report had been issued and the applications for review had been served."*[33]

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28 Judgment of the high court, vol 8, p 616, para 127
29 Judgment of the high court, vol 8, p 616, para 127
30 Judgment of the high court, vol 8, p 616-617, para 127
31 Judgment of the high court, vol 8, p 617, para 127 contd
32 Judgment of the high court, vol 8, p 617, para 127 contd
33 Judgment of the high court, vol 8, p 617, para 128

37.8 *"The Public Protector has demonstrated that she has exceeded the bounds of indemnification [under section 5(3) of the Public Protector Act]."*[34]

38. In the final analysis, the high court appears to punish the Public Protector for what it terms the *"unacceptable way in which she conducted her investigation"* and for the Public Protector's *"persistence to oppose all three applications to the end"*.[35]

39. The personal costs order appears to have been made on the basis that:

39.1 the Public Protector did not disclose in her report that she had meetings with the Presidency on 25 April 2017 and again on 7 June 2017 and that she only disclosed the first meeting in her answering affidavit;

39.2 she did not afford the reviewing parties a similar opportunity as she did the Presidency, and that she gave no explanation for this omission when she had the opportunity to do so;

39.3 she pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to

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[34] Judgment of the high court, vol 8, p 617, para 128
[35] Judgment of the high court, vol 8, p 617, para 128

finalising her report when such advice was obtained after the final report had been issued and the applications for review had been served.

40. The Public Protector's explanation on these issues is the following:

40.1 She did not intentionally fail to disclose in the Report that she had meetings with the Presidency on 25 April 2017 and again on 7 June 2017;[36]

40.2 The first meeting on 25 April 2017 had nothing to do with the subject matter of the applications to which the case relates. It was a meet and greet meeting and was unrelated to this matter. The email dated 24 April 2017 confirms that *"[t]he purpose for the meeting is a greet and meet between the Public Protector and the President's Legal Advisor"*.[37] The Public Protector mistakenly referred to this meeting in paragraphs 171 to 173 of her answering affidavit in a different context.[38]

40.3 The second meeting took place on 7 June 2017 and was not specifically mentioned in the Report because it related to the Presidency's response to the section 7(9) notice and the Presidency's request to clarify the Presidency's response to the section 7(9) notice.[39] The meeting had

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36 Founding Affidavit, vol 9, p 665, para 42
37 Founding Affidavit, annexure "PP7", vol 9, p 687
38 Founding Affidavit, vol 9, p 664, para 40.1. See also vol 9, p 665, para 42 and p 666, para 45
39 Founding Affidavit, vol 9, p 666, para 43 read with Replying Affidavit, vol 10, p 776, p 103-104. See

nothing to do with the substance of the content of the Report.[40] It was during this meeting that the Public Protector:

40.3.1 indicated that there is a pending judicial review about state of capture; and

40.3.2 asked about the report of the SIU and sought clarity that if there is no SIU report then the President's proclamation that was previously issued remains open.[41]

40.4 Hence, she requested clarity on the process and not on how to craft her remedial action.[42]

40.5 The Public Protector mistakenly referred to the meeting of 25 April 2017 in paragraphs 171 to 173 of her answering affidavit (in the high court) in a different context. What was explained in the Public Protector's answering affidavit at paragraph 172 in fact related to the meeting of 7 June 2017 and not the meeting of 25 April 2017. The Public Protector only became aware of the error in preparation for this application when she was asked by her new legal representatives what the purpose of each

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also Founding Affidavit, vol 9, p 667, para 46 all implicated parties were given section 7(9) notices in terms of the Public Protector Act 23 of 1994. In terms of this section the Public Protector shall afford any implicated person an opportunity to respond in connection with the matter under investigation, in any manner that may be expedient under the circumstances. In fact, the SARB appreciated not only the opportunity given to them to respond but also the extension of the time period by which to do so.

40 Founding Affidavit, vol 9, p 666, para 45

41 Founding Affidavit, vol 9, p 666, para 43

42 Founding Affidavit, vol 9, p 666, para 43

of the two meetings was and why she did not disclose them in her answering affidavit.[43]

40.6 As regards, the high court's finding that the Public Protector *"pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report… [when] Dr Makoka's report was obtained after the final report had been issued and the applications for review had been served"*[44], the explanation is this:

40.6.1 On 23 April 2017, the Public Protector interviewed, among others, Mr Stephen Mitford Goodson, a well-known author and a former independent non-executive director of the South African Reserve bank.[45] The Report was issued only on 19 June 2017, almost two months after that interview.

40.6.2 Thus, the high court is with respect mistaken when it says the Public Protector *"pretended"* that she was acting on the advice received prior to finalising her report *"[when in fact such advice] was obtained after the report had been issued and the applications for review had been served"*. The Public Protector

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43 Founding Affidavit, vol 9, p 664-665, para 40.1 and 41

44 Judgment of the high court, vol 8, p 617, para [128]

45 see Report at p 24 para 4.4.3.6. (Supplementary volume, p 879)

did not claim to have relied on the report of Dr Mokoka during the investigation.[46]

40.6.3 There is a sentence in paragraph 15.4 of the Public Protector's replying affidavit in these proceedings that is clearly a *bona fide* mistake.[47] In that paragraph, the Public Protector says, in this sequence, (1) that she consulted with Mr Goodson on 23 April 2017 as mentioned in the Report; (2) that she engaged with Dr Mokoka only *"following receipt of the three review applications"*; (3) that nowhere has she said that she consulted with Dr Mokoka *"during the investigation"*; (4) that *"Both Dr Mokoka's and Mr Goodson's views were taken into account in the preparation of the Report"*; and (5) that she did not pretend to act on the advice of Dr Mokoka *"in the preparation of the Report"*. Sentence (4) is clearly a *bona fide* factual mistake. It is a *non sequitur* from sentences (2) and (3) in that sequence. The Public Protector's explanatory affidavit is annexed in this limited respect and she asks that it be admitted into evidence. She relied on Dr Mokoka's report only as corroborative evidence for purposes of her answering affidavit in the review applications, not in the preparation of her Report.

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46 Founding Affidavit, vol 9, p 674, para 56.5. See also Replying Affidavit, vol 10, p 792, para 15.4

47 Replying Affidavit, vol 10, p 792-3, para 15.4

40.6.4 The fact that the Public Protector says she relied on Dr Mokoka's report in the answering affidavit is not, to an objective observer, indicative of her having consulted with him *"during the investigation of the complaint"*.[48]

G. BAD FAITH OR GROSS NEGLIGENCE NOT ESTABLISHED

41. In **Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)**[49] this Court affirmed the principle that public officials may be ordered to pay costs out of their own pockets only if they are found to have acted in bad faith or with gross negligence.[50]

42. Here, the Public Protector conducted her investigation impartially and independently, and has to the best of her ability provided the Court with her explanation.[51] Her explanation is plausible. That the SARB does not accept it does not make her conduct one in bad faith. She did not act in bad faith. There is no suggestion that she acted with gross negligence. The instances from which the high court inferred bad faith[52] arise from a mistaken appreciation of the facts, perhaps occasioned by a less than lucid exposition of those facts in the pleadings. She may have acted with unbridled zeal, but zealousness in

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48 Replying Affidavit, vol 9, p 792, para 15.3 and 15.4

49 At para [9]

50 See also **South African Social Security Agency and Another v Minister of Social Development and Others** (CCT48/17) [2018] ZACC 26 (30 August 2018) at para [37]

51 Founding Affidavit, vol 9, p 663-668, paras 39-48; Replying Affidavit, vol 10, p 800, para 21.6

52 For example the finding that the Public Protector *"pretended"* to have relied for her Report on Dr Mokoka's report whereas the latter came almost 6 months after the Report.

recovering public funds is to be applauded not met with accusations of bad faith and punitive personal costs orders.

43. In any event, the high court conflated the principles of *audi* and *bias* when it held that the Public Protector engaged with the Presidency without affording the reviewing parties a similar opportunity. It found bias on an *audi* question.[53]

44. But these are distinct principles of law. Bias, or a reasonable apprehension of it, may trigger a recusal and, if proven, ultimately vitiate the decision. *Audi* has no such result. Lack of it may even be remedied by *audi* after the decision has been taken. But here there is no allegation that a decision was taken after the Presidency meeting without hearing the SARB. Quite the opposite is pleaded.[54]

45. In the context of the independence and impartiality of courts and the issue of recusal, this Court held in **Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC)** that:

> "[28] . . . The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.
> [29] The test for recusal which this court has adopted is whether there is a reasonable apprehension of bias in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring

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53 Judgment of the high court, vol 8, p 601-604, paras 97-101

54 Vol 2, p 100, para 24

an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.

[30] In *SARFU II* this court formulated the proper approach to an application for recusal, and said:

> 'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the *onus* of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[31] What must be stressed here is that which this court has stressed before: the presumption of impartiality and the double requirement of reasonableness. The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice'. Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution.

[32] As is apparent from the Constitution, the very nature of the judicial function requires judicial officers to be impartial. Therefore, the authority of the judicial process depends upon the presumption of impartiality. As Blackstone aptly observed, '(t)he law will not suppose a possibility of bias or favour in a judge, who [has] already

sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'. And, as this court observed in *SARFU II*, judicial officers, through their training and experience, have the ability to carry out their oath of office, and it 'must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions'. Hence the presumption of impartiality."

46. This Court further held that:

"[33] But, as this court pointed out in both *SARFU II* and *SACCAWU*, this presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased.

[34] The other aspect to emphasise is the double requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable. As we pointed out in *SACCAWU*, 'the two-fold emphasis . . . serve[s] to underscore the weight of the burden resting on a person alleging judicial bias or its appearance'. This double requirement of reasonableness also 'highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough'. The court must carefully scrutinise the apprehension to determine whether it is, in all the circumstances, a reasonable one.

[35] The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."

47. Section 181(2) of the Constitution requires chapter nine institutions, like Judges, to be independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

48. Section 1A(3) of the Public Protector Act provides that:

> "The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who-
> (a) is a Judge of a High Court; or
> (b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or
> (c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or
> (d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or
> (e) has, for a cumulative period of at least 10 years, been a member of Parliament; or
> (f) has acquired any combination of experience mentioned in paragraphs *(b)* to *(e)*, for a cumulative period of at least 10 years."

49. These are stringent requirements that are indicative of the calibre of the man or woman serving in the capacity of Public Protector. They do not melt away just because a litigant is unhappy about the heat coming from the incumbent – whether such heat is justified or not.

50. Also indicative of the calibre of the man or woman serving in that capacity is the fact that the Public Protector is appointed directly by the President, on the

recommendation of the National Assembly, in terms of chapter nine of the Constitution. The appointment presupposes the qualities and qualifications in section 1A(3) of the Public Protector Act. In addition, she must in the performance of her duties be independent, subject only to the Constitution and the law, be impartial and must exercise her powers and perform her functions without fear, favour or prejudice.

51. These are qualities, qualifications, protections and professional strictures that are not dissimilar to those to which Judges are subject. In fact, the similarities in these respects between Judges, on the one hand, and the Public Protector on the other are striking and indicative of the relative reverence with which the Public Protector should be treated in comparison with other public officials. We highlight some of those similarities in the table below:

Judges	**Reference**	**Public Protector**	**Reference**
Judicial independence: - Courts are **independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice**	s165(2) Constitution	**PP independence:** - Chapter nine institutions are **independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice**	s181(2) Constitution
No person or organ of state may interfere with the	s165(3) Constitution	**No person or organ of state may**	s181(4) Constitution

functioning of the courts		**interfere with the functioning of these institutions**	
Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts	s165(4) Constitution	**Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions**	s181(3) Constitution
Appointment: - Any appropriately qualified woman or man who is a **fit and proper person** may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. - **The President as head of the national executive, after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.** - **The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the**	s174 Constitution	**Appointment:** - The Public Protector must be women or men who are South African citizens, who are **fit and proper persons** to hold the particular office and comply with any other requirements prescribed by national legislation - **The President, on the recommendation of the National Assembly, must appoint the Public Protector**	s193 Constitution s1A Public Protector Act 23 of 1994

National Assembly - The President must appoint the judges of all other courts on the advice of the Judicial Service Commission - Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.			
Before judicial officers begin to perform their functions, they must take an **oath or affirm, in accordance with Schedule 2**, that they will uphold and protect the Constitution.	s174(8) Constitution	The Public Protector strengthens constitutional democracy The Public Protector is subject only to the Constitution and the law	s 181(1) and 181(2) Constitution
Removal: A judge may be removed from office only if - the Judicial Service Commission finds that the judge suffers from an **incapacity, is grossly incompetent or is guilty of gross misconduct**; and - the National Assembly calls for that judge to be removed, by a **resolution adopted with a supporting vote of at least two thirds of its members**.	s177 Constitution	**Removal**: The Public Protector may be removed from office only on - the ground of **misconduct, incapacity or incompetence** ; - a finding to that effect by a committee of the National Assembly; and - the adoption by the Assembly of a resolution calling for that person's removal from office - A resolution of	s194 Constitution

		the National Assembly concerning the removal from office of the Public Protector must be **adopted with a supporting vote of at least two thirds of the members of the Assembly**	
Judicial immunity (common law) As a general rule judicial officers are immune against actions for damages arising out of the discharge of their judicial functions. The only exception is if the conduct of the judicial officer was malicious or in bad faith. Mere possibility of bias apparent to a layman, on the part of a judicial officer, is insufficient in the absence of an extrajudicial expression of opinion in relation to the case, or in the absence of one of the other recognized grounds. The applicant must found the required exceptio recusationis (or exceptio suspecti judicis) on a reasonable cause (justa causa recusationis) which must be proved	Claassen v Minister of Justice and Constitutional Development 2010 (6) SA 399 (WCC) at 407B–410B. In this case it has also been held that the doctrine of judicial immunity is consonant with the provisions of the Constitution, notably s 165 thereof.	**Liability of Public Protector** - The office of the Public Protector shall be a juristic person. - The State Liability Act, 1957 (Act 20 of 1957), shall apply with the necessary changes in respect of the office of the Public Protector, and in such application a reference in that Act to 'the Minister of the department concerned' shall be construed as a reference to the Public Protector in his or her official capacity - Neither a	s 5 Public Protector Act 23 of 1994

		member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitution	
Contempt of Court - Any person who, during the sitting of any Superior Court— a) wilfully insults any member of the court or any officer of the court present at the sitting, or who wilfully hinders or obstructs any member of any Superior Court or any officer thereof in the exercise of his or her powers or the performance of his or her duties; b) wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in the place where the sitting of the court is held; or c) does anything calculated improperly	s 41 Superior Courts Act 10 of 2013	**Contempt of Public Protector** - No person shall insult the Public Protector or the Deputy Public Protector - No person shall in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court	s 9 Public Protector Act 23 of 1994

to influence any court in respect of any matter being or to be considered by the court, may, by order of the court, be removed and detained in custody until the court adjourns - Removal and detention does not preclude the prosecution in a court of law of the person concerned on a charge of contempt of court - At common law contempt of court is an injury committed against a person or body occupying a judicial office, by which injury the dignity and respect to which are due to such office or its authority in the administration of justice is intentionally violated. It may be committed either *in facie curiae* or *ex facie curiae*			

52. Thus, bias cannot be presumed or inferred on the part of the Public Protector as lightly as the high court has done, and on the basis of facts taken on the hoof. Upon careful scrutiny, the alleged apprehension is, in the circumstances of this case, not a reasonable one.

53. In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)** this Court held that:

> "[45] From all of the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the *onus* of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in a dissenting judgment by De Grandpr, J in *Committee for Justice and Liberty et al v National Energy Board:*
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> > '. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude".'
>
> In *R v S (RD)* Cory J, after referring to that passage, pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in *Pinochet:*
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> > 'Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough*, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Judge was not impartial.'
>
> An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test."

54. The high court was mistaken in its assessment of the facts in respect of the Public Protector's meeting with the Presidency. It is from that mistaken

assessment that it inferred bias on the Public Protector's part. The Public Protector has given a plausible explanation for those two meetings. That the SARB disbelieves her must be seen in the context of the SARB's self-preservation mode in the face of what it considers to be *"an attack on the Reserve Bank"*[55] by the Public Protector. That cannot turn even an over-zealous pursuit of public funds by the Public Protector, in the independent exercise of her constitutional duties without fear, favour or prejudice, into an exercise in bad faith.

55. The high court was mistaken in inferring bad faith in respect of the Dr Mokoka report. The Public Protector has explained this. She never claimed to have consulted Dr Mokoka during her investigation and for purposes of preparing the Report. The high court appears to have inferred this. There is no bad faith.

56. On the facts,

56.1 The Public Protector was brought to court as the applicants sought to set aside her remedial action which she made not in pursuit of her own personal interest but in the fulfilment of her constitutional function.

56.2 The manner of investigation that the high court found to be objectionable, and the persistence in opposing applications aimed at

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[55] Vol 2, p 102, paras 33-34

setting aside decisions arising from that investigation, are hardly grounds for mulcting any decision-maker in personal costs, much less the head of a chapter nine institution in the independent exercise of her constitutional and statutory functions without fear or favour.

56.3 The Public Protector prepared the Report in accordance with what she believed to be her constitutional and statutory duties.

56.4 The high court not only failed to appreciate the gravity of the bias it inferred in a constitutional creature such as the Public Protector who has, through the Constitution and legislation, all the protections and professional strictures of a Judge, it also failed to engage with the two-stage inquiry in the bias assessment and contented itself simply with stating the standard but failed to apply it. Its assessment relates more to the fairness of the Public Protector's approach as regards the *audi* principle rather than to bias.

56.5 In any event, there was no failure of *audi*. The reviewing parties were afforded an opportunity to comment when they were interviewed by the former Public Protector and provided with section 7(9) notices. Their comments were taken into account. Evidence of that cannot be acceptance of their point of view, anymore than a losing litigant can complain that his or her side was not considered.

57. In any event, the SCA has described bias as arising, *"when a deliberative process is subverted by receiving information and hearing one party to the deliberate exclusion of the other"*.[56] That is not what happened here. The meeting with the Presidency in April 2017 was not deliberative and there was no deliberate exclusion of the reviewing parties from a deliberative process. The June 2017 meeting was also not deliberative as it dealt with the Presidency's clarification, at their request, and in accordance with section 7(9)(a) of the Public Protector Act, of their response to the provisional report and in respect of the status of the proclamation that had been issued to the SIU. There was therefore no bias. There was no bad faith.

58. Since (as we have shown above) the Constitution requires of the Public Protector the same qualifications and qualities as it requires of Judges, and bestows largely the same protections and imposes the same strictures on both, there is no reason in principle why the presumption of impartiality enjoyed by Judges should not be enjoyed by the Public Protector. This would not be a uniquely South African phenomenon. A look at a number of foreign jurisdictions by way of example demonstrates this. It is that topic to which we now turn.

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[56] **Chairman, Board of Tariffs and Trade and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA)** at 538H-I, para [65]

H. FOREIGN JURISPRUDENCE

(a) *United States*

59. In **Harlow v Fitzgerald 457 US 800 (1982) (US Supreme Court)**, a case involving the doctrine of qualified immunity, the Supreme Court held that:

59.1 Government officials may be protected by either absolute or qualified immunity.

59.2 Absolute immunity generally applies to legislators who are conducting their legislative functions as well as prosecutors and executive officers who are conducting adjudicative functions.

59.3 Qualified immunity applies in a broader range of situations and is a more appropriate balance between the need of government officials to exercise their discretion and the importance of protecting individual rights. Cabinet members receive only qualified immunity, so presidential aides should not receive a higher degree of immunity. Their job is not so sensitive that it requires absolute immunity. This does not affect the ability of courts to dismiss meritless claims against government officials.

59.4 Qualified or *"good faith"* immunity is an affirmative defense that must be pleaded by a defendant official. The *"good faith"* defense has both an *"objective"* and a *"subjective"* aspect. The objective element involves a presumptive knowledge of and respect for *"basic, unquestioned constitutional rights."* The subjective component refers to *"permissible intentions."* Referring both to the objective and subjective elements, the court held that qualified immunity would be defeated if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

(b) *Canada*

60. In **Hinse *v.* Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621** the Supreme Court held that:

60.1 Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person, or by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed.

60.2 The trial judge erred in approaching the issue of the federal Crown's civil liability from the perspective of a fault of institutional inertia or indifference.

60.3 The appellant failed to prove, on a balance of probabilities, that the Minister acted in bad faith or with serious recklessness in reviewing his applications for mercy.

(c) *Seychelles*

61. In **Fanchette vs Attorney General (CS 155.2012) [2014] SCSC 63 (19 February 2014)** the court held that *statutory immunity* granted to members of the Family Tribunal is a qualified immunity as such immunity operates only when they had acted in good faith in the performance of their judicial functions under the statute. Constitutional Immunity which is granted to Justices, Judges and Masters is an absolute immunity as it is an unconditional one.

62. Applying the above to the facts of this case, in terms of section 5(3) of the Public Protector Act, neither a member of the Office of the Public Protector nor the Office of the Public Protector itself is liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith.

63. The Public Protector prepared the Report and made a recommendation in good faith and has provided reasons that justify her actions. In the absence of bad faith or gross negligence, there can be no personal costs order against her. The instances from which the high court inferred bad faith[57] arise from a mistaken appreciation of the facts, perhaps brought on by a less than lucid exposition of those facts in the pleadings.

64. There is no bad faith. There is no gross negligence. There is no suggestion that the Public Protector acted in her own interest. There is no evidence that she intended maliciously to cause a deprivation constitutional rights.

65. In **South African Social Security Agency and Another v Minister of Social Development and Others (CCT48/17) [2018] ZACC 26 (30 August 2018)** this Court found that deference by a public official of her statutory duty to another is not sufficient to constitute bad faith or gross negligence.[58] It characterised her deference as *"mistaken"* and refused to order a personal costs order against her. This Court also refused to make a personal costs order against another public official whose explanation for the delay in bringing an application for the extension of an unlawful contract was found to be

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[57] For example the finding that the Public Protector *"pretended"* to have relied for her Report on Dr Mokoka's report whereas the latter came almost 6 months after the Report.

[58] At para [47]

"unsatisfactory". It found that the *"unsatisfactory explanation falls short of gross negligence or bad faith which would warrant a personal costs order"*[59].

66. In this case the Public Protector has given an explanation on all the issues for which the SARB attacks her and on the basis of which the high court made the personal costs order against her. Her explanations are plausible. But even if they are unsatisfactory, that is not sufficient to constitute bad faith or gross negligence.

I. COSTS AGAINST THE PERSON OF THE PUBLIC PROTECTOR

67. In terms of section 5(3) of the Public Protector Act, neither a member of the Office of the Public Protector nor the Office of the Public Protector itself is liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith. The Public Protector prepared the Report and made recommendations in good faith.

68. With a punitive personal cost order hanging over the Public Protector at the instance of an institution which she may well in future have occasion to investigate and make remedial action affecting it, inevitably comes the potential for her independence and impartiality in any future investigation by her office involving the SARB being adversely affected or seriously placed in

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[59] At para [44]

doubt in the eyes of the public if she should reasonably, after thorough investigation, conclude in any future probe that the SARB has done nothing wrong. The complainant or public or reasonable observer may get the impression that her decision was influenced by a fear of incurring an adverse personal costs order in the event of the SARB again taking the Public Protector's decision on review and seeking a similar costs order.

69. This is undesirable and would reflect negatively on the work of the Office of the Public Protector. It could in fact result in something akin to constructive dismissal if the Public Protector's tenure were terminated prematurely owing to what would effectively amount to unbearable working conditions where the effectiveness of the Office of the Public Protector is held back by an ineffectual or gun-shy Public Protector who is held captive by fear of adverse personal costs orders being made against her for performing her constitutional function.

70. Such an order begets fear and favour towards the SARB, and prejudice against anyone (and, by necessary extension, the public) who may dare lodge a complaint (valid or not) against the SARB.

71. If the precedent now set by the high court in this case goes unchallenged, what is to stop a political party or non-governmental organisation, or indeed a listed corporation intent on one or other political or economic agenda, from seeking personal costs against, say, the Auditor-General (whatever his or her identity)

along with the review and setting aside of his or her decision to withdraw the mandate of one or other auditing firm auditing a State Owned Enterprise, on the ground that the Auditor-General's decision was preceded by an *"unacceptable way in which [he or she] conducted his or her investigation"* and his or her *"persistence to oppose the application [for the review of that decision] to the end"*?

72. The implications of the costs order against the person of the Public Protector has far-reaching effects and the high court appears not to have considered these serious implications on the administration of justice and the Rule of Law. A Public Protector, operating always in fear of personal adverse cost orders, can hardly be effective in the performance of his or her constitutional obligations.

73. We respectfully submit that even if the Public Protector were wrong or mistaken in her remedial action, that is no basis for a personal costs order against her. In any event, the correctness or otherwise of her remedial action is not before this court for determination.

74. The danger that is created is that these costs orders against the person of the Public Protector in the review of decisions that the Public Protector has made in the fulfilment of her constitutional obligations may open the floodgates for numerous similar applications for such extraordinary orders. We have already given two <u>current</u> examples of a political party and a lobby group seeking

personal costs orders against the Public Protector in an application for the review and setting aside of her report, whether or not she opposes it. If granted, this will have far-reaching consequences that travel well beyond the identity of the incumbent in that office and other constitutional institutions.

J. CROSS APPEAL

75. The relief sought by the SARB goes against the rule of practice that in motion proceedings a party stands or falls by its founding papers. The SARB failed to amend its notice of motion to seek the declaratory order in the high court and raised the declaratory order relief for the first time in its replying affidavit.

76. The allegation that the Public Protector abused her office was not properly made and should therefore not be considered. This was already known to the SARB when it launched it review application and so should have been raised in the founding affidavit.

77. In any event, for the reasons already demonstrated above the Public Protector did not abuse her office. She conducted her investigation independently and impartially without fear, favour or prejudice.

78. The authority on which the SARB relies at Vol 10 p 755 para 13 is not authority for proposition it advances. This court did not there have in mind

punitive costs orders personally against public officials. A personal costs order will not make her conduct consistent with the Constitution. It is merely retributive and not restorative.

79. In any event, the SARB knew of the facts underpinning its declaratory order when it launched the review application and should have included that prayer in its notice of motion. It cannot spring that for the first time in its replying affidavit.[60]

80. There is also no compelling reason why the cross-appeal should be heard.

K. CONCLUSION

81. For all these reasons we submit that a case has been made out for the relief sought.

V Ngalwana SC
F Karachi

Duma Nokwe Group of Advocates
Chambers, Sandton

14 September 2018

[60] **Mostert and Others v Firstrand Bank t/a RMB Private Bank 2018 (4) SA 443 (SCA), at para 13**

LIST OF AUTHORITIES

1. Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC)
2. Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)
3. Chairman, Board of Tariffs and Trade and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA)
4. Claassen v Minister of Justice and Constitutional Development 2010 (6) SA 399 (WCC)
5. Economic Freedom Fighters v Speaker, National Assembly and Others
6. Minister of Home Affairs and Others v Scalabrini Centre and Others 2013 (6) SA 421 (SCA)
7. Mostert and Others v Firstrand Bank t/a RMB Private Bank 2018 (4) SA 443 (SCA)
8. President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)
9. South African Social Security Agency and Another v Minister of Social Development and Others (CCT48/17) [2018] ZACC 26 (30 August 2018)

FOREIGN AUTHORITIES

10. Fanchette vs Attorney General (CS 155.2012) [2014] SCSC 63 (19 February 2014)
11. Harlow v Fitzgerald 457 US 800 (1982) (US Supreme Court)
12. Hinse *v.* Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621