

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No. : 62/2020  
Case No. *a quo*: 5578/2019

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

NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS

Third Respondent

THE NATIONAL COMMISSIONER OF POLICE

Fourth Respondent

ECONOMIC FREEDOM FIGHTERS

Fifth Respondent

FINANCIAL INTELLIGENCE CENTRE

Sixth Respondent

AMABHUNGANE CENTRE FOR INVESTIGATIVE

JOURNALISM NPC

Seventh Respondent

INFORMATION REGULATOR OF SOUTH AFRICA

Amicus curiae

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**FIFTH RESPONDENT'S CONDITIONAL APPLICATION FOR LEAVE TO APPEAL**  
IN TERMS OF RULE 19(2)  
(ECONOMIC FREEDOM FIGHTERS)

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BE PLEASED TO TAKE NOTICE that the fifth respondent, the Economic Freedom Fighters ("EFF"), conditionally applies to the Constitutional Court for an Order in the following terms:

1. Leave to appeal be granted directly to the Constitutional Court against the judgment and Order of the Full Bench of the High Court, Gauteng Provincial Division (Pretoria), under case number 55578/19 delivered on 10 March 2020 ("the judgment").
2. Costs of the application for leave to appeal to be cost in the appeal.
3. Further and/or alternative relief.

TAKE NOTICE FURTHER that the EFF's application for leave to appeal is only made in the event that the Public Protector is granted leave to appeal.

TAKE NOTICE FURTHER that the EFF's application for leave to appeal is brought on the grounds that the judgment determines a constitutional issue which ought to be finally decided by this Court.

TAKE NOTICE FURTHER that, if any of the other parties to this matter intend to lodge a cross-appeal to the Constitutional Court, they are required to do so with the Registrar of the Court within 10 days from the date upon which this application is lodged.

TAKE NOTICE FURTHER that the accompanying affidavit of JULIUS SELLO MALEMA, together with the annexures thereto, will be used in support of this application.

DATED at JOHANNESBURG on this 30<sup>th</sup> day of APRIL 2020.



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AND TO:

REGISTRAR OF THE HIGH COURT  
GAUTENG DIVISION  
PRETORIA

AND TO:

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**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT No. : \_\_\_\_\_  
Case No. *a quo*: 5578/2019

In the matter between:

**THE PUBLIC PROTECTOR**

Applicant

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I, the undersigned,

**JULIUS SELLO MALEMA**

do hereby make oath and say that:

1.

- 1.1. I am an adult male, the President and Commander-in-Chief of the Economic Freedom Fighters ("**EFF**"), the fifth respondent in these proceedings, with its principal place of business at 78 De Korte Street, Braamfontein, Johannesburg.
- 1.2. I am duly authorised to act on behalf of the EFF, cited as the fifth respondent in this Court by the Public Protector.
- 1.3. The EFF was the fourth respondent in the Court *a quo*, and I deposed to the affidavits filed on its behalf.
- 1.4. Consequently, and in light of the aforesaid, I am familiar with the history of this matter.
- 1.5. The facts stated herein fall, unless the context indicates otherwise, within my personal knowledge and are both true and correct.

JS

- 1.6. Where I make legal submissions, I do so on behalf of my legal representatives which I accept.

#### **INTRODUCTION and OVERVIEW**

2. This is a conditional application directly to this Court for leave to appeal against the judgment and Order of the Full Bench of the High Court, Gauteng Provincial Division (Pretoria), under case number 55578/19 delivered on 10 March 2020 ("**the judgment**").
3. A copy of the judgment is attached as annexure "PP1" to the founding affidavit of the Public Protector in her application directly to this Court seeking leave to appeal ("**PP's FA**").
4. As foreshadowed in the Public Protector's founding affidavit (at para 9), that the EFF has already applied to the Court *a quo* for leave to appeal to the Supreme Court of Appeal ("**SCA**").
5. A copy of the EFF's application for leave to appeal is attached as "PP2" to the PP's FA.
6. I pray that the grounds advanced in annexure "PP2" be read as though specifically incorporated herein by reference thereto.

JS

7. In order to avoid prolixity, the EFF shall pursue these grounds in the event that the Public Protector is granted leave to appeal.
8. Respectfully, and without being disrespectful or presumptuous, the EFF ought to be granted leave to appeal as a matter of course if this Court grants leave to appeal to the Public Protector.
9. This, with respect, is the logical "next step" insofar as the EFF's litigation is concerned because:
  - 9.1. It would be inappropriate for the High Court and/or the Supreme Court of Appeal to consider matters already canvassed in and/or pronounced upon by this Court in granting the Public Protector leave to appeal;
  - 9.2. Respectfully, regardless of the High Court's and/or the Supreme Court of Appeal's decision in respect of the EFF's application for leave to appeal, this Court would have to eventually be seized with the contents thereof.
  - 9.3. The considerations in paragraph 9.2. above are especially relevant if either the High Court and/or the

Supreme Court of Appeal denies the EFF leave and/or dismisses the appeal on the merits.

- 9.4. A piecemeal approach to litigation of this nature – which raises issues of constitutional significance (see, for example, para 41 of the PP FA) and which would, with respect, ultimately need to be determined by this Court – is both inappropriate and undesirable.
  - 9.5. A “consolidated” appeal procedure before this Court – both as the forum which would ultimately need to determine it, and now that it has to consider the Public Protector's application for leave to appeal – is the most prudent approach, ensuring minimum waste of judicial resources and at least cost to the parties.
10. Over and above these considerations of “policy”, the EFF's application for leave to appeal (annexure “PP2”, PP FA) squarely raises constitutional issues in its own right that justify the attention of this Court, namely, determining:
- 10.1. The correct test to be applied to the answers given in Parliament, especially by Members of the Executive,

particularly when regard is had to the fact that the sum total of the President's conduct willingly placed himself in a position of ignorance from which potentially misleading Parliament can (and, in this case, did) arise. This, as the EFF contends, is in direct contradiction to the President's immutable duty to account to Parliament (para 1, annexure "PP2", PP FA);

10.2. That the Public Protector has, and in this case did have, the requisite jurisdiction to investigate the CR17 campaign by virtue of the fact that the first respondent, the President of the Republic of South Africa ("**the President**"), was/is always subject of a duty for any conduct which places him at a risk of a conflict of interest (para 2, annexure "PP2", PP FA);

10.3. Whether Members of the Executive could, as the President did in this case, set up a scheme to avoid a duty to account for donations made to their internal political party campaigns from which they derive a benefit (in the widest sense), thus obviating the very

purpose of the legislative obligations they are ordinarily subject to (para 3, annexure "PP2", PP FA); and

- 10.4. That section 7(9) of the Public Protector Act, No 23 of 1994, does not require the Public Protector to consult anyone in respect of remedial action (para 4, annexure "PP2", PP FA).
11. The EFF contends, with respect, that the Court *a quo* misdirected itself in respect of each of the grounds raised above.
12. These are matters which warrant this Court's final determination and decision. Leave, consequent upon the Public Protector being granted leave to appeal, ought to also be granted to the EFF.
13. As to the appropriate forum to determine the appeal, and without commenting on the Public Protector's approach in seeking to apply for leave to appeal directly from this Court, the EFF is of the view that its conditional application is most prudent in the circumstances, and when regard is had to the grounds raised above.

JS

14. Respectfully, should this Court refuse the Public Protector leave, then the EFF's application for leave to appeal pending determination in the High Court ought to proceed. As at the time of deposing to this affidavit, the EFF has been informed that its application for leave to appeal has been set down for 12 May 2020.
15. To that end, the EFF has, through its attorneys of record, caused a letter to be sent to the High Court informing it of this conditional application. This has been done so as to keep the High Court fully informed of the matter and to ensure that no judicial resources – in, for example, convening and hearing the application for leave to appeal – need be expended unnecessarily.
16. A copy of this letter is attached as annexure "**JSM1**".

#### **CONDONATION**

17. Given the conditional nature of the EFF's application for leave to appeal, the question of condonation ought to properly be addressed with respect to the Public Protector.

JS

18. Save to align the EFF with the argument regarding the uncertainty created national lock down and the directives as addressed by the Public Protector (para 78 – 80, read with the supporting affidavit), the EFF also submits that it is worthy of being granted condonation in the circumstances.
19. The EFF's filing its application for leave to appeal prior to the expiry of *dies* (annexure "PP2" to the PP FA), coupled with its attempt to expeditiously bring this conditional application upon learning of the Public Protector's application for leave to appeal, demonstrates its *bona fides* and demonstrates that its delay is not wilful.
20. In the premises, it is in the interests of justice that the EFF be granted condonation, to the extent necessary.

#### **COSTS**

21. Although the EFF has asked for the costs of the application for leave to appeal to be costs in the appeal itself, the EFF nonetheless submits that no costs order should be made against it on account of the fact that:

JS

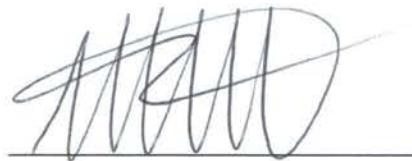
21.1. The Court *a quo* ordered no costs against it despite its opposition, *qua* respondent; and

21.2. The EFF acts in the public interest and should be immunised from an adverse costs order, as per the established jurisprudence of this Court.

22. The EFF only seeks costs in the case of opposition, to which it would ordinarily be entitled.

#### **CONCLUSION**

23. In the premises, the EFF's conditional application for leave to appeal ought to be granted, to the extent that the Public Protector may be granted leave.



**JULIUS SELLO MALEMA**

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_ on this \_\_\_\_\_ day of APRIL 2020, and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, having been complied with.

JS

7067488-4  
  
COMMISSIONER OF OATHS

EX OFFICIO: BALOYI JM POLICE OFFICIAL

FULL NAMES: JEFFREY M. BALOYI

PHYSICAL ADDRESS: 38 SCHOEMAN STREET  
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DESIGNATION: WARRANT OFFICER



JS

# Ian Levitt

## ATTORNEYS & CONVEYANCERS

Our Ref : A CHARALAMBOUS/MAT2808  
Date : 29 APRIL 2020

Writer's Email : [angelike@ianlevitt.co.za](mailto:angelike@ianlevitt.co.za)

**TO: THE JUDGE PRESIDENT, GAUTENG DIVISION OF THE HIGH COURT  
HIS LORDSHIP, THE HON. MR JUSTICE MLAMBO JP**

**AND TO: THE HON. MR JUSTICE MATOJANE J**

**AND TO: THE HON. MADAM JUSTICE KEIGHTLEY J**

**PER EMAIL: [NWalkinshaw@judiciary.org.za](mailto:NWalkinshaw@judiciary.org.za)**

Dear Judge President,

**RE: THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA// THE PUBLIC PROTECTOR  
CASE NO.: 55578/19 – APPLICATION FOR LEAVE TO APPEAL**

1. We act for the Economic Freedom Fighters (“**our client**”).
2. As Your Lordship is aware, our client has filed an application for leave to appeal against the Order and Judgment of the Court, consisting of Your Lordship, and The Hon. Mr Justice Matojane J and The Hon. Madam Justice Keightley J.
3. AmaBhungane have filed a conditional application for leave to appeal, consequent upon our client's application for leave to appeal being granted.
4. The President, as applicant in the matter *a quo*, has opposed our client's application.



Ian Levitt B.Com., LLB (Wits), HDip Tax Law (Wits), Michael Strauss BA Law (Stellenbosch) LLB (RAU),  
**ASSISTED BY: Jeanne B Strauss** LLB.LLM, Cert in Medicine & Law (Cum Laude), **Wikus Steyl** LLB (UP), **Heidi Jonker** LLB (UP),  
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B-BBEE Status: Level 4

CONVEYANCER: IN ASSOCIATION WITH MICHELLE CHAVKIN ATTORNEYS

For service in terms of Rule 4A(1)(c) email copy to: [info@ianlevitt.co.za](mailto:info@ianlevitt.co.za)

JS

# "JSM1"

5. By directive sent to us yesterday (28 April 2020), our client's application for leave to appeal has been set down to be heard on 12 May 2020.
6. As at the time of writing this letter:
  - 6.1. The Public Protector launched an application for Leave to Appeal directly to the Constitutional Court against the Judgment of the Court.
  - 6.2. A copy of the Public Protector's application (dated 14 April 2020) is attached hereto an annexure "A".
  - 6.3. Today, being 29 April 2020, the Presidency has filed opposing papers in the Constitutional Court.
7. In light of the Public Protector's application, and the impact it will undoubtedly have on our client's application for leave to appeal before the Court which has been set down (as per above), our client respectfully requests that the matter before Your Lordship is stayed pending the outcome of the pending application in the Constitutional Court.
8. We further record that as a result of the President's opposition in the Constitutional Court, our client has also instructed our offices to draw a further application for leave to appeal to be served before the Constitutional Court. That application is currently in its finalisation stage, and it should be launched by the end of this week.
7. Should it be necessary, subject to further directives from Your Lordship, our client will bring a formal application for the stay of the leave to appeal pending the outcome of the application presently served before the Constitutional Court.
8. We are hopeful, however, that this will not be necessary and that the other parties will prefer us and the Court with a favourable response. We have copied all of the parties to the matter herein in order to bring this letter to all of their attention.
9. We await your directions in this regard.

"JSM1"

Yours faithfully,

**IAN LEVITT ATTORNEYS**  
**PER: A CHARALAMBOUS**

CC: HARRIS NUPEN MOLEBATS  
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JS