

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

**PRACTICE NOTE ON BEHALF OF
THE PUBLIC PROTECTOR**

1. **NATURE OF THE PROCEEDINGS**

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

2. **ISSUES TO BE DETERMINED**

The only substantive issue in this case is whether the costs of litigation initiated by the South African Reserve Bank 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

3. **SUMMARY OF PUBLIC PROTECTOR'S ARGUMENT**

3.1. The high court, at the urging of the SARB for the first time in its replying affidavit, 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.

3.2. The high court erred in mulcting the Public Protector in personal costs that were only sought in reply. This was impermissible, prejudicial and inappropriate.

3.3. The order interferes with the independence of the Public Protector and her constitutional duty to perform her powers and functions without fear, favour or prejudice.

3.4. This Court in **Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)** 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 a mistaken appreciation of the facts.

3.5. Direct access to this Court is in the interests of justice for, among others, the following grounds:

3.5.1. The personal costs order against the Public Protector has far-reaching implications and poses the real risk of interference (whether perceived or real) with the independence of the Public Protector and the exercise of her powers without fear, favour or prejudice.

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

3.5.3. Such orders may provide an incentive to powerful and well-resourced persons against whom appropriate and effective remedial action are 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.

- 3.5.4. 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.
- 3.5.5. 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.
- 3.5.6. There are already at least two review applications known to us in which punitive personal costs orders are being sought against the Public Protector 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. The floodgates have already opened within hardly a month of the high court judgment.
- 3.5.7. The threat is real that more such cases may come.
- 3.5.8. The interests of justice dictate in these circumstances that direct access be granted.
- 3.6. 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 her.

- 3.6.1. the appeal has reasonable prospects of success;
- 3.6.2. there is a compelling reason why the appeal should be heard,
- 3.6.3. the decision sought will have a practical effect or result; and
- 3.6.4. the appeal will lead to a just and prompt resolution of the real issue between the parties, namely, whether it is in the interests of justice and desirable that the Public Protector (the head of a chapter 9 institution) be mulcted in personal costs when her remedial action is set aside on review.

4. **PORTIONS OF THE RECORD THAT ARE NECESSARY TO DETERMINE THE MATTER**

- 4.1 Full Record of 10 volumes and the supplementary volume.
- 4.2 Applicant's additional explanatory affidavit.

5. **ESTIMATED DURATION OF ORAL ARGUMENT**

The Applicant requests 1 hour

6. **AUTHORITIES**

- Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC)
- Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)
- Chairman, Board of Tariffs and Trade and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA)
- Claassen v Minister of Justice and Constitutional Development 2010 (6) SA 399 (WCC)
- Economic Freedom Fighters v Speaker, National Assembly and Others
- Minister of Home Affairs and Others v Scalabrini Centre and Others 2013 (6) SA 421 (SCA)

- Mostert and Others v Firststrand Bank t/a RMB Private Bank 2018 (4) SA 443 (SCA)
- President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)
- South African Social Security Agency and Another v Minister of Social Development and Others (CCT48/17) [2018] ZACC 26 (30 August 2018)

FOREIGN AUTHORITIES

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

**V Ngalwana SC
F Karachi**

**Duma Nokwe Group of Advocates
Chambers, Sandton**

14 September 2018