IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No. 62/20

Court *a quo* Case No. 55578/19

In the matter between:

THE PUBLIC PROTECTOR	First Applicant
THE ECONOMIC FREEDOM FIGHTERS	Second Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Third 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 FINANCIAL INTELLIGENCE CENTRE	Fifth Respondent

PRINCIPAL SUBMISSIONS ON BEHALF OF THE PUBLIC PROTECTOR

CONTENTS

A. INTRODUCTION

1. The Public Protector applies for leave to appeal directly to the above Honourable Court against the judgment and order of the full bench of the High Court of South Africa, Gauteng Division, Pretoria, under case number 55578/19 delivered on 10 March 2020 (**"the Judgment"**)[1].

2. In the judgment, the court *a quo* ordered as follows:

> **"1. The Public Protector's decision to investigate and report on the CR 17 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; 9.2 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 and sixth respondents, and the *amicus curiae*."**[2]

3. The issues that arise and require determination in this appeal may be summarised as follows:

   3.1. Whether the Public Protector's finding that the President of the Republic of South Africa, His Excellency Mr Cyril Matamela Ramaphosa ("**the President**"), misled Parliament was irrational;

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1 Record, p1295
2 Record, p1385-1386

3.2. Whether the Public Protector had jurisdiction to investigate donations made to the CR17 campaign. Under this rubric, the following -- intertwined -- issues arise:

3.2.1. Whether the Public Protector had jurisdiction to investigate the conduct of the President. In particular, whether the Public Protector had jurisdiction to investigate whether the President (the Deputy President as he then was) acted in a way that was inconsistent with his office and/or exposed himself to a situation involving the risk of a conflict between his official responsibilities and private interests;

3.2.2. Whether donations made to the CR17 campaign were benefits of a material nature to the President or whether such donations constituted private party-political donations; and

3.2.3. Whether the President was obliged to disclose such benefit/s to the National Assembly;

3.3. Whether the Public Protector's finding that there was merit in the allegation of the suspicion of money laundering was irrational;

3.4. Whether the remedial action taken by the Public Protector constitutes an unlawful encroachment on the Speaker and the National Director of Public Prosecutions; and

3.5. Whether section 7(9) of the Public Protector Act 23 of 1994 (**"the Public Protector Act"**) requires *audi* in relation to the remedial action to be taken.

4. This application therefore raises issues about the accountability of holders of public power in our nascent democracy, regardless of who they are and how popular they may or may not be with dominant classes in society. Objectively viewed, this case is about the legality of the conduct of two of the most important people in our democracy, the President and the Public Protector, both of whom are constitutional beings. Until this Honourable Court finally determines the issues raised in this matter, uncertainty will forever prevail in respect of the scope of the constitutional mandate of the Public Protector as well as the constitutional obligations of members of Cabinet in terms of section 96 of the Constitution.

B. ESSENTIAL BACKGROUND

5. On 6 November 2018 during a question session in the National Assembly, Mr Mmusi Maimane, then Leader of the Democratic Alliance (**"Mr Maimane"**) posed the following question to the President:

> **"Mr President, here I hold a proof of payment that was transferred to say that R500 000 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."**[3]

6. The President's reply to the above question was:

> **"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**

[3] Record, p181-182

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 money was 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, and all that."[4]

7. Having made these statements in the National Assembly, in such absolute and certain terms about his knowledge of the issue, the President revised his certainty and communicated a different statement about this very issue in respect of which he stated he had been informed **"some time ago."** On 14 November 2018, some 8 days later, the President wrote to the Speaker of the National Assembly stating 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 African Global Operations.
It is true that my son's company does indeed have a contract with African Global Operations for the provision of consultancy services.
…
I have been subsequently informed that the payment referred to in the supplementary question by the Leader of 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 I answered the question in the National Assembly.
…"[5]

4 Record, p182
5 Record, p187

8. On 17 November 2018, the CR17 campaign management team issued a media statement titled *"Former CR17 campaign management team to return some donations and audit donors list"*.

The media statement states that:

> **"The CR17 campaign was established and managed by like-minded individuals to support the candidature of Cyril Ramaphosa as the next ANC President.**
> **The team comprised various structures including a finance task team whose sole responsibility was to raise funds for the numerous activities that would be undertaken by volunteers and other members of team CR17.**
> **To avoid conflicts of interests and to completely eliminate any expectation of reciprocal intent, action or preferential treatment by donors, real or perceived, the fundraising team was ring-fenced from other operations.**
> **Consequently, it was also determined that President Ramaphosa should not be involved in the fundraising effort and that he shouldn't have a record of donors, although he was asked on occasion to attend dinners with potential donors.**
> **Donations were received from no less than 200 individuals from across the country. The campaign funds received were used to pay for venue hires, transport, accommodation, communications and other campaign related activities.**
> **At no point were any funds transferred to the Cyril Ramaphosa Foundation, his relations or to President Ramaphosa himself.**
> **The fundraising team has confirmed to us (the campaign management team) that the funds referred to in a Parliamentary question on 6 November 2018 were paid into a trust account that was one of the avenues used by the CR17 campaign to temporarily house the funds raised for the campaign.**
> **Members of the former campaign co-ordination team have resolved to return funds referred to above and have requested the donors' list from the fundraising team for the purpose of immediately conducting an audit to ensure that fundraising processes and sources of funds were above board.**
> **President Ramaphosa was not aware of the payment, either at the time it was made or when he was answering questions in the National Assembly. His response was an honest reflection of the information available to him at the time.**
> **Donors were asked to support the campaign to restore integrity and cohesion of the ANC and to put South Africa back on a path of growth and transformation, with an explicit understanding that their contribution would earn them no special favours or undue advantage.**
> **Subsequent to the ANC's Nasrec Conference, the CR17 campaign folded its operations and used all remaining funds to settle its obligations to service providers.**
> **It was thanks to the contributions of all the donors, the tireless work of many volunteers across the country, and to the support of the membership of the**

ANC that the CR17 campaign was ultimately able to have President Cyril Ramaphosa elected as president of the ANC".[6]

9. Two complaints were thereafter lodged with the Office of the Public Protector. The first complaint was on 26 November 2018 from Mr Maimane. The complaint was headed *"Relationship of the President with African Global Operations, formerly known as Bosasa"*.[7] The following appears from this complaint:

9.1. On 18 October 2017, an amount of R 500 000 was paid into the account "EFG2".

9.2. The money was paid from the personal account of Mr Gavin Watson (who recently passed away), who was the CEO of African Global Operations (formerly known as Bosasa) into the account of Miotto Trading, a company closely associated with Bosasa. From there the money was paid into the account "EFG2" said to be a "trust or foundation" of the son of the President, Mr Andile Ramaphosa.

9.3. On 6 November 2018, during a question session in the National Assembly, Mr Maimane presented the President with documentary proof of the payment and the sworn statement alleging that the money was intended for the President's son, Mr Andile Ramaphosa.

9.4. 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 his son, Mr Andile Ramaphosa. It shall become clearer below whether this "fact "confirmed by the President is actually true.

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6 Record, p190-191

7 Record, p78a & 79a

9.5. On 16 November 2018, the President sent a letter to the Speaker of the National Assembly purporting to "correct" the answer he had given in the National Assembly ten days earlier. In this letter, the President reveals that the payment was actually a donation towards his campaign to be elected ANC President in December 2017.

9.6. In his complaint, Mr Maimane stated that he was concerned that the set of facts reveals that there was possibly an improper relationship existing between the President and his family on the one side, and the company African Global Operations, on the other.

9.7. The nature of the payment, passing through several intermediaries, so he contended, did not accord with a straightforward donation and raised suspicion of money laundering. This was the nature of his complaint to me and I was duty bound to investigate it.

9.8. He further noted in his complaint that the alleged donor was widely reported to have received billions of Rands in state tenders. Furthermore, Mr Maimane stated that he is concerned that the President may have lied to the National Assembly in his reply to his question on 6 November 2018.

9.9. That the true facts of the matter needed to be established.

10. In January 2019, a second complaint was lodged with the Office of the Public Protector from Mr Floyd Shivambu, Deputy President of the Economic Freedom Fighters (**"Mr Shivambu"**).[8] The following appears from the complaint:

10.1. The Economic Freedom Fighters (**"the EFF"**) lodged the complaint in terms of section 4(1) of the Executive Members Ethics Act, 82 of 1998 (**"the EMEA"**) in respect of an alleged breach of the Executive Ethics Code by the President.

10.2. That during the President's appearance in the National Assembly on 6 November 2019, when responding to the question from Mr Maimane about a payment of R 500 000 from Mr Gavin Watson, the President misled the National Assembly.

10.3. The President said his son's company had a contract with African Global Operations (formerly known as Bosasa) for the provision of consultancy services.

10.4. That the President went on to explicitly state that he had seen the contract that his son signed with Bosasa and the contract also *"deals with issues of integrity, anti-corruption and there was nothing untoward"*.

10.5. That section 3(1) and 4(1)(a) of the EMEA provides that the Public Protector must investigate any alleged violation of the Executive Ethics Code by a Cabinet member on receipt of a complaint by a Member of the National Assembly.

10.6. The EFF lodges a formal complaint for the Public Protector to investigate:

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8 Record, p81a & 81b

10.6.1. 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

10.6.2. whether the President deliberately misled Parliament in violation of the Executive Ethics Code.

11. Based on the analysis of the two complaints and having taken into account the fact the President was then the Deputy President and thus a member of the National Assembly, the following issues were identified to inform the focus of the Public Protector's investigation:

11.1. Whether on 6 November 2018, during question session in Parliament, the President 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 Assembly and Permanent Council Members (**"the Code of Ethical Conduct and Disclosure"**);

11.2. Whether the President improperly and in violation of the provisions of the Executive Ethics Code and the Code of Ethical Conduct and Disclosure 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; and

11.3. Whether there was an improper relationship between the President and his family on the one side, and the company African Global Operations on the other side due to

the nature of the R 500 000,00 payment passing through several intermediaries, instead of a straightforward donation to the CR17 campaign thus raising the suspicion of money laundering.[9]

12. The Public Protector duly conducted the investigations, issued a section 7(9) notice in terms of the Public Protector Act, interviewed the President and gave him an opportunity to make representations in respect of possible findings. The President duly made his representations by way of a statement filed on his behalf by his legal representatives, and to which the President attached his confirmatory affidavit.[10]

13. Having conducted the requisite interviews, obtained information from the Financial Intelligence Centre (**"the FIC"**) and other sources, having issued the section 7(9) notices and after considering the President's own representations, the Public Protector issued her report **"Report on an investigation into a violation of the Executive Ethics Code through an improper relationship between the President and African Global Operations (AGO), formerly known as Bosasa"** ("**the Report**").

14. The Public Protector found that:

14.1. The allegation that on 06 November 2018 during question session in Parliament, the President deliberately misled the National Assembly, was substantiated.[11]

14.2. The allegation that the President improperly and in violation of the provisions of the Executive Ethics Code and the Code of Ethical Conduct and Disclosure exposed

9 Record, p82, para (viii)
10 Record, p332; p383
11 Record, p171

himself to a 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, was substantiated.[12]

14.3. The allegation that there is an improper relationship between the President and his family on the one side, and the company African Global Operations on the other side due to the nature of the R 500 000,00 payment passing through several intermediaries, instead of a straightforward donation to the CR17 campaign thus raising the suspicion of money laundering, has merit.[13]

15. The appropriate remedial action taken as contemplated in section 182(c) of the Constitution, with a view of remedying the impropriety referred to was:

15.1. Requiring the Speaker of the National Assembly (**"the Speaker"**) to refer the matter to the Joint Committee on Ethics and Members' Interests (**"the Joint Committee"**) for consideration in terms of paragraph 10 of the Code of Ethical Conduct and Disclosure.[14]

15.2. Requiring the Speaker to consider, within her discretion, whether there should be deliberations on the issues relating to the Public Protector's observations.[15]

15.3. Requiring the Speaker to demand publication of all donations received by the President as he was bound to declare such financial interests at the time when he

12 Record, p172
13 Record, p172
14 Record, p174
15 Record, p174

was Deputy President of the Republic as required in paragraph 9 of the Code of Ethical Conduct and Disclosure.[16]

15.4. Requiring the National Director of Public Prosecutions (**"the NDPP"**) to take note of the Public Protector's observations and recommendations and, in line with section 6(4)(c)(i) of the Public Protector Act, conduct further investigation into the issue of money laundering.[17]

15.5. Requiring the National Commissioner of the South African Police Service (**"the SAPS"**) to investigate criminal conduct against Mr Gavin Watson for violation of section 11(3) of the Public Protector Act by lying under oath.[18]

C. DID THE PRESIDENT MISLEAD PARLIAMENT?

16. If this question were to be determined objectively, regardless of the status or popularity of the President, it is incontrovertible that the President misled the National Assembly when he responded to the parliamentary question by Mr. Maimane. The common cause facts bear out that finding. That the President reverted back to the National Assembly does not detract from the fact that at the time he made the statement, he misled the National Assembly. That he came back to correct it should not affect the fact that he had misled Parliament as that could well be a matter of being advised of the seriousness of misleading Parliament.

17. As confident as the President was when he stated his "facts" and confirming that the matter had been brought to his attention, the President later realized that the falsehoods could not be

16 Record, p174
17 Record, p175
18 Record, p175

sustained and reverted to Parliament with his purportedly "correct version". No one, let alone the first citizen, should be allowed to get away with such backpaddling.

18. It must be borne in mind that the President is the first citizen of the Republic of South Africa, the embodiment of our constitutional values, that in the case of the **EFF v Speaker of the National Assembly**[19], this Court defined / described a President in the following manner:

> **"[20] That this Court enjoys the exclusive jurisdiction to decide a failure by the President to fulfil his constitutional obligations ought not to be surprising, considering the magnitude and vital importance of his responsibilities. The President is the Head of State and Head of the national Executive. He is indeed the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project."**

19. The following <u>facts</u> are worth mentioning again in order to appreciate the reasons why the President's unequivocal, yet wrong answer to the Parliamentary question was an act of misleading Parliament, why the President's attendance at fundraising events as well as the emails in which he gives instructions about transactions are all at odds with his stated stance

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19 2016 (3) SA 580 (CC) at [20]

that he was kept in the dark about the details of the donations and transactions related thereto. Again, no one should get away with such conflicting versions. It is important to analyse the sequence as the court *a quo* , with the greatest of respect, seems to have hastily and readily exonerated the President.

20. On 6 November 2018, Mr Maimane posed the following question in Parliament to the President:

> **"Mr President, here I hold a proof of payment that was transferred to say that R500 000 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."**

21. The President's response was:

> **"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 money was 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, and all that."**

22. The President went on to say that:

> **"On this one, I have made sure that I get as much information as I can…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…even if it means…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…"

23. There is nothing in the above answer that suggests doubt or uncertainty on the part of the President. What was clear from the above statement was that the President was familiar with the issue raised by Mr Maimane. Not only was he familiar with what the issue was, he had actually specifically enquired about it from his son. He had even seen a contract that related to the payment to his son.

24. More light was shed by Mr Bejani Chauke (**"Mr Chauke"**), the President's special adviser, in this regard. In his affidavit filed with the Public Protector, he confirmed that the President was correct that "this issue" was brought to the President's attention "some time ago". Mr Chauke stated as follows:

> **"4. In early September 2018, I heard a rumour that Mr Andile Ramaphosa, the son of President Ramaphosa, had received a donation of R500 000 (five hundred thousand rand) from Bosasa. I then informed President Ramaphosa of this rumour.**
> **5. I was further advised that a R500 000 (five hundred thousand rand) deposit had been made into an ABSA account belonging to Mr Andile Ramaphosa. I enquired from Mr Andile Ramaphosa whether he had any knowledge of funds donated into his ABSA account and he responded by saying that he does not have an ABSA bank account."**

25. Clearly, when the President stated in the National Assembly that the matter had been brought to his attention "some time ago" he referred to his conversation with Mr Chauke. In September 2018 the President became aware of the issue raised by Mr Maimane. That much is apparent, and he understood what "the issue" was. The President was aware of the payment at least two months prior to Mr Maimane raising the issue, and that on enquiring from his son, his son

informed him that in December 2017, his company Blue Crane Capital (Pty) Ltd had signed an Advisory Mandate with African Global Operations for possible business entry in some East African countries.

26. Having made these statements in the National Assembly, in such absolute and certain terms about his knowledge of the issue Mr Maimane was referring to, the President revised his certainty and communicated a different statement about this very issue about which he had been informed "some time ago."

27. In the President's letter to the Public Protector dated 1 February 2019, the President states as follows:

> **"On returning to [his] office in Tuynhuys following the questions, session, [he] was informed by one of [his] advisors, Ms Donné Nicol, 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 for the campaign to advocate for [his] election as President of the ANC at the organisation's 54th National Conference in December 2017. … [His] immediate response was that this information should be disclosed and that [his] reply in the National Assembly should be corrected".**

28. The President only wrote to the Speaker of the National Assembly some 8 days later, on 14 November 2018 to be precise. In his letter to the National Assembly, the President writes therein 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 African Global Operations.
It is true that my son's company does indeed have a contract with African Global Operations for the provision of consultancy services.
…
I have been subsequently informed that the payment referred to in the supplementary question by the Leader of 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 I answered the question in the National Assembly.
…"

29. On 17 November 2018, the CR17 campaign management team issued a media statement titled *"Former CR17 campaign management team to return some donations and audit donors list"*.

The media statement states that:

"The CR17 campaign was established and managed by like-minded individuals to support the candidature of Cyril Ramaphosa as the next ANC President.
The team comprised various structures including a finance task team whose sole responsibility was to raise funds for the numerous activities that would be undertaken by volunteers and other members of team CR17.
To avoid conflicts of interests and to completely eliminate any expectation of reciprocal intent, action or preferential treatment by donors, real or perceived, the fundraising team was ring-fenced from other operations.
Consequently, it was also determined that President Ramaphosa should not be involved in the fundraising effort and that he shouldn't have a record of donors, although he was asked on occasion to attend dinners with potential donors.
Donations were received from no less than 200 individuals from across the country. The campaign funds received were used to pay for venue hires, transport, accommodation, communications and other campaign related activities.
At no point were any funds transferred to the Cyril Ramaphosa Foundation, his relations or to President Ramaphosa himself.
The fundraising team has confirmed to us (the campaign management team) that the funds referred to in a Parliamentary question on 6 November 2018 were paid into a trust account that was one of the avenues used by the CR17 campaign to temporarily house the funds raised for the campaign.

Members of the former campaign co-ordination team have resolved to return funds referred to above and have requested the donors' list from the fundraising team for the purpose of immediately conducting an audit to ensure that fundraising processes and sources of funds were above board. President Ramaphosa was not aware of the payment, either at the time it was made or when he was answering questions in the National Assembly. His response was an honest reflection of the information available to him at the time.
Donors were asked to support the campaign to restore integrity and cohesion of the ANC and to put South Africa back on a path of growth and transformation, with an explicit understanding that their contribution would earn them no special favours or undue advantage.
Subsequent to the ANC's Nasrec Conference, the CR17 campaign folded its operations and used all remaining funds to settle its obligations to service providers.
It was thanks to the contributions of all the donors, the tireless work of many volunteers across the country, and to the support of the membership of the ANC that the CR17 campaign was ultimately able to have President Cyril Ramaphosa elected as president of the ANC".

30. But, the evidence shows (1) that there was in fact money that was transferred to the Cyril Ramaphosa Foundation[20], (2) that Mr Watson was in fact present at the fund-raising dinner hosted by the President[21], (3) that the President was in fact involved in the fundraising efforts and was aware of the identities of donors[22], (4) that Mr Maimane was specific that monies were transferred to a trust account called "EFG2" for the benefit of the President's son and that the monies were transferred on 18 October 2017 (prior to Mr Andile Ramaphosa's company Blue Crane Capital (Pty) Ltd signing the Advisory Mandate with African Global Operations which the President says he saw)[23].

31. On these facts, the Public Protector found that:

20 Record, p132, para 5.2.24
21 Record, p151, para 5.3.10.48
22 Record, p132, para 5.2.25, 5.2.26. See also p137, para 5.3.10.9
23 Record, p181

31.1. The President's heat of the moment response was of concern because Parliamentary questions are an important means used by Members of Parliament to ensure that Government is accountable to Parliament for its policies and actions and, through Parliament to the people.[24]

31.2. The President's provocation by the question from the leader of the opposition cannot justify giving poorly prepared answers and creating a risk of misleading Parliament.[25]

31.3. The President was not new to the processes of Parliament. He could, if he wished, object to the question and request the Speaker to allow him, in terms of the Rules, to prepare his response.[26]

31.4. The President, as the head of state and the quintessential embodiment of the Constitution, should have acted with restraint and not allow Mr Maimane's question to affect his demeanour as he had stated in his response, that he had felt attacked and had to defend himself and his family.[27] It is understandable that the President or any person may feel hurt when their family is attacked, but such hurt is no justification for misleading the Legislature.

32. The allegation that on 6 November 2018 during question session in Parliament, the President deliberately misled the National Assembly, was therefore substantiated and the Public Protector's finding in this regard was therefore rational. Given the sequence of events set out above, the conclusion is inescapable that the President misled Parliament. That he regretted

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24 Record, p 119, para 5.1.24
25 Record, p 119, para 5.1.25
26 Record, p 121, para 5.1.32
27 Record, p 122, para 5.1.35 (read with p 120, para 5.1.29)

having done that and reverted back with a different answer does not change the fact that he had, with certainty, given a different answer to Parliament.

33. The court *a quo,* however, agreed with the President in every respect and held that:

33.1. There was no evidence to indicate that the President knew about the account EFG2 at the time the President had answered the question in Parliament;

33.2. There was no evidence to indicate that the President knew about the R500 000.00 donation made by Mr Watson to the CR17 campaign;

33.3. That there is nothing to gainsay the President's version that the President focused on the gist of Mr Maimane's question and not on the date of the payment (which was in fact before Mr Andile Ramaphosa's agreement with African Global Operations came about) or the account details;

33.4. If the President gave Parliament incorrect facts, this was based on a misstated set of facts presented to him by Mr Maimane;

33.5. The origin of the error was on the part of Mr Maimane not the President;

33.6. The facts do not point to the President having acted so as to wilfully mislead Parliament;

33.7. In the Public Protector's treatment of the issue, she demonstrated a fundamentally flawed approach to the principles underpinning the question of whether the President violated the Executive Ethics Code by wilfully misleading Parliament;

33.8. By no stretch of law, logic or even ethics, could conduct of this nature be said to amount to a wilful or deliberate misleading of Parliament such as to amount to a violation of paragraph 2.3(a) of the Executive Ethics Code. That would be inconsistent with the rights of members of the Executive to be protected from freedom of speech when they appear in the National Assembly under section 58 of the Constitution;

33.9. 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 conflict of interest;

33.10. The President's uncontested version is that his insulation from the details of the financial transactions and donors to the CR17 campaign ensured that the President avoided the risk that donors might subsequently expect some form of pay-back from him;

33.11. There was no evidence to the contrary nor was it an implausible explanation and that on the contrary, it seems to have been a reasonable strategy to employ in order to avoid possible conflicts of interest;

33.12. The Public Protector did not make the obvious finding that the President had told the truth about his son having an agreement with African Global Operations; and

33.13. The Public Protector did not approach the issue with an open mind, that she committed a material misdirection in her legal approach and reached an irrational and unlawful conclusion on the issue.

34. This Honourable Court has repeatedly explained the limits of rationality review. As was made clear in **Law Society of South Africa and Others v Minister for Transport and Another**[28]:

> **"[T]he requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise…."**

35. Although the above relates to legislation, the general principle is applicable. Even reasonableness review requires only a qualitative assessment of a decision to determine whether it is one that a decision-maker could reasonably make.[29]

36. The test used is whether the decision in question was one which a reasonable authority could reach.

37. The impugned decision may or may not have been the best decision in the circumstances, but it is not for the court on review to consider. The court merely has to decide whether the decision struck a reasonable equilibrium.[30] In **Bato Star** the Court held that:

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28 2011 (1) SA 400 (CC) at para 35

29 **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs** 2004 (4) SA 490 (CC) at [44], citing **R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd** [1999] 1 All ER 129 (HL) at 157

30 **Bato Star** at [54]

> **"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. The distinction between appeals and reviews continues to be significant. The court should take care not to usurp functions of administrative agencies. Its task is to ensure that the decision taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.**[31]

38. The discussion of reasonableness review by the SCA in **Calibre Clinical Consultants** is also helpful:

> **"On the second count - whether the decision was one that was so unreasonable that no reasonable person could have made it - there is considerable scope for two people acting reasonably to arrive at different decisions."**[32]

39. The cold facts reveal that the President changed the answer he had confidently. The degree of certainty in the answer given by the President to Parliament leaves no room for doubt that he knew what he was conveying to Parliament at the time. Having made these statements in the National Assembly, in such absolute and certain terms about his knowledge of the issue Mr Maimane was referring to, the President, some 8 days later, revised his certainty and communicated a different version which was still inconsistent with the facts. To sanitize this inconsistency and misleading statement by the President is simply unjustified.

40. The issue was therefore not simply about whether there was a contract that existed between the President's son and African Global Operations. It was common cause that Mr Andile Ramaphosa had a business relationship with African Global Operations which was confirmed

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31 **Bato Star** at [45]

32 **Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another** 2010 (5) SA 457 (SCA) at paras 58 – 59. See **also: MEC for Environmental Affairs and Development Planning v Clairison's** CC 2013 (6) SA 235 (SCA) at paras 20 - 22

by the Advisory Mandate and the Anti-Bribery and Corruption Policy signed between his company, Blue Crane Capita l (Pty) Limited and African Global Operations in December 2017. The issue became much wider than that when the President communicated a further version that the monies Mr Maimane enquired about related to a donation made to the CR17 campaign.

41. For these reasons, we submit that there was nothing irrational about the Public Protector's finding that the President misled Parliament. The Public Protector made her decision on the basis of rational considerations. The court *a quo* may not consider it correct in its view but that does not make the Public Protector's decision irrational and unlawful.

42. Responsibility of the President and Parliament has been underscored by this Court as follows:

> **"[1] South Africa is a constitutional democracy — a government of the people, by the people and for the people through the instrumentality of the Constitution. It is a system of governance that 'we the people' consciously and purposefully opted for to create a truly free, just and united nation. Central to this vision is the improvement of the quality of life of all citizens and the optimisation of the potential of each through good governance.**
>
> **[2] Since constitutions and good governance do not self-actualise, governance structures had to be created to breathe life into our collective aspirations. Hence the existence of the legislative, executive and judicial arms of the state. They each have specific roles to play and are enjoined to interrelate as foreshadowed by the following principle that guided our Constitution-making process:**
> **'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'**
>
> **[3] Knowing that it is not practical for all 55 million of us to assume governance responsibilities and function effectively in these three arms of the state and its organs, 'we the people' designated messengers or servants to run our constitutional errands for the common good of us all. These errands can only be run successfully by people who are unwaveringly loyal to the core constitutional values of accountability, responsiveness and openness. And this would explain why all have to swear obedience to the Constitution before the assumption of office.**

…

[6] The President is an indispensable actor in the proper governance of our Republic and bears important constitutional responsibilities. To enable him or her to discharge these obligations, he or she has a fairly free hand in assembling the service-delivery team — another set of servants comprising the Deputy President and a number of ministers required to exercise the executive authority of the Republic. As many deputy ministers as are deemed necessary may also be appointed. Like cabinet ministers, they may be dismissed.

[7] Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. *Amandla awethu, mannda ndiashu, maatla ke a rona,* or *matimba ya hina* (power belongs to us) and *mayibuye iAfrika* (restore Africa and its wealth) are much more than mere excitement-generating slogans. They convey a very profound reality that state power, the land and its wealth all belong to 'we the people', united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since state power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.

[8] This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office bearers, in all arms of the state, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. And the objective is to arrest or address underperformance and abuse of public power and resources. Since this matter is essentially about executive accountability, that is where the focus will be.

[9] Accountability, responsiveness and openness enjoin the President, Deputy President, ministers and deputy ministers to report fully and regularly to Parliament on the execution of their obligations. After all, Parliament 'is elected to represent the people and to ensure government by the people under the Constitution'.

[10] It thus falls on Parliament to oversee the performance of the President and the rest of cabinet and hold them accountable for the use of state power and the resources entrusted to them…"[33]

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33 **United Democratic Movement v Speaker, National Assembly and Others 2017 (5) SA 300 (CC)** at paras [1]-[10]

43. The above principles should apply consistently to all holders of public power. Public office bearers, in all arms of the state, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. The objective being is to arrest or address the abuse of public power.

D. JURISDICTION TO INVESTIGATE DONATIONS MADE TO THE CR17 CAMPAIGN

Legislative Framework

44. The Public Protector is established in terms of section 181(1)(a) read with section 182 of the Constitution. The Public Protector is an institution which strengthens and supports constitutional democracy in the Republic.

45. This Honourable Court in **Economic Freedom Fighters v Speaker, National Assembly and Others** set out the importance of the Public Protector.[34] The Court held:

> **"[52] The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs, and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.**
>
> **[53] Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental embarrassment' and censure. This is a necessary service because state resources belong to the public, as does state power. The repositories of these resources and power are to use them on behalf and for the benefit of the public. When this is**

[34] 2016 (3) SA 580 (CC) at [52]-[53]

suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector. This finds support in what this court said in the *Certification* case:

'(M)embers of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action.'

46. Importantly, section 181 provides that the Public Protector is subject only to the Constitution and the law. The Public Protector is under an obligation to be impartial and must exercise her powers and perform her functions without fear or favour or prejudice. In this regard, this Court in **Economic Freedom Fighters v Speaker, National Assembly and Others** held:

> "**[55] Her investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw state power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated."**

47. Sections 182(1) and 182(2) of the Constitution provides that:

> "
>
> **(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."**

48. Recognising the particular vulnerability of the Public Protector, sub-section 181(3) obliges other organs of State (including the executive) to assist and protect the Public Protector (among other chapter nine) institutions to ensure that she is independent, impartial, dignified and is effective.

49. The functions and powers of the Public Protector are sourced from section 182 of the Constitution and then supported by the Public Protector Act. Sub-section (1)(a) of the Constitution empowers the Public Protector 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.

50. As directed by the Constitution, the Public Protector Act then sets out the additional functions and powers of the Public Protector.

51. Section 7 of the Public Protector Act empowers the Public Protector to conduct an investigation, on her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to her knowledge and which points to conduct that falls within her purview as set out in section 6 (4) and (5) of the Public Protector Act.

52. In conducting her investigations, the Public Protector is given additional powers which enables her to fulfil her constitutional mandate. Section 6 of the Public Protector Act which deals with "reporting matters to and additional powers of the Public Protector."

53. Section 6(4)(a) sets out the matters that the Public Protector may investigate. It provides that:

"6(4) 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 (insofar 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."

54. In relevant part, section 6(4)(c) provides the following:

"6(4) The Public Protector shall, be competent-
…
(c) At a time prior to, during or after an investigation –
(i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
(ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority."

55. Specifically, in respect of conduct of Cabinet members and Deputy Ministers, the Constitution provides that:

"96 Conduct of Cabinet members and Deputy Ministers

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not

(a) **undertake any other paid work;**
(b) **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 private interests; or**
(c) **use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."**

56. Section 3 of the EMEA provides that the Public Protector must investigate any alleged breach of the Executive Ethics Code on receipt of a complaint. Clause 2.3 of the Executive Ethics Code provides that:

"2.3 Members of the Executive may not

(a) wilfully mislead the legislature to which they are accountable;
(b) wilfully mislead the President or Premier, as the case may be;
(c) act in a way that is inconsistent with their position;
(d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;
(e) use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;
(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
(g) receive remuneration for any work or service other than for the performance of their functions as members of the Executive or
(h) make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowance or payments."

57. The Code of Ethical Conduct and Disclosure provides a framework of reference for Members of Parliament when discharging their duties and responsibilities. It outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct.

58. Clause 5.1 of the Code of Ethical Conduct and Disclosure provides that a Member must:

58.1. resolve any financial or business conflict of interest in which he or she is involved in his or her capacity as a public representative, in favour of the public interest; and

58.2. always declare such interest, and where appropriate, the Member should recuse himself or herself from any forum considering or deciding on the matter.

59. Clause 5.2.1 of the Code of Ethical Conduct and Disclosure provides that a member must not accept any reward, benefit or gift from any person or body:

59.1. that creates a direct conflict of financial or business interest for such Member or any immediate family of that Member or any business partner of that Member; or the immediate family of that Member;

59.2. that is intended or is an attempt to corruptly influence that member in the exercise of his or her duties or responsibilities as a public representative.

60. Clause 9 of the Code of Ethical Conduct and Disclosure provides that members must disclose particulars of their registrable interests. The following kinds of financial interests are registrable interests which must be disclosed:

60.1. shares and other financial interests in companies and other corporate entities;

60.2. remunerated employment outside Parliament;

60.3. directorships and partnerships;

60.4. consultancies;

60.5. sponsorships;

60.6. gifts and hospitality in excess of R1500, from a source other than a family Member or permanent companion or gifts of a traditional nature provided that this does not create a conflict of interest for the Member;

60.7. any other benefit of a material nature;

60.8. foreign travel (other than personal visits paid by the Member, business visits unrelated to the Member's role as a public representative, and official and formal visits paid for by an organ of State or the Member's party);

60.9. ownership in land and property including land and property outside the Republic;

60.10. pensions;

60.11. public contracts awarded;

60.12. trusts;

60.13. encumbrances.

61. Clause 9.18 provides that where any doubt exists as to whether any financial interests must be disclosed, the Member concerned must act in good faith. The contention that an amount close to R1 Billion to assist the country's Deputy President to win an internal party election is no a benefit of a material nature is simply disingenuous.

Findings of the court *a quo*

62. In respect of whether the Public Protector had jurisdiction to investigate the CR17 campaign donations, the court *a quo* held that:

62.1. The overriding feature of section 182(1) of the Constitution and section 6(4) of the Public Protector Act is that the Public Protector's 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;

62.2. It is implicit in this circumscription of the Public Protector's powers that she cannot investigate matters falling within the private sphere;

62.3. The Public Protector enjoys wide powers, including the power to investigate any issue on her own initiative but she only enjoys these powers within her sphere of competence;

62.4. She cannot initiate her own investigation on an issue that falls outside her sphere of competence nor can she investigate a complaint that falls outside it;

62.5. Critical to the Public Protector's sphere of competence is that she may only investigate improper or allegedly improper conduct in state affairs, or in the public administration in any sphere of government;

62.6. 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;

62.7. The Public Protector's sphere of competence to investigate is limited to State or public bodies or functionaries within the meaning of "organs of state" i.e. those performing a public power or function;

62.8. The Public Protector's competence to investigate non-State or private bodies or functionaries exists only if the alleged improper conduct involves public money;

62.9. The jurisdictional issue is not whether the Public Protector had the competence to investigate the complaint against the President, or his conduct. The issue is whether the Public Protector's sphere of competence extended to investigating the CR17 campaign;

62.10. The CR17 campaign fell squarely within the constitutional rights of participating members under section 19(1) of the Constitution. 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;

62.11. The conduct of those members of the ANC who came together under the banner of the CR17 campaign to raise funds for the President was not conduct in state affairs;

62.12. The activities of the CR17 campaign was by nature the activities of members of a private group of people and not a statutory body. There was no suggestion that these activities involved the suspected improper use of public funds;

62.13. The donations were private donations. It did not fall within the Public Protector's sphere of competence to investigate the CR17 campaign;

62.14. In assuming jurisdiction to investigate, the Public Protector appears to have conflated the CR17 campaign with the President;

62.15. The Public Protector then assumed jurisdiction on the basis that the President was the Deputy President at the time that the donations were received;

62.16. The mere fact that the President was the Deputy President at the time did not catapult the activities of the CR17 campaign into the arena of "affairs of the state" and thus subject to the Public Protector's jurisdiction;

62.17. The CR17 campaign was a campaign to further a particular ideological agenda within the ANC. The donations made were to support the party-political cause of some members of the ANC for purposes of the December 2017 internal party elections;

62.18. The Executive Ethics Act and the complaint under the Executive Ethics Code may give jurisdiction to investigate the President but not the CR17 campaign;

62.19. The outer limits of the Public Protector's competence remain limited to state affairs, thus excluding the activities of the CR17 campaign;

62.20. Section 3 of the Executive Ethics Code is limited to the actual complaint lodged. Neither of the complaints were directed at the activities of the CR17 campaign;

62.21. The CR17 campaign was much broader than simply supporting the President a prospective President of the ANC;

62.22. The evidence established that he was not involved in the organisational structures of the campaign and generally not involved in fund raising;

62.23. The evidence supports the President's explanation of his limited involvement in the fundraising activities;

62.24. To the extent that the President was involved in the CR17 campaign it was as a member of the ANC;

62.25. There was no evidence that in his involvement in the CR17 campaign, the President placed himself at the risk of a conflict between his official responsibilities and his private affairs;

62.26. The Public Protector's finding that the President received direct financial sponsorship through the CR17 campaign was based on her conflation of the CR17 campaign with the President;

62.27. She did not identify any evidence or facts to substantiate her conclusion that the President received direct personal sponsorship through the CR17 campaign;

62.28. There was no evidence that the President received personal financial benefit from any campaign contributions;

62.29. Neither the President nor his family were beneficiaries of the Cyril Ramaphosa Foundation neither did they receive funds from it;

62.30. If the President did not personally benefit or receive financial campaign contributions through the CR17 campaign how could the Public Protector rationally have concluded that the President was obliged under the Executive Ethics Code to make the disclosure of the donations;

62.31. There was no evidence that the President received direct financial sponsorship from the donations through the CR17 campaign;

62.32. The nature of the benefit was not a financial benefit upon which one could place the type of 'value' required to be disclosed by paragraph 6 of the Code;

62.33. The President was not obliged to make disclosure of donations received by the CR17 campaign under paragraph 6.4 of the Executive Ethics Code;

62.34. The Public Protector's findings on the disclosure issue are unsustainable and her finding that the President breached the Executive Ethics Code by failing to disclose donations to the CR17 campaign was irrational and unlawful.

Why the court *a quo* is wrong

63. This matter was not about investigating donations made to a private party-political campaign. This matter was about investigating the conduct of the President and donations made for his benefit and to enhance his chances of winning an internal party election.

64. The Public Protector was asked to investigate, among other things, whether the President (the Deputy President as he then was) improperly and in violation of the provisions of the Executive Ethics Code and the Code of Ethical Conduct and Disclosure 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.

65. In her Report, the Public Protector states that:

> **"5.2.16 In the Constitutional Court case between the Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others, the question whether the President knowingly or unwittingly exposed himself to "a situation involving the risk of a conflict between his official responsibilities and private interests" was exhaustively dealt with.**
>
> **5.2.17 The Public Protector's finding on the violation of section 96 was based on the self-evident reality that the features identified and unrelated to the security of the President, checked against the list of what the South African Police Service (SAPS) security experts themselves determined to be security features were installed because the people involved knew they were dealing with the President.**
>
> **5.2.18 When some government functionaries find themselves in that position, the inclination to want to please higher authority by doing more than is reasonably required or legally permissible or to accede to a gentle nudge by overzealous and ambitious senior officials to do "a little wrong" here and there, may be irresistible.**
>
> **5.2.19 However, a person in the position of the President should be alive to this reality and guard against its occurrence. Failure to do this may constitute an infringement of this provision. To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise.**
>
> **Public Protector's Touchstones:**
>
> **5.2.20 "State and Party: Blurred Lines": Report No. 1 2 of 2015/2016**
>
> **5.2.20.1 The issue here, inter alia, was about conflation of party political activities and the state events where sometimes members would be regarded or purporting to act in their personal capacities and therefore violating applicable provisions of the Executive Ethics Code due to the blurred lines between their responsibilities in circumstances where state and party' roles tend to overlap .**
>
> **Conclusion**

5.2.21 Deriving from the above legal prescripts and case law, it can be safely argued that the campaign pledges towards the CR1 7 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. President Ramaphosa's failure to disclose the said material benefits, including a donation from AGO constitutes a breach of the Code.

5.2.22 President Ramaphosa received "assistance from any source other than the member's party which benefits the member in his or her personal and private capacity" because as a presidential candidate for the ANC political party he received campaign contributions which benefitted him in his personal capacity. Being the Deputy President of the country and a Member of Parliament at the time, President Ramaphosa was therefore duty bound to declare financial benefit accruing to him from the campaign activities.

5.2.23 It cannot also be argued that the financial benefit did not accrue to President Ramaphosa personally merely because it was deposited in a trust account for the CR17 campaign.

5.2.24 I have evidence which indicates that some of the money collected through the CR 17 campaign trust account was transferred into the Cyril Ramaphosa Foundation account."[35]

66. The Public Protector further states that:

> **"…political parties are under no express legal obligation to disclose the sources of their private funding, at elections or other times. However, on the contrary different considerations apply when it comes to individual political party members who may be Members of Parliament and Cabinet Ministers at the same time who in their private capacity, obtain sponsorships, solicit gifts in whatever disguised form or obtain any other**
> **benefit of a material nature to aid them in their competition for party leadership position. Therefore they cannot seek refuge behind the party political activity label as they should comply with the applicable ethical codes of conduct governing their conduct as Members of Parliament or the Executive."**[36]

67. There is nothing irrational about these findings. The CR17 campaign was not a party-political campaign for the propagation of a party-political cause. It is common cause that the donations

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35 Record, p131-132

36 Record, p132-133, para 5.2.27

were benefits of a material nature to the President (the Deputy President as he then was) and were a form of sponsorship.

68. In **Public Protector v Mail & Guardian Ltd and Others** 2011 (4) SA 420 (SCA), the Supreme Court of Appeal held as follows:

> **"[9] The national legislation that is referred to in s 182 is the Public Protector Act 23 of 1994. The Act makes it clear that, while the functions of the Public Protector include those that are ordinarily associated with an ombudsman, they also go much beyond that. The Public Protector is not a passive adjudicator between citizens and the State, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring proaction in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than 'information that has come to his or her knowledge' of maladministration, malfeasance or impropriety in public life.**
>
> **[10] The Act repeats in greater detail the constitutional jurisdiction of the Public Protector over public bodies and functionaries, and it also extends that jurisdiction to include other persons and entities in certain circumstances. In broad terms the Public Protector may investigate, among other things, any alleged improper or dishonest conduct with respect to public money, any alleged offence created by specified sections of the Prevention and Combating of Corrupt Activities Act 12 of 2004, with respect to public money, and any alleged improper or unlawful receipt of improper advantage by a person as a result of conduct by various public entities or functionaries."**

69. In **Economic Freedom Fighters v Speaker, National Assembly and Others** 2016 (3) SA 580 (CC), this Honourable Court held that:

> **[49] Like other ch 9 institutions, the office of the Public Protector was created to 'strengthen constitutional democracy in the Republic'. To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice….**
>
> **[50] We learn from the sum total of ss 181 and 182 that the institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation. In appreciation of the high sensitivity and**

importance of its role, regard being had to the kind of complaints, institutions and personalities likely to be investigated, as with other ch 9 institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of state. And the Public Protector is one of those deserving of this constitutionally imposed assistance and protection. It is with this understanding that even the fact that the Public Protector was created, not by national legislation but by the supreme law, to strengthen our constitutional democracy, that its role and powers must be understood.

[51] The office of the Public Protector is a new institution — different from its predecessors like the 'Advocate General' or the 'Ombudsman' — and only when we became a constitutional democracy did it become the 'Public Protector'. That carefully selected nomenclature alone speaks volumes of the role meant to be fulfilled by the Public Protector. It is supposed to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice. And of course, the amendments to the Public Protector Act have since added unlawful enrichment and corruption to the list. Among those to be investigated by the Public Protector for alleged ethical breaches are the President and members of the executive at national and provincial levels."

70. We submit that the Public Protector had the necessary jurisdiction to investigate the President's conduct. We also submit that the conclusions by the court a quo in this respect are inconsistent with those set out in the Mail and Guardian case in the SCA regarding the approach to investigations by the Public Protector. In our respectful view, consistency is of utmost importance in the application of legal principles. They should not be fashioned to suit particular litigants and not others. This has the unfortunate effect of corrupting our law. At the time the payment was made, the President was the Deputy President and a member of Parliament. The Public Protector correctly found that the donations were benefits of a material nature to the President (the Deputy President as he then was). The evidence reveals that some monies collected through the CR17 campaign account were transferred into the Cyril Ramaphosa Foundation account. Such conduct was inconsistent with the office which he held as contemplated in section 96 of the Constitution and was duty-bound to declare such benefit.

71. The importance of openness, responsiveness, accountability and transparency was emphasised in the matter of **My Vote Counts NPC v Minister of Justice and Correctional Services and Another** 2018 (5) SA 380 (CC) at paras [48] – [51]. This Court held that:

> **"[48] The foundational values of our constitutional democracy — like openness, responsiveness, accountability and the realisation of the constitutional vision of building a united nation and improving the quality of life of all — could thus be at the mercy of unknown and even unscrupulous funders. For, there is indeed no free lunch. This is not to say that all funders are, without more, intent on furthering selfish or sectional interests at the expense of national interests. But some big political campaign funders, even in old democracies, have been exposed as being inclined 'to use money for improper purposes'. They reportedly tend to determine or influence, in a meaningful way, the policy direction to be pursued by those in whose political life or fortunes they 'invested' their resources. And when elected public office bearers are illegitimately dictated to, that is likely to poison the broader political landscape and governance, thus weakening or throttling our shared values and constitutional vision. Lack of transparency on private funding provides fertile and well-watered ground for corruption or the deception of voters.**
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> …
>
> **[51] Transparency in the area of the private funding of political parties and independent candidates helps in the detection or discouragement of improper influence and the fight against corruption. Both the African Union and the United Nations have come to this realisation and have taken appropriate steps to help inject transparency and root out corruption in relation to private funding. Politicians who use public office in the furtherance of the agendas of benefactors, at the expense of the best interests of all, are very likely to be found out where there is transparency. The recordal, preservation and disclosure of information on the private funding of political players will thus keep voters better equipped to make out the real interests these politicians are likely to serve."**

72. There is nothing irrational about the Public Protector's findings. The CR17 campaign was not a party-political campaign for the propagation of a party-political cause. We demonstrated to the court *a quo* that the contention that the CR 17 was a party project was simply false. The ANC as a party never confirmed such contention. In fact, the ANC's official position was condemnatory of the use of money to win internal party elections. The court a quo disregarded this fact. With respect, it was disingenuous for the President to contend that the focus of the

CR17 campaign was aimed at shaping the ANC into a more effective and trusted popular movement and that the sole focus of the campaign did not relate to his candidature as the next President. It is naïve and/or misleading in the extreme to contend that the CR17 campaign involved party funding for the ANC and not funding for the benefit of the President.

73. There is simply no evidence that the funding was donated to the ANC in order to assist it with the so-called renewal project. The President provided no evidence from the ANC confirming that such funding was indeed for the ANC as a party. He was specifically invited to do so. In fact, such submission was false. However, the court *a quo* was no perturbed by this false assertion.

74. Furthermore, the statement issued by the ANC in regard to the funding of the CR17 campaign makes no mention that such funding was indeed for the party and not the President or his individual campaign. The donations were for the advancement of his own individual political career. Nevertheless, monies were in fact paid to the Cyril Ramaphosa Foundation Trust Account. The President (the Deputy President as he then was) therefore exposed himself to a situation involving the risk of a conflict between his official responsibilities and his private interest.

E. THE ISSUE OF MONEY LAUNDERING

75. The following appears from the facts before the Public Protector.

76. The R500 000.00 payment was transferred from Mr Watson's personal account as part of a lump sum of R3 million into the account of Miotto Trading and eventually into the EFG2 trust account which is an attorney's trust account for the CR17 campaign.

77. Large sums of money were transferred by various benefactors into the EFG2 trust account for the CR17 campaign from where it was disbursed by the attorneys to several beneficiaries, including Ria Tenda Trust, Linked Environmental Services and Cyril Ramaphosa Foundation to name a few.

78. An amount of **R 1 91 482 227, 43** was deposited into the EFG2 ABSA trust account between 06 December 2 0 1 6 and 01 January 2018 and **R190 108 227, 00** was transferred out of this account in the same period.

79. Evidence from bank records reflect that an amount of **R388 544 340, 34** was deposited into ABSA Ria Tenda Trust account between 0 1 January 201 7 and 20 February 2019 whilst about **R388 518 464, 55** was transferred out of it in the same period.

80. Records also reflect that **R441 179 572, 43** was deposited into the FNB account of Linked Environmental Services between 1 5 December 20 1 6 and 13 February 201 9 and **R441 147 804, 83** was transferred out of this account in the same period.

81. About **R335 738, 42** was transferred from Linked Environmental Services FNB account into the Cyril Ramaphosa Foundation between 20 July 2017 and 26 March 2018.

82. Out of all of the donations received for the campaign, records reflect that there were three single largest donations of **R30 000 000, 00** on 9 March 2017, **R39 620 000, 00** on 28 September 2017 and **R51 506 000, 00** on the same date into the EFG2 ABSA Trust Account which came from the same donor.

83. The Public Protector expressed her concern in this regard and indicated that in her **"preliminary view such a scenario when looked at carefully, creates a situation of the risk of some sort of state capture by those donating these monies to the campaign"**.[37]

84. In her Report, the Public Protector states that it would have been remiss of her not to deal with this aspect of the complaint so as to be able to confirm or dispel with any such suspicion as referred to in the allegations brought before her by the complainants. She further stated that section 6(4)(c)(i) of the Public Protector Act provides 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.[38]

85. In the court *a* quo, the President relied on a selected paragraph of the affidavit deposed to by Adv Xolisile Khanyile of the FIC which states that *"…Muller informed him that he could find no indication of money laundering."* This was the high watermark of their case in this regard. However, the affidavit goes on further to clarify the issue as follows:

> **"I wish to emphasize that the FIC does not have investigative powers – it collects information, interprets and analyses it for the purposes of assisting the legislated entities who have such powers to conduct their own investigations. In this regard, the FIC's findings on the existence or not of the predicate offence are not conclusive as it did not investigate whether or not such predicate offence existed. The conclusions were solely based on the fact that the amount of R500 000.00 came from sources that appeared to be lawful."**[39]

86. It was not in dispute that a payment of R 500 000, 00 was made into the EFG2 trust account and that the payment passed through several intermediaries. The evidence reveals that the R500 000, 00 payment was transferred from Mr Watson's personal account as part of a lump

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37 Record, p155, para 5.3.10.67
38 Record, p157, para 5.3.10.73-5.3.10.74
39 Record, p601, para 87-88

sum of R 3 million into the account of Miotto Trading and eventually into the EFG2 trust account. Of concern to the Public Protector was that, the FIC in its report revealed details of transactions through various accounts for the benefit of the CR17 campaign. That these sums of money claimed to be *"donations"* created a situation of the risk of some sort of state capture by those donating such large sums of the money.

87. Ms Donne Nicol, the President's advisor, confirmed that over R 200 million was collected for the CR17 campaign. This was also confirmed by Mr James Motlatsi one of the CR17 campaign managers. In her affidavit, Ms Donne Nicol confirms that Edelstein Farber Grobbler Incorporated was indeed part of the CR17 campaign. In paragraph 4 of her affidavit she states that:

"On 22 November 2016, a trust account was opened in the name of Edelstein, Farber and Grobbler Incorporated, a law firm in Johannesburg, at ABSA Bank, referred to as account "EFG2". This account was to be used for the purpose of fundraising for the CR17 Campaign to advocate for the election of Cyril Ramaphosa as President of the ANC at the organisation's 54th National Conference in December 2017."

88. The court *a quo* held that:

88.1. The Public Protector extended her investigation on the money laundering issue beyond the single payment of R500 000.00 by Mr Watson;

88.2. The Public Protector made a finding that the President had involved himself in illegal activities sufficient to evoke a suspicion of money laundering;

88.3. In dealing with this issue the Public Protector completely failed to properly analyse and understand the facts and evidence at her disposal;

88.4. Had the Public Protector been diligent she would not have arrived at the conclusion that she did;

88.5. It is so that at the time that she conducted her investigations, the alleged corrupt activities of African Global Operations in state tenders had aired at the Commission into State Capture but this is immaterial. The evidence from Mr Watson was that he made the donation to the CR17 campaign as a long-standing member of the ANC;

88.6. The FIC could find no indication of money laundering;

88.7. Even if Mr Watson's sources of funding were suspect, the suspicion of money laundering might fall on Mr Watson but he was not the subject of her investigation;

88.8. It is unfathomable how the Public Protector thought the President might have harboured the requisite knowledge that the money in question is the proceeds of crime;

88.9. The Public Protector assumed that the monies donated to CR17 campaign constituted bribes or kickbacks, presumably for political kickbacks;

88.10. The Public Protector reasoning 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 expressed, ought not to be made without strong supporting evidence;

88.11. There was no evidence to support this very serious allegation;

88.12. The Public Protector displayed anything but an open and enquiring mind on the issue of money laundering;

88.13. The Public Protector made serious findings on unfounded assumptions; and

88.14. The Public Protector findings were irrational and reckless.

89. But, we submit with respect, if one looks at the totality of evidence and the large sums of money that passed through the account, it would have been remiss in the extreme for the Public Protector to turn a blind eye. The Public Protector duly conducted her investigation and considered and analysed, among other things, the information she had received from the banks. She conducted her investigation with an open mind and could not ignore the R500 000.00 passing through several accounts and passing through millions of Rands.

90. There was nothing irrational in her finding that there was merit to the allegation relating to the suspicion of money laundering and that this feature of the investigation should be dealt with in conjunction with the provisions of section 6(4)(c)(i) of the Public Protector Act. The Public Protector did not investigate whether there was in fact money laundering but referred the matter to the relevant authorities to do their work. It was perfectly rational and correct for the Public Protector to refer this issue for further action by the relevant authorities who may decide that there is no case to pursue.

F. THE REMEDIAL ACTION DOES NOT ENCROACH ON THE POWERS OF THE RELEVANT AUTHORITIES

91. In **Economic Freedom Fighters v Speaker, National Assembly and Others** at para [65] – [69] this Court held that:

> "**[65] Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the '(e)fficient, economic and effective use of resources [is] promoted', that accountability finds expression, but also that high standards of professional ethics are promoted and maintained. To achieve this requires a difference-making and responsive remedial action. Besides, one cannot really talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.**
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> **[66] The language, context and purpose of ss 181 and 182 of the Constitution give reliable pointers to the legal status or effect of the Public Protector's power to take remedial action. That the Public Protector is required to be independent and subject only to the Constitution and the law, to be impartial and exercise her powers and perform her functions without fear, favour or prejudice, is quite telling. And the fact that her investigative and remedial powers target even those in the throne room of executive raw power, is just as revealing. That the Constitution requires the Public Protector to be effective and identifies the need for her to be assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness, show just how potentially intrusive her investigative powers are and how deep the remedial powers are expected to cut.**
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> **[67] The obligation to assist and protect the Public Protector so as to ensure her dignity and effectiveness, is relevant to the enforcement of her remedial action. The Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly. The power to take remedial action that is so inconsequential that anybody against whom it is taken is free to ignore or second-guess, is irreconcilable with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy. The words 'take appropriate remedial action' do point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector to take. 'Take appropriate remedial action' and 'effectiveness' are operative words essential for the fulfilment of the Public Protector's constitutional mandate. Admittedly in a different context, this court said in *Fose*:**

'(A)n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.'

[68] Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the interim Constitution. It connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint. Remedial action must therefore be suitable and effective…

[69] But, what legal effect the appropriate remedial action has in a particular case depends on the nature of the issues under investigation and the findings made. As common sense and s 6 of the Public Protector Act suggest, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. And so might recommending litigation or a referral of the matter to the relevant public authority, or any other suitable recommendation, as the case might be. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow."

92. In the present case, it was incorrect for the court *a quo* to hold that the remedial action constitutes a usurpation of the powers and functions of the relevant authorities.

93. The relevant authorities have the statutory mandate to investigate and make a determination. Section 6(4)(c)(i) of the Public Protector specifically states that the Public Protector shall be competent to, at a time prior to, during or after an investigation if he/she is of the opinion that the facts disclose a commission of an offence bring the matter to the attention of the relevant authority charged with prosecutions.

94. Taking remedial action is not contingent upon a finding of impropriety or prejudice.

95. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made, and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to.[40]

96. In **President of the Republic of South Africa v Public Protector and Other 2018 (2) SA 100 (GP)** at para [82] – [84] the High Court held that:

> **"[82] As is evident from the aforegoing, the Public Protector's investigative powers are of the widest character. Section 182(1)*(c)* of the Constitution requires that the Public Protector provide an effective remedy for state misconduct. The Public Protector's role is to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice. In order to fulfil this role, the Public Protector is empowered to take binding remedial action that is capable of remedying the wrong in the particular circumstances. This must include directing or instructing members of the executive, including the President, to exercise powers entrusted to them under the Constitution where that is required to remedy the harm in question.**
>
> **[83] It ought to be borne in mind that the Public Protector regularly instructs members of the executive, including high-ranking government officials, to exercise discretionary powers assigned by law to them. In its answering affidavit the sixth respondent refers to some 20 examples where the Public Protector had instructed organs of state to perform functions that are ordinarily left to their discretion.**
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> **[84] In *EFF* the Constitutional Court emphasised that although the Public Protector's power to take appropriate remedial action is wide, it is certainly not unfettered. The remedial action is always open to judicial scrutiny. It is also not 'inflexible in its application, but situational'. What remedial action is appropriate in a particular case depends on the nature of the issues under investigation and the findings made. Remedial action is therefore context-specific."**

97. Paragraph 8.1.1 of the Public Protector's remedial action merely requires the Speaker to refer the matter to the Joint Committee for consideration in terms of paragraph 10 of the Code of

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40 **Economic Freedom Fighters v Speaker, National Assembly and Others** para [70]

Ethical Conduct and Disclosure. This paragraph provides for "Breaches and procedure for investigation". Paragraph 10.2 of the Code envisages that any person or body may submit a complaint or the Joint Committee itself may, acting on its own, consider any breach or alleged breach. The Public Protector did not usurp the functions of the Joint Committee. The violation of the Code of Ethical Conduct and Disclosure relates to the President's conduct when he was Deputy President. It is unfathomable how donations that were received by the President whilst he was the Deputy President and thus a member of the National Assembly, cannot be investigated by the Joint Committee because the President is no longer a member of the National Assembly. Accountability, responsiveness and openness is the founding values of our Constitution.

98. Paragraph 8.1.2 of the Public Protector's remedial action merely requires the Speaker to consider, within her discretion, whether there should be deliberations on the issues relating to the Public Protector's observations under paragraph 6.1 to 6.6 of the Report.

99. Paragraph 8.1.3 of the remedial action requires the Speaker to demand publication of all donations received by the President as he was bound to declare such financial interests at the time when he was Deputy President of the Republic as required in paragraph 9 of the Code of Ethical Conduct and Disclosure.

100. Paragraph 8.2 of the remedial action does not take away the autonomy of the NDPP to decide whether or not a particular criminal conduct should be prosecuted. The remedial action merely refers the matter to the NDPP to conduct further investigation.

101. Paragraph 8.3 of the remedial action merely requires the SAPS to investigate criminal conduct against Mr Gavin Watson.

102. The monitoring measures contained in paragraphs 9.1 to 9.3 of the Report are measures necessary to ensure that the remedial action is effective. It does not infringe the doctrine of separation of powers.

103. We submit that the remedial action is consistent and conforms with the findings made by this Honourable Court. It is consistent with the Constitution and the Public Protector Act.

G. AUDI ALTERAM PARTEM

104. In respect of *audi*, the court *a quo* found that:

104.1. The Public Protector did not give the President any forewarning about her remedial action;

104.2. She did not include the remedial action in the section 7(9) notice to the President;

104.3. Section 7(9) of the Public Protector Act does not expressly require the Pubic Protector to include her contemplated remedial action in the notice to a party under investigation but that does not mean that she 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, the Public Protector should afford them this opportunity;

104.4. In this case, the remedial action had potentially serious implications for the President;

104.5. The President's right to just administrative action placed an obligation on the Public Protector to forewarn the President and give him an opportunity to make representations.

105. Section 7(9)(a) of the Public Protector Act 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."**

106. We submit that what is required of the Public Protector in terms of section 7(9) of the Public Protector Act is to alert implicated persons who are the subject of her investigation about possible adverse findings. The Public Protector is not required to state what her remedial action will be. At the time the section 7(9) notice is issued, it would be premature for her to know what remedial action to take.

107. It is incorrect to hold that if the section 7(9) notice does not contain remedial action it falls short of the requirement of the provision. Had the Public Protector foreshadowed specific remedial action, she would have been accused of pre-judging the issue.

108. In any event, the Public Protector stated in the section 7(9)(a) notice that the remedial action could be a referral of the matter to the relevant authorities. It is also foreshadowed that the matter is best dealt with by the relevant authorities.

109. We submit with respect that the Public Protector does not have an added obligation to anticipate remedial action when issuing a section 7(9) notice.

H. PUNITIVE COSTS ORDER / PERSONAL COSTS ORDER IS UNJUSTIFIED

110. Punitive costs are to be awarded where there is fraudulent, dishonest, vexatious conduct in connection with litigation, and conduct that amounts to an abuse of court process. It should only be in relation to conduct that is clearly and extremely scandalous or objectionable in connection with litigation that these exceptional costs are awarded. Such conduct was not proven to exist in this case.

111. There was furthermore no evidence that the Public Protector did not act in good faith and in accordance with the law or that she was grossly negligent or acted improperly in flagrant disregard of constitutional norms in her investigation. The Public Protector's conduct in these proceedings and in the investigation does not warrant a punitive costs order.

112. The President in his answering affidavit in this Court now seeks a personal punitive costs order. We submit that there is no factual basis to support a costs order of this nature.[41]

I. CONCLUSION

113. There is no unlawful conduct. There is no violation of the constitutional mandate or statutory powers of the Public Protector. The investigation was procedurally fair. The investigation and Report are rational.

114. In determining whether this Court should dismiss this application and confirm the court *a quo's* declaration of invalidity and set aside the Report, we ask this Court to be mindful of what the

41 **Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others** (CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020) at [91]-[92]

SCA held in the matter of **Public Protector v Mail & Guardian Ltd and Others** 2011 (4) SA 420 (SCA) at paras [19]-[21]:

> **"[19] The Public Protector must not only discover the truth, but must also inspire confidence that the truth has been discovered. It is no less important for the public to be assured that there has been no malfeasance or impropriety in public life, if there has not been, as it is for malfeasance and impropriety to be exposed where it exists. There is no justification for saying to the public that it must simply accept that there has not been conduct of that kind, only because evidence has not been advanced that proves the contrary. Before the Public Protector assures the public that there has not been such conduct he or she must be sure that it has not occurred. And if corroboration is required before he or she can be sure then corroboration must necessarily be found. The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth.**
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> **[20] The second important observation I need to make is that we are not called upon to direct the Public Protector as to the manner in which an investigation is to be conducted, and I do not purport to do so in this judgment. A proper investigation might take as many forms as there are proper investigators. It is for the Public Protector to decide what is appropriate to each case, and not for this court to supplant that function. To the extent that I have suggested what might have been done in this case, it is only to assess what might be expected in the proper performance of the functions of the Public Protector, so as to determine the adequacy or otherwise of his investigation.**
>
> **[21] There is no dispute in this case that an investigation and report of the Public Protector is subject to review by a court. I do not find it necessary to pronounce upon the threshold that will need to be overcome before the work of the Public Protector will be set aside on review. It would be invidious for a court to mark the work of the Public Protector as if it were marking an academic essay. But I think there is nonetheless at least one feature of an investigation that must always exist — because it is one that is universal and indispensable to an investigation of any kind — which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in this case."**

115. We further submit that the issues raised in this matter raised important constitutional matters that justify the appeal to this Honourable Court. They relate to the constitutional functions of two of the most important constitutional beings in our democracy, i.e. the President and the

Public Protector. It is therefore in the interests of justice that this Honourable court determines this appeal of the High Court order.[42]

116. We ask that leave to appeal be granted and that the appeal be upheld with costs such costs to include the costs of two counsel.

MUZI SIKHAKHANE SC

FARZANAH KARACHI

PABASA, Sandton Chambers
14 August 2020

[42] **Pheko and Others v Ekurhuleni Metropolitan Municipality** 2012 (2) SA 598 (CC) para 29; See also s 172 of the Constitution

LIST OF AUTHORITIES

- Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)
- Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another 2010 (5) SA 457 (SCA)
- Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC)
- Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others (CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020)
- Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC)
- My Vote Counts NPC v Minister of Justice and Correctional Services and Another 2018 (5) SA 380 (CC)
- Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC)
- President of the Republic of South Africa v Public Protector and Other 2018 (2) SA 100 (GP)
- Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA)
- United Democratic Movement v Speaker, National Assembly and Others 2017 (5) SA 300 (CC)