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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 55578/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

10 MARCH 2020 .....

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Applicant
And	
THE PUBLIC PROTECTOR	First Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
THE NATIONAL COMMISSIONER OF POLICE	Third Respondent
THE ECONOMIC FREEDOM FIGHTERS	Fourth Respondent
THE FINANCIAL INTELLIGENCE CENTRE	Fifth Respondent
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Sixth Respondent
THE INFORMATION REGULATOR	*Amicus curiae*

Summary: *Review – Powers of the Public Protector* – Public Protector extending scope of investigation to include funding of CR17 campaign – Public Protector's powers lie in section 182 of the Constitution – Investigative powers determined by sections 6(4) and 6(7) of Public Protector Act 23 of 1994 – Further, section 3(1) of the Ethics Act giving powers to investigate – Public Protector's sphere of competence, or jurisdiction limited to matters involving state affairs; public administration; the exercise of public powers or functions; public funds; or conduct occurring in, or concerning the affairs of, any of the spheres of government – activities of CR17 campaign by nature are activities of members of private group of people and not statutory body – Public Protector having no power to investigate donations made to CR17 campaign.

Failure to Disclose and misleading Parliament – Executive Members' Ethics Act 92 of 1998 – Executive Code – finding that President violated Executive Code by misleading Parliament – Public Protector demonstrated fundamentally flawed approach to the principles underpinning question whether President violated Code by willfully and "*inadvertently*" misleading Parliament – word "*inadvertently*" not contained in Code – whether the President breached the Executive Code by failing to disclose the CR17 campaign donations – Public Protector's conclusion that President breached Executive Code by failing to disclose donations to CR17 campaign irrational and unlawful.

Money laundering finding that there was prima facie suspicion of money laundering not based on evidence at Public Protector's disposal and irrational

Remedial measures imposed by Public Protector – measures directed at Speaker constitute unlawful interference with the Speaker's constitutional role – Public Protector has no power to direct the NDPP to investigate any criminal offence and how to go about doing this

Challenge to the constitutional validity of the Executive Code – basis of challenge that if found that Code does impose duty of disclosure of campaign donations then it is constitutionally deficient – held – Executive Members Ethics Act does not contain duty of disclosure – Code derives its authority from the Act – therefore challenge is misplaced – it must be directed at the Executive Members Act

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JUDGMENT

THE COURT:

INTRODUCTION

1. The genesis of this matter was a parliamentary question put to the President of the Republic of South Africa (the President, and first applicant) in the National Assembly by the then leader of the official opposition, Mr Musi Maimane (Mr Maimane) on 6 November 2018. The question concerned a payment of R500 000. 00 into an account allegedly for the President's son. The payment was alleged to have been from Mr Gavin Watson, who was the chief executive officer of African Global Operations (AGO), formerly called Bosasa.

2. The President answered the question on the spot. He explained that his son had a business contract with AGO and that the payment was related to work he had undertaken for that company. Approximately one week later, the President wrote to the Speaker of the National Assembly to explain that he had provided incorrect information in response to Mr Maimane's question. He explained that the payment had been made on behalf of Mr Watson to the CR17 campaign. The CR17 campaign was an initiative conducted during the run-up to the 2017 internal party

elections for the African National Congress (ANC). The CR17 campaign supported the President's candidature for the position of president of the ANC. At that time, he was the Deputy President of the ANC and of the country.

3. These events gave rise to two complaints to the Public Protector.[1] One was from Mr Maimane, and the other was from Mr Floyd Shivambu (Mr Shivambu), a member of parliament for the Economic Freedom Fighters (the EFF). The Public Protector investigated the complaints. She engaged with several parties in the course of her investigation. Ultimately, she released her "*Report on an investigation into a violation of the Executives Ethics Code through an improper relationship between the President and African Global Operations (AGO), formerly known as Bosasa*"[2] (the Report). The Public Protector made three serious findings against the President in her Report. They included a finding that the President had misled Parliament; that he had failed to disclose donations to the CR17 campaign; and that her investigation supported a *prima facie* suspicion of money laundering. The Report included certain remedial action directed at the Speaker of the National Assembly (the Speaker), the National Director of Public Prosecutions (the NDPP), and the National Commissioner of Police.

4. This Judgment concerns Part B of an application instituted by the President. He seeks to review and set aside the Report on a number of grounds. Part A of the application was directed at suspending the operation of the remedial action contained in the Report pending the finalisation of the review proceedings. That application was subsequently granted by agreement.

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[1] It is common cause that the Public Protector received a third complaint. However, because it came from a member of the public and not a member of the National Assembly, she did not proceed to investigate it. The third complain has no relevance to the issues before the court

[2] Report No 37: of 2019/20

5. The Speaker is the second applicant. She seeks to review and set aside the remedial action directed at her. The NDPP, the second respondent, also seeks to review and set aside the remedial action directed at her. The Public Protector opposes the review, as does the EFF, which was granted leave to intervene as the fourth respondent. The Financial Intelligence Centre (the FIC) is the fifth respondent. The FIC initially intervened in the application in order to refute the contention made in the President's supplementary affidavit that it had acted unlawfully in providing the Public Protector with information unrelated to her request to it. However, the President did not persist with this contention, and the FIC ultimately adopted a neutral position in the litigation and sought to make submissions for the assistance of the Court. The same applies to the *amicus curiae*, the Information Regulator. Finally, the amaBhungane Centre for Investigative Journalism NPC (amaBhungane) was granted leave to intervene as the sixth respondent. AmaBhungane has extended the scope of the issues in dispute in the matter by launching a conditional constitutional challenge against the Executive Ethics Code (the Executive Code). The constitutional challenge is conditional on this Court making certain findings regarding the proper interpretation of the Executive Code. This issue will be dealt with towards the end of this Judgment. The National Commissioner of Police, although cited as the third respondent, has played no active role in the proceedings.

6. Both the President and the Public Protector hold positions of high constitutional significance. The President is the Head of State. He is expressly enjoined to uphold, defend and respect the Constitution.[3] His is the highest office in the land.

[3] Section 83 of the Constitution

He is the first citizen and he occupies a position indispensable for the effective governance of our democracy.[4]

7. The Public Protector's office was established as one of the Chapter 9 institutions under the Constitution to strengthen our constitutional democracy.[5] She has the power to investigate any improper conduct in state affairs in the public administration. Her office is independent and is subject only to the Constitution and the law.[6] Her investigative and remedial powers target even those "in the throne room of executive raw power".[7] She is empowered to take binding and effective remedial steps,[8] and she has extensive investigative powers under the Public Protector Act (the PPA).[9] These investigative powers are "*not supposed to bow down to anyone*".[10] In keeping with the constitutional significance of her office, the incumbent of the office of Public Protector is required to be a highly-skilled professional. She must be (among others) a Judge of the High Court, or an admitted attorney or advocate with at least ten years of practice experience in that capacity.

8. A legal dispute between these two bearers of high office will always be of constitutional import. We were addressed in detail on high-level principles of ethics, morality and constitutionalism, and on the far-reaching powers of the Public Protector against the most powerful. In matters of this nature, it is as well to be reminded of these salutary principles. It is equally important, however, to remain focused on what this case is about. It is about the Public Protector's report and

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[4] *Economic Freedom Fighters v Speaker, National Assembly & Others* 2016 (3) SA 580 (CC) at para 20 (*EFF v Speaker*)
[5] Section 181(1) of the Constitution
[6] Section 181(2) of the Constitution
[7] *EFF v Speaker* at para 66
[8] *EFF v Speaker* at para 67
[9] Act 23 of 1994, sections 7 & 7A
[10] *EFF v Speaker* at para 55

the competency of the findings she made. It is about the particular facts that served before her, and how she applied the relevant legal principles to those facts. Do the Public Protector's findings stand the test of constitutional rationality, as she contends? Or did she exceed the limits of her constitutional jurisdiction in her investigation and her findings, as the President contends? At the heart of the case is the question of the outer-limits of the Public Protector's powers under the Constitution and the PPA.

THE QUESTION AND RESPONSES

9. The starting point of the matter is the question put by Mr Maimane to the President in the National Assembly, and the President's responses to it. Mr Maimane's question was:

> *"Mr President, here I hold a proof of payment that was transferred to say that R500 000,00 had to be transferred to a trust account called EFG2 on 18 October 2017. This was allegedly put for your son, Andile Ramaphosa. (Interjections). Following on that, I have a sworn affidavit from Peet Venter, stating that he was asked by the chief executive officer of Bosasa to make this transfer for Andile Ramaphosa. Mr President, we can't have family members benefiting. (Interjections). I would want to ask you, right here today, that you bring our nation into confidence and please set the record straight on this matter. Thank you very much. (Applause)"*

10. The question was posed after Mr Maimane had asked the President a question about VBS Bank. Under the rules of debate of the National Assembly, Mr Maimane ought not to have asked a follow-up question that was unrelated to the original question posed. Nonetheless, the President elected to answer Mr Maimane's question. He did so in the following terms:

> *"Speaker and the Hon Maimane, this matter was brought to my attention. It was brought to my attention some time ago. I proceeded to ask my son what this was all about. He runs a financial consultancy business, and he consults for a number of companies, and one of those companies is Bosasa ... (Interjections) ... where he provides services on entrepreneurship, particularly*

on the procurement process. He advises both local and international companies.

Regarding this payment, I can assure you, Mr Maimane, that I asked him at close range whether this was money obtained illegally, unlawfully - and he said this was a service that was provided. To this end, he actually even showed me a contract that he signed with Bosasa. (Interjections). The contract also deals with issues of integrity, issues of anti-corruption, and all that... He is running a clear and honest business as an advisory service, as he has been trained as a consultant with his business science qualifications. I have had no idea or inkling whatsoever at what he has informed me, that this money was obtained illegally. If it turns out - Mr Maimane, I can assure if it turns out that there is any illegality and corruption in the way that he has dealt with this matter, I will be the first, the absolute first, to make sure that he becomes accountable ... (Interjections) ... even if it means ... (Applause) ... I can assure you, even if it means that I am the one to take him to the police station. That I will be able to do. (Interjections)."

11. This was on 6 November 2018. On 14 November 2018, the President wrote a follow-up letter to the Speaker. The text of the letter reads as follows:

"I wish to draw your attention to the fact that during my appearance in the National Assembly when I was answering questions on 6 November 2018, I inadvertently provided incorrect information in reply to a supplementary question.

Following my response to Question 19 on VBS Mutual Bank, the Leader of the Opposition asked me about a payment that had been made on behalf of a Mr Gavin Watson to my son, Mr Andile Ramaphosa.

My reply to the question was based on the information that was at my disposal at the time, regarding a business relationship that my son's company has with the company Africa Global Operations.

It is true that my son's company does indeed have a contract with Africa Global Operations for the provision of consultancy services.

The said consultancy services are provided by my son's company to Africa Global Operations in a number of African countries other than South Africa. He informed me that South Africa was specifically excluded to avoid a potential conflict of interest.

Since my reply in the National Assembly, I have sought to get more information regarding this matter.

I have been subsequently informed that the payment referred to in the supplementary question by the Leader of the Opposition does not relate to that contract.

I have been told that the payment to which the Leader of the Opposition referred was made on behalf of Mr Gavin Watson into a trust account that was used to raise funds for a campaign established to support my candidature for the Presidency of the African National Congress.

The donation was made without my knowledge. I was not aware of the existence of the donation at the time that I answered the question in the National Assembly."

12. In his response to the Public Protector's notice to him under section 7(9) of the PPA, the President explained the context of his original response and his follow-up letter. He said that the National Campaign Manager of the CR17 campaign, Mr Bejani Chauke (Mr Chauke), had told him in early September 2018 about rumours that his son, Andile Ramaphosa (Andile), had received a payment of R500 000.00 from AGO. This prompted the President to ask his son about the matter. Andile told the President that he had an arm's length business relationship with AGO, through his company Blue Crane Capital (Pty) Ltd. He had signed an Advisory Mandate with AGO in December 2017, and an Anti-Corruption and Bribery Policy in January 2018. The President said that Andile had shown him both of these documents.

13. The President told the Public Protector that when Mr Maimane asked him about the payment to Andile of R500 000.00, he assumed it concerned Andile's business relationship with AGO. It was on this basis that he gave his initial response to Mr Maimane in the National Assembly on 6 November 2018. However, after he had left the National Assembly on that day, one of his advisors, Ms Donne Nicol (Ms Nicol), told him that that the account that Mr Maimane had referred to, EFG2, was an attorney's trust account that had been used by the CR17 campaign to raise funds. Ms Nicol was on the fundraising committee of the CR17 campaign. The President was advised that the amount had not been paid to his son Andile for

work undertaken for AGO. In fact, the payment was a campaign donation from Mr Watson. Armed with this information, the President says that he wrote to the National Assembly to set the record straight.

THE COMPLAINTS

14. On 26 November Mr. Maimane filed his complaint with the Public Protector. The main body of the complaint read:

> *"On 6 November 2018, during a question session in the National Assembly, I presented President Ramaphosa with the documentary proof of the payment and the sworn statement that alleges the money was intended for his son Andile. The President confirmed that he was aware of the payment but had been satisfied that it was a lawful payment for services rendered by a consultancy firm owned or operated by Andile Ramaphosa....*
>
> *Subsequently, and on or about 16 November 2018, the President sent a letter to the Speaker of the National Assembly purporting to "correct" the answer he gave in the National Assembly ten days earlier.... In this letter of correction the President reveals that the payment was actually a donation toward his campaign to be elected ANC President in December 2017.*
>
> *It is my concern that the set of facts related above reveal that there is possibly an improper relationship existing between the President and his family on the one side, and the company African Global Operations (formerly Bosasa) on the other side. The nature of the payment, passing through several intermediaries, does not accord with a straight forward donation and raises the suspicion of money laundering. The alleged donor is further widely reported to have received billions of Rands in state tenders, often in irregular fashion.*
>
> *It is further my concern that the President may have lied to the National Assembly in his reply to my question on 6 November 2018."*

15. Mr Maimane asked the Public Protector to investigate the complaint with utmost urgency. He said that another President could not be allowed to be captured, and that the true facts of the matter needed to be established with all due haste.

16. Mr Shivambu's complaint was filed in January 2019. It was a complaint based on section 4(1) of the Executive Code. He asked the Public Protector to investigate:

"(a) whether the statement made by the President in the National Assembly on 6 November 2018 that he saw a contract between his son's company and African Global Operations is true, and that a contract indeed does exist; and

(b) whether the President deliberately misled Parliament in violation of the Executives Ethics Code."

THE INVESTIGATION BY THE PUBLIC PROTECTOR AND THE PRESIDENT'S RESPONSE

17. Having received the complaints, the Public Protector went about investigating them. She issued subpoenas to a number of individuals, including Mr Watson, Mr Venter, Ms Nicol, Mr Chauke, Mr Motlatsi (another organising member of the CR17 campaign), Mr Andile Ramaphosa, and the law firm Edelstein, Faber and Grobler Inc. Except for Andile, she interviewed all of these individuals. She also obtained affidavits from them, including Andile.

18. The Public Protector requested the FIC for their assistance in providing information on banking transactions. On receipt of information from the FIC, she subpoenaed Absa Bank and FNB for bank statements from the accounts associated with the CR17 campaign.

19. In addition, the Public Protector received responses from the President in respect of the complaints, and in respect of her section 7(9)(a) notice to him.[11] The President requested of the Public Protector that he be permitted to cross-examine Mr Watson, in terms of section 7(9)(b) of the PPA. It is common cause that the President was unable to do so before the Public Protector released her Report.

[11] Section 7(9)(a) provides that:
"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

The parties differ on the reasons for this. The President also requested access to the FIC information provided to the Public Protector, but this was denied.

20. It was evident from the Public Protector's section 7(9)(a) notice that she had extended the scope of her investigation to include, not only the alleged misleading of the National Assembly by the President, and the R500 000.00 payment to EFG2, but also the flow of funds for the entire CR17 campaign. She stated in her notice that her "preliminary view" was that "there is merit to the allegation relating to the suspicion of money laundering".

21. In his response to the section 7(9)(a) notice, the President contested the Public Protector's jurisdiction to investigate the CR17 campaign. He contended that her jurisdiction was limited to public administration and the improper exercise of public power. He asserted that the CR17 campaign fell outside of this ambit. As regards misleading Parliament, the President said he had not done so: he had answered the question put by Mr Maimane truthfully and in accordance with the information available to him at the time.

22. The President denied that he had placed himself at risk of a conflict of interest between his official duties and his private interests. He also denied that he had used his position to enrich himself or his son through an association with AGO. He told the Public Protector that the R500 000.00 payment by Mr Watson was a donation to the CR17 campaign, and that he had been unaware of the donation at the time. He contended that he had no duty under the Executive Code to disclose campaign donations to the CR17 campaign.

23. In support of this, the President gave the Public Protector a detailed account of the CR17 campaign. He made several important factual averments in this regard:

23.1. He explained that the origin and purpose of the CR17 campaign as follows:

> *"The CR17 campaign brought together like-minded individuals to support the renewal of the ANC and the candidature of the President as the ANC president, and many others for election to the ANC's NEC. The campaign had broad political objectives, including the unity of the ANC and the restoration of its values and character. Through its communications and messaging, CR17 sought to engage ANC members and supporters in political debate and promote organisational development and unity in the ANC."*

23.2. On its website, the CR17 campaign called on:

> *"... all ANC members and supporters who share this objective to work together — within the structures, practices and discipline of the ANC — to build a united, strong and mass-based movement."*

23.3. The President explained that:

> *"From the outset, CR17 determined that the campaign should not focus simply on promoting an individual's candidacy but should also present a vision for the ANC and the country by electing an ethical leadership collective."*

23.4. The President's response included an outline of the governance and governance structures of the CR17 campaign. As to the role of the President:

> *"The President was not involved in the management or the operations of the campaign. He did not participate in organising, communications, administration, and security coordination of the campaign."*

23.5. Further:

> *"(the) CR17 management and Fundraising Committee ... decided that the President would not be directly involved in the solicitation of funds for the campaign."*

23.6. And:

> *"The President was generally not aware of the donations, except for his own donation as well as the contributions of James Motlatsi, Sifiso Dabengwa and Donne Nicol."*

23.7. The President explained that he had agreed with the CR17 campaign that those involved would not tell him about any of the donations they received from anybody:

> *"It was probably not necessary for them to go that far but it was a wise precaution. It precluded any suggestion that the President's goodwill can be bought."*

23.8. As to the donation of R500 000.00 by Mr Watson, the President, explained that it was Mr Motlatsi who had approached Mr Watson for a donation, as he (Mr Motlatsi) knew Mr Watson, and did not discuss this with the President. Mr Watson made the donation into the EFG2 account on 18 October 2017. The President was not made aware of this donation until after the President responded to Mr Maimane's question on 6 November 2018. He told the Public Protector that he had no relationship with AGO nor with Mr Watson.

23.9. The President said that he had also made donations and loans to the CR17 campaign, along with other ANC members and non-member supporters of the campaign. Further, the costs of running the campaign were significant.

23.10. He explained the link between the bank accounts and entities that had been the subject of the Public Protector's investigation:

23.10.1. EFG2 was the trust account established by the CR17 campaign at the law firm of Edelstein, Faber and Grobler Inc. Initially, donors made donations to the CR17 campaign into this account. A 2% commission was paid to Edelstein, Faber and Grobler Inc on all amounts deposited by donors into the EFG2 account.

23.10.2. ABSA Bank later advised EFG and the CR17 campaign that it should not use the EFG2 trust account on a regular basis to make payments to service providers of the CR17 campaign.

23.10.3. Consequently, the Ria Tenda Trust (Ria Tenda) was established, with a trust deed duly lodged with the Master. A bank account with Standard Bank was opened for Ria Tenda. It was mandated to receive donations on behalf of the CR17 campaign. Payments to service providers were also made from this account. The President did not establish the Ria Tenda Trust. He had no role in directing its operations. These were done separately and independently of him.

23.10.4. In addition, Ria Tenda entered into a service level agreement with Linkd Environmental Services (Linkd). This is a private company, independent of the CR17 campaign. It offers various services to private and public companies. Through Ria Tenda, the CR17 campaign engaged the services of Linkd to take responsibility for the payment of the campaign's salaries, related financial services, administrative assistance to the campaign, and also to make payments to service providers. In the President's submissions to the Public Protector, he states that:

"All monies received by Linkd for the purposes of the CR17 campaign were disbursed according to an approved budget and on instruction from the CR17 campaign management. These transactions have been audited and verified by the company's auditors."

23.10.5. The CR17 campaign incurred a range of expenses. The President described these as including office rental and administration, travel and accommodation, salaries, marketing and communication campaigns, media monitoring, research and security. Besides, the CR17 campaign had to pay the cost of hiring venues for rallies, stipends for organisers, branch meetings, T-shirts and related campaign items. These expenses were incurred at both the national and provincial level.

23.10.6. The President's response to the Public Protector set out, in some detail, the payments to EFG2, Ria Tenda and Linkd.

23.10.7. The President submitted to the Public Protector in this regard that:

"Therefore, the 'large sums of money' referred to by the Public Protector were perfectly lawful, did not breach any laws, were necessary for the overall running of the campaign and the payments did not constitute maladministration. No monies went to the President or his family. The President, to the contrary was one of the donors to the campaign."

23.10.8. The President also dealt with the Cyril Ramaphosa Foundation (the CRF), which the Public Protector had identified as one of the entities to have received payment from the CR17 campaign. He explained the origins of the CRF as a charitable organisation he had set up originally as the Shanduka Trust. He confirmed that neither he nor any family members were beneficiaries of the CRF. On the contrary, he was a

donor. He explained further that CRF had been reimbursed for expenses it had incurred on the CR17 campaign's behalf.

24. In short, the President submitted to the Public Protector that he was not guilty of any of the complaints raised against him. He also called on the Public Protector to afford him a hearing in respect of any remedial action she may have been contemplating in her final report.

25. The Public Protector interviewed Ms Nicol, Mr Motlatsi and Mr Chauke. They confirmed the President's submissions regarding the CR17 campaign. Ms Nicol told the Public Protector that she had approached the President with the idea of raising funds for the campaign. She confirmed that those involved took the decision not to reveal details of the donors to the President. She also told the Public Protector that donors were told as a pre-condition to donating that they should expect no favours in return.

THE PUBLIC PROTECTOR'S FINDINGS AND REMEDIAL ACTION

26. For purposes of her investigation and report the Public Protector consolidated the two complaints. She identified the following issues as the focus of her investigation:

> *"(a) Whether on 06 November 2018, during question session in Parliament, President Ramaphosa deliberately misled the National Assembly and thereby acted in violation of the provisions of the Executive Ethics Code and the Code of Ethical Conduct and Disclosure of Members' interests for the National Assembly and Permanent Council Members.*
> *(b) Whether President Ramaphosa improperly and in violation of the provisions of the Executive Ethics Code and Disclosure of Members' interests for the National Assembly and Permanent Council Members exposed himself to any situation involving the risk of a conflict between his official duties and his private interest or used his position to enrich himself and his son through businesses owned by African Global Operations.*
> *(c) Whether there is an improper relationship between President Ramaphosa and his family on the one side, and the company African Global Operations on the other side due to the nature of the R500 000,00 payment passing through several*

intermediaries, instead of a straightforward donation to the CR17 campaign thus raising the suspicion of money laundering."

27. For the sake of simplicity, we refer to the issue identified under paragraph (a) as "the misleading of Parliament issue", the issue identified under paragraph (b) as "the disclosure issue," and the issue under paragraph (c) as "the money laundering issue". It is necessary to set out in full the Public Protector's findings as regards each of these issues.

28. In respect of the misleading of Parliament issue, the Public Protector made the following findings:

> *"7.1.1 The allegation that on 06 November 2018 during question session in Parliament, President Ramaphosa deliberately misled the National Assembly, is substantiated.*
>
> *7.1.2 President Ramaphosa's statement on 06 November 2018 in his reply to Mr Maimane's question albeit defective in terms of the Rules of the National Assembly, was misleading, as he also conceded in his correspondence to my office on 01 February 2019, and even in his subsequent letter to the Speaker of the National Assembly on 14 November 2018 where he sought to correct the incorrect information he had provided in the National Assembly.*
>
> *7.1.3 Consequently, President Ramaphosa's reply was in breach of the provisions of paragraph 2.3(a) of the Executive Ethics Code, the standard of which includes deliberate and inadvertent misleading of the Legislature. He deliberately misled Parliament, in that he should have allowed himself sufficient time to research on a well-informed response.*
>
> *7.1.4 I therefore find President Ramaphosa's conduct as referred to above although ostensibly in good faith, to be inconsistent with his office as a member of Cabinet and therefore in violation of section 96(1) of the Constitution, as referred to above."*

29. As far as the disclosure issue is concerned, she found as follows:

> *"7.2.1 The allegation that President Ramaphosa improperly and in violation of the provisions of the Executive Ethics Code and Disclosure of Members' interests for the National Assembly and Permanent Council Members exposed himself to any situation involving the risk of a conflict between his official responsibilities and his private interests or used his position to enrich himself and his son through businesses owned by AGO, is substantiated.*
>
> *7.2.2 In light of the evidence before me, it can be safely concluded that the campaign pledges towards the CR17 campaign were some form of sponsorship, and that they were direct financial sponsorship or assistance from non-party sources*

other than a family member or permanent companion, and were therefore, benefits of a material nature to President Ramaphosa.

7.2.3 President Ramaphosa as a presidential candidate for the ANC political party, received campaign contributions which benefitted him in his personal capacity. He was therefore duty-bound to declare such financial benefit accruing to him from the campaign pledges. Failure to disclose the said material benefits, including a donation from AGO constitutes a breach of the Code.

7.2.4 I have evidence which indicates that some of the money collected through the CR17 campaign trust account was also transferred into the Cyril Ramaphosa Foundation account from where it was also transferred to other beneficiaries.

7.2.5 President Ramaphosa at the time of receipt of the donations, was the Deputy President of the Republic of South Africa and a Member of Parliament. He was therefore bound by the Code of Ethical Conduct and Disclosure of Members' Interest for Assembly and Permanent Council Members, to declare such financial interest.

7.2.6 I therefore, find President Ramaphosa's failure to disclose financial interest which accrued to him, as a result of the donations received towards the CR17 campaign to be in violation of paragraph 2 of the Executive Ethics Code, and accordingly amounts to conduct that is inconsistent with his office as member of Cabinet, as contemplated by section 96 of the Constitution."

30. Finally, concerning the money laundering issue, the Public Protector made the following findings:

"7.3.1 The allegation that there is an improper relationship between President Ramaphosa and his family on the one side, and the company African Global Operations on the other side, due to the nature of the R500 000, 00 payment passing through several intermediaries, instead of a straight donation towards the CR17 campaign, thus raising suspicion of money laundering, has merit.

7.3.2 I have taken into account of the facts as well as prima facie evidence before me, I am therefore of the view that there is merit to the allegation relating to the suspicion of money laundering as alluded to in the complaint lodged with my office.

7.3.3 However, I have decided to refer this matter to the relevant institution for further probing as provided for in section 6(4)(c)(i) of the Public Protector Act which states that the Public Protector may, "at any time prior to, during or after an investigation, if he or she is of the opinion that the facts disclose a commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions".

31. The Public Protector also made certain "observations" regarding proceedings in the National Assembly. She observed that some members of the House did not give sufficient prior consideration to questions, or to the responses they are to provide. She also observed that the Rules of the National Assembly were silent

on whether members are permitted to make subsequent written submissions to correct or clarify the oral replies they have given.

32. The Public Protector directed the Speaker to take the following remedial action to remedy the improprieties she had identified:

> *"8.1.1 Within 30 working days of receipt of this Report, refer His Excellency President Ramaphosa's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members Interests for consideration in terms of the provisions of paragraph 10 of the Code.*
>
> *8.1.2 Within 30 working days of receipt of this Report, consider within her discretion, for deliberations by Members of Parliament in terms of the Rules of the National Assembly, issues relating to my observations under paragraphs 6.1 to 6.6 of this Report for possible review and amendment thereof.*
>
> *8.1.3 Within 30 working days of receipt of this Report, demand publication of all donations received by President Ramaphosa because as he was the then Deputy President, he is bound to declare such financial interests into the Members' registerable interests register in the spirit of accountability and transparency."*

33. The NDPP was directed to:

> *"8.2.1 Within 30 working days of receipt of this Report, take note of the observations contained in paragraph 7.3.1. as well as the recommendations contained in paragraph 7.3.3 of this report, and in line with section 8(4)(c)(i) of the Public Protector Act, conduct further investigation into the prima facie evidence of money laundering as uncovered during my investigation, and deal with it accordingly."*

34. The Public Protector went further by directing particular monitoring mechanisms to be effected. In this regard, in paragraph 9.3 of the report, she directed both the Speaker and the NDPP to "*within 30 working days of the issuing of this report, provide the Public Protector with the Implementation Plan indicating how the remedial action referred to in paragraphs (8.1.1, 8.1.2 and 8.1.3 of the Report) will be implemented.*" In paragraph 9.4 she directed the NDPP to "*within 30 days from the date of the issuing of this Report and for approval of the Public Protector,*

submit an implementation plan to the Public Protector indicating how the remedial action referred to in paragraph 8.2.1 of this report will be implemented."

GROUNDS OF REVIEW

35. It is common cause that, based on the decision of the Supreme Court of Appeal in *Minister of Home Affairs v Public Protector*,[12] the Public Protector's reports do not constitute administrative action. Accordingly, as they constitute an exercise of public power, they are reviewable under the principles of the rule of law in terms of section 1(c) of the Constitution.

36. The President seeks an order reviewing, declaring invalid and setting aside:

36.1. the Public Protector's decision to investigate and report on the CR17 election campaign for the ANC leadership elected in December 2017;

36.2. the Public Protector's Report number 37 of 2019/20; and

36.3. the findings and remedial orders in paragraphs 7.1; 7.2; 8.1.1; 8.1.3; 8.2.1; 9.1; 9.3 and 9.4 of the Public Protector's Report.

37. The President's grounds of review may be summarised as follows:

37.1. The Public Protector's finding that the President misled the National Assembly in breach of the Executive Code is unlawful in that it was based on a material error of law, it was wholly irrational, and it was in breach of the President's right to freedom of speech in the National Assembly enshrined under section 58(1) of the Constitution.[13]

[12] 2018 (3) SA 380 (SCA)
[13] This section is on Privilege and provides that:

37.2. The Public Protector had no power to investigate the donations made to the CR17 campaign, and her investigation in this regard was unlawful. The Public Protector only has jurisdiction to investigate "*any conduct in state affairs*" and "*public administration in any sphere of government*". The CR17 campaign and its funding falls outside of the scope of these powers.

37.3. The finding that the President had breached the Executive Code or the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members (the Parliamentary Code) was irrational and unlawful. On the undisputed facts and as a matter of law, the President was not required under either Code to disclose the donations made to the CR17 campaign.

37.4. The Public Protector's finding that there was merit in the complaint that Mr Watson's donation to the CR17 campaign gave rise to a suspicion of money laundering was irrational. There was no evidence of money laundering before the Public Protector. In addition, the Public Protector based her finding on an interpretation of the Prevention and Combatting of Corrupt Activities Act (PRECCA),[14] and not on the Prevention of Organised Crime Act (POCA).[15] It is the latter, and not the former Act that establishes the offence of money laundering.

37.5. The Public Protector acted unlawfully in that she failed to afford the President a hearing in terms of section 7(9)(a) of the PPA, and under the common law.

"Cabinet members, Deputy Ministers and members of the National Assembly-
(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-
(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees. ..."

[14] Act 12 of 2004
[15] Act 121 of 1998

More particularly, she failed to afford the President a hearing on the remedial action she was contemplating before releasing her Report.[16]

37.6. Finally, the remedial action directed by the Public Protector is unlawful. It is not competent for the Public Protector to usurp the powers of the Speaker and of the NDPP in her remedial orders.

38. The Speaker seeks to review and set aside the remedial and monitoring measures insofar as they are directed at her. She contends that these orders are inappropriate and unlawful in that they impermissibly trench on the constitutional discretionary power of the National Assembly to hold the Executive to account. Further, the Speaker says that she does not have the power to refer the President to the Joint Committee, as directed by the Public Protector. This is because the President is not bound by the Parliamentary Code as he is no longer a member of Parliament. The Speaker contends that the remedial action imposed by the Public Protector in this regard is accordingly misdirected, ineffective and inappropriate. She also contends that the Public Protector has no power under section 182(1) of the Constitution to monitor the Speaker and the National Assembly on the discharge of their constitutional obligations. Thus, she says, the monitoring mechanisms constitute an unjustifiable infringement on the doctrine of separation of powers.

39. The NDPP seeks to review and set aside the remedial and monitoring orders insofar as they are directed at her. In particular, the NDPP contends that the remedial and monitoring actions are unlawful and irrational. The Public Protector

[16] The President's original case based on the absence of a hearing extended also to the Public Protector's failure to afford him a hearing in respect of the information she obtained from the FIC, and in respect of certain CR17 campaign emails that were provided to her, allegedly by a whistleblower. At the hearing of the matter, counsel made it clear that the President's review on this ground was focused on the alleged failure as regards the remedial action only.

has no power under section 182(1) of the Constitution, or under section 6(4)(c)(i) of the PPA to direct the NDPP to investigate and to monitor her actions in this regard. In terms of section 6(4)(c)(i), the Public Protector is empowered to do no more than to bring the matter to the notice of the NDPP. The NDPP says that the Public Protector exceeded her powers in imposing the remedial actions and monitoring mechanisms on the NDPP.

40. The President, the Speaker and the NDPP seek orders of costs against the Public Protector in the event that their review applications succeed. The President seeks punitive costs order against the Public Protector, i.e. an order directing her office to pay costs on an attorney and client scale. However, the President does not seek a personal costs order against her. The Public Protector and the EFF oppose the relief sought by the President, the Speaker and the NDPP. The Public Protector seeks an order of costs in her favour, should she be successful. The EFF asks the court to deal with costs, insofar as it affects it, based on the *Biowatch*[17] principle.

AMABHUNGANE'S APPLICATION

41. Before dealing with the main issues before us, it is necessary to contextualise amaBhungane's application. It brings a conditional constitutional challenge to the Executive Code. The constitutional challenge relates to the duty of members of the Executive to disclose donations made to campaigns for positions within political parties.

42. AmaBhungane does not seek to enter the dispute between the Public Protector and the President. Nor does it seek to become involved in the interpretive debate

[17] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)

as to the meaning of the Executive Code as it currently stands. AmaBhungane's challenge arises only if we find that the Executive Code does not require disclosure of funding for internal party-political campaigns.

43. In that event, amaBhungane seeks an order:

43.1. Declaring that the Code is unconstitutional, unlawful and invalid to this extent; and

43.2. Directing that the declaration of invalidity shall have no retrospective effect and shall be suspended for a period of 12 months to allow for the defect to be remedied.

44. The gist of amaBhungane's case is that if the Executive Code is found not to require such disclosure, then it is in breach of the Constitution, and particularly sections 19,[18] 32[19] and 96.[20] It is also in breach of the Executive Members' Ethics Act (the Ethics Act).[21]

ISSUES

45. The issues we must determine are as follows:

45.1. The first issue is whether the finding of the Public Protector that the President had misled Parliament in violation of the Executive Code was rational and lawful.

45.2. The second issue is whether the Public Protector had jurisdiction to investigate donations to the CR17 campaign at all. This jurisdictional

[18] Which deals with political rights
[19] Which deals with the right of access to information
[20] Which deals with the conduct of Cabinet members and Deputy Ministers
[21] Act 82 of 1998

question primarily underpins the disclosure issue. If the Public Protector did not have jurisdiction to investigate the CR17 campaign donations, then her finding that the President breached his duty of disclosure by not disclosing CR17 donations is for this reason alone open to being reviewed and set aside.

45.3. The third issue is whether, even if the Public Protector had jurisdiction to investigate the CR17 campaign donations, her conclusion that he was obliged to disclose the donations was lawful and rational.

45.4. The fourth issue is whether the finding by the Public Protector that there was merit in the complaint of a suspicion of money laundering was rational and lawful.

45.5. The fifth issue is whether the Public Protector's Report and findings are subject to review on the basis that she failed to afford the President *audi alteram partem* before finalising her findings.

45.6. The sixth issue is whether the remedial and monitoring orders directed at the Speaker and the NDPP are lawful. Of course, if we determine that the findings underpinning the remedial and monitoring measures should be reviewed and set aside, it would follow as a matter of course that the remedial and monitoring measures associated with them should suffer the same fate. However, the challenges to the remedial and monitoring measures ordered by the Public Protector raise important issues concerning the ambit of her powers. For this reason, our view is that we should consider these issues regardless of the outcome of our determination on the Public Protector's substantive findings.

45.7. The seventh issue is the amaBhungane application, which is conditional on our findings regarding the disclosure issue.

45.8. Finally, we must consider the question of costs.

THE FINDING THAT THE PRESIDENT MISLED PARLIAMENT

46. There are some fundamental difficulties with the Public Protector's finding that the President misled Parliament.

47. To begin with, it is apparent from the Report that the Public Protector was confused about the legal foundation for her finding. It is common cause that the finding was based on the Executive Code. The relevant paragraph of this Code is 2.3(a). It prescribes that:

> "Members of the Executive may not ... willfully mislead the legislature to which they are accountable."

48. For some inexplicable reason, the Public Protector reframed the paragraph and the test. In paragraph 5.1.28 of her report, she purports to quote from paragraph 2.3(a) when she says the following:

> "*...regard must be had to section 2.3 of the Code which states that: Members may not — 'Deliberately or inadvertently mislead the President, or the Premier, or, as in this case, the Legislature'* ." (emphasis added)

Of course, this cannot have been a direct quote from paragraph 2.3(a), as indicated by the Public Protector's inclusion of the phrase: "*or, as in this case*". However, her purported excerpt from the Code is even more fundamentally problematic than this. The Public Protector replaces "willfully" with "deliberately or inadvertently".

49. While, as counsel for the Public Protector was at pains to point out, there may be no appreciable distinction between "willfully" and "deliberately," this is not the problem. The problem is that the Public Protector introduced the element of inadvertent misleading of Parliament into the Code. This is entirely at odds with the text of the Code. It also introduces an entirely different test: whether in legal terms, or even in common sense terms, there is a material difference between conduct that is willful and that which is inadvertent. The one simply cannot be mistaken or interchanged with the other.

50. This error and confusion are repeated throughout the Report.[22] It occurs in her final finding, where she concludes that:

> *"Consequently, President Ramaphosa's reply was in breach of the provisions of paragraph 2.3(a) of the Executive Ethics Code, the standard of which includes deliberate and inadvertent misleading of the Legislature. He inadvertently and/or deliberately misled Parliament, in that he should have allowed himself sufficient time to consider the question and make a well- informed response."*[23] *(emphasis added)*

51. The Public Protector points out that elsewhere in her Report she cites the correct text. She stated in her answering affidavit that insofar as she erroneously misstated paragraph 2.3(a) of the Code, her error was immaterial. This is because according to her: "*...my finding is based primarily on the President deliberately misleading Parliament rather than inadvertently doing so.*" This is inconsistent with her final conclusion, which states, in so many words, that her finding was also based on an inadvertent misleading by the President. A further difficulty with the Public Protector's stance is that it simply does not explain her confusion in the first place. Even if she sometimes referred to the correct formulation of the Code, she

[22] See also paras (c), (cc), and 5.1.34 of the Report
[23] At para 7.1.3 of the Report

demonstrably remained confused throughout as to what the Code said and what test was to be applied before she could properly find that the President had breached the Code in this regard.

52. In our view, the President is correct in his submission that the Public Protector's confusion permeates her entire consideration of this issue. Her confusion is borne out by her ultimate conclusion, which is difficult to understand. Counsel for the President submitted that it was "garbled". As best we can understand, the Public Protector appears to have found that the President misled Parliament (either deliberately and inadvertently, or inadvertently) by answering Mr Maimane's question on the spot, and not allowing himself time to go away and consider the question so that he could make a well-informed response.

53. At best, this conclusion seems to point to carelessness on the President's part, or, with the benefit of hindsight, an ill-judged decision to answer Mr Maimane's question then and there. However, by no stretch of law, logic or even ethics, could conduct of this nature be said to amount to a willful, or deliberate misleading of Parliament such as to amount to a violation of paragraph 2.3(a) of the Executive Code. That would be inconsistent with the right of members of the Executive to be protected in their freedom of speech when they appear in the National Assembly under section 58 of the Constitution. It would also be contrary to the obvious purpose of the Executive Code, viz. to hold members of the Executive to account for their deliberate, willful or intentional (however one might wish to phrase it) misleading of Parliament.

54. In her treatment of this issue the Public Protector demonstrated a fundamentally flawed approach to the principles underpinning the question of whether the President violated the Executive Code by willfully misleading Parliament. It is to

be expected of the Public Protector to proceed from the premise of the correct formulation of paragraph 2.3(a); to understand what the test is that must be applied to determine whether there has been a violation; and finally, to pronounce a conclusion that can be clearly understood and is in line with that test. Unfortunately, the Public Protector's approach to the issue, in this case, falls far short of this.

55. In this regard, the Public Protector's finding on the misleading of Parliament issue is fatally flawed due to a material error of law. For this reason alone, the finding warrants review and setting aside. However, there are further reasons for reaching the same conclusion.

56. If one considers the facts before the Public Protector, it is clear that they simply did not establish that the President willfully misled Parliament at all. The full text of the question posed by Mr Maimane and the response of the President in Parliament are set out earlier in this judgment. It is important, first, to consider the question, and then to consider the President's answer.

57. The factual premise of Mr Maimane's question was that he (Mr Maimane) had proof that Mr Watson, the CEO of AGO, had caused a payment of R500 000.00 to be made to the President's son. This was the statement of fact that was put to the President. He was then asked to set the record straight as "*we can't have family members benefiting*". It is so that Mr Maimane mentioned the account name and the date of the transfer in his question. However, it is also clear that his real concern was that the President's son had secured an improper benefit. Mr Maimane asked the President to explain the payment to his son.

58. It is important to appreciate that the President was not asked by Mr Maimane to comment on whether the account EFG2 was in fact, an account held by Andile, nor was he asked to confirm that the payment on that date was one made to his son. These were given facts that Mr Maimane put to him as having already been established and the President's answer was directed at those facts.

59. Of course, we know with hindsight that the payment was not to Andile and that the account EFG2 was not linked to him. At the time, however, these facts were not known to either Mr Maimane or to the President. There is no evidence to indicate that the President knew about the account EFG2 at the time he answered the question, or about the R500 000.00 donation made by Mr Watson to the CR17 campaign. The uncontested evidence before the Public Protector was that the President only found out about the donation, and about the account EFG2 after he had answered the question in Parliament.

60. In this context, it is difficult to understand how the President's answer could rationally be viewed as anything but honest and reasonable, given the nature of Mr Maimane's question. There was no evidence before the Public Protector to gainsay the President's version, which was backed up by the evidence of Mr Motlatsi, Mr Chauke and Ms Nicol. He said that he had spoken to his son about his connection with AGO in the previous months and that this was why he had assumed that the payment Mr Maimane mentioned in his question, as having been made to his son, was a payment for services his son had rendered to AGO in terms of his agreement with it. There is also nothing to gainsay the President's version that he focused on the gist of Mr Maimane's question, and not on the date of the payment (which was in fact before Andile's agreement with AGO came

about) or the account details. Indeed, it is clear that these details were not the thrust of Mr Maimane's concern at all.

61. At best for the Public Protector, the President's answer contained incorrect information: he said that the payment was for services rendered by his son to AGO. It is so that the President stated this emphatically, as the Public Protector points out, and that he did so confident of the accuracy of his answer. However, if the President gave Parliament incorrect facts, this was based on a misstated set of facts presented to him by Mr Maimane in the first place. The origin of this error was on the part of Mr Maimane, not the President. In these circumstances, whatever incorrect facts were placed before Parliament, the President cannot rationally be found to have misled the National Assembly in that regard.

62. This is particularly so considering that the test to be applied for a violation of paragraph 2.3(a) requires a willful misleading of the National Assembly. The facts simply do not point to the President having acted so as to willfully mislead when he answered Mr Maimane's question. The evidence supports his version that he acted in good faith. Indeed, the Public Protector accepted the President's good faith in this regard in her section 7(9) notice, and in parts of her Report. In her section 7(9) notice, she concluded that:

> *"His conduct referred to above, although in good faith, is inconsistent with his office as a member of Cabinet and therefore in violation of section 96(1) of the Constitution... ."*[24]

63. This is repeated by the Public Protector in the executive summary of her Report, although she also states in her conclusion in the Report that the President acted

[24] Para 11.1.4 of the section 7(9) notice

"ostensibly" in good faith. Whatever the explanation for this contradiction might be, the Public Protector is on record as having accepted the President's *bona fides* in this regard. It would be strange if she had not done so, as the evidence before her clearly established that he acted honestly and in good faith when he answered Mr Maimane's question. The President subsequently addressed a letter to the Speaker to set the record straight by providing details that went beyond the question Mr Maimane had posed originally. Far from indicating an attempt to mislead the National Assembly, this was conduct consistent with an intention to ensure that Parliament is given the correct information, rather an intention willfully to mislead it.

64. What is more troubling is that the President dealt with the Public Protector's acceptance of his *bona fides* when he responded to her section 7(9)(a) notice. His response recorded that:

> *"The Public Protector has correctly found that the President acted in good faith. That should be the end of the matter. Any suggestion that the President contravened the Executive Ethics Code is incompatible with the Public Protector's own finding that his response to Mr Maimane was given honestly and in good faith."*

65. In her response in her final report, the Public Protector referred to this submission as "*preposterous*". This response displays a deep-seated inability, or refusal, to process facts before her in a logical and fair-minded manner. Such a response is difficult to reconcile with her constitutional obligations. Furthermore, it was totally irrational for the Public Protector to make a finding that the President misled Parliament on the basis that he should not have answered Mr Maimane's question before first checking the facts. The President had sufficiently clarified how it came about that he had answered Mr Maimane's question on the spot.

66. In its submissions to us, the EFF suggested that the Public Protector had been correct in her finding on this issue. The EFF contended that the court should apply what it called a hybrid test for determining whether the President misled Parliament in breach of the Executive Code. As we understand the contention, it is that the President was under the highest ethical duty, as the Head of State, to account properly to the National Assembly. For this reason, so the submission went, his conduct in answering Mr Maimane's question must be judged on ethical standards, and not solely on the legal standard of whether he intentionally misled Parliament.

67. According to the EFF, the President breached this ethical standard when he told the National Assembly that he was telling the truth based on facts he had gathered from his son. The EFF says that hindsight shows that what the President claimed to be the truth was not the truth. The EFF submits that this explains the Public Protector's finding that he misled Parliament by not taking time to answer the question properly: had he done so, he would have provided Parliament with the truth.

68. These submissions have no substance. We are not told which rule of Parliament is the source of the contended highest ethical standard. It appears that we are expected to simply conjure the said rule and then enforce it. It would be a sad day indeed for our law were Courts to operate in this manner. In addition, the EFF's submissions come nowhere to showing the requisite willfulness to found substance in the complaint investigated by the Public Protector.

69. It is important to remember that Mr Maimane did not ask the President about donations to the CR17 campaign. He asked him about a payment to his son. Yet, when the President discovered that the identified payment was a donation to the

CR17 campaign, he took steps to correct the information he had given Parliament by providing it with the correct facts. He cannot, in hindsight, be said to have acted in breach of his ethical duties by electing to follow this path rather than by doing what the EFF says he should have done.

70. The EFF further contends that the President's answer to Mr Maimane must be considered in conjunction with his prior conduct in what the EFF says was his deliberately distancing himself from the donations made to the CR17 campaign. The EFF says that the President decided to operate within a "*ring of ignorance*", and that he assumed a position of wilful blindness as regards donations to the CR17 campaign. The EFF says that this was a deliberate strategy to provide him with plausible deniability, in dereliction of his ethical duties to be open and transparent to Parliament. As we understand the EFF's argument, it is this aspect of the President's conduct that satisfies the element of willfulness contained in paragraph 2.3(a) of the Code.

71. The undisputed evidence of the President is that the reason why it was decided that he should be insulated from information about donations to the CR17 campaign was precisely to avoid him being placed in a position of possible conflicts of interest. His uncontested version is that his insulation from the details of the financial transactions and donors to the CR17 campaign ensured that he avoided the risk that donors might subsequently expect some form of pay-back from him. There is no evidence to the contrary, nor is it an implausible explanation. On the contrary, it seems to have been a reasonable strategy to employ in order to avoid possible conflicts of interest.

72. The EFF's argument is based on the assumption that the only way to avoid possible conflicts is for a candidate to have full knowledge of donations. The EFF

however failed to advance any basis for this submission to buttress its plausibility. The EFF's argument also proceeds on the assumption that the President had nefarious motives by preferring not to be provided with the details of the funding. The EFF has provided no factual foundation for these submissions. Other than proffering unsubstantiated accusations of ill will against the President, the EFF has not displaced his factually supported reason for his answer to Mr Maimane's question as well as his exclusion from the inner workings of the CR17 campaign. There is simply nothing on the facts to support the EFF's assumption, and its contentions do not assist the Public Protector.

73. Finally, it is necessary to deal with an important anomaly in the Report. Although the Public Protector decided to consolidate the two complaints, she made no findings in respect of the complaint of Mr Shivambu. The Public Protector included the agreement and anti-corruption policy between AGO and Andile in her Report. Accordingly, they clearly existed. However, she did not draw the obvious conclusion from this evidence, viz. that the President had not misled Parliament in this respect. She does not explain her omission. In all fairness, the President was entitled to be exonerated on this complaint. Instead, the Public Protector ignores the point of Mr Shivambu's complaint, which was to question whether the President misled the National Assembly about his son's contract.

74. The Public Protector did not make the obvious finding that the President had told the truth about his son having an agreement with AGO. In our view, in failing to do so the Public Protector did not act with an open mind, and so breached one of the cardinal requirements of her position.

75. For these reasons, we find that not only did the Public Protector commit a material misdirection in her legal approach to the misleading of Parliament issue, but she

also reached an irrational and unlawful conclusion on the facts that were before her. Further, she did not approach the issue with an open mind. The President's review of her finding in this regard therefore must be upheld and the finding set aside.

DID THE PUBLIC PROTECTOR HAVE JURISDICTION TO INVESTIGATE THE CR17 CAMPAIGN DONATIONS?

76. The Public Protector's findings on the disclosure issue and on the money laundering issue arose out of her investigation into the flow of funds to and from the CR17 campaign. She subpoenaed bank records linked to the identified account, and analysed the flow of funds. From this, she concluded that the President had opened himself up to a risk of a conflict of interest between his personal and official obligations. She also concluded that a *prima facie* suspicion of money laundering was established. Her investigation into the CR17 campaign bank records was essential to her eventual findings.

77. In his complaint, Mr Maimane raised a concern that the payment from Mr Watson might be indicative of an "*improper relationship existing between the President and his family on the one side, and the company African Global Operations on the other*". On the question of money laundering, he again focused on the payment from Mr Watson, saying that "*the nature of the payment, passing through several intermediaries, does not accord with a straightforward donation and raises the suspicion of money laundering*". He raised a concern about state capture, saying that: "*we cannot allow another President to be thus captured*". This was in the context, as stated by Mr Maimane, of AGO having been reported as having received billions of Rands in state tenders in an irregular fashion. Mr Maimane's complaint was not about the CR17 campaign.

78. Mr Shivambu's complaint similarly had nothing to do with the CR17 campaign. It also focused on the payment of R500 000.00 by Mr Watson. However, it was even more specific. It requested the Public Protector to investigate whether there was an existing contract between AGO and the President's son, as the President had claimed; and whether the President had indeed seen the contract.

79. The President contends that the Public Protector acted outside of the ambit of her powers by nonetheless proceeding to investigate the CR17 campaign, and by making findings flowing from her investigation. According to him, the CR17 campaign was a campaign that took place within the context of an election campaign internal to the ANC. It was for the election of the President as President of the ANC, and for the election of other, like-minded members to additional positions within the party structures. The funding that the Public Protector investigated was private funding. It was sourced from private donors who supported the campaign. Neither public affairs nor public funds were involved in the campaign. Thus, the President says that the Public Protector had no jurisdiction to investigate the CR17 campaign and its donations. The Public Protector disputes this. She says that her powers are wide enough to encompass her investigation into the CR17 campaign and that she acted within her jurisdiction in doing so.

80. There can be no doubt that the Public Protector has wide powers. This fact has been repeated in numerous *dicta*, including those emanating from our highest Court.[25] However, like any statutory body, those powers are not unlimited. Nor is the Public Protector's sphere of jurisdiction unlimited. The question is what were

[25] See, for example, *Public Protector v Mail and Guardian Ltd and Others* 2011 (4) SA 420 (SCA) (hereafter *Mail & Guardian*); *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and others (Corruption Watch as amicus curiae)* 2016 (2) SA 522 (SCA); *EFF v Speaker*

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the limits of her jurisdiction in this matter? This is not an abstract question. It must be answered by looking at, among other things, the context in which the Public Protector investigated the CR17 campaign, the powers she relied on in doing so, the facts she had before her, and the particular findings she made in her Report arising out of her investigation.

81. The source of the Public Protector's powers lies in section 182 of the Constitution. It reads, in relevant part:

> "(1) The Public Protector has the power, as regulated by national legislation-
>
> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
>
> (b) to report on that conduct; and
>
> (c) to take appropriate remedial action.
>
> (2) The Public Protector has the additional powers and functions prescribed by national legislation." (emphasis added)

82. The PPA sets out her additional powers and functions. Her sphere of competence, insofar as her investigative powers are concerned, is determined by section 6(4), which reads:

> "The Public Protector shall be competent-
>
> (a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged-
>
> (i) maladministration in connection with the affairs of government at any level;
> (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
> (iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and

Combating of Corrupt Activities Act, 2004, with respect to public money;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person; ..." (emphasis added)

83. Section 6(7) is also relevant. It provides that:

> "The Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged attempt to do anything which he or she may investigate under subsections (4) or (5)."

84. Finally, the Public Protector has powers to investigate under section 3(1) of the Ethics Act:

> "The Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4."

85. Altogether these provisions circumscribe the conduct that the Public Protector is competent to investigate.[26] The overriding feature of section 182(1) of the Constitution and section 6(4) of the PPA is that her sphere of competence, or jurisdiction, is limited to matters involving state affairs; public administration; the exercise of public powers or functions; public funds; or conduct occurring in, or concerning the affairs of, any of the spheres of government.[27] It is implicit in this circumscription of her powers that she cannot investigate matters falling within the private sphere. However, as we discuss shortly, it may not always be easy to determine what falls within the public sphere, and thus within the Public Protector's

[26] *Mail & Guardian* at para 11
[27] *Mail & Guardian* at paras 10 & 92

jurisdiction, and what falls within the private sphere, and thus outside of her jurisdiction. But clearly, what is important, is that the issue must be dealt with on a case-by-case basis.

86. From inception, the President disputed the Public Protector's competence to investigate the CR17 campaign. His attorney expressed as much in the covering letter accompanying the President's response to the Public Protector's section 7(9)(a) notice. They stated that:

> *"In our Client's response, we indicate that we do not accept that you have jurisdiction to investigate the CR17 campaign and to make any findings in relation to it. Specifically, we point out that section 6 of the Public Protector Act, 23 of 1994, limits the powers of the Public Protector to investigate matters which concern public administration and the improper exercise of public or statutory powers. The CR17 campaign and its fund-raising operations do not concern public administration or the exercise of public or statutory power. Therefore, the Public Protector has no jurisdiction in terms of the Public Protector Act to investigate the matter at all."*

87. The President's stance was echoed in his representations attached to the letter. In her Report, the Public Protector stated that:

> *"The conduct of President Ramaphosa amounts to conduct in state affairs, and therefore, the matter falls within the ambit of the Public Protector's mandate."*[28]

88. The Public Protector's Report and answering affidavit identify the bases on which she claimed to have jurisdiction to investigate the CR17 campaign. She relied on her constitutional powers under section 182(1); her further powers under the PPA, and in particular on sections 6(4) and (7); her duty to investigate complaints under the Ethics Act; and on the nature of the complaints lodged.

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[28] Report, para 3.3.13

89. Her stance may be summarised as follows. Section 182 of the Constitution gives her the power to investigate any conduct, not merely any complaint. She has the power to determine, from a complaint, what conduct should be investigated.[29] Section 6(7) further extends her powers by permitting her to investigate issues on her own initiative, if these are issues she has the power to investigate under sections 6(4) or (5).

90. Further, she received two complaints under the Ethics Act. Mr Maimane's complaint included a concern about money laundering in relation to the payment by Mr Watson. According to the Public Protector, she could not ignore her duty to investigate this issue. Consequently, she obtained the bank statements associated with the CR17 campaign and investigated them. She was: "*further concerned that these sums of money claimed to be 'donations' (sic) created a situation of the risk of some sort of state capture by those donating such large sums of the money*".[30] She was also concerned about the manner in which the transactions were conducted, in light of the complaint of money laundering by Mr Maimane.[31] As the donations were made at a time when the President was the Deputy President of the Republic, the Public Protector held the view that he may have opened himself to a risk of a conflict of interest under section 96 of the Constitution.

91. For clarity, section 96 deals with the conduct of Cabinet members and Deputy Ministers. Subsection (2)(b) provides that they:

> "*... may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.*"

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[29] Report, para 71
[30] Report, para 124
[31] Report, para 125

92. Of course, the Public Protector enjoys wide powers, including the power to investigate any issue on her own initiative. However, she only enjoys these powers within her sphere of competence. She cannot use her wide powers as a basis to extend her jurisdiction. On the contrary, the limits of her jurisdiction set the outer limits of her powers. Thus, she cannot initiate her own investigation on an issue if the issue falls outside her sphere of competence. Nor can she investigate a complaint that falls outside it.

93. Critical to her sphere of competence, as we pointed out earlier, is that she may only investigate improper or allegedly improper conduct in state affairs, or in the public administration in any sphere of government. This raises the question: what is the meaning of state affairs?

94. We were urged during oral argument by counsel for the Public Protector to adopt a very broad definition of state affairs based on the concept of the State in political science. He urged us to steer clear of restrictive, lawyerly meanings of the concept. In what was, admittedly, his own gloss, he submitted that anything associated with the population, the territory, the sovereignty or the government of a state falls within the meaning of state affairs. Extrapolating from this, he submitted that any conduct involving the Deputy President of the country in his quest to become a leader of his party, and consequently, to become President of the country is a matter of state affairs. On this basis, he submitted that the Public Protector had jurisdiction to investigate the CR17 campaign and its funding from private sources.

95. Counsel for the EFF adopted an approach that was compatible with the Public Protector's. Relying on the Constitutional Court judgment in *My Vote Counts (2)*,[32] he submitted that the raising of funds for any election, even an internal political party election, has a direct result on the democratic order. For this reason, the conduct of the CR17 campaign in accepting private donations was a matter of state affairs and thus fell within the Public Protector's investigative jurisdiction.

96. One cannot give the concept of state affairs, as it appears in section 182(1) of the Constitution so wide a meaning that it serves no purpose. The Constitution is a legal document. The jurisdiction of the Public Protector in a review application like this one is a legal question. Consequently, we must seek to give the concept a legal meaning. It is not helpful to seek an answer within the broader realms of political science.

97. The Constitution does not define "state affairs". However, it defines "organ of state" in section 239 as meaning:

> (a) "any other functionary or institution-
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer."

Section 182(1) also limits the Public Protector's competence to investigate conduct that occurs in "*any sphere of government*". Section 40 of the Constitution describes government as being constituted by the national, provincial and local spheres.

[32] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC)

98. The Constitutional treatment of these key elements of the Public Protector's jurisdiction is aligned with the specific powers she is given under section 6 of the PPA, which were set out in full earlier. It is clear from this that her sphere of competence to investigate is limited to state or public bodies or functionaries, within the meaning of "*organ of state*", i.e. those performing a public power or function. The Public Protector's competence to investigate non-State or private bodies or functionaries exists only if the alleged improper conduct involves public monies. Thus, she cannot investigate any conduct she chooses simply because it is alleged to be improper, no matter how serious the impropriety seems to be.

99. It is important to bear in mind that the jurisdictional issue is not whether the Public Protector had the competence to investigate the complaint against, or the conduct of, the President. The issue is whether her sphere of competence extended to investigating the CR17 campaign.

100. It is common cause that the CR17 campaign was an initiative operating within the context of pending internal party-political elections of the ANC. The object of those elections was to elect office bearers within the party. The funding raised by the CR17 campaign was from private sources, in support of certain candidates, including the then Deputy President of the country, being elected as office-bearers.

101. The activities of the CR17 campaign fell squarely within the constitutional rights of participating members under section 19(1) of the Constitution. That section provides that:

> "Every citizen is free to make political choices, which includes the right-
> (a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause."

102. The Constitutional Court has held as follows as regards the nature of the relationship between political parties and their members within the context of section 19:

> "*Section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate. These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities. The constitutions of political parties are the instruments which facilitate and regulate participation by members in the activities of a political party.*"[33] (my emphasis)

103. And further:

> *"Before demonstrating that some of the irregularities raised were established it is necessary to outline the nature of the legal relationship that arises from membership of the ANC. At common law a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by statute. The ANC's constitution together with the audit guidelines and any other rules collectively constitute the terms of the agreement entered into by its members. Thus the relationship between the party and its members is contractual. It is taken to be a unique contract."*[34] *(emphasis added)*

104. Clearly, as appears from the excerpts referred to above, the conduct of political party members in conformity with their party structures and in furtherance of their own personal party ambitions is squarely within the private domain. It follows from this that the conduct of those members of the ANC, who came together under the

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[33] *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) at para 73
[34] At para 79

banner of the CR17 campaign to raise funds for the President and other members to be elected to office in the party-political elections held in 2017, was not conduct in state affairs. They acted in furtherance of their right to participate in the activities of their party, and to campaign for the party-political cause with which they identified. The activities of the CR17 campaign were thus by nature the activities of members of a private group of people, and not a statutory body, in furtherance of a matter that concerned their relationship with their party.

105. Further, there was no suggestion that these activities involved the suspected improper use of public funds. It is common cause that the donations were private donations, sourced from members and non-members of the ANC who supported the cause of the CR17 campaign. The Public Protector's bald statement that this involved conduct in state affairs does not answer the critical issue, viz. on what basis did she draw the conclusion that the conduct of the CR17 campaign was conduct in state affairs. At that time the State did not legislate, and indeed, up to the present, the State has not legislated, to regulate internal party-political activity or funding. Our view is that the Public Protector does not appear to have fully appreciated the distinction between her powers and her jurisdictional competence in the approach she took on this issue.

106. Consequently, it did not fall within the sphere of competence of the Public Protector to investigate the CR17 campaign. In assuming jurisdiction to investigate, the Public Protector appears to have conflated the CR17 campaign with the President. She then assumed jurisdiction on the basis that he was the Deputy President at the time that the donations were received. However, the mere fact that the President was Deputy President of the country at that time did

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not catapult the activities of the CR17 campaign into the arena of "affairs of state", and thus subject to the Public Protector's jurisdiction.

107. The uncontested evidence before the Public Protector attested to the broad-based nature of the campaign. As set out earlier, the President explained this to the Public Protector in his representations to her in response to her section 7(9)(a) notice. The President included in his representations media statements by the CR17 campaign from 2017 explaining the purpose of the campaign:

> *"The CR17 campaign promotes the unity and renewal of the African National Congress. It seeks to restore the values and character of the ANC as a selfless champion of the South African people. In advancing this effort, CR17 campaigns for the election of a leadership that has the commitment, capacity and integrity to the organisation and the country. Since its establishment, the campaign has called on all ANC members and supporters who share this objective to work together — within the structures, practices and discipline of the ANC — to build a united, strong and mass-based movement."*

108. The uncontested evidence concerning the organisational structure of the CR17 campaign demonstrated that, despite the campaign bearing, as counsel for the EFF put it, the "branding" of the President, it was nonetheless a campaign that was far bigger than him. Critically, it was a campaign to further a particular ideological agenda within the ANC. The Public Protector missed the significance of this point. She made much in her answering affidavit about the fact that the donations were not donations to the ANC. This is immaterial. It was never the President's contention that they were donations to the ANC. The more important point is that they were donations to support the party-political cause of some members of the ANC for purposes of the December 2017 internal party elections.

109. Once it is established that the activities of the CR17 campaign did not fall within the Public Protector's jurisdiction, it does not assist her to rely on her powers

under section 6(7) of the PPA, or on the money laundering complaint. This provision and the complaint cannot create jurisdiction for her: she either has the jurisdiction or not. If she does not have it, then no matter how wide her powers might be, she could not use them to investigate the CR17 campaign.

110. As to the Public Protector's reliance on the Ethics Act and the complaint under the Code, this may have given her jurisdiction to investigate the conduct of the President, but not the CR17 campaign. The outer limits of the Public Protector's competence remain limited to state affairs, thus excluding the activities of the CR17 campaign. Besides, under section 3 of the Ethics Act, her competence to investigate a complaint of a violation of the Executive Code is limited to the actual complaint lodged. As we pointed out earlier, neither of the complaints was directed at the activities of the CR17 campaign.

111. For these reasons, we conclude that on the facts of this case, the Public Protector did not have jurisdiction to investigate the CR17 campaign. It follows that the findings she made on the disclosure issue fall to be reviewed and set aside. The investigation into the CR17 campaign was an essential element of her findings on that issue. Her investigation and consequently, her findings are thus unlawful.

THE FINDING THAT THE PRESIDENT BREACHED THE CODE BY FAILING TO DISCLOSE THE CR 17 CAMPAIGN DONATIONS

112. Apart from the jurisdictional challenge to the Public Protector's findings on the disclosure issue, the President contends that these findings are in any event irrational and unlawful for other reasons.

113. Certain key elements emerge from the findings of the Public Protector on the disclosure issue:

113.1. She found that there was substance in the allegation that the President had placed himself in a situation involving a risk of a conflict between his official responsibilities and his private interests, contrary to the Ethics Act and the Executive Code. Alternatively, there was substance in the allegation that the President used his position to enrich himself and his son through AGO.

113.2. She found that on the evidence before her, it could be concluded that the donations to the CR17 campaign were a direct financial sponsorship of the President, and therefore constituted benefits of a material nature to him.

113.3. She found that the President received campaign contributions which benefited him in his personal capacity. Accordingly, he was duty-bound to declare them.

114. The President contends that these elements of her findings are not supported by the evidence that was before her. For this reason, they are irrational and unlawful. Further, that on the undisputed facts, and on a proper interpretation of the Code, the President did not have a duty to disclose under the Ethics Code. For this reason, too, he contends that her findings are unlawful.

115. There is some overlap between the issues for consideration here, and those that arose under the jurisdiction question. In particular, the misdirected conflation that the Public Protector made of the activities of the CR17 campaign and the President permeate her findings here too. In this conflation, she ignored the uncontested evidence before her.

116. We have already explained that on the facts before her, the CR17 campaign was much broader than simply supporting the President as prospective president of the

ANC. Further, the evidence established that he was not involved in the organisational structures of the campaign and generally not in the fundraising. The President attested to this, as did Ms Nicol, Mr Motlatsi and Mr Chauke. The President made it clear that he attended fund-raising dinners, that he was consulted on the invitation lists and that he occasionally was asked for guidance on possible donors. However, the general practice was that the details of the donors and amounts contributed would not be shared with him.

117. In this regard, in her Report and answering affidavit the Public Protector discredited the President's version on the basis that the "leaked emails" showed that their evidence was untrue. In her answering affidavit, the Public Protector identifies the emails she relied upon in discrediting the President's version. They comprise two emails, sent by Ms Nicol within the space of one week in November 2017. They support the President's explanation of his limited involvement in the fundraising activities in that they show no more than two instances in which, among other things, the names of potential donors were discussed with him. These emails do not constitute a sufficient basis for the Public Protector's rejection of the President's explanation of the CR17 campaign and his involvement.

118. To the extent that the President was involved in the CR17 campaign, it was as a member of the ANC. He was entitled to engage in the activities of the CR17 campaign in furtherance of his rights under section 19(1) of the Constitution. There was nothing untoward in this. There was also no evidence at all before the Public Protector concerning anything the President did that involved the exercise of his official duties overlapping with his involvement in the CR17 campaign. There is thus no evidence that in his involvement in the CR17 campaign, he

placed himself at the risk of a conflict between his official responsibilities and his private affairs.

119. There was also nothing to substantiate her finding that there was merit in the allegation that he used his position to enrich himself and his son through AGO. The President said he did not know Mr Watson, did not approach him for a donation and did not know about the donation when it was made. Mr Motlatsi confirms that he approached Mr Watson as he knew him. Ms Nicol confirms this version. There was no evidence before the Public Protector to contradict this.

120. The Public Protector's finding that the President received direct financial sponsorship through the CR17 campaign was based on her conflation of that campaign with the President. What she had before her was a full explanation as to how the CR17 campaign spent the money that it raised. This showed that it funded the entire broad-based CR17 campaign. There was no evidence that it was used to pay the President's expenses. On the contrary, the President himself contributed to the CR17 campaign, as did many other ANC members. The Public Protector has not identified any evidence nor facts to substantiate her conclusion that he received direct personal sponsorship through the campaign.

121. The same goes for her finding that he received campaign contributions through the CR17 campaign that benefited him in his personal capacity. This conclusion again emanated from her conflation between the CR17 campaign and the President. There was simply no evidence that the President received personal financial benefit from any campaign contributions. From her Report it appears that the Public Protector was concerned about transfers from the CR17 campaign accounts to the Cyril Ramaphosa Foundation (the CRF). However, the facts before her clearly established that neither the President nor his family were

beneficiaries of the CRF, neither did they received funds from it. The Public Protector had no contrary evidence at her disposal.

122. The question that arises is, if the President did not personally benefit or receive financial campaign contributions through the CR17 campaign (as the Public Protector found), how could the Public Protector rationally conclude that he was obliged under the Executive Code to make the disclosure of the donations?

123. The source of the duty of members of the Executive to make disclosure of their financial interests is section 96(1) of the Constitution, and the Ethics Act. Section 2(1) of the Ethics Act provides that:

> "The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities."

124. Section 2(2)(b)(iii) provides that the Code of Ethics must include provisions prohibiting such members from: "exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests". Flowing from this, section 2(2)(c) provides that the Code must require those members to disclose to a designated official:

> "(i) all their financial interests when assuming office; and
>
> (ii) any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them ... as may be determined in the code of ethics ... ."

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125. Paragraph 2.3(f) of the Executive Code repeats the injunction in section 2(2)(b)(iii) of the Act. Paragraph 6 sets out the financial interests that must be disclosed. These include:

125.1. Under paragraph 6.2, direct financial sponsorship or assistance from any source other than the member's party which benefits the member in her personal and private capacity; and

125.2. Under paragraph 6.4, the nature and source of any other benefit of a material nature and the value of that benefit.

126. We stated above that on the facts before the Public Protector, there was nothing to substantiate the conclusion that the President was obliged to disclose donations made to the CR17 campaign under paragraph 6.2 of the Code. This is because there was no evidence that he received direct financial sponsorship from the donations through the CR17 campaign. The only other possible basis for the duty to disclose is under paragraph 6.4, i.e. that he received another disclosable benefit of a material nature. To sustain the Public Protector's finding on this basis, as supported by the EFF, paragraph 6.4 would have to be interpreted to include an indirect benefit. If it is interpreted to mean a direct benefit, then the Public Protector's finding would be unsustainable for the same reason that her conclusion that the President received a disclosable sponsorship was unsustainable.

127. It was submitted to us in oral argument on behalf of the EFF that because the President indirectly benefited from the CR17 campaign (as one of the candidates whom the CR17 campaign promoted), this attracted an obligation under the Executive Code to disclose the donations received by the CR17 campaign. One fundamental difficulty with this proposition is that it is not the basis on which the

Public Protector reached her conclusion. We are required to determine the rationality of her conclusions and the reasons for those conclusions.[35] Her conclusions, as we have already noted, were founded on her conflation between the CR17 campaign and the President. It was on this basis that she assumed that what accrued to the CR17 campaign accrued to the President for his personal benefit and were thus disclosable benefits. Therefore, the submission by the EFF does not assist the Public Protector.

128. Apart from this, paragraph 6.4 does not describe the kind of indirect benefit that must be disclosed. What the President gained from the CR17 campaign was support for his candidature as ANC president. So did the other members of the party whose candidatures were supported by the campaign. The nature of the benefit was to advance the internal party-political power base of those candidates. It was not a financial benefit upon which one could place the type of "value" required to be disclosed under paragraph 6. It would be irrational to equate the value of this indirect, political benefit with the value of all donations received by the whole CR17 campaign, and to find that the President was under an obligation to disclose those donations. For this reason, the President was not obliged to make disclosure of donations received by the CR17 campaign under paragraph 6.4 of the Executive Code.

129. We must also mention a further submission by the EFF on this issue making common cause with the Public Protector. The submission is that in directly receiving the benefit emanating from the CR17 campaign, the President placed himself in a position where he exposed himself to a situation involving the risk of a

[35] *Afriforum v Emadlangeni Municipality* (A286/2015) [2016] ZAGPPHC 1222 (27 May 2016) at para 26; *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 28

conflict between his official responsibilities and his private interests. For this it was argued on behalf of the EFF, the President was obliged to disclose the CR17 donations and his failure to do so violated section 96(2) of the Constitution. Clearly this submission must be pegged to paragraph 6.2 of the Code to resonate with what the Public Protector found.

130. The EFF argued that this conclusion was upheld by this Court in *President of the Republic of South Africa v Public Protector and Others*[36] (the *Zuma* case) where the then President's power to appoint the Chairperson of a Commission of Enquiry was curtailed on the basis, so it was submitted, that the then President's private interests may have improperly affected how he discharged the powers of his office. The submission was that should we uphold the President's argument in the case before us that would amount to a declaration that the *Zuma* case was decided on an incorrect basis.

131. This argument is contrived. It ignores the cardinal issues in the *Zuma* case and one before us. The *Zuma* case had nothing to do with the duty of disclosure but with a finding of alleged malfeasance by the then President in allegedly allowing his private interests and his family to influence how he exercised his powers in state affairs, eg as regards the appointment of Ministers. There can therefore be no question of in the case before us of the *Zuma* case having been decided on an incorrect basis.

132. We conclude that the findings of the Public Protector on the disclosure issue are unsustainable. Rational findings must be premised on a proper factual and legal foundation. That foundation was lacking in this case. The Public Protector's

[36] 2018 (2) SA 100 (GP)

conclusion that the President breached the Executive Code by failing to disclose donations to the CR17 campaign was irrational and unlawful and falls to be set aside.

THE FINDING OF A *PRIMA FACIE* SUSPICION OF MONEY LAUNDERING

133. In her Report, the Public Protector made the very serious finding that a *prima face* suspicion of money laundering had been established. She framed the question of money laundering that was before her as follows:

> *"whether there is an improper relationship between President Ramaphosa and his family on the one side, and the company African Global Operations on the other side, due to the nature of the R500 000. 00 payment passing through several intermediaries, instead of a straightforward donation to the CR17 campaign."*

134. The focus of the money laundering issue was thus the payment by Mr Watson. This is consistent with Mr Maimane's complaint, which introduced the issue of money laundering. However, in her investigation of the matter, the Public Protector extended her investigation on the money laundering issue beyond the single payment from Mr Watson. Having subpoenaed the CR17 campaign bank statements, she proceeded to analyse them. She noted that large sums of money had been deposited into the EFG2 trust account. From there, transfers were made to the Ria Tenda and Linkd accounts, and some to the CRF. She concluded from this:

> *"I wish to express my preliminary view that such a scenario when looked at carefully, creates a situation of the risk of some sort of state capture by those donating these moneys to the campaign."*[37]

[37] Report, para 5.3.10.67

135. The Public Protector went further to identify the legal prescripts upon which she would draw her conclusion on the issue of money laundering. She referred to The Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PRECCA") and noted that section 3 of that Act provides for, among others, an all-encompassing general offence of corruption. She stated in this regard that:

> *"In terms of this section, anybody who accepts (or even agrees to accept or offers to accept) any gratification from anybody else or gives (or even agrees to give or offers to give) any gratification from anybody else or gives (or even agrees to give) any gratification to anybody else to influence the receiver to conduct himself of herself in a way which amounts to the unlawful exercise of any duties, commits the act of corruption."*[38]

136. She concluded that the evidence established a *prima facie* suspicion of money laundering based on PRECCA. She reached this conclusion despite the fact that PRECCA does not deal with money laundering.[39] She stated:

> *"My investigation into the issue pertaining to possible money laundering is premised on the above legislation dealing with corruption and applies not only to private individuals who offer bribes, but also to private individuals who accept bribes."*[40]

137. It is necessary to unpack the Public Protector's findings leading to her conclusions. The question she framed at the outset contemplated the President, his family, AGO and the R500 000.00 payment. The issue was whether there was an improper relationship between the President's family and AGO. She then makes the statement that the R500 000.00 passed through several intermediaries. The evidence is that the money went from Mr Watson's personal account into the

[38] Report, para 5.3.10.69
[39] Sections 3 to 9 of the Act intend to punish the activity of giving and accepting of any gratification in order to act in a manner that amounts to, amongst others, 'the illegal, dishonest, unauthorised or biased exercise or performance of powers, duties or functions; or to the abuse of a position of authority, a breach of trust, or the violation of a legal duty or set of rules.
[40] Report, para 5.3.10.72

account of Miotto Trading which was associated with Mr Watson. The evidence is that both accounts had nothing to do with the President. From the Miotto account the money was deposited into the EFG account, being the CR17 campaign bank account. What this illustrates is that only one account is involved on the CR17 campaign side as far as this amount is concerned. There is no evidence of "several intermediaries" as stated by the Public Protector. We also point out that the paucity of evidence of the so-called "several intermediaries" points to the Public Protector simply repeating the language used by Mr Maimane in his complaint to her office. What the evidence shows is that there was one straightforward transaction into the EFG account when it left the Watson side. To state the obvious, the question framed by the Public Protector to investigate possible money laundering was not based on the evidence at her disposal. In fact, it was not based on any evidence at all.

138. The Public Protector then widened her investigation beyond the R500 000.00 specifically mentioned in the Maimane complaint. She focused on the other transactions involving the CR17 campaign and expressed the "preliminary view" that the "scenario" presented a risk of some state capture by those donating to the CR17 campaign.

139. We know that the Public Protector did not have facts or evidence that the donors were either public officials or that public funds were used to donate to the CR17 campaign. In fact, the evidence she had at her disposal identified the donors as private donors. It is inexplicable how then the Public Protector made the state capture statement. To buttress her view the Public Protector then referred to PRECCA to found her conclusion that money laundering was involved. She made the firm finding that, based on PRECCA, the evidence at her disposal established

a "prima facie" suspicion of money laundering. We know that she had no evidence even remotely suggesting that money laundering was at play. We also know that PRECCA has nothing to do with money laundering. The legislation that establishes the offence of money laundering is of the Prevention of Organised Crime Act[41] (POCA), and particularly sections 4, 5 and 6.

140. First, a person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities, commits an offence in terms of section 4 if he enters into any agreement, arrangement or transaction (whether legally enforceable or not) in connection with the property; or performs any other act in connection with the property, which has the effect or is likely to have the effect:

(i) of concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of the property or any interest in the property; or

(ii) of enabling or assisting any person who committed an offence to avoid prosecution or to remove or diminish any property acquired as a result of an offence.

141. Second, a person commits an offence in terms of section 5 if he knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities and enters into any transaction, agreement or arrangement in terms of which:

(i) the retention or control by or on behalf of that other person of the proceeds of unlawful activity is facilitated; or

[41] 121 of 1998

(ii) the proceeds are used to make funds available to that person, to acquire property on his behalf, or to benefit him in any other way.

142. Third, a person who acquires, uses or possesses property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, commits an offence under section 6.

143. The essence of the offence is the concealment of proceeds of crime. Unless the money involved in the suspected money laundering transactions is the proceeds of crime, it does not matter how many accounts and transactions are involved in dealing with the money: there can be no offence of money laundering without the proceeds of crime.

144. The other legislation that deals with money laundering is the Financial Intelligence Centre Act[42] (the FIC Act). The FIC Act was introduced to combat money laundering activities and the financing of terrorist related activities. The Act defines "money laundering" or "money laundering activity" to mean:

> "an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of this Act or section 4, 5 or 6 of the Prevention Act".

145. There was no evidence before the Public Protector that any of the donations made to the CR17 campaign were the proceeds of crime nor that the President entered into an agreement or an arrangement whereby he assisted Mr Watson to conceal or disguise money, which he knew or ought reasonably to have known, is the

[42] 38 of 2001

proceeds of a crime. There was, further, no evidence before the Public Protector that the President knew or ought reasonably to have known that the Watson donation constituted the proceeds of unlawful activities. Additionally, it cannot be said that the President ought reasonably to have known that Mr Watson made (and there is no evidence to suggest this) a tainted donation to his campaign and then failed to obtain information to confirm or disprove the fact.

146. Clearly the Public Protector had no foundation in fact and in law to arrive at her finding that the President had involved himself in illegal activities sufficient to evoke a suspicion of money laundering. In addition the Public Protector based her finding on legislation that has nothing to do with the offence of money laundering. The conclusion is inescapable that in dealing with this issue the Public Protector completely failed to properly analyse and understand the facts and evidence at her disposal. She also showed a complete lack of basic knowledge of the law and its application. She clearly did not acquaint herself with the relevant law that actually defines and establishes the offence of money laundering before making serious unsubstantiated findings of money laundering against a duly elected head of state. Had she been diligent she would not have arrived at the conclusion she did.

147. It is so that at the time that the Public Protector conducted her investigations, the alleged corrupt activities of AGO in state tenders had aired at the Commission into State Capture. But this is immaterial. The evidence before the Public Protector from Mr Watson was that he had made a donation to the CR17 campaign as a long-standing member of the ANC. There was no contrary evidence. In fact, the FIC had told the Public Protector in April 2019 at a meeting with her that its investigation could find no indication of money laundering, as they could not establish whether any of the monies deposited to the CR17 campaign accounts

constituted the proceeds of crime. The FIC told the Public Protector that the payment from Mr Watson "*came from sources that appeared to be lawful*". Of course, even if Mr Watson's sources of funding were suspect (and there was no evidence of this before the Public Protector) the suspicion of money laundering might fall on Mr Watson. But he was not the subject of the Public Protector's investigation.

148. As we have already noted, the uncontradicted evidence of the President, Ms Nicol and Mr Motlatsi is that the President had nothing to do with the donation from Mr Watson. In order to be suspected of money laundering a person must know, or they ought reasonably to know, that the money in question is the proceeds of crime. Quite how the Public Protector thought that the President might have harboured the requisite knowledge to constitute this crucial element of the offence on the evidence before her is unfathomable.

149. The only real clue to the Public Protector's reasoning on the money laundering issue comes from the following passage:

> "*... a criminal may attempt to integrate the funds he/she received from corrupt activity, such as a bribe or kickback, into a financial system by channeling the funds through complex financial transactions during which he/she may involve several entities as conduits and use financial institutions as a means to disguise the corrupt source of funds as well as the ultimate beneficial owner of the proceeds of unlawful activity.*"[43]

150. This passage formed a direct link to her conclusion that there was a suspicion of money laundering. In her reasoning, the Public Protector assumed that the monies donated to the CR17 campaign constituted bribes or kickbacks, presumably for political favours. It is not clear who the Public Protector suspected

[43] Report, para 5.3.10.71

was the "criminal" receiving them. However, as she was investigating the President, one must assume that he was the suspect.

151. The allegation at the heart of her reasoning is extremely serious. It implies that the President orchestrated the entire CR17 campaign and used it as a vehicle for laundering the bribes he received from donors in return for political favours. This kind of allegation, even if implied and not express, ought not to be made without strong supporting evidence. We need to emphasise, once again, that in this case, the Public Protector had no evidence before her to substantiate this very serious allegation.

152. The role of the Public Protector is to "*inspire confidence that all is well in public life*".[44] Of course this does not mean that she must suppress evidence or curtail her investigations inappropriately to protect public figures. But she is required to approach each case with an open mind:

> "*That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious, but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do.*"[45]

153. On the money laundering issue, the Public Protector displayed anything but an open mind. She made serious findings based on unfounded assumptions. She paid no regard to the statute that establishes the very offence in which she implied the President is suspected to have been involved. She also ignored the detailed explanations from Ms Nicol, Mr Motlatsi and Mr Chauke about the provenance of each of the accounts involved in the CR17 campaign, and how and why the

[44] *Mail & Guardian*, para 23
[45] *Mail & Guardian*, para 22

transfers were effected between them. Had she considered this evidence properly, she could not rationally have concluded that these accounts were being used in such a manner as to warrant a *prima facie* suspicion of money laundering. We find that her findings on the money laundering issue were not only irrational, but, indeed, reckless. Consequently, they fall to be reviewed and set aside.

AUDI ALTERAM PARTEM

154. The President contends that the Public Protector failed to afford him a hearing in respect of the remedial action she included in her Report.

155. It is common cause that the Public Protector afforded the President a number of opportunities to make representations to her, and that he took advantage of those opportunities. However, it is also common cause that she did not give him any forewarning about the remedial action that she was contemplating. She did not include the remedial action in her section 7(9) notice to the President. In his response to that notice, the President specifically requested that he be given an opportunity to address her on any remedial action she was contemplating. The Public Protector elected, instead, to simply include the remedial action in her Report without affording him that opportunity.

156. Section 7(9)(a) of the PPA obliges the Public Protector to afford a hearing to persons implicated in any investigation. It provides that:

> *"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."*

157. In addition, the right to be afforded a reasonable opportunity to make representations on matters that may detrimentally affect one's interests is a well-established principle of natural justice and of our common law. It is an important component of the right to just administrative justice and is expressly recognised as such in the Constitution.[46] Whether or not a decision-maker has complied with this obligation or not will depend on the facts of the particular case.

158. The Public Protector's stance is that section 7(9)(a) does not oblige her to give a person being investigated a hearing on her contemplated remedial action. She says that in her notice to the President she forewarned him that the remedial action could be a referral of the matter to the relevant authorities. She contends that this was sufficient compliance with her obligations under the *audi alteram partem* principle.

159. Section 7(9)(a) does not expressly require the Public Protector to include her contemplated remedial action in the notice to a party under investigation. However, that does not mean that the Public Protector may not be obliged to do so. The facts may be such that in order to constitute compliance with a person's constitutional right to just administrative action, she should afford them this opportunity.

160. In this case, the remedial action directed by the Public Protector has potentially serious implications for the President. The Speaker is directed to demand that he discloses all donations made to the CR17 campaign. This is information which, on the evidence before the Public Protector, is not known to the President. He accordingly runs the risk of falling foul of a directive from the Speaker that he

[46] Section 33(1) provides that:
"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

discloses information about funds he never personally received but which was raised and spent by the CR17 campaign to advance his campaign to become president of the ANC.

161. However, even more serious for the President is the remedial action relating to the money laundering issue. In terms of this remedial action, the NDPP is directed to conduct further investigations into the *prima facie* evidence of money laundering. The effect of this direction is that the President potentially would be a criminal suspect for an offence that carries the possibility of a 30-year period of imprisonment. Thus, the remedial action she proposed was at least as important (if not even more so) as her finding of a suspicion of money laundering.

162. Given these serious implications of the remedial action, the President's right to just administrative active placed an obligation on the Public Protector to be forewarned of them, and to be given an opportunity to make representations. She failed to comply with this obligation. In the circumstances, the remedial action she included in her report falls to be reviewed and set aside.

REVIEW OF THE REMEDIAL ACTION

163. The Speaker and the NDPP are the main proponents of the review of the remedial action directed by the Public Protector in her report. The President supports the review. These parties contend that the remedial action and monitoring measures are inappropriate, in some instances ineffective, and constitute a usurpation of the constitutional discretionary powers of the Speaker and the NDPP.

164. The Public Protector is empowered under section 182(1) of the Constitution to "take appropriate remedial action". The Courts have fleshed out what this power means and entails. The Constitutional Court has said in this regard:

"In sum, the Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. Moreover, the remedial action is always open to judicial scrutiny. It is also not inflexible in its application, but situational. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. Of cardinal significance about the nature, exercise and legal effect of the remedial power is the following:

(a) The primary source of the power to take appropriate remedial action is the supreme law itself, whereas the Public Protector Act is but a secondary source;

(b) It is exercisable only against those that she is constitutionally and statutorily empowered to investigate;

(c) Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;

(d) She has the power to determine the appropriate remedy and prescribe the manner of its implementation;

(e) "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case;

(f) Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken;

(g) Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken; and

(h) Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is binding or not or what its legal effect is, would be a matter of interpretation aided by context, nature and language."[47]

Remedial action that is binding cannot be ignored.[48] However, it is open to judicial scrutiny.[49] The Public Protector has the power to direct or instruct members of the Executive, to exercise powers entrusted to them under the Constitution where that is required to remedy the harm in question.[50] However, the Public Protector is an organ of state and must abide by the constitutional principle of separation of

[47] *EFF v Speaker*, para 71
[48] *EFF v Speaker*, para 73
[49] *EFF v Speaker*, para 74
[50] *Zuma* case

powers. She must give due deference to the expertise within other organs of state.[51]

Remedial measures directed at the Speaker

165. Cardinal to the power of the Public Protector to determine an appropriate remedy is that the remedy should be effective. The Speaker challenges two of the Public Protector's remedial measures on the basis that they lack this essential quality. The Public Protector directed the Speaker to refer the President's violation to the Joint Committee on Ethics and Members' Interests for consideration in terms of the provisions of paragraph 10 of the Code of Ethical Conduct and Disclosure of Members' Interests for Members of the Assembly and Permanent Council Members, i.e. the Parliamentary Code.[52] She also directed the Speaker to demand publication of all donations received in the Members' register of interests.[53]

166. The Speaker points out that the President is no longer a member of the National Assembly. He ceased being a member when he was elected as President. The Joint Committee has no competence to consider complaints against former members, save for limited circumstances, which do not apply here. Similarly, the register of disclosable interests applies to members of the National Assembly. The Speaker submits that these two remedial directives are ineffective, as they fall outside of her area of competence. She has no power to refer a complaint to the Joint Committee, or to require registration of interests in respect of, ex-members of the National Assembly.

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[51] *ABSA Bank Limited and Others v Public Protector and Others* [2018] 2 All SA 1 (GP) at para 16
[52] Report, para 8.1.1
[53] Report, para 8.1.3

167. The Speaker's submissions find support in 3.1 of the Code, which provides:

> *"The Code applies to all Members of Parliament including those Members who are Members of the Executive, however Members of the Executive are also subject to the "Handbook for Members of the Executive and Presiding Officers"".* (emphasis added)

As the President is no longer a Member of Parliament, the Code thus does not apply to him. The Code has limited application to former members. It will apply to the President as a former member only in so far as he has abused or improperly used members' facilities or benefits provided to him as a former member. This is under clause 8.2 which provides:

> *"A former Member must avoid any abuse or improper use of Members' facilities or any benefit provided to the former Member by Parliament and strictly observe and adhere to the administrative rules that apply to such facilities or benefits"*

168. The Public Protector did not engage with the problem raised by the Speaker in this regard. In oral argument, we sought to determine whether the Public Protector accepted that the Joint Committee did not have the requisite competence, or whether she disputed this. Counsel for the Public Protector responded that this was not for the Public Protector to decide. Surely, if the Joint Committee does not have competence, this is something with which the Public Protector must engage. She has an interest in ensuring that her remedial measures are effective, and this is an issue that should have concerned her. She cannot suggest it is up to the Joint Committee to decide whether it is competent to consider the complaint. We find this attitude on the part of the Public Protector to be puzzling.

169. It is plain that the Joint Committee does not have the competence to consider the complaint that the Public Protector has directed the Speaker to refer to it. Nor does the Speaker have competence to demand that the President, who is no

longer a member of the National Assembly, should disclose the CR17 campaign donations in the register of Member's interests. The remedies fashioned by the Public Protector are thus ineffective and inappropriate. They also constitute an unlawful interference with the Speaker's constitutional role to determine what measures are most appropriate to deal with conduct that is alleged to breach the Rules or Codes applicable to the National Assembly.

170. It does not save the Public Protector to suggest that if the Speaker and the Joint Committee do not have competence to carry out her directions they may simply, for good reason, ignore her remedial measures. This suggestion was made to us during oral argument. As we indicated above, the Speaker cannot simply ignore remedial action directed by the Pubic Protector. The remedial action in the Public Protector's Report in this regard does not appear to be in the nature of mere advice or recommendations. On the contrary, the Speaker is directed to carry out the Public Protector's directions within 30 days, and to report to her with an implementation plan. This is not the kind of direction that may simply be ignored.

171. The appropriate action is for this Court to set aside the remedial action imposed by the Public Protector. The monitoring mechanisms related to the measures must follow the same fate.

172. The remedial action in paragraph 8.2 of the Report directs the Speaker:

> *"Within 30 working days of receipt of this Report, consider within her discretion, for deliberations by Members of Parliament in terms of the Rules of the National Assembly, issues relating to my observations under paragraphs 6.1 to 6.6 of this Report for possible review and amendment thereof."*

173. The Public Protector's observations related to the view expressed by her in her Report about the conduct of members in not properly considering questions posed

to them before answering, and the lack of clarity in the Rules of the National Assembly as to whether members may subsequently clarify an answer by providing a written response. This was not foreshadowed in either complaint and it is remarkable that the Public Protector actually ventured this far. The fact of the matter is that the Speaker received the President's subsequent written clarification without demur. That was the end of the matter. We fail to grasp what just cause the Protector had to deal with this aspect, especially as the Speaker had no issues with it.

174. Moreover, although the measure is couched so as to accommodate the Speaker's discretion, it is not clear quite what it is that the Speaker is being directed to do. If indeed there was something untoward about the subsequent written clarification, which we don't find, at most the Public Protector should have referred the matter to the Speaker for her consideration within her discretion and left the matter there. Instead her remedial measure is not couched in the form of a recommendation, or advice. It seems to direct the Speaker to exercise her discretion and to refer "the issues" relating to the Public Protector's observations for deliberation in the National Assembly.

175. In our view, the direction to the Speaker lacks clarity. But if it is intended to be a directive to the Speaker to exercise her discretion, then it is difficult to understand why such a direction is necessary in this case. Discretionary powers are generally left to the holder of the power to exercise. While there may be instances where the Public Protector is lawfully entitled to encroach on a discretionary power, and to direct that it should be exercised and in what fashion, such a remedial measure must be necessary and appropriate to remedy the prejudice associated with the complaint. Too quick a resort to this type of measure may infringe the separation

of powers. It was, in our view, simply beyond the Public Protector's competence to issue such a directive to the Speaker. As there was nothing warranting the Public Protector's involvement in this issue, there was no particular need in this case to direct the Speaker to exercise her discretion and to arrange a discussion of the Public Protector's observations in Parliament. Clearly in our view, this was an unwarranted encroachment on the Speaker's discretionary powers by the Public Protector, and it is similarly reviewed and set aside.

Remedial measures directed at the NDPP

176. The Public Protector directed the NDPP:

> *"Within 30 working days of receipt of this Report, (to) take note of the observations contained in paragraph 7.3.1. as well as the recommendations contained in paragraph 7.3.3 of this report, and in line with section 6(4)(c)(i) of the Public Protector Act, conduct further investigation into the prima facie evidence of money laundering as uncovered during my investigation, and deal with it accordingly."*

The Public Protector further directed the NDPP to submit to her, "*for approval of the Public Protector*" an implementation plan indicating how the remedial action will be implemented.

177. Section 6(4)(c)(i) of the PPA makes specific provision for what the Public Protector may do if she forms the opinion, as a result of her investigations, that there are facts disclosing the commission of an offence. In that instance, she may "*bring the matter to the notice of the relevant authority charged with prosecutions*". The Constitution gives the National Prosecuting Authority (NPA), which is headed by the NDPP, the power to institute criminal proceedings and to carry out necessary functions incidental to this.[54] Under section 32(1)(b) of the National Prosecuting

[54] Section 179(2)

Authority Act,[55] no organ of state may improperly interfere with, hinder or obstruct the NPA in the exercise of its powers, duties and functions. Thus, the NPA enjoys prosecutorial independence.[56]

178. The remedial action and monitoring measures directed at the NDPP go much further than is permitted by the Public Protector's powers. Although she refers to her "*observations*" and "*recommendations*", it is plain that the Public Protector was doing more than simply bringing the matter to the attention of the NDPP. Her remedial measure includes a direction to conduct further investigations. Further, the monitoring measure directs the NDPP to submit a plan which will be subject to the Public Protector's approval.

179. Understandably, the NDPP was concerned about the Public Protector's directions to her. She wrote to the Public Protector for clarity. She asked the Public Protector if the remedial measure was simply intended to be a referral to the NDPP under section 6(4)(c)(i), or whether the Public Protector expected the NDPP to do more to comply with the direction. The NDPP hoped that the remedial action in the report might simply be a case of bad drafting, and not an attempt to encroach upon the NDPP's independence by directing her to undertake an investigation. The response from the Public Protector's office is surprising. It noted the NDPP's letter "*with regret*". It made it perfectly clear that it expected the NDPP to comply with the direction and to submit an implementation plan to the Public Protector. Further, the letter implied that the NDPP was aligning herself with, and being influenced by the President in seeking to question the Public Protector under the guise that the remedial measures were lacking in clarity.

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[55] Act 32 of 1998

[56] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 146; *Corruption Watch NPC v President of the South Africa* 2018 (10) BCLR 1179 (CC) at paras 19-21; *Pikoli v President* 2010 (1) GNP SA 400 (GNP)

180. Having obtained no assistance in trying to settle the matter by engaging with the Public Protector, the NDPP had no option but to approach the court to seek to review the remedial measures directed at her. Strangely, in her answering affidavit, the Public Protector suggested that:

> *"Furthermore, the consistent attacks against the remedial action are equally spurious and ill-conceived. They fail to recognise that such remedial actions are couched in a manner that leaves the discretion with the authorities such as ... the (NDPP) to perform their functions. If these institutions believe they should do nothing, they are entitled to do so if such discretion is exercised lawfully and for a legitimate purpose."* (emphasis added)

181. This is a surprising suggestion from the Public Protector. As we pointed out earlier, the NDPP could not lawfully simply ignore the Public Protector's remedial action directed at her. The remedial action was not in the form of a mere recommendation. On the contrary, it required the NDPP to act and, furthermore, it required her not only to submit an implementation plan on her action to the Public Protector, but also to obtain the Public Protector's approval of the plan.

182. The Public Protector has no power to direct the NDPP when or how to carry out her functions. Nor does she have powers to monitor the NDPP's conduct. That would be to undermine the very essence of prosecutorial independence. The PPA makes this clear by limiting the options open to the Public Protector if she uncovers evidence of a possible crime. She may "*bring the matter to the attention*" of the prosecuting authority.

183. We must also turn to a submission advanced by both counsel appearing for the Public Protector and the EFF. That submission was advanced in relation to the objections by the Speaker and NDPP regarding the competence of the Public

Protector to issue remedial action against anyone should she be so minded, and to do so in a manner that impinges on their ordinary discretionary powers.

184. Once again, this submission is reliant on the *Zuma* case, discussed earlier. We were urged to follow that decision as its import was that this Court sanctioned remedial action issued by the then Public Protector against former President Zuma. That remedial action curtailed his discretionary powers to appoint the Chairperson of a Commission of enquiry, on the basis that his private interests may have affected how he discharged the powers of his office.

185. A number of important considerations seem to have been ignored by the proponents of this submission. The Public Protector report considered in the *Zuma* case was dubbed the State of Capture report for a reason. The facts relied on by the then Public Protector, in crafting the remedial action regarding the appointment of the chairperson of the Commission, were of allegations of corruption involving the then President and members of his family in state affairs and state institutions. The Court there described the issues investigated by the then Public Protector as:

> *"The Report concerns an investigation conducted by the Public Protector into complaints of alleged improper and unethical conduct by the President, certain State functionaries and the Gupta family, relating to the appointment of cabinet ministers and directors of state-owned entities (SOEs), which possibly resulted in the improper and corrupt award of state contracts and other benefits to businesses of the Gupta family. The remedial action directed the President to appoint a commission of inquiry to investigate the matters identified in the Report."*[57]

186. As we explained earlier, what was at issue in the Report in the *Zuma* case was alleged corruption involving the then President in state affairs. We need say no more as the facts in that case speak for themselves. We pause to simply point out

[57] At para 2

that in the case before us the complaints said nothing about alleged corruption of the President in state affairs. The complaints focused on a R500 000.00 donation by Mr Watson to a private party-political election campaign supporting the President's candidature for the position of President of the ANC.

187. We have deliberately referred to portions of the *Zuma* case to dispel the submission that that case is good authority to uphold the remedial action issued to the Speaker and NDPP in the case before us. This is a misconstrued submission. On the facts before us, the remedial action issued by the Public Protector is incompetent for reasons we need not repeat here. Furthermore, as we point out above, the facts are very different and there are no allegations of corruption levelled against the President in state affairs in the complaints investigated by the Public Protector. The Constitutional Court in the *EFF v Speaker* case decreed that remedial action is "situational" and "context specific". The context in our case is that the Public Protector has issued illegitimate findings from which no competent remedial action can follow.

188. The Public Protector exceeded the lawful limits of her powers in the remedial action and monitoring measure she directed at the NDPP. She was entitled to bring what she considered to be her *prima facie* evidence of money laundering to the attention of the NDPP. But she could not expect the NDPP to investigate on her direction, or to obtain her approval for the implementation plan. This was the plain import of her directions to the NDPP. Consequently, the remedial action and monitoring measures must be set aside.

189. We are constrained to find that the Public Protector's issuing of the remedial action to the NDPP coupled with her insistence, when the NDPP queried her, that she expected the NDPP to carry out her directive, displays, in our view, a complete

lack of understanding on her part of the limits of her powers as provided in section 6(4)(c)(i) of the PPA in relation to matters falling under the NPA. We also find that she displayed a clear failure to grasp the meaning of the concept of prosecutorial independence decreed by section 32(1)(b) of the NPA Act. The PPA and the NPA Act are clear that she has no power to direct the NDPP to investigate any criminal offence and how to go about doing this.

AMABHUNGANE'S APPLICATION

190. AmaBhungane applied and was granted leave to intervene as a respondent in these proceedings. As we have indicated, it did not embroil itself in the main issues in dispute in respect of the Public Protector's Report. AmaBhungane brings a constitutional challenge to the Executive Code. It is a conditional challenge, as appears from the terms of the relief it seeks, viz:

> "*In the event that the Executive Ethics Code, 2000 ("the Code") is held not to require the disclosure of donations made to campaigns for positions within political parties:*
>
> *1.1 It is declared that the Code is unconstitutional, unlawful and invalid to this extent; and*
>
> *1.2 The declaration of invalidity shall have no retrospective effect and shall be suspended for a period of 12 months to allow for the defect to be remedied.*" (emphasis added)

191. The constitutional provisions that amaBhungane relies on to mount its constitutional challenge are sections 7(2); 19; 32(1) and 96 of the Constitution. Its case may be summarised as follows:

191.1. Transparency is critical to the functioning of the democratic process. Access to information is an important tool in achieving transparency. It

encourages a greater and more accurate flow of information between the governing and the governed, and thus aids accountability.

191.2. Access to information is indispensable to the right to vote and to make truly free political choices:

> *"For every citizen to be truly free to make a political choice, including which party to join and which not to vote for or which political cause to campaign for or support, access to relevant or empowering information must be facilitated."*[58]

191.3. The rights implicated here are the right to vote, under section 19, and the right of access to information under section 32. When a voter makes her mark, she is unable to exercise her right to vote in a meaningful way, and to make a meaningful political choice without disclosure of information that may reveal ulterior motives or hidden political agendas.

191.4. Thus, in order to vote and to make political choices, *"information must be made available about donations to political campaigns."*

191.5. Further constitutional considerations apply with respect to section 96 of the Constitution and the Ethics Act. Section 96 makes it plain that members of Cabinet and Deputy Ministers may not act in any way that exposes them to a risk of a conflict between their official responsibilities and their private interests. They may also not use their position to enrich themselves or to improperly benefit.

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[58] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) (hereafter, *My Vote Counts 2*) at para 31

191.6. Corruption may result from a breach of these constitutional ethical prescripts. The state has a duty to take steps to combat corruption.[59]

191.7. Access to information is a key corruption fighting tool. Thus, the state must ensure that the Executive Code serves as a shield against potentially corrupt acts by requiring disclosure.

191.8. Both the Constitution and section 2(2)(c) of The Executive Ethics Act were intended to require the Executive Code to cast a wide net as regards financial interests members may possibly have. Neither the Constitution nor the Ethics Act contemplate the exclusion of donations made to campaigns for positions within political parties.

191.9. Politicians receive a tangible benefit from their political campaigns, and this leads to a risk of patronage and corruption. Secrecy enables corruption in that it conduces more to a disposition by politicians that is favourable towards those who funded them privately once they are elected into public office.

191.10. Consequently, if this court finds that the Executive Code does not require disclosure of donations made to campaigns for positions within political parties, this means it is unconstitutional and invalid to the extent that it breaches sections 1, 7(2), 19; 32 and 96 of the Constitution, and the Ethics Act, particularly section 2(2)(a) and (b).

192. There is no doubt that amaBhungane's case is founded on issues that are critical to our democracy and the constitutional project. It is unthinkable that anyone concerned with the proper functioning of our constitutional democracy would

[59] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

disagree with the broad principles outlined in their submissions. We certainly do not. We also agree that access to information is a key tool in combatting corruption. The importance of the right of access to information in the context of the right to vote was dealt with fully by the Constitutional Court in *My Vote Counts 2*. It is so that that case was particularly concerned with the right to vote in national elections under section 19(2) of the Constitution. However, section 19(1) gives everyone the right to participate in the activities of political parties and to campaign for a political cause. The right of access to information is undoubtedly of importance to the exercise of those rights too.

193. Counsel for amaBhungane made a compelling case highlighting why these principles are so important, and why access to information is so key to the ability to exercise one's broad political rights. He also made a compelling case for the link between information about funding within the political context and rooting out corruption.

194. Compelling as the arguments may have been, however, we are not persuaded that the constitutional challenge has been raised properly before us. We say this for the following reasons.

194.1. The effect of our conclusion on the disclosure issue is that in the absence of evidence that the President benefited personally and directly from CR17 campaign donations, the Public Protector could not rationally have concluded that he breached the Code through non-disclosure. In other words, the effect of our finding is that the Code does not require disclosure of indirect benefits to members of the Executive in the nature of party-political campaign donations. It is this conclusion that amaBhungane submit provides

a basis for us to consider and decide their constitutional challenge to the Code.

194.2. In order to grant amaBhungane's relief, we must find that the Code is constitutionally deficient on the bases identified by amaBnhungane. There are some problems with amaBhungane's challenge in this regard.

194.3. The challenge cannot rest on section 96 of the Constitution alone. If it did, then amaBhungane would face the same subsidiarity difficulty that the applicant faced in *My Vote Counts NPC v Speaker of the National Assembly and Others*[60] (*My Vote Counts 1*). In that case the court rejected a constitutional challenge based directly on section 34 of the Constitution. It found that the challenge should have been mounted against the Promotion of Access to Information Act[61] (PAIA).

194.4. AmaBhumgane attempts to avoid this problem by directing their challenge at the Executive Code. We are not persuaded that this gets amaBhungane out of the woods. The Executive Code follows the Ethics Act in that it requires disclosure of "financial interests".[62] As we have already pointed out, the indirect benefit of a well-funded campaign for a candidate's party-political power base is not a "financial interest" as envisaged under the Act. Nowhere in section 2 (2) can one find even remotely that indirect and intangible benefits gained through internal political party donations are contemplated or meant. The Code is more specific in that it lists the types of financial interests that must be disclosed. However, it is aligned to the Ethics Act in that these interests are restricted to being "financial" in nature. The

[60] (CCT121/14) [2015] ZACC 31 (30 September 2015)
[61] Act 2 of 2000
[62] Section 2(2)(c)

Code cannot require greater disclosure than that required under the Ethics Act. If this is too narrow a meaning such that it amounts to an unconstitutionality (as amaBhungane suggests), then in our view, the constitutional challenge should be directed at the Ethics Act. A challenge to the Code without a challenge to that Act is not permissible.

194.5. There is a further and related reason why the challenge is impermissible. This is that however amaBhunagane may want to narrow the field of challenge to the Executive Code, there is no question that the right of access to information is a central core of the constitutional context in which the challenge is mounted. AmaBhungane itself acknowledges the centrality of this right. It relies on it as an express basis for its challenge to the Executive Code. If this is the case, then amaBhungane faces the same difficulty as the applicant did in *My Vote Counts 1*.

194.6. This is because there is no challenge to PAIA before us. The question of whether the same constitutional objectives could be reached through the medium of PAIA is not addressed. It is at least arguable that any person who wishes to know about donor funding for an internal party-political campaign would be entitled to ask for that information. It is information that is held by a person (although it may not be the politician herself), and it is arguably necessary for the exercise of the requestee's right to engage in political activities guaranteed under section 19(1). The question that then arises is whether, if the information is potentially available through PAIA, on what basis should this court find that the Executive Code is unconstitutional? In *My Vote Counts 1*, the Constitutional Court definitively laid down that PAIA is the vehicle through which the right of access to information is given effect:

> *"These authorities brook no possibility that PAIA is not the legislation enacted to give effect to the section 32(1) right. That it may have shortcomings in its protection of the right and possibly even be constitutionally invalid does not alter this legal reality."*[63]

As in that case, in the absence of a challenge to PAIA, the challenge to the Code is impermissible.

194.7. Indeed, even if the Executive Code was amended to make disclosure of party-political campaign funding a requirement for members of the Executive, this would not meet the purpose of the guarantee of the right of access to information. It would mean that only existing members of the Executive would have to be transparent about their donors. Those politicians who are vying for positions in their party who are not covered by the Code could remain as intransparent as possible. The right of access to information for purposes of enjoyment of one's section 19(1) right, requires more than selective transparency.

194.8. There is a further difficulty with amaBhungane's challenge. The essence of the order it seeks is that the Code must be amended so as to require that the disclosure of donations made to campaigns for positions within political parties is made by members of the Executive covered by the Executive Code. This would require us to enter into the Executive and Parliament's constitutional terrain by prescribing the ambit of the duty to disclose.[64] That is something that falls to them to determine. It is not for the court to be prescriptive. To do so would undermine the separation of powers. To paraphrase (with contextual changes) what the Constitutional Court said

[63] Para 147
[64] Section 2(1) provides that the President must publish a Code, after consultation with Parliament.

in *My Vote Counts 1*,[65] it may well be that it would be ideal to require members of the Executive to make disclosure of donations made to campaigns for positions within political parties; who knows? But that is not the issue. It is for the Executive, after consultation with Parliament, to decide. In fact, there may be good reason for them not to follow amaBhungane's path of action. It is equally arguable that members of the Executive should be kept in the dark about who donates to their campaigns, in order to avoid the risk of conflict and patronage. To require disclosure in the manner sought by amaBhungane would force them to know who has supported them. This could provide its own risks down the line. These are all issues that fall to be discussed and debated by other organs of state, and not the court.

195. The ultimate result is that we find that the constitutional challenge must be dismissed. We wish to emphasis that we do not dismiss the application on the merits. We make no finding as to whether the Code is constitutional or not. That is an argument for another day. As we have already indicated, the underlying issues raised by amaBhungane are critical to our democracy. There are sound reasons for why the public should have easy access to funding information, whether in respect of individual politicians or political parties. However, this was not the case in which the constitutional implications of these issues could be fully ventilated.

COSTS

196. In respect of some of the parties there is no issue as to the question of costs. The

[65] Para 155

FIC did not seek an order as to costs, and nor did the Information Regulator. AmaBhungane submitted that the principles laid down in the *Biowatch* judgment should be applied to them, and that they should not be mulcted in costs in the event of them being unsuccessful. We agree with amaBhungane's submissions in this regard. In *Biowatch*, the Constitutional Court reiterated the principle laid down in *Affordable Medicines Trust and Others v Minister of Health and Another*.[66] As a general rule, in constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be ordered to pay the costs.[67] Thus, the principle is that in litigation between the state and a party seeking to assert a constitutional right, ordinarily, if the government loses, it should pay the costs of the other side and if the government wins, each party should pay its own costs.[68]

197. The EFF also sought an application of the *Biowatch* principles to it. The EFF must be treated as a private party in a matter involving a constitutional issue. In this matter, the Public Protector is a state body, having been established under the Constitution. The President, the Speaker and the NDPP sought to review her Report. Although the EFF sided with the Public Protector in contending that the grounds of review had no merit, the basic principle should still apply to the EFF. It was unsuccessful. However, it sought to intervene in what was a constitutional matter, and should not be mulcted in costs, even though its support of the Public Protector was unsuccessful. There was no conduct on the EFF's part that warranted a departure from the general principle laid down in *Biowatch*. Thus, the principle should be applied to the EFF as well.

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[66] 2006 (3) SA 247 at para 139
[67] *Biowatch* para 21
[68] *Biowatch*, para 22

198. As to the Public Protector, there is no question that she should be ordered to pay the costs of the President, the Speaker and the NDPP, for her unsuccessful opposition to their review applications. The only question is the scale of the costs that she should be ordered to pay. The President submits that she should be ordered to pay costs on the punitive scale of attorney and client. He does not suggest that the conduct of the Public Protector warrants her being ordered to pay costs in her personal capacity.

199. Counsel for the President submitted that the conduct of the Public Protector in this case shows a reckless determination to make an adverse finding against the President. They pointed to what they submitted was her egregious misreading of the Executive Code, and her baseless, and very serious conclusion that there was *prima facie* evidence of a suspicion of money laundering. They submit that her investigation showed a determination to malign the President by making very serious findings against him without engaging meaningfully with the evidence before her and the applicable law.

200. The principles applicable to the court's discretion to order costs on a punitive scale, as opposed to on a party and party scale are usefully collected and referred to in the Constitutional Court judgment in *Public Protector v South African Reserve Bank*[69] (*PP v SARB*). Costs are a discretionary matter for the court concerned. Such costs are warranted when it would be unfair to expect a party to bear any of the costs occasioned by the litigation.[70] The question must be answered with reference to what would be just and equitable in the circumstances of a particular case.[71] The general principle is that an attorney and client scale is awarded when

[69] 2019 (6) SA 253 (CC)
[70] Para 221
[71] Para 222

a court wishes to mark its disapproval of the conduct of a litigant.[72] Courts have awarded this scale of costs to mark their disapproval of dishonest or *mala fides* conduct, vexatious conduct, conduct that amounts to an abuse of the process of court,[73] or conduct that is extraordinary and worthy of a court's rebuke.[74] As costs lie at the discretion of the court, this is not a closed list.

201. Public officials attract special consideration when it comes to punitive costs orders, and they may even be ordered to pay costs out of their own pockets. In *PP v SARB* the Constitutional Court said the following in this regard:

> "*A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. ... The Public Protector is therefore enjoined by the Constitution to observe the highest standards of conduct in litigation.*"[75] (emphasis added)

And:

> "*There is no merit in the Public Protector's contention that the independence of her office and proper performance of her functions demand that she should be exempted from the threat of being mulcted with adverse personal costs orders. On the contrary, personal costs orders constitute an essential, constitutionally infused mechanism to ensure that the Public Protector act in good faith and in accordance with the law and the Constitution.*"[76] (emphasis added)

202. While the latter excerpt refers specifically to personal costs orders, the underlying principle is applicable also to attorney client costs orders against the Public Protector. It underlines that the Public Protector is carrying out a constitutional duty, and that the Constitution demands that she is scrupulous in using her powers in accordance with her constitutional mandate.

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[72] Para 223
[73] Para 223
[74] Para 226
[75] Paras 155-156
[76] Para 157

203. We have discussed the Public Protector's broad powers and the particular mandate given to her under the Constitution. Her broad powers come with important obligations. In using them she must act independently, impartially and she must approach each investigation with an open mind. It is not surprising that, given the weight of the constitutional burden she carries, and the breadth of her powers, she is required to be a highly skilled professional in her relevant field of expertise. She must be expected to understand and correctly apply legal prescripts that may be relevant to her investigations. She should consider all the evidence before her and weigh it appropriately and fairly before making an adverse finding. She should be conscious of the impact that an adverse conclusion may have on the rights of those she is investigating. She should not hesitate to make adverse findings when the evidence reasonably and rationally supports such a finding. Equally however, she should not rush to conclusions and should tread carefully before making findings that may have serious implications for people within the scope of her investigations.

204. Unless the Public Protector conducts herself in this manner, she runs the risk of undermining the very reason for the existence of her office. If she strays from this path, she will lose the confidence of the citizens for whom she has been appointed protector. For these reasons, it is critical that, where appropriate, Courts should show their displeasure should the Public Protector fail to meet her constitutional mandate. It is a duty imposed on the Courts by the Constitution itself.

205. We earlier concluded that the Public Protector acted not only irrationally, but also recklessly in reaching her conclusion that there was evidence supporting a *prima facie* case of money laundering. We noted that this conclusion had potentially extremely serious consequences for the President. This is not a consequence

peculiar to him because of the position that he holds: anyone against whom such a finding is made would potentially find themselves under investigation for an extremely serious offence. However, the fact that it was the President is an added concern. When the Head of State is implicated in money laundering it immediately presents a threat to the well-being of the public at large. If the implication is well-founded, then this is a consequence with which the general public must come to terms. However, if it is reached irrationally and recklessly it is another matter entirely.

206. What makes the Public Protector's conduct in this regard worse is that despite being requested to give the President an opportunity to respond to the remedial action she had in mind, she refused to do so. The President was not given sight of her remedial action directing the NDPP to investigate money laundering. It is unclear why the Public Protector failed to comply with one of the most fundamental principles of natural justice by declining the President's request to be permitted to make representations on the remedial action. It would not have unduly slowed down her investigation, which seems to have been conducted at relative speed. The Public Protector ought to have understood the importance of not making findings that will have such serious implications without affording a proper hearing to the persons affected. At the very least, she failed to show appreciation for an elementary principle of due legal process.

207. Of similar concern is her confusion over the proper version of the Executive Code. She has not explained how she committed this error. Her conduct in this regard goes further than simply having reference to two different versions of that Code. The legal test for a violation of the Code by misleading the National Assembly was fundamentally different in the two versions. Instead of appreciating the difference

between the "*willful*" misleading of the National Assembly, and the "*inadvertent*" misleading of it, she asserted that if she had made an error at all it was an immaterial error of form over substance. This submission shows a flawed conceptual grasp of the issues with which she was dealing.

208. Like any official required to make pronouncements to the public, the Public Protector must surely strive to be as clear as possible in her findings. Her reasoning on the disclosure issue was muddled and difficult to understand. It failed to explain to the public why she had found that the President of the country had willfully breached the duty of transparency established by the Code. Indeed, her conclusion inexplicably found that at the same time the President had also inadvertently misled Parliament, sowing further confusion.

209. As Counsel for the President pointed out, although the Public Protector received full representations from the President, she did not engage meaningfully with them. She did not deal with the explanations as to how the CR17 campaign was structured and how it functioned. She did not engage with the explanations that the transfers between the various accounts were aligned with the very structure of the CR17 campaign itself. Instead, and despite this evidence before her, she persisted with her thesis that there were reasons to suspect that the CR17 campaign was involved in state capture of some sort, and that a *prima facie* case of a suspicion of money laundering had been established. She recklessly ignored the evidence at her disposal, which pointed to the opposite conclusion. In doing so, she breached her duty to approach every investigation in an open-minded fashion.

210. Finally, we are concerned by her attitude to the Speaker and the NDPP. As we have already described, in her letter in response to the NDPP, the Public Protector

implied that the NDPP was being unduly influenced to back the President's case. Such an implication is completely unfounded, particularly in circumstances where we have found that the NDPP was entirely correct to seek clarity and, subsequently, a review of the Public Protector's directive.

211. Her attitude to the Speaker is equally concerning. In her answering affidavit, in response to the Speaker's review, the Public Protector says that the Speaker's review is tantamount to "*demonstrating support for the President*" and is a failure to "*stand on the side of accountability*". These are reckless statements to make against another organ of state and deserve the opprobrium of the court.

212. The totality of the Public Protector's conduct highlighted above warrants an adverse costs order against her. In our view, an order that she be directed to pay the President's costs on an attorney and client scale is warranted.

CONCLUSION AND ORDER

213. As is apparent from our Judgment, the Public Protector acted unlawfully in exercising her powers in the manner that she did in this matter. We have found, for the detailed reasons given above, that her investigation into the CR17 campaign donations fell outside her field of competence. Further, that her Report, and the findings and remedial action contained in it, were invalid on several grounds. It follows that they cannot stand, and must be set aside.

214. In the result, the review by the President, the Speaker and the NDPP succeed. We make an order in the following terms:

1. The Public Protector's decision to investigate and report on the CR17 election campaign for the African National Congress leadership elected in December 2017, is reviewed, declared invalid and set aside.

2. The Public Protector's Report number 37 of 2019/20 of 19 July 2019, including the findings and remedial orders in paragraphs 7.1;7.2; 7.3; 8.1.1; 8.1.3; 8.2.1; 9.1; 9.3 and 9.4 ("the Report"), is reviewed, declared invalid and set aside.
3. The Public Protector is ordered to pay the costs of the first applicant on the punitive scale as between attorney and client, including the costs of two counsel.
4. The Public Protector is ordered to pay the costs of the second applicant and the third respondent on the party and party scale, including the costs of two counsel.
5. No order as to costs is made in respect of the fourth, fifth and six respondents, and the *amicus curiae*.

D Mlambo
Judge President of the
High Court of South Africa
Gauteng Division, Pretoria

K E Matojane
Judge of the High Court of
South Africa
Gauteng Division, Pretoria

R Keightley
Judge of the High Court of
South Africa
Gauteng Division, Pretoria

APPEARANCES

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COUNSEL FOR SIXTH RESPONDENT:	S Budlender SC T Ramogale
COUNSEL FOR *AMICUS CURIAE*:	C Puckrin SC S Scott
DATE HEARD:	4 & 5 February 2020
DATE OF JUDGMENT:	10 March 2020

PP 2

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 5578/2019

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Applicant

and

THE PUBLIC PROTECTOR	First Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
THE NATIONAL COMMISSIONER OF POLICE	Third Respondent
ECONOMIC FREEDOM FIGHTERS	Fourth Respondent
FINANCIAL INTELLIGENCE CENTRE	Fifth Respondent
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Sixth Respondent
INFORMATION REGULATOR OF SOUTH AFRICA	*Amicus Curiae*

FOURTH RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL (ECONOMIC FREEDOM FIGHTERS)

PLEASE TAKE NOTICE that the applicant for leave to appeal (being the fourth respondent in the proceedings *a quo*), the Economic Freedom Fighters ("**EFF**"), intends to apply to this Court, on a date and time to be arranged with the Registrar, for leave to appeal to the Supreme Court of Appeal against paragraphs [1] – [4] of the order and the

relevant parts of the judgment of the Court *a quo* (comprising of The Judge President, His Lordship, The Hon. Mr Justice Mlambo JP, His Lordship, The Hon. Mr Justice Matojane J, and Her Ladyship, The Hon. Madam Justice Keightley J) ("**Court *a quo***" or "**the Full Bench**"), delivered on 10 March 2020 with case number 55578/2019, as set out hereunder.

TAKE FURTHER NOTICE THAT the Court *a quo* granted an order in the following terms:

1. *The Public Protector's decision to investigate and report on the CR17 election campaign for the African National Congress leadership elected in December 2017, is reviewed, declared invalid and set aside.*

2. *The Public Protector's Report number 37 of 2019/20 of 19 July 2019, including the findings and remedial orders in paragraphs 7.1., 7.2., 7.3., 8.1.1., 8.1.2., 8.1.3., 8.2.1., 9.1., 9.3. and 9.4. ("the Report"), is reviewed, declared invalid and set aside.*

3. *The Public Protector is ordered to pay the costs of the first on the punitive-scale as between attorney and client, including the costs of two counsel.*

4. *The Public Protector is ordered to pay the costs of the second applicant and third respondent on the part-and-party scale, including the costs of two counsel.*

5. *No order as to costs is made in respect of the fourth, fifth, and six respondents, and the amicus curiae.*

TAKE FURTHER NOTICE THAT the EFF will seek that the Order of the Court *a quo* is replaced with an Order in the following terms:

1. *The application is dismissed with costs.*

TAKE FURTHER NOTICE THAT the application for leave to appeal is made on the basis that:

1. The Full Bench erred in rejecting the EFF's contentions demonstrating that the President misled Parliament (para [67]).

    1.1 The Court *a quo* focussed its attention on the so-called "hybrid test" and rejected the EFF's submissions that the President, in contradiction to his duty of utmost good faith, misled Parliament because it could not point the Court to a particular rule of Parliament and invited the Court to simply conjure same (para [68]).

    1.2 This is incorrect.

    1.3 The Full Court in *President of the Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP) ("**Zuma**") at para [184] has previously characterised the statements of the President in Parliament as follows:

> "***The statements made by the President in the National Assembly are not ordinary statements but were made in Parliament before the legislative body to whom the President is accountable***. *They were made by the President in his position as head of state. Section 92(2) of the Constitution provides that Members of the cabinet — which includes the President — are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions." (own emphasis)*

1.4 As the Full Bench in that matter identified, the President's duty to be accountable flows directly from the Constitution.

1.5 Far from failing to demonstrate the President's wilfulness in misleading Parliament (para [68]), it is the President himself who demonstrates same.

1.6 The President tells the Court that despite his duty to be held accountable – a duty that is unqualified – he took steps to limit what knowledge he had about his own campaign's affairs (Founding Affidavit, p 02-26, para 62).

1.7 This was apparently so as to avoid a conflict of interest (Founding Affidavit, Annexure MCR3, p 02-187).

1.8 But, by placing himself in a position of "wilful ignorance" (para [70]), the President set in motion a series of events that had the purpose or effect of frustrating his duty to account to Parliament.

1.9 The President's misleading of Parliament was deliberate because when he took the steps above, he knew (or ought to have known) it would mean he would not be

able to account to Parliament for things that had a duty to account for (i.e. everything).

1.10 The President's subjective reasoning for taking those steps (*bona fide* or not) is irrelevant (para [71], [72]). What must be examined is the purpose or effect those steps have on his immutable duty to account to Parliament (para [70]), objectively assessed.

1.11 So, too, is the fact that the President took steps to account to Parliament *after* the fact (para [69]). His duty was continuous while he was a Member of the Cabinet, and even greater when he assumed the Office of the President (see quote from *Zuma* above).

1.12 The duty of full knowledge (para [72]) is an explicit, alternatively implicit obligation, when regard is had to the overall regime regarding disclosures of Members of the Executive.

1.13 There is no duty on the EFF to adduce evidence or proof (para [72]). The Court ought to have had proper regard that the real threshold the EFF had to demonstrate was

the existence of a risk or the threat of a risk of a conflict of interest.

1.14 This risk exists particularly in circumstances where the President (as principal) divests himself of knowledge he is obliged to have and where his agents secure funding on his behalf and in his interests and where the disclosure of those funds and identity of the donors is out-sourced to other persons.

1.15 The risk is created by the fact that the President may act in his donor's favour without knowing – and his agent may deliberately refrain from telling him this because the overall effect may be to continue securing donations in the President's favour (para [116] – [117]).

1.16 The Court, with respect, erred, then, in preferring a view that undermines accountability.

2. The Full Court erred in its ultimate finding that the Public Protector lacked the jurisdiction to investigate the CR17 campaign (para [111]).

2.1 Although the Court *a quo* correctly identified that it is not always easy to identify what falls within state affairs (para

[85]), that it rejected state affairs extending to the internal affairs of a political party in government (para [100]) was mistaken.

2.2 The Court *a quo* erred because it failed to properly appreciate that both complainants asked the Public Protector to investigate a breach of the Code (para [90]) which owes its genesis to the Executive Ethics Act, No 82 of 1998 ("**the Act**").

2.3 Consequently, the Court failed to appreciate that the true test of the President's conduct – and the Public Protector's powers – stems from section 96(2)(b) of the Constitution (para [91]).

2.4 In other words, the Court was obliged to interpret the Public Protector's powers (para [81] – [84]), when investigating a breach of the Code, in its broadest terms, otherwise it runs the risk of limiting the deliberately wide ambit of section 96(2)(b) of the Constitution.

2.5 Thus, the Court *a quo*'s description of the Public Protector's investigation as an "extension of her jurisdiction" (para [92]) is mistaken.

2.6 The Public Protector always had jurisdiction to investigate same because the President's conduct in the realm of his political party threatened to expose him to the risk of a conflict of interest in his official capacity.

2.7 For state affairs to be given sensible meaning, it is to understand that a constitutional office-bearer's conduct in a private capacity can or could impact their conduct in an official capacity.

2.8 It is this for that reason that the Public Protector can "look through" the public/private and State/party divide and investigate all matters that expose a member of the Executive to the risk of a conflict of interest.

2.9 The Court *a quo*'s attempt to define state affairs in this particular context is, thus, irrelevant (para [93] – [97]).

2.10 If anything, the Court's preoccupation with attempting to define state affairs served as a distraction and, ultimately, caused it to view the Public Protector's conduct through her "regular" investigative powers and not those specifically crafted by the Act and the Code.

2.11 In consequence the Court *a quo* improperly limited the Public Protector's investigative remit based on an incorrect imposition of different standards to those which actually regulated her jurisdiction to investigate the complaints she received (para [99]).

2.12 The Public Protector did not simply investigate the CR17 campaign because she suspected impropriety (para [98]). She was obliged to investigate the conduct in terms of section 96(2)(b) of the Constitution, the Act, and the Code.

2.13 Similarly, the Court *a quo*'s regard for the CR17 campaign being protected as political rights is also irrelevant (para [101] – [103], [119]).

2.14 What the Public Protector can investigate is how the conduct of persons within their political parties may expose them to a risk of a conflict of interest where they are holders of a specific obligation in terms of section 96(2)(b) that itself has no regard for the divide between the "public" and "private" sphere.

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2.15 It is not that conduct in a political party is the same as state affairs (para [104]), but, rather, whether that conduct exposes those persons to the risk of a conflict of interest in terms of section 96(2)(b) of the Constitution.

2.16 The Public Protector's "conflation" of the CR17 campaign with the President is, thus, both justified – but also, with respect, irrelevant (para [104], [107] – [108]). The real question is whether the Public Protector could investigate it having regard to section 96(2)(b) of the Constitution, the Act, and the Code. This is answered by having regard to the President's obligations (para [106])

2.17 The Court *a quo*, with respect, confused this as having a direct impact on the appropriate investigative powers of the Public Protector (para [110]).

3. The Full Bench erred in its ultimate finding that the President was not under a duty to disclose his CR17 campaign funding to Parliament (para [132]).

3.1 As the Court *a quo* recognised, the disclosure and jurisdiction issues are closely related (para [115]). To that extent, the grounds in respect of jurisdiction are repeated

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as sustaining the attack on Court a *quo*'s incorrect finding in respect of jurisdiction.

3.2 Although the Court *a quo* correctly identified that it is not always easy to identify what falls within state affairs (para [85]), that it rejected state affairs extending to the internal affairs of a political party in government (para [100]) was mistaken.

3.3 The duty to disclose emanates from section 96(2)(b) of the Constitution, the Act, and the Code. The Court *a quo*'s attempt to define the specific kind of benefit (para [120] – [121]), in this instance, is misplaced because it fails to appreciate the true test: a risk of a conflict of interest.

3.4 In any event, the benefit is, with respect, obvious: the President was boosted by the financial contributions to increase his campaign activities which was necessary for him to win his party's leadership.

3.5 The President conceded he benefitted from his campaign and its financing. The Court *a quo*'s contrary finding that the President did not personally benefit is thus mistaken, as

is the finding that he was not under a duty to disclose such benefits (para [122]).

3.6 The constitutionally compliant interpretation of the duty to disclose must, with respect, include all contributions, otherwise accountability will be fundamentally undermined. The Court's exclusion of "indirect benefit" is not sustainable when the impact on accountability is properly understood (para [126]).

3.7 If the Court *a quo* had proper regard to its own accepted definition from the Code (para [125.1]), being "*assistance from any source other than the member in his personal and private capacity*", it would have reached this conclusion. The Court a quo's attempt to regulate direct and indirect benefits differently is, thus, unsustainable (para [128]).

3.8 This is especially when the Court *a quo* had already accepted that the President's belonging to a political party was a private matter (para [101] – [103).

3.9 Logically, the money the President received fits this definition of a benefit as it was neither from the ANC (his

party), nor was it to benefit anyone other than the President (in his private capacity).

3.10 The Court *a quo*'s suggestion that such a finding of disclosure could only be reached after evidence of the President's private benefit was adduced (para [126]) is misplaced.

3.11 So, too, is the conclusion that the EFF's argument regarding "indirect benefits" is of no assistance to the Public Protector because it conflates the President and the CR17 campaign (para [127]).

3.12 As above, not only has the President accepted he was a beneficiary because he was one of the (primary) candidates it promoted (President's HoA: p 04-19, para 36), the campaign is self-evidently, and even on the Court a *quo*'s understanding, a campaign for his benefit (albeit a particular faction within the ANC) (para [107]).

3.13 Respectfully, the Court *a quo*'s attempt to distinguish *Zuma* for the purpose of showing the President had not a duty to disclose is mistaken (para [130] – [131]). *Zuma* shows that the Public Protector's remedies were correct.

4. The Full Bench erred in holding that the Public Protector's remedial action needed to be consulted on the remedial action (para [155]).

4.1 The Court *a quo* failed to appreciate that the obligation stemming from the section 7(9) notice in the Public Protector Act, No. 23 of 1994 ("**PP Act**"), *ex facie* attaches to "investigations" and not remedial action (para [156]).

4.2 Remedial action can only be ordered after investigations are concluded. The Public Protector bears no specific obligation to consult in respect of remedial action which is not at all addressed by the PP Act.

4.3 The Court *a quo* recognised this (para [159]) and improperly imported a duty to consult. The Court *a quo* on one hand, limits the Public Protector to the strict terms of the Act, but then does not.

4.4 This, with respect, is unsustainable when considering that the Public Protector is only empowered to only do what the Public Protector (or the Constitution) permits.

5. In the event that the Full Bench grants leave to appeal against its judgment, the EFF shall contend that flowing from its

arguments (above), the correct outcome in respect of the remedial action ought to have been to remit the remedial action to the Public Protector to the extent that it may be incorrect. This, with respect, is the correct outcome if the EFF is correct on the "merits", above.

TAKE NOTICE FURTHER THAT, quite aside from the abovementioned reasons as to why leave to appeal should be granted, this matter presents the quintessential case for "compelling reasons" under section 17(1)(a)(ii) of the Superior Courts Act, 2013. This section provides, in relevant part, that leave to appeal may only be given where the Judge or Judges concerned are of the opinion that "there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

1. The judgment of the Full Bench creates a dangerous precedent for Members of the Executive to subvert their duty to account to Parliament for, *inter alia*, financial contributions received by them for their benefit (para [120]). Regardless of whether the purpose of that financial contribution is lawful, the Full Court's reasoning is inimical in its effect: it decreases transparency and accountability of those in positions of trust.

2. The judgment of the Full Bench improperly limits the kind of "benefit" to "financial benefits" in a narrow sense and fails to properly appreciate the nature of monetary donations to political parties and the benefits derived therefrom (in this case, individual candidates). This is particularly true for individual candidates who occupy Executive office. In consequence of the judgment, individual candidates occupying Executive office, who necessarily need to adhere to the highest standards of probity, will be able to accrue significant financial benefits, in the broader sense, and not be accountable for them. Disclosure is an essential mechanism through which accountability is achieved.

TAKE FURTHER NOTICE THAT the EFF shall seek costs against any party opposing this application for leave to appeal. The EFF shall also seek the costs of the appeal itself against any party opposing it.

DATED at **SANDTON** on this the **25TH day** of **March 2020.**

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PP3

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No.

Court *a quo* Case No. 55578/19

In the matter between:

THE PUBLIC PROTECTOR	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
THE NATIONAL COMMISSIONER OF POLICE	Fourth Respondent
THE ECONOMIC FREEDOM FIGHTERS	Fifth Respondent
THE FINANCIAL INTELLIGENCE CENTRE	Sixth Respondent
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Seventh Respondent

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CONFIRMATORY AFFIDAVIT
IN SUPPORT OF THE APPLICATION FOR
LEAVE TO APPEAL IN TERMS OF RULE 19(2)

I, the undersigned

THEOPHILUS NOKO SEANEGO

do hereby make oath and state as follows:

1.

1.1. I am a major male attorney practising under the name and style "Seanego Attorneys Inc." at Block B, Suite C, First Floor, 53 Kyalami Boulevard, Kyalami Business Park, c/o Manong Pilane Mokotedi Inc., 164 Katherine Street, Pinmill Farm, Block F, Ground Floor, Sundown, Sandton.

1.2. I am the Applicant's attorney of record in this application for leave to appeal.

1.3. The facts deposed to in this affidavit fall within my personal knowledge and are both true and correct.

2.

I have read the Founding Affidavit of BUSISIWE MKHWEBANE and confirm the correctness of the affidavit in so far as it refers to me or my involvement in the matter.

3.

3.1. I wish to state that the announcement of the lockdown created confusion as to what it meant for *dies*.

3.2. Ordinarily, the *dies* in respect of the application for leave to appeal would have expired on 31 March 2020.

3.3. On 26 March 2020, the Minister of Justice and Correctional Services, after consultation with the Chief Justice, issued directions in terms of which all time limits imposed by any rule of court was suspended and shall recommence after the termination or lapsing of the period of the National Disaster.

3.4. On 30 March 2020, further directions were issued which appeared to have removed the suspension of *dies*.

3.5. On 2 April 2020 the Office of the Judge President issued a directive in terms of which any litigant who is obliged by any provision in a statute or by a rule of Court to serve and file Court processes and/or deliver any document ancillary thereto, and the date of compliance falls within the lockdown period may comply with such obligations as stipulated in the directive.

3.6. It has remained unclear whether this affected the *dies* in respect of the rules of the above Honourable Court, as a result, I have advised the Applicant to file this application as a caution in the event that my understanding is mistaken. If it is, I humbly ask the above Honourable Court to condone the late filing of this application.

THEOPHILUS NOKO SEANEGO

I certify that the above signature is the true signature of the deponent who has acknowledged to me that she knows and understands the contents of this affidavit, which affidavit was signed and sworn to at Pretoria on this the 14th day of April 2020 in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.

COMMISSIONER OF OATHS

Full names:

Designation and area:

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