

**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  
PRACTICE NOTE IN  
THE APPLICATION FOR LEAVE TO APPEAL  
AND  
THE CONDITIONAL CROSS APPEAL**

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**NAMES OF THE PARTIES AND CASE NUMBER**

1 As above.

## **NATURE OF PROCEEDINGS**

- 2 The Public Protector has sought leave to appeal against a personal costs order that a full bench of the Pretoria High Court granted against her. The Public Protector also seeks direct access to this Court for essentially the same relief as she seeks in her application for leave to appeal.
  
- 3 The South African Reserve Bank also seeks conditional leave to cross appeal the High Court's dismissal of its application for a declaration that the Public Protector abused her office during the investigation that resulted in the report issued on 19 June 2017 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*)

## **ISSUES FOR DETERMINATION**

- 4 The first issue to be determined is whether the Public Protector should be granted leave to appeal 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.

- 5 The second issue to be determined, if leave to appeal is granted to the Public Protector, is whether to grant leave to cross appeal to the Reserve Bank against the dismissal of the application for a declaration that the Public Protector abused her office. And if leave is granted, whether to uphold the cross appeal and issue the declarator.

## **SUMMARY OF THE SOUTH AFRICAN RESERVE BANK'S ARGUMENT**

- 6 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 are required to be candid and place a full and fair account of the facts before the court.
- 7 The object of a personal costs order against a public official is to vindicate the Constitution. 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.

8 The Public Protector failed to live up to the standards required of her office during her investigation. She conducted a partisan investigation which was aimed at undermining the Reserve Bank. She also fell egregiously short of her duties during the litigation.

8.1 The Public Protector failed to produce a complete record of the impugned conduct, despite persistent requests from the applicants that she do so.

8.2 She failed to provide a full and frank explanation of a number of concerning features of her investigation including:

8.2.1 Secret meetings with the Presidency;

8.2.2 Discussions with the Presidency and the State Security Agency about the new remedial action in her

Report when she failed to discuss these new features of the Report with the parties most affected by them;

8.2.3 Misrepresentations about the economic advice that was obtained during the investigation;

9 These failings are not innocent errors or mistakes. They form a consistent pattern of obfuscation and avoidance. They deserve censure, both in the form of the personal costs ordered against the Public Protector and the declaratory order sought.

10 Both these orders are designed to vindicate the Constitution when its duties have been defied in such a flagrant manner.

**PORTIONS OF THE RECORD THAT ARE NECESSARY FOR THE DETERMINATION OF THE MATTER**

11 The full record and the supplementary volume must be read for the determination of this matter.

## **ESTIMATED DURATION OF ORAL ARGUMENT**

12 One day.

## **LIST OF AUTHORITIES TO WHICH SPECIFIC REFERENCE WILL BE MADE**

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

14 *South Africa Social Security Agency and another v Minister of Social Development and others* [2018] ZACC 26

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

16 *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC)

17 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC)

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**VINCENT MALEKA SC**

**KATE HOFMEYR**

**CINGASHE TABATA**

**Counsel for the Reserve Bank**

**Chambers, Sandton**

**20 September 2018**