**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT No: 107/18
High Court Case No: 52883/2017

In the matter between :

**PUBLIC PROTECTOR** Applicant

and

**SOUTH AFRICAN RESERVE BANK** Respondent

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**SOUTH AFRICAN RESERVE BANK'S**
**WRITTEN SUBMISSIONS IN**

**THE APPLICATION FOR LEAVE TO APPEAL**
**AND**
**THE CONDITIONAL CROSS APPEAL**

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**TABLE OF CONTENTS**

## INTRODUCTION

1 On 19 June 2017, the Public Protector issued a final report in the 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 public funds from ABSA Bank" (*the Report*).

2 The remedial action directed Parliament to amend section 224 of the Constitution in order to strip the Reserve Bank of its primary object as the country's central bank. The Report had immediate and drastic consequences for the economy.[1] The Reserve Bank therefore approached the courts urgently to review and set aside that part of the remedial action that directed Parliament to amend the Constitution. The Public Protector did not oppose the urgent application.

3 In addition to the urgent application, the Reserve Bank brought a second review application, in the ordinary course, to set aside the

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[1] SARB FA, Appeal Record Vol 1, page 10 para 9

other aspects of the Public Protector's remedial action. This remedial action required the Special Investigating Unit, amongst other things, to approach the President to re-open and amend a 1998 proclamation in order to recover misappropriated funds unlawfully given to ABSA Bank in the amount of R1,125 billion.

4 The Public Protector opposed the second review.

5 The High Court upheld the review, set aside the remaining remedial action in the Report, and ordered the Public Protector to pay 15% of the Reserve Bank's costs in her personal capacity.

6 The Public Protector seeks leave to appeal to this Court (alternatively direct access) against the personal costs order and those parts of the High Court judgment that found that there was a reasonable apprehension that she was biased in her investigation and that she did not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice.[2]

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[2] PP Notice of Motion in Constitutional Court, Appeal Record Vol 9, page 646 paras 2.1 and 2.2

7 In the High Court, the Reserve Bank also sought a declaration that the Public Protector abused her office during the investigation that led to the Report. The High Court found that:

> "*The Public Protector did not conduct herself in a manner which should be expected from a person occupying the office of Public Protector … the Reserve Bank's submissions in this regard are warranted. She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and the high standard that is expected from her. She failed to explain her actions adequately. There may be a case to be made for a declaratory order*".[3]

8 However, the High Court refused to grant the declarator because it held that the Reserve Bank only sought this relief in its replying affidavit and it ought to have filed a notice in terms of rule 28(1) to amend its notice of motion to include a prayer for this relief.[4]

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[3] Judgment, Appeal Record Vol 8 page 612, para 120

[4] Judgment, Appeal Record Vol 8 page 612, para 121

9 The Reserve Bank also seeks conditional leave to cross appeal against the High Court's dismissal of the application for the declarator.

**10** These written submissions are structured in two parts. They deal, first, with the Public Protector's application for leave to appeal and then the cross appeal.

## PART A

## THE PERSONAL COSTS ORDER

### The Legal Principles

11 The first important principle in this appeal is that the courts exercise a true discretion in relation to costs orders. This means that an appeal court will not lightly interfere with the exercise of that discretion.[5] There must be a material misdirection on the part of the High Court in order for an appeal court to interfere.[6]

12 It is therefore not sufficient for an application for leave to appeal against a costs order simply to show that the High Court's order was wrong. It must show that the High Court materially misdirected itself when it granted the costs.[7]

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5 *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) para 28

6 *Swartbooi and Others v Brink and Others* 2006 (1) SA 203 (CC) para 23

7 *Limpopo Legal Solutions and Others v Vhembe District Municipality and Others* [2017] ZACC 14 para 17

13 Whether there has been a material misdirection in relation to the costs order in this case must take account of the guiding principles on *de bonis propriis* costs against public officials.

14 Costs *de bonis propriis* are costs which a party is ordered to pay out of her own pocket as a penalty for some improper conduct.[8]

15 This Court has previously granted such costs against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities[9] and where they acted inappropriately and in a reasonably egregious manner.[10] The assessment of the gravity of the person's conduct is objective and lies in the discretion of the court.[11]

16 The Court has also recently affirmed the test for personal costs orders against public officials. It held in *SASSA*[12] that

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8 *Pheko and Others v Ekurhuleni Metropolitan Municipality (No. 2)* 2015 (5) SA 600 (CC) para 51.

9 *Pheko* para 54

10 *Stainbank v SA Apartheid Museum at Freedom Park* 2011 (10) BCLR 1058 (CC) para 52

11 *Stainbank* para 54

12 *South Africa Social Security Agency and another v Minister of Social Development and others* [2018] ZACC 26 (*SASSA*)

"*It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation*."[13]

17 In *SASSA*, the Minister of Social Development sought to argue that personal costs orders against public officials are unconstitutional because they would breach the separation of powers. The Court made short shrift of that argument. It held that the source of the power to impose personal costs orders against public officials is the Constitution itself.[14]

18 The Constitution requires public officials to be accountable and to observe heightened standards in litigation. They must be candid and frank. They must never mislead or obfuscate. They must do right and

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13 *SASSA* para 37

14 *SASSA* para 38

they must do it properly.[15] They are required to be candid and place a full and fair account of the facts before the court.[16]

19 The object of a personal costs order against a public official is to vindicate the Constitution.[17] These orders are not inconsistent with the Constitution; they are required for its protection because public officials who flout their constitutional obligations must be held to account. And when their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer.[18]

20 Despite this clear authority, the Public Protector argues for an exception in her case.

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15 *Lesapo v North West Agricultural Bank and Another* 1999 (12) BCLR 1420 (CC) par 17; *Mohamed and another v President of the Republic of South Africa and others* 2001 (3) SA 893 (CC) para 69; *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (10) BCLR 1039 (SCA) para 15; *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* 2006 (8) BCLR 901 (CC) para 49; *Njongi v Member of the Executive Council, Department of Welfare, Eastern* Cape 2008 (6) BCLR 571 (CC) para 79; *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC) para 82.

16 *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC) para 107; *Western Cape Government v Ndiki* 2013 JDR 1109 (WCC) para 77

17 *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) para 9

18 Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government 2013 (5) SA 24 (SCA) para 54

21 She contends that if such orders are granted, the Public Protector will always operate in fear of a personal adverse costs order and will thereby be hampered in the performance of her constitutional obligations.[19] She contends that a personal costs order against her will be an "ever-present threat" to the Public Protector's independence, impartiality and ability to act without fear, favour or prejudice. She says that such orders may open the floodgates for similar applications in other matters where her conduct is reviewed.[20]

22 In the written submissions filed on behalf of the Public Protector, a further technical objection is raised against the costs order. The Public Protector argues that the personal costs order sought against her ought to have been referred to in the notice of motion.[21]

23 There are two problems with this contention.

23.1 The first is that it is settled law that it is not necessary that there be formal notice of a request for a special costs order. It is

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19 PP FA in Constitutional Court, Appeal Record Vol 9, page 660 para 29; page 661 para 32

20 Public Protector's written submissions para 26

21 Public Protector's written submissions para 3

sufficient that the party against whom such an order is sought is informed that the order will be asked for.[22]

23.2 The second is that the Public Protector's written submissions concede that all the facts underpinning the costs order sought were set out in detail in the Reserve Bank's founding papers.[23]

24 There is, accordingly, no merit in this point. The Public Protector had ample opportunity to address all the facts which justify the personal costs order against her.

25 The fears that the Public Protector has about the impact of a personal costs order on the Institution of the Public Protector are also, with respect, unwarranted. Personal costs orders are not granted against public officials who conduct themselves appropriately. They are not granted against officials who are frank and candid with the courts and who act reasonably and responsibly. They are granted when public officials fall egregiously short of what is required of them.

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22 *Sopher v Sopher* 1957 (1) SA 598 (W) 600E; *Shatz Investments (Pty) Ltd v Valovyrnas* 1976 2 SA 545 (A) at 560; *Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) 269H – 270A; *Naidoo v Matlala* NO 2012 (1) SA 143 GNP para 15; *African Dawn Property Transfer Finance 3 (Pty) Ltd v Tuscaloosa 37 (Pty) Limited* 2014 JDR 2530 (GP) para 56

23 PP's written submissions paras 6 and 7

26 Furthermore, granting a personal costs order in a case where it is warranted, will not open the floodgates for further personal costs orders because, as this Court has emphasised, whether a personal costs order should be granted must be determined "in the light of the particular circumstances of each and every case".[24] That a public official has acted recklessly and in conflict with her obligations in one piece of litigation does not mean that she will do so again in another matter.

27 The only relevant question therefore is whether the High Court misdirected itself in concluding that the Public Protector did not act in good faith,[25] and behaved in an unacceptable and secretive manner.[26]

**The Public Protector's conduct**

*The first duty – the record*

28 The Public Protector's first duty in the review was to produce a full and complete record under Rule 53.

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[24] *Pheko* para 51

[25] Judgment Appeal Record, Vol 8 page 617 para 128

[26] Judgment Appeal Record, Vol 8 page 611 para 116, page 617 para 128

29 The record was essential to enable the reviewing applicants to understand what occurred during the investigation that led to the impugned remedial action and to equip the court to ensure the proper administration of justice in the case.[27]

30 The record that was produced was thrown together,[28] with no discernible order or index,[29] and excluded important documents.[30] The Public Protector is wrong when she claims that she "filed the entire record".[31] She did not. She omitted from the record pertinent documents, some of which were only put up for the first time as annexures to her answering affidavit in the High Court,[32] and others, which have only for the first time been disclosed in her affidavit before this Court.[33]

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27 *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) para 13

28 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 97 para 10

29 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 97 para 9

30 SARB Supp FA in the High Court Appeal Record Vol 2 page 97 para 7; SARB RA in the High Court Appeal Record, Vol 7, page 527 para 29.1.6

31 Public Protector RA in the Constitutional Court, Appeal Record, Vol 10 page 782 para 13.1

32 Annexure PP9 to the Public Protector's AA in the High Court, Appeal Record, Vol 6 pages 478 and 479

33 Annexure PP8 to the Public Protector's FA in the Constitutional Court, Appeal Record, Vol 9 pages 690 and 691;

The first page of annexure PP7 to the Public Protector's FA in the Constitutional Court, Appeal Record, Vol 9 page 687. Although pages 688 and 689 were annexures to the Public Protector's affidavit in the High Court, page 687 was not.

*The second duty – a frank and candid account of the impugned conduct*

31 The Public Protector's second duty in the litigation was to provide a full and frank account of the impugned conduct.

32 This required her to explain:

32.1 Why the Report did not disclose meetings that she had held with the Presidency shortly before it was issued?[34]

32.2 Why she held meetings with the Presidency and the State Security Agency but not with the parties most affected by her new remedial action?[35]

32.3 Why she discussed amending the Constitution to take away the central function of the Reserve Bank with the Presidency?[36]

32.4 Why she discussed the vulnerability of the Reserve Bank with the State Security Agency?[37]

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[34] SARB Supp FA in the High Court, Appeal Record, Vol 2, page 101 para 29

[35] SARB Supp FA in the High Court, Appeal Record, Vol 2, page 100 paras 24 and 25

[36] SARB Supp FA in the High Court, Appeal Record, Vol 2, page 100 para 27

[37] SARB Supp FA in the High Court, Appeal Record, Vol 2, page 102 para 31

32.5 Why she recorded and transcribed other meetings held during the conduct of the investigation, but failed to record or transcribe the meetings with the Presidency and the State Security Agency?[38]

33 These explanations were called for because, as the Reserve Bank made plain in its supplementary founding affidavit, the engagements with the Presidency and the State Security Agency gave rise to a serious concern about whether the Public Protector had conducted the investigation independently and impartially.[39] They also gave rise to a reasonable apprehension that the Public Protector was biased against the Reserve Bank.[40]

34 The Reserve Bank highlighted that the discussion with the State Security Agency about the vulnerability of the Bank was irregular. It said:

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38 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 98 para 13; page 103 paras 36 and 37

39 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 101 paras 27 and 28; page 102 para 30

40 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 103 para 38

"*It is unclear on what possible basis the vulnerability (and vulnerability to whom) of the Reserve Bank was relevant to the Public Protector's investigation into the CIEX report*".[41]

35 The Reserve Bank expressed its concern that this discussion appeared to be aimed at undermining the Reserve Bank and that it appeared to indicate that by May 2017, the Public Protector's investigation had turned from the question whether the government had implemented the CIEX report to an attack on the Reserve Bank.[42]

36 These matters were of grave concern to the Reserve Bank. They were also serious accusations to make against the Public Protector and the Reserve Bank explained that it did not make them lightly. It therefore called on the Public Protector "to deal with each and every averment set out above when she file[d] her answering affidavit".[43]

37 The Public Protector failed to dispel these serious concerns about the independence of her investigation when she filed her answering

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41 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 102 para 32

42 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 102 para 33

43 SARB Supp FA in the High Court, Appeal Record, Vol 2, page 102 para 35

affidavit in the High Court. This is because she either failed entirely to deal with the allegations or, when she did address them, offered palpably false explanations. For example:

37.1 No explanation was given for why there were no transcripts of the meetings with the Presidency and the State Security Agency.

37.2 No explanation was provided for why the vulnerability of the Reserve Bank was discussed with the State Security Agency.

37.3 No explanation was provided for the meeting with the Presidency on 7 June 2018. Instead, another meeting with the Presidency, held on 25 April 2018, was disclosed for the first time.[44]

37.4 The Public Protector's failure to address the meeting of 7 June 2018 with the Presidency was woefully inappropriate. The handwritten notes of that meeting indicated that the Public Protector had discussed amending the Constitution to strip the Reserve Bank of its central function with the Presidency. It also showed that the Public Protector had been discussing her new remedial action of amending the SIU proclamation with the

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[44] Public Protector AA in the High Court, Appeal Record, Vol 3 page 199 para 171

Presidency when no other party had been given an opportunity to comment on the new remedial action. And despite the seriousness of these matters, the Public Protector decided not to offer a word of explanation.

37.5 Where the Public Protector did provide an explanation of the meeting with the Presidency on 25 April 2017, it was demonstrably false.

37.5.1 Ms Mkhwebane's affidavit said 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).[45]

37.5.2 But the Public Protector's draft remedial action (which was already issued to the parties in December 2016) did not direct the President to establish a commission

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[45] PP AA in the High Court, Appeal Record, Vol 3 page 199 para 173

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 preliminary report for comment in December 2016. 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 Presidency to appoint a commission of inquiry. By the time she met with the President in April 2017, she had already ensured that her remedial action did not direct the Presidency to appoint a commission of inquiry but rather to consider whether to do so.

37.6 The meeting of 25 April 2017 therefore remained shrouded in mystery. The Public Protector's explanation of what was discussed was highly improbable.

37.7 The Public Protector's failure to deal pertinently and responsibly with the serious accusations made against her impartiality in the light of these meetings, meant that the High Court was left with only the handwritten notes as evidence of what was discussed at the meetings and no countervailing account from the Public Protector.

37.8 This led the High Court to conclude that *"the question remains unanswered as to why [the Public Protector] acted in such a secretive manner and she does not give an explanation for doing so."*[46]

38 The Public Protector's answering affidavit also misrepresented her reliance on the evidence of Dr Mokoka.

39 At paragraph 2 of her answering affidavit, Ms Mkhwebane said the following:

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[46] Judgement, Appeal Record Vol 8 page 611 para 116

*"where I make averments relating to economics, I do so on the basis of advice received from economic experts during the investigation of the complaint referred to below."*[47]

40 This is not a statement without significance in the context of the Public Protector's investigation because the economic rationale of the so-called "ABSA lifeboat" was an important aspect of the investigation. The reference to the engagement of economic experts was intended to bolster the findings in the Report relating to the nature of the lifeboat and its impact.

41 What this introductory passage sought to convey, therefore, was that the statements in the Public Protector's affidavit about economics were based on the advice she received *from economic experts during the investigation*.

42 At paragraph 126 of her affidavit, the Public Protector explained that she had engaged the services of Dr Tshepo Mokoka, an economist and lecturer at Wits, after the review applications had been received and, hence, after the investigation had been concluded. The

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[47] PP AA in the High Court, Appeal Record, Vol 3, page 143 para 2

paragraph then qualified Dr Mokoka as an expert on economics and on the issues traversed in his report.[48]

43 The statements in the affidavit relating to economics ought not, therefore, to have included the input from Dr Mokoka because he was not consulted *during the investigation*.

44 However, there were numerous sections of the Public Protector's answering affidavit that were direct copies of the statements in Dr Mokoka's report.[49]

45 This led the High Court to conclude that Ms Mkhwebane had "failed to make a full disclosure when she pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalizing her report".[50]

46 Ms Mkhwebane's affidavit was neither candid nor frank about her engagement of economic experts. She claimed that the statements in her affidavit relating to economics where based on the advice of

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48 PP AA in the High Court, Appeal Record, Vol 3, page 181 para 126

49 Annexure JDJ3 to SARB AA in the Constitutional Court, Appeal Record, Vol 9, page 725ff

50 Judgment, Appeal Record, Vol 8, page 617 para 128

economic experts she had consulted during the investigation but Dr Mokoka was the only person identified as an economic expert and he had only been consulted after the investigation.

47 The reliance on Dr Mokoka's advice was intended to bolster the economic conclusions of the Report. However, it was incorrect to represent those views as having been procured during the investigation.

*The explanation in this Court*

48 In her founding and replying affidavits before this Court, the Public Protector has endeavored to explain the inadequacies of her answering affidavit before the High Court.

49 But this is too little too late. This Court is required to determine whether, on the facts that were presented to the High Court (and not which have subsequently been volunteered), the High Court

materially misdirected itself in granting personal costs against the Public Protector.[51]

50 The subsequent explanations ought, therefore, not to have a bearing on this appeal. However, even if this Court were to take them into account, they do not assist the Public Protector. In fact, they compound the case against her.

51 To explain why this is so, requires a careful and detailed analysis of the changing versions of Ms Mkhwebane over the course of this litigation. We set that out below, first, in relation to the meetings with the Presidency and the State Security Agency and, secondly, in relation to Dr Mokoka.

The meetings with the Presidency and the State Security Agency

52 The Reserve Bank's founding affidavits required Ms Mkhwebane to explain meetings she had with the Presidency and the State Security Agency after her provisional report was issued in December 2016 and before her final Report was issued on 19 June 2017. The handwritten

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[51] *R v Verster* 1952 E (2) SA 231 (A) at 236; *Attorney-General, Free State v Ramokhosi* 1999 (3) SA 588 (SCA) para 8

notes of these meetings indicated that her independence in the investigation had been compromised because she was discussing matters that ought not to have been discussed with either of these institutions. They also indicated that her impartiality was imperiled because she appeared to be intent on undermining the Reserve Bank.

53 In this Court, the Public Protector endeavours to overcome the deficiencies in her explanation in the High Court. She says that she confused two meetings that she had had with the Presidency.

54 The salient features of the new explanation are these.

54.1 When the Public Protector referred to the April meeting in her answering affidavit in the High Court (at paragraphs 171 to 173), she meant to refer to the June 2017 meeting because the meeting on 25 April 2017 was only a meet and greet with the Presidency. It had nothing to do with the investigation.[52]

54.2 The 7 June 2017 meeting did relate to the investigation. It had been requested by the Presidency in the response to the

[52] PP FA in the Constitutional Court, Appeal Record, Vol 9, page 664 para 40.1

provisional report that was sent to the Public Protector on 28 February 2017. The request from the Presidency for the June 2017 meeting was in order to clarify the response to the provisional report.[53]

55 The latter claim is false. As the Reserve Bank pointed out in its answering affidavit before this Court, the President's response to the provisional report made no request for a meeting.[54]

56 This prompted the Public Protector to file a replying affidavit in this Court, in order to explain, for a third time, what precisely was the origin and content of the meeting with the Presidency on 7 June 2017.

57 Her replying affidavit is, however, again false. Ms Mkhwebane now says that there was an error in her founding affidavit before this Court. She concedes that the President's response to the provisional report did not request a meeting.[55] But she explains that she just mistakenly referred to this document as containing the request for a meeting to

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53 PP FA in the Constitutional Court, Appeal Record, Vol 9, page 666 para 43

54 SARB AA in the Constitutional Court, Appeal Record, Vol 9, page 702 para 25

55 PP RA in the Constitutional Court, Appeal Record, Vol 10, page 776 para 10.3

clarify the Presidency's response to the provisional report. She meant to refer to the next document in the High Court papers.[56] But this, again, is false.

58 The document that the Public Protector, now in her replying affidavit in this Court, contends is the request for the meeting to clarify the Presidency's response to the provisional report, is the request for the April 2017 meeting.[57] This is the meeting that the Public Protector has already explained to this Court had nothing at all to do with the investigation.

59 Thus, despite three successive explanations for the 7 June 2017 meeting with the Presidency, the Public Protector still has not come clean and frankly explained why the meeting was called.

60 The Public Protector has also been less than frank about what was discussed. As we set out above, the explanation in her High Court affidavit of what was discussed at the meeting, cannot be correct

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56 PP RA in the Constitutional Court, Appeal Record, Vol 10, page 776 para 10.3.1

57 PP RA in the Constitutional Court, Appeal Record, Vol 10, page 776 para 10.3.1 read with Annexure PP9 to the PP AA in the High Court. Appeal Record, Vol 6 page 478

because the provisional report did not direct the President to appoint a commission of inquiry; it required him only to consider doing so.

61 In this Court, the explanations are contradictory.

61.1 On the one hand, the Public Protector says that the meetings with the Presidency had "nothing to do with the substance of the content of [her] Report"[58] and that they did not discuss the final remedial action.[59]

61.2 But that is false on her own version, because Ms Mkhwebane confirms that the handwritten notes of the meeting of 7 June 2018 set out "what was discussed at the meeting".[60] The handwritten notes of the meeting with the Presidency on 7 June 2018 record that the following was discussed:

61.2.1 The Public Protector discussed the SIU proclamation, its re-opening through amendment and the inclusion of other matters such as those involving Nedbank in the

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58 PP FA in the Constitutional Court, Appeal Record, Vol 9, page 666 para 45;

59 PP RA in the Constitutional Court, Appeal Record, Vol 10, page 777 para 10.7

60 PP RA in the Constitutional Court, Appeal Record, Vol 10, page 780 para 11.3. That the handwritten notes correctly reflect what was discussed at the meeting on 7 June 2018, is confirmed by the two other people from the Public Protector's office who were present at the meeting – Mr Kekana and Mr Nemasisi – Appeal Record, Vol 10, pages 827 and 829.

new proclamation.[61] This was the new remedial action in the final Report. It is therefore clearly false that the new remedial action was not discussed with the Presidency.

61.2.2 Extensive details about the investigation into the CIEX report were discussed, including the interview with Dr Stals.[62]

61.2.3 The Public Protector's engagements with Mr Goodson were discussed. This included remedial action to change the constitution around the central bank.[63]

61.3 The Public Protector's dogged insistence that the substance of her remedial action in the final Report was not discussed with the Presidency at the meeting on 7 June 2018 is flatly contradicted by her own confirmation that the handwritten notes of the 7 June 2017 meeting reflect what was discussed. The two

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61 Annexure SFA2, Appeal Record, Vol 2, page 130 (retyped at page 130a)

62 Annexure SFA2, Appeal Record, Vol 2, pages 131 to 133 (retypes at pages 131a, 132a, 133a)

63 Annexure SFA2, Appeal Record, Vol 2, pages 134 to 137 (The retyped version of page 134 has an error. Under the second asterisk on the page should be the words "change constitutions" rather than "change institutions, as reflected in the retyped page at 134a. This is being addressed with the Public Protector's lawyers and the revised retyped version of the page will be provided to the Court)

people from her office who attended the meeting with her, have also confirmed under oath that the handwritten notes correctly reflect what was discussed at the meeting.

61.4 The Public Protector's explanation of the meeting with the State Security Agency is not only woefully late but also unintelligible. As we highlighted above, before the High Court, the Public Protector simply ignored the serious concern raised by the Reserve Bank that she was discussing its vulnerability with the State Security Agency. In this Court, no explanation was offered in her founding affidavit. In her replying affidavit, for the first time, she purports to explain this discussion. In her replying affidavit, she denies that the notes of the meeting with the SSA appeared to indicate that she had discussed the vulnerability of the SARB with the SSA. But then she goes on to say the following:

> "*The vulnerability aspect as entailed in the notes related to the meeting with SSA, wherein Judge Heath's media statement relating to his fear of "run on the banks" was*

*discussed to mean SARB's vulnerability with regard to its mandate*".[64]

61.5 With all due respect to the Public Protector, this makes no sense.

61.6 This Court, like the High Court, is therefore left with no clarity on why the vulnerability of the Reserve Bank was discussed with the State Security Agency during an investigation into government's failure to implement the CIEX report.

62 The Public Protector continues to shirk her duties as a public functionary in litigation. Her persistent falsehoods cannot be explained away on the basis of a mistake or error. There are simply too many of them to make this a credible explanation. The Public Protector's conduct before the High Court warranted a *de bonis propriis* costs order against her because she acted in a grossly unreasonable manner.

63 In this Court, the Public Protector has endeavoured to explain away the serious findings against her on the basis of innocent errors. But

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[64] PP RA in the Constitutional Court, Appeal Record, Vol 10, page 782 para 13.2.1

her own affidavits before this Court show that they are not mere errors. The Public Protector has still not come clean about the meetings she had with the Presidency and the State Security Agency before she finalised the Report.

64 The Reserve Bank, this Court, and the public are entitled to know why she was discussing the new remedial action with the Presidency when she discussed it with no other affected party. They also have a right to know why amending the Constitution's provisions around the powers of the central bank was being discussed with the Presidency. Finally, they are entitled to a clear explanation of why the security arm of the state was being asked about the vulnerability of the Reserve Bank.

65 In its supplementary founding affidavit, the Reserve Bank made it clear that these meetings called into question whether the Public Protector's investigation was independent and impartial. She was under a duty to explain her conduct. However, instead of doing so in a forthright manner, the Public Protector made false claims and obfuscated.

66 The Public Protector's entire model of investigation was flawed. She failed to engage economic experts during the investigation. Instead, she allowed herself to be influenced by the partisan views of a maverick former shareholder of the Reserve Bank with a personal grievance against the Bank.[65] She also failed to engage with the parties most affected by her new remedial action before she published her final report.

67 This type of investigation falls well short of the high standards of her office.

Dr Mokoka's involvement

68 In her affidavits before this Court, the Public Protector endeavours to explain that she did not misrepresent her reliance on the work of Dr Mokoka in bolstering the economic conclusions of her Report.

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[65] SARB FA in the High Court Appeal Record Vol 1, page 31 para 86.3; page 32 para 86.5

69 She says that she consulted “Mr Stephen Mitford Goodson, a well-known author and former non-executive director of the South African Reserve Bank” during the investigation.[66]

70 But Mr Goodson is not an economic expert and the Public Protector never seeks to qualify him as one. She could not, therefore, have been referring to Mr Goodson when she said in the High Court that the averments in her affidavit relating to economics were based on the advice of *economic experts* received during her investigation. The only person she qualified as an expert was Dr Mokoka and yet his input was received after the investigation was completed.

71 In a third affidavit before this Court, filed with the written submissions on behalf of the Public Protector, Ms Mkhwebane explains that she meant to say in the High Court that she relied on Dr Mokoka’s evidence only as “corroborative evidence” for the purposes of responding to the review applications. But that distinction was never made in the affidavits before the High Court. There was no careful delineation between the views that the Public Protector formed during

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[66] PP FA in the Constitutional Court, Appeal Record, Vol 9, page 674 para 56.5

her investigation based on the interview she had with a former non-executive director of the Reserve Bank, on the one hand, and the economic analysis of the ABSA lifeboat that she procured from Dr Mokoka after the investigation, on the other.

72 Without this delineation, the affidavit in the High Court was misleading because it conveyed that the economic analysis that underpinned the Report was based on expert economic advice, which it was not.

73 The new explanation therefore does not assist the Public Protector because it still falls short of the standard expected of public officials in litigation. That standard is for full and frank disclosure. The Public Protector's explanations are neither.

*The third duty – not to pursue a meritless appeal*

74 In *Njongi*,[67] this Court explained that public functionaries are not ordinary litigants. They have heightened obligations and must

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[67] *Njongi v Member of the Executive Council, Department of Welfare, Eastern* Cape 2008 (6) BCLR 571 (CC) para 79

consider carefully what points to plead in litigation because of the impact they made have on the constitutional rights of others.

75 The underlying principle of that case finds new application in this matter. Just as it is incumbent upon organs of state to not to plead points in litigation that will unreasonably limit the constitutional rights of their opponents, so too, must organs of state be circumspect about the use of public funds to prosecute meritless appeals.

76 In this case, the Public Protector has pursued an appeal without prospects of success. The standard for overturning a costs order on appeal is an onerous one. The High Court must be shown to have misdirected itself. There was no prospect that the Public Protector would establish that in this case. She failed to comply with her most basic duty in review applications to file a full and complete record. Her explanations before the High Court were grossly inadequate and, at times, patently false.

77 Public funds ought not, therefore, to have been used to pursue this appeal.[68] We explain in the next section of these submissions how the Public Protector's breach of this third duty impacts on the appeal.

## Conclusion

78 In the light of what is set out above, we submit that there was no material misdirection on the part of the High Court in ordering Ms Mkhwebane to pay 15% of the Reserve Bank's costs.

79 This means three things for this application:

79.1 leave to appeal should not be granted because the appeal has no prospects of success;

79.2 if leave to appeal[69] is granted, the appeal should be dismissed because the High Court did not misdirect itself;

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68 SARB AA in the Constitutional Court, Appeal Record, Vol 9, page 700 paras 16, 17 and 70

69 Although the Public Protector also brings an application for direct access to this Court, the relief she seeks in that application relates to the High Court's order of personal costs against her. That order can only be overturned in an appeal and therefore there is no basis for direct access to this Court to overturn that order.

79.3 in either event, the Reserve Bank's costs in this Court should be paid by the Public Protector in her personal capacity.

80 This is a case where a further personal costs order against the Public Protector is warranted. Ms Mkhwebane has used public funds to prosecute this appeal in circumstances where it had no prospect of success.[70] Ms Mkhwebane's affidavits before this Court contain further false statements and inadequate explanations. She has not conducted the litigation in this Court openly or frankly. Her failings are egregious and warrant a mark of displeasure from this Court.

81 The Reserve Bank therefore seeks the following orders:

81.1 dismissing the application for leave to appeal (and the application for direct access) or granting leave to appeal, but dismissing the appeal; and

81.2 directing that the Reserve Bank's costs in this Court be paid by the Public Protector personally.

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[70] SARB AA in the Constitutional Court, Appeal Record, Vol 9, page 700 paras 16 and 17

**PART B**

**THE CROSS APPEAL**

82 In the High Court, the Reserve Bank sought a declaration that the Public Protector abused her office during the investigation that led to the Report.

83 The High Court found that such a declarator may well be warranted[71] but declined to grant the order because it ought to have been brought "explicitly by an application for amendment and not only when the replying affidavit was filed.[72]

84 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 the Public Protector showed that

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71 Judgment Appeal Record, Vol 8 page 612 para 120

72 Judgment Appeal Record, Vol 8 page 613 para 122

she had breached the terms of her office in the conduct of the investigation.

**The procedural point**

85 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 point did not, therefore, "spring for the first time in its replying affidavit".[73]

86 The supplementary founding affidavit made specific reference to section 181 of the Constitution and called on the Public Protector to explain her conduct in the light of the concerning evidence from the record of proceedings that appeared to indicate that she had failed to conduct her investigation impartially and independently.[74]

87 There was, accordingly, no prejudice to the Public Protector as a result of the request for the declarator being addressed in Reserve

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[73] See PP's written submissions para 79

[74] SARB Supp FA in the High Court, Appeal Record Vol 2, page 101 paras 27 and 28; page 102 para 35

Bank's replying affidavit. The grounds for it, and the demand for an account of her conduct, already appeared in the founding papers.

88 This Court has also recently held in *Economic Freedom Fighters* 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".*[75]

89 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.

90 In the Public Protector's written submissions, the point is made that *Economic Freedom Fighters* does not provide support for this argument because this Court was not dealing with a personal costs

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[75] *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) para 211

order against public officials in that case.[76] But this misunderstands the reliance that the Reserve Bank places on *Economic Freedom Fighters.*

91 The Reserve Bank does not suggest that *Economic Freedom Fighters* related to personal costs orders against public officials. It does not rely on the case at all in relation to the personal costs order that the High Court granted against the Public Protector. It relies on *Economic Freedom Fighters* for the proposition that the declarator ought to have been granted by the High Court because formal amendments under rule 28(1) for declaratory relief are not required if the relief sought is adequately addressed on the papers before the court and will allow the real dispute between the parties to be addressed.

**The merits**

92 Section 172(1)(a) of the Constitution requires courts to declare any law or conduct that is inconsistent with the Constitution invalid to the

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[76] PP's written submissions para 78

extent of its inconsistency. This Court has described the section as an injunction to courts to vindicate the supremacy of the Constitution.[77]

93 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.

94 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*".[78]

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[77] *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) para 33

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

95 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.

96 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. We have set out above all the respects in which the Public Protector failed to meet this standard. In short,

96.1 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". The Public Protector's answering affidavit in the High Court did not answer this serious accusation and her replying affidavit in this Court is contradictory and unintelligible.

96.2 The Public Protector met with the Presidency on two occasions. Neither of these meetings was disclosed in the 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 but she did not. Instead, she presented a lengthy list of all the other meetings and interviews that were conducted during the investigation[79] but omitted to include the meetings with the Presidency.

96.3 The Public Protector's contention in this Court that she did disclose the meetings with the Presidency in the Report "through the Presidency's response to [her] section 7(9) process",[80] is demonstrably false. There is a section of the Report dealing with the meetings that were held and interviews were conducted, this list does not refer to meetings with the Presidency. Nowhere in the Report does the Public Protector indicate that, after the Presidency had already responded in writing to her section 7(9) notice on 28 February 2017, she held a further meeting with the

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79 The Report, Appeal Record, Supplementary Vol, pages 878 to 879 paras 4.4.3 to 4.4.3.12

80 PP RA in the Constitutional Court, Appeal Record Vol 10, page 796 para 18.3

Presidency. It therefore could never be that this meeting was disclosed in the Report “through” the Presidency’s response to her section 7(9) notice. The response to that notice was a written letter from the Presidency which, as we have set out above, it is now common cause, made no reference whatsoever to a further meeting.

96.4 The explanations of what was discussed at these two meetings with the Presidency has changed three times during the course of this litigation. The last explanation is, however, the most concerning because it confirms that the handwritten notes of the meeting with the Presidency on 7 June 2017 accurately recorded what was discussed. Those notes show that the Public Protector discussed the new remedial action in her Report with the Presidency and yet, offered no-on else this opportunity. They also show that the Public Protector discussed amending the Constitution to remove the Reserve Bank’s central bank function with the Presidency. There was no legitimate basis on which these matters should have been discussed with the Presidency.

96.5 No adequate explanation has ever been offered for why the meetings with the State Security Agency and the Presidency were not recorded and transcribed when that is the usual practice of the Public Protector's office. The Reserve Bank highlighted this glaring discrepancy in its supplementary founding affidavit and called on the Public Protector to respond to it.[81] She failed to do so.

97 This conduct is inconsistent with the constitutional duty placed on the Public Protector to be independent and impartial. It is an abuse of the important office of the Public Protector to use its powers to conduct an unfair and partisan investigation. The High Court ought, accordingly, to have issued a declarator to that effect.

**REMEDY**

98 For all the reasons set out above, we submit that the following orders should be granted:

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[81] SARB Supp FA in the High Court, Appeal Record, Vol 2, page 98 para 13; page 103 paras 36 and 37

98.1 The Public Protector's application for leave to appeal or direct access should be refused.

98.2 Alternatively, in the event that the Public Protector's application for leave to appeal or direct access is granted, then

98.2.1 The appeal or direct access application should be dismissed;

98.2.2 The Reserve Bank's application for leave to cross-appeal should be granted and the appeal upheld.

98.2.3 This Court should declare that the Public Protector abused her office during the investigation that led to the Report.

98.3 In either event, the Reserve Bank's costs in this Court should be paid by the Public Protector personally.

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**20 September 2018**