

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CC Case No: 62/2020**

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

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**SECOND RESPONDENT'S HEADS OF ARGUMENT**

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## A. INTRODUCTION

1. The First Applicant ('the Public Protector'), the Second Applicant ('the EFF') and Third Applicant ('Amabhungane') seek leave to appeal directly to this Court against the judgment and orders of the Full Court of the Gauteng Division of the High Court, Pretoria (*per* Mlambo JP, Keightley and Matojane JJ) dated 10 March 2020 in an application under case number 55578/2019 brought by the present First Respondent ('the President') and the present Second Respondent ('the Speaker').<sup>1</sup>
2. The Speaker abides the decision of this Court on the applications for leave to appeal. If leave is granted, the Speaker opposes the appeal by the Public Protector to the extent and for the reasons indicated below.
3. At issue in this matter generally is the validity of the '*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*' by the Public Protector dated 19 July 2019 number 37 of 2019/20 ('the Report'), and the investigation by the Public Protector which preceded and culminated in the Report.

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<sup>1</sup> Public Protector's CCT Leave to Appeal, 14: 1437: 1; The EFF's CCT Conditional Leave to Appeal, 15: 1549: 1; AmaBhungane's CCT Conditional Leave to Appeal, Suppl Vol: 1655: 1. We refer to the bound appeal record as follows: the number before the first colon is the volume number; the number after that colon is the page number; and the number before the second colon, if any, is the paragraph number

4. In the High Court the Speaker applied for judicial review and the setting aside of the remedial action in paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the Report.<sup>2</sup> The President sought wider relief, including that the Report in its entirety be reviewed and set aside.<sup>3</sup>
5. The High Court granted the relief sought by the President, which thus included the relief sought by the Speaker. The relevant order reads:  
  
*‘The Public Protector’s Report number 37 of 2019/20 of 19 July 2019, including the findings and remedial orders in paragraphs 7.1, 7.2, 7.3, 8.1.1, 8.1.3, 8.2.1, 9.1, 9.3 and 9.4 (“the Report”), is reviewed, declared invalid and set aside.’<sup>4</sup>*
6. Although not specifically mentioned, it is clear both from the introductory part of this order (i.e. the part before ‘, including’) and from the relevant part of the High Court’s judgment<sup>5</sup> that it encompasses the remedial action in paragraphs 8.1.2 and 9.2 of the Report.
7. The High Court also ordered that the Public Protector pay the Speaker’s costs of suit on the party and party scale, including the costs of two counsel.<sup>6</sup>

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<sup>2</sup> Speaker’s Notice of Motion, 6: 633: 1

<sup>3</sup> President’s Notice of Motion, 1: 3: 6.1-6.3

<sup>4</sup> Order, 13: 1386: 2

<sup>5</sup> Judgment, 13: 1362-1366: 165-175

<sup>6</sup> Order, 13: 1386: 4

8. In this Court the Public Protector contends that the High Court erred in reviewing and setting aside the remedial action in paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the Report because that remedial action is consistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') and the Public Protector Act 23 of 1994 ('the Public Protector Act') and conforms with findings made by this Honourable Court in earlier litigation.<sup>7</sup>
9. The Speaker disagrees and consequently asks that if leave to appeal directly to this Court is granted, the Public Protector's appeal be dismissed insofar as it relates to the High Court's order reviewing and setting aside the remedial orders in those paragraphs of the Report.
10. In what follows we shall:
  - 10.1. briefly describe the key facts relevant to the relief sought by the Speaker in the High Court;
  - 10.2. briefly describe the relevant parts of the Executive Members' Ethics Act 82 of 1998 ('the Executive Ethics Act') and the Executive Ethics Code made in terms of section 2(1) of that Act;

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<sup>7</sup> Public Protector's CCT Leave to Appeal, 14: 1498-1500: 65-76; PP CCT Heads of Argument, 51-55: 91-103

- 10.3. briefly describe the relevant parts of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members ('the Parliamentary Ethics Code') adopted by the National Assembly ('NA') and National Council of Provinces ('NCOP');
- 10.4. set out the remarks in paragraph 6 of the Report and summarise the findings in paragraph 7 of the Report on which the remedial action in paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the Report is based;
- 10.5. set out the remedial action in paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the Report;
- 10.6. set out the applicable constitutional provisions and principles;
- 10.7. deal in turn with the Speaker's challenges to the remedial action, which in essence are that:
  - 10.7.1. the remedial action in paragraphs 8.1.1 and 8.1.3 of the Report (and the corresponding supervisory remedial action in paragraphs 9.1 and 9.3 thereof) is ineffective and, hence, inappropriate and inconsistent with section 182(1)(c) of the Constitution; and

10.7.2. the remedial action in paragraph 8.1.2 of the Report (and the corresponding supervisory remedial action in paragraph 9.2 thereof) infringes the rule or principle against vagueness and the principle of the separation of powers and, hence, is inappropriate and inconsistent with section 182(1)(c) of the Constitution.

## **B. KEY FACTS**

11. The facts relevant to the Speaker's challenges to the remedial action in paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the Report are common cause and most are set out in the Judgment. They are the following.
12. In the run-up to the election of the top leadership of the governing African National Congress ('ANC') political party in December 2017, Mr Matamela Cyril Ramaphosa and other ANC members formed and participated in a campaign to have him elected as the president of the ANC and like-minded members of the party elected to the other top leadership positions of the party. The campaign was called the CR17 campaign.<sup>8</sup>
13. At the time of the CR17 campaign, Mr Ramaphosa was a member of the NA and the Deputy President of South Africa and of the ANC.<sup>9</sup>

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<sup>8</sup> Judgment, 13: 1296: 2; 1341: 108

<sup>9</sup> Judgment, 13: 1296: 2

14. The CR17 campaign solicited and received funds from donors.<sup>10</sup>
15. The campaign resulted in Mr Ramaphosa being elected as the president of the ANC.<sup>11</sup>
16. On 15 February 2018 Mr Ramaphosa was elected by the NA as the President of South Africa and, following the 8 May 2019 general election, on 22 May 2019 he was re-elected by the NA as the President of South Africa.<sup>12</sup> Upon being so elected and re-elected, Mr Ramaphosa ceased to be a member of the NA in accordance with section 87 of the Constitution.
17. On 6 November 2018, while appearing in the NA to answer question from members in terms of NA Rule 140, President Ramaphosa gave an incorrect answer to a question from the leader of the Democratic Alliance political party, Mr Mmusi Maimane, about a payment of R500 000 made to the CR17 campaign by Mr Gavin Watson, the Chief Executive Officer African Global Operations ('AGO'), formally called Bosasa. President Ramaphosa said it was a payment by AGO to his son, Mr Andile Ramaphosa, for work he had performed for AGO.<sup>13</sup>

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<sup>10</sup> Judgment, 13: 1339-1340: 104

<sup>11</sup> Judgment, 13: 1296: 2

<sup>12</sup> Speaker's Founding Affidavit, 6: 650: 44.1.4

<sup>13</sup> Judgment, 13: 1300-1301: 9-11

18. On 14 November 2018 President Ramaphosa wrote to the Speaker explaining that he had subsequently found out his answer was wrong in that the payment had been made on behalf of Mr Watson to the CR17 campaign. The President added that he did not know about the payment at the time he answered Mr Maimane's question in the NA.<sup>14</sup>
19. These events led Mr Maimane and Mr Floyd Shivambu, a NA member representing the Economic Freedom Fighters ('EFF'), to lodge complaints with the Public Protector.<sup>15</sup>
20. The Public Protector investigated the complaints; and, as explained, she issued her report on it on 19 July 2019 (i.e. the Report).

### **C. THE EXECUTIVE ETHICS ACT AND CODE**

21. The Executive Members' Ethics Act 82 of 1998 ('the Executive Ethics Act') was enacted to provide for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of the Provincial Executive Councils, and to provide for related matters.
22. Section 2(1) of the Executive Ethics Act is the statutory provision in terms of which the Executive Ethics Code is made. It provides the Code is to be

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<sup>14</sup> Judgment, 13: 1301-1302: 11

<sup>15</sup> Judgment, 13: 1303-1304: 14-16

made by the President, by proclamation in the *Government Gazette*, after consulting Parliament. It further provides the Code shall prescribe standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.

23. The resulting Executive Ethics Code,<sup>16</sup> which was made on 28 July 2000, is applicable to members of the national Cabinet referred to in section 91(1) of the Constitution, including the President and the Deputy President, as well as Deputy Ministers and Members of the Provincial Executive Committees.
24. Paragraph 2.1 of the Code prescribes general standards, aimed at promoting an open, democratic and accountable government, to which these members of the national and provincial executive branch of government must adhere when performing their official responsibilities. These standards include fulfilling the obligations imposed upon them in good faith and in the best interest of good governance; and acting in all respects in a manner consistent with the integrity of their office or the government.<sup>17</sup>
25. Paragraph 2.3 of the Code provides, amongst other things, that members of the national and provincial executives may not wilfully mislead the

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<sup>16</sup> Proclamation R41 of 2000, published in *Government Gazette* 21399 of 28 July 2000

<sup>17</sup> Executive Ethics Code, 4: 418

legislature to which they are accountable; act in any way that is inconsistent with their position; use their position or information entrusted to them to enrich themselves or improperly benefit any other person; expose themselves to a situation involving the risk of a conflict of interests; or receive remuneration for any work or service other than for the performance of their executive functions.<sup>18</sup>

26. Paragraph 5.1 of the Code provides, amongst other things, that members of the national and provincial executives must disclose particulars of all their financial interests to the secretary or the Cabinet or the Provincial Executive Council concerned.<sup>19</sup> Paragraph 5.4 adds that Cabinet members who are members of the National Assembly and are required to disclose particulars of their financial interests in terms of the Rules of Parliament, comply with paragraph 5.1 by submitting to the Secretary a copy of those particulars on the same date as they are filed with the relevant parliamentary official and, in so far as those particulars do not meet the requirements of paragraph 6 of the Code, by filing with the Secretary to the Cabinet a statement containing the necessary additional disclosure.<sup>20</sup>

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<sup>18</sup> Executive Ethics Code, 4: 418-419

<sup>19</sup> Executive Ethics Code, 4: 420

<sup>20</sup> Executive Ethics Code, 4: 420

27. Paragraph 6 of the Code describes the financial interests which must be so disclosed. They include the following: direct financial sponsorships or assistance from any source other than the member's party which benefits the member in his or her personal and private capacity; gifts with a value of more than R350 or received from a single source with a cumulative value of more than R350 in any calendar year, other than gifts received from the member's spouse or permanent companion; and any other benefits of a material nature.<sup>21</sup>
28. Sections 3(1) and 4(1) of the Executive Ethics Act, read together, provide that the Public Protector must investigate, in accordance with section 3, an alleged breach of the code of ethics on receipt of, amongst others, a complaint by a member of the National Assembly against a Cabinet member. Section 3(4) adds that when conducting an investigation the Public Protector has all the powers vested in her by the Public Protector Act.

#### **D. THE PARLIAMENTARY ETHICS CODE**

29. The Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members ('the Parliamentary Ethics

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<sup>21</sup> Executive Ethics Code, 4: 420-421

Code’) is a schedule to the Joint Rules of the NA and the NCOP. It was adopted in the NA and the NCOP, respectively, on 29 and 31 July 2014.<sup>22</sup>

30. In line with the oath or solemn affirmation to be taken by all Members of Parliament before they may perform their functions as such (see item 4 of Schedule 2 to the Constitution), the Parliamentary Ethics Code outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct (see clause 2.1).<sup>23</sup> It applies to all Members of Parliament, including those who are members of the Executive (clause 3.1).<sup>24</sup>
31. The Parliamentary Ethics Code provides, amongst other things, that all members of the NA must *‘take decisions solely in terms of public interest and without regard to personal financial or other material benefits for themselves, their immediate family, their business partners, or their friends’* (clause 2.4.1),<sup>25</sup> *‘steadfastly avoid placing themselves under any financial or other obligation to any outside individual or organization where this creates a conflict or potential conflict of interest with his or her role as a*

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<sup>22</sup> Speaker’s Founding Affidavit, 646-647: 33

<sup>23</sup> Parliamentary Ethics Code, 6: 672

<sup>24</sup> Parliamentary Ethics Code, 6: 673

<sup>25</sup> Parliamentary Ethics Code, 6: 672

*Member*’ (clause 2.4.2),<sup>26</sup> ‘*declare private interests relating to public duties and resolve any conflict arising in a way that protects public interest*’ (clause 2.4.5)<sup>27</sup> and must ‘*discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests*’ (clause 4.1.4).<sup>28</sup>

32. Clause 5.2.1(ii) of the Parliamentary Ethics Code provides that a member ‘*must not accept any reward, benefit or gift from any person 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*’.<sup>29</sup>
33. Clause 9.2 of the Parliamentary Ethics Code provides that Members must disclose all their ‘*registrable interests*’ to the Registrar of Members’ Interests (a senior official on the staff of Parliament, appointed by the Speaker and the Chairperson of the NCOP).<sup>30</sup> These include the following kinds of financial interests, amongst others: direct financial sponsorships or assistance from non-party sources (clauses 9.3.5 and 9.8),<sup>31</sup> gifts in excess of R1 500 or from a single source which cumulatively exceed R1 500 in any

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<sup>26</sup> Parliamentary Ethics Code, 6: 673

<sup>27</sup> Parliamentary Ethics Code, 6: 673

<sup>28</sup> Parliamentary Ethics Code, 6: 674

<sup>29</sup> Parliamentary Ethics Code, 6: 675

<sup>30</sup> Parliamentary Ethics Code, 6: 678-679

<sup>31</sup> Parliamentary Ethics Code, 6: 679 & 681

calendar year (clauses 9.3.6 and 9.9)<sup>32</sup> and any other benefits of a material nature (clauses 9.3.7 and 9.10).<sup>33</sup>

34. A member of the NA breaches the Parliamentary Ethics Code when he or she, amongst other things, ‘*contravenes or fails to comply with the requirements of the provisions for disclosing interests*’ (clause 10.1.1.1) or contravenes clauses 4.1 or 5.2 (clause 10.1.1.3).<sup>34</sup>
35. The Joint Committee on Ethics and Members’ Interests as established by the Joint Rules of Parliament may consider complaints of alleged breaches of these provisions of the Parliamentary Ethics Code (clause 10.2.2.1) or acting on its own may consider any breach or alleged breach of the Code (clause 10.2.2.3).<sup>35</sup> If the Committee finds on the balance of probabilities that a member has breached a provision of the Code (clause 10.7.6.1),<sup>36</sup> then, depending on the provision breached, the Committee may recommend to the NA the imposition of sanctions including a reprimand in the NA or a fine of up to 30 days’ salary (clause 10.7.7.1) or recommend to the NA any greater sanction it deems appropriate, in which event the NA shall decide on the

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<sup>32</sup> Parliamentary Ethics Code, 6: 679 & 681

<sup>33</sup> Parliamentary Ethics Code, 6: 679 & 682

<sup>34</sup> Parliamentary Ethics Code, 6: 686

<sup>35</sup> Parliamentary Ethics Code, 6: 687

<sup>36</sup> Parliamentary Ethics Code, 6: 692

appropriate sanction to be imposed (clause 10.7.7.2).<sup>37</sup> Upon receipt of the Committee's report, the NA must accept or reject the recommendations or refer the matter back to the Committee for further consideration (clause 10.7.8.2).<sup>38</sup>

## **E. THE RELEVANT REMARKS AND FINDINGS IN THE REPORT**

36. We turn now to the Public Protector's remarks in paragraph 6 of the Report and her findings in paragraph 7 of the Report on which the remedial action in paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the Report is based.

37. We start with the relevant findings in paragraph 7 of the Report, which may be summarised as follows.

38. First, the Public Protector found that when answering Mr Maimane's question in the NA on 6 November 2018 President Ramaphosa deliberately misled the NA (para 7.1.1) and, in so doing, breached clause 2.3(a) of the Executive Ethics Code (para 7.1.3) and violated section 96(1) of the Constitution (para 7.1.4).<sup>39</sup>

39. Second, the Public Protector found that President Ramaphosa had improperly and in violation of the Executive Ethics Code and the

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<sup>37</sup> Parliamentary Ethics Code, 6: 693-694

<sup>38</sup> Parliamentary Ethics Code, 6: 694

<sup>39</sup> The Report, 2: 171-172

Parliamentary Ethics Code exposed himself to a situation involving the risk of a conflict between his official responsibilities and his private interests and used his position to enrich himself and his son through businesses owned by AGO (para 7.2.1).<sup>40</sup>

40. Third, the Public Protector found that President Ramaphosa had breached the Executive Ethics Code and the Parliamentary Ethics Code and violated section 96(1) of the Constitution by failing to declare the pledges or contributions towards the CR17 campaign (including the donation from AGO), which constituted direct financial sponsorships or assistance and benefitted him in his personal capacity (paras 7.2.2, 7.2.3, 7.2.5 and 7.2.6).<sup>41</sup>

41. Returning to paragraph 6 of the Report, which is headed ‘*Observations*’, it reads as follows:

*‘6.1 The rules of the National Assembly of 2016 clearly stipulate what processes and procedures need to be observed by Members of Parliament in connection with questions and answers they need to provide to the House during the parliamentary proceedings.*

*6.2 I have however, observed that despite the decorum of the House, some members seem not to make prior consideration of the questions*

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<sup>40</sup> The Report, 2: 172

<sup>41</sup> The Report, 2: 172-173

*they are required to prepare for and respond to orally, and/or do not pay sufficient attention to consider seriously the oral responses they need to provide to the House, despite being allowed sufficient time to do so prior to the sitting of Parliament.*

- 6.3 *I am attributing this observation to the number of EMEA [Executive Members Ethics Act] investigations I have had to deal with since taking office, all of which occur during the Question and Answer session, and emanate from the ill-considered oral responses provided by the Members of Parliament in which consequently, they would have been regarded to have misled the House, inadvertently or deliberately.*
- 6.4 *Even the EMEA matter that I have just investigated as lodged by Mr Maimane, was clearly not dealt with in accordance with the Rules of Parliament in that he was allowed to pose a follow-up question which was in no way related to the original question he had asked President Ramaphosa.*
- 6.5 *Furthermore the Rules of the National Assembly are also silent on whether the Members of Parliament are allowed to make subsequent written submissions in order to correct or clarify the oral replies they may have provided to the question posed to them during the Question and Answer session of the House.*

6.6 *I have also observed that it is against any potential manifestation of the capture of the state, which all South African state functionaries, including the President, should guard against exposing himself to a situation involving the risk of a conflict between their official responsibilities and private interests, which is in violation of section 96 of the Constitution.’<sup>42</sup>*

## **F. THE RELEVANT REMEDIAL ACTION IN THE REPORT**

42. There are three sets of remedial action in the Report relevant to the Speaker.

43. First, in paragraphs 8.1.1 and 9.1 of the Report the Public Protector directed that the Speaker:

43.1. *‘[w]ithin 30 working days of receipt of the Report, refer His Excellency President Ramaphosa’s violation of the Code of Ethical Conduct and Disclosure of Members’ Interests for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members’ Interests for consideration in terms of the provisions of paragraph 10 of the Code’ (para 8.1.1);<sup>43</sup> and*

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<sup>42</sup> The Report, 2: 170-171

<sup>43</sup> The Report, 2: 174

43.2. *‘within 30 working days of the issuing of this report, provide the Public Protector with the Implementation Plan indicating how the remedial action referred to in paragraph 8.1.1 of this report will be implemented’ (para 9.1).<sup>44</sup>*

44. Second, in paragraphs 8.1.2 and 9.2 of the Report the Public Protector directed that the Speaker:

44.1. *‘[w]ithin 30 working days of receipt of this Report, consider within her discretion, for deliberations by Members of Parliament in terms of the Rules of the National Assembly, issues relating to my observations under paragraphs 6.1 to 6.6 of this Report for possible review and amendment thereof’ (para 8.1.2);<sup>45</sup> and*

44.2. *‘within 30 working days of the issuing of this Report provide the Public Protector with the Implementation Plan indicating how the remedial action referred to in paragraph 8.1.2. of this Report will be implemented’ (para 9.2).<sup>46</sup>*

45. Third, in paragraphs 8.1.3 and 9.3 of the Report the Public Protector directed that the Speaker:

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<sup>44</sup> The Report, 2: 175

<sup>45</sup> The Report, 2: 174

<sup>46</sup> The Report, 2: 175

- 45.1. *‘demand publication of all donations received by President Ramaphosa because as he was the then Deputy President, he is bound to declare such financial interests into the Members’ registerable interests register in the spirit of accountability and transparency’ (para 8.1.3);*<sup>47</sup>
- 45.2. *‘within 30 working days of the issuing of this report provide the Public Protector with an Implementation Plan indicating how the remedial action referred to paragraph 8.1.3. of this Report will be implemented’ (para 9.3).*<sup>48</sup>

## **G. THE CONSTITUTIONAL PROVISIONS AND PRINCIPLES**

46. Section 182(1)(c) of the Constitution confers on the Public Protector the power *‘to take appropriate remedial action’*.
47. In *SABC v Democratic Alliance* the Supreme Court of Appeal (‘SCA’) said:
- ‘... the language, history and purpose of s 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide*

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<sup>47</sup> The Report, 2: 174

<sup>48</sup> The Report, 2: 175

*an effective remedy for state misconduct, which includes the power to determine the remedy and direct its implementation*'.<sup>49</sup>

48. The power to appropriate remedial action is elaborated upon in section 6(4) of the Public Protector Act to entail mediation, conciliation, negotiation and giving advice to a complainant regarding how best to secure an appropriate remedy; bringing what appears to be an offence to the attention of the prosecuting authority; referring a matter to an appropriate public body or authority affected by it or making suitable recommendations to remedy the complaint to the affected public body or authority; and resolving any complaint by '*any other means that may be expedient in the circumstances*'.<sup>50</sup>
49. In *EFF 1* this Court stressed that, to be '*appropriate*', any remedial action must be suitable and effective or practical.<sup>51</sup> A corollary of this principle is that '*[o]nly when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken*'.<sup>52</sup>

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<sup>49</sup> *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others (Corruption Watch as amicus curiae)* 2016 (2) SA 522 (SCA) para 52, our underlining

<sup>50</sup> Compare *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) ('*EFF 1*') para 61 n 61

<sup>51</sup> *EFF 1* paras 67-68, 70 and 71(e)

<sup>52</sup> *EFF 1* para 71(f)

50. Another relevant constitutional principle is the separation of powers. Its present relevance arises from sections 42(3), 55(2)(b)(ii), 89 and 102 of the Constitution, which together empower and oblige the NA, which is elected to represent the people and ensure government by the people under the Constitution, to hold the President accountable.<sup>53</sup>

51. As this Court explained in *EFF 1*:

*‘... Holding members of the Executive accountable is indeed a constitutional obligation specifically imposed on the National Assembly. ... Is holding the Executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the Executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation. To determine whether the National Assembly has fulfilled or breached its obligations will therefore entail a resolution of very crucial political issues. And it is an exercise that trenches sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly’s constitutional power or discretion.’<sup>54</sup>*

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<sup>53</sup> Compare *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) para 10

<sup>54</sup> *EFF 1* para 43, footnote omitted

52. In the case of the judiciary, it follows from this aspect of the separation of powers that:

*‘It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the “vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government”. Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the*

*same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.’<sup>55</sup>*

53. We submit this aspect of the principle of the separation of powers applies equally to the Public Protector when exercising her power to take appropriate remedial action; and, consequently, that remedial action which infringes the separation of powers by going outside the parameters described in this passage, is not appropriate.

54. A third relevant constitutional principle is the rule or principle against vagueness. As this Court explained in *Dawood*,<sup>56</sup> it is an important principle of the rule of law that rules be stated in a clear and accessible manner. Consequently, as this Court explained in *Hyundai*,<sup>57</sup> a legislator is under a duty to make legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. That this principle is not confined to legislation, but applies to all exercises of public power, appears from *Affordable Medicines Trust*, where this Court said:

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<sup>55</sup> *EFF 1* para 93, footnotes omitted

<sup>56</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 47

<sup>57</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 24

*‘The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly...’.*<sup>58</sup>

55. In *City Capital SA* the SCA was therefore right to emphasize that the principle against vagueness applies to orders made by our courts:

*‘Section 165(5) of the Constitution provides that an order or decision of a court binds all those to whom and organs of state to which it applies. This court has held that parties who are required to comply with court orders must know with clarity what is required of them; otherwise they risk being held in contempt of court. The doctrine of vagueness, which is founded on the rule of law, is a foundational value of our constitutional democracy. It*

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<sup>58</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 108, our underlining, footnotes omitted

*requires laws to be written in a clear manner, with reasonable certainty and not perfect lucidity. Orders of court must comply with this standard: vague provisions in a court order violate the rule of law.’<sup>59</sup>*

56. We submit that because remedial action made by the Public Protector in terms of section 182(1)(c) of the Constitution is binding and enforceable, it, too, must indicate with reasonable certainty to those who are bound by it what is required of them.

## **H. CHALLENGE TO THE REMEDIAL ACTION IN PARAGRAPHS 8.1.1 AND 8.1.3 OF THE REPORT**

57. It will be recalled that in paragraphs 8.1.1 and 8.1.3 of the Report the Public Protector directed that the Speaker, within 30 working days of receipt of the Report:

57.1. refer ‘*President Ramaphosa’s violation of the Code of Ethical Conduct and Disclosure of Members’ Interests for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members’ Interests for consideration in terms of the provisions of paragraph 10 of the Code*’ (para 8.1.1); and

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<sup>59</sup> *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 (SCA) para 35, footnotes omitted

- 57.2. *‘demand publication of all donations received by President Ramaphosa because as he was the then Deputy President, he is bound to declare such financial interests into the Members’ registerable interests register in the spirit of accountability and transparency’* (para 8.1.3).
58. As appears from paragraphs 39 and 40 above, the violations of the Parliamentary Ethics Code which the Public Protector found that President Ramaphosa had committed, referred to in paragraph 8.1.1 of the Report, related to the CR17 campaign period in the run-up to the ANC’s national leadership elections in December 2017.
59. Although President Ramaphosa was a member of the NA during that period, he ceased to be a member on 15 February 2018 when he was elected by the NA as the President of South Africa; and although President Ramaphosa became a member of the NA following the 8 May 2019 general election, he again ceased to be a member on 22 May 2019 when was re-elected by the NA as the President of South Africa, an office which he continues to hold to this day.
60. It follows that when the Public Protector issued the Report on 19 July 2019, President Ramaphosa was not a member of the NA; and that has remained the position ever since.

61. The significance of this is, first, that, with one exception,<sup>60</sup> which is not presently relevant, paragraph 10 of the Parliamentary Ethics Code, which governs the process of investigation of and the sanctions for breaches of the Code by the Joint Committee on Ethics and Members' Interests, does not apply to former members of the NA. As regards the process, see the repeated references to '*the Member*'. As regards the sanctions, see in particular the penalties listed in paragraph 10.7.7.1, none of which can be applied to former members of the NA.
62. It follows that the Public Protector's direction that the Speaker refer the violations of the Parliamentary Ethics Code she found President Ramaphosa had committed to the Joint Committee on Ethics and Members' Interests for consideration in terms of the provisions of paragraph 10 of the Code, is ineffective and, hence, not appropriate remedial action authorised by section 182(1)(c) of the Constitution.
63. Turning to the Public Protector's direction the Speaker '*demand publication ... into the Members' registrable interests register*' (i.e. disclose to the Registrar of Members' Interests in terms of paragraph 9 of the Parliamentary Ethics Code) '*of all donations received by President Ramaphosa*' (i.e. the pledges or contributions towards the CR17 campaign during 2017), for

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<sup>60</sup> Clauses 8.2 and 10.1.2, which deal with the abuse or improper use by former members of members' facilities or of any benefit provided to the former member by Parliament

essentially the same reasons this, too, is ineffective and, hence, not appropriate remedial action authorised by section 182(1)(c) of the Constitution. Assuming without conceding that when he was the Deputy President and a member of the NA President Ramaphosa was required by paragraph 9 of the Code to disclose to the Registrar all donations towards the CR17 campaign, he is no longer a member of the NA and, consequently, the Speaker has no authority to demand that he now disclose them to the Registrar.

64. We consequently respectfully submit that the High Court's reasoning in paragraphs 165-169 of its judgment and its decision in paragraphs 171 of its judgment to set aside paragraphs 8.1.1 and 8.1.3 of the Report, cannot be faulted.<sup>61</sup>
65. In relation to the relevant part of the Public Protector's finding summarised in paragraph 40 above, namely that President Ramaphosa had breached the Parliamentary Ethics Code by failing to declare the pledges or contributions towards the CR17 campaign (including the donation from AGO), there is a further reason why the Public Protector's direction is ineffective and, hence, inappropriate. It is that such pledges or contributions, made as they were to a broad-based grouping campaigning for the leadership of a political party,

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<sup>61</sup> Judgment, 13: 1362-1364: 165-169 & 171

of which President Ramaphosa was merely one of many members, do not constitute ‘*direct financial sponsorship or assistance from non-party sources*’ (as envisaged by clauses 9.3.5 and 9.8 of the Code); and they also do not constitute ‘*other benefits of a material nature*’ (as envisaged by clauses 9.3.7 and 9.10 of the Code), because if they did that would make a nonsense of the requirement in clause 9.8 of the Code that financial sponsorships or assistance be direct.<sup>62</sup>

## **I. CHALLENGE TO THE REMEDIAL ACTION IN PARAGRAPH 8.1.2 OF THE REPORT**

66. It will be recalled that in paragraph 8.1.2 of the Report the Public Protector directed that the Speaker, within 30 working days of receipt of the Report, ‘*consider within her discretion, for deliberations by Members of Parliament in terms of the Rules of the National Assembly, issues relating to my observations under paragraphs 6.1 to 6.6 of this Report for possible review and amendment thereof*’.

67. The first difficulty with this direction is it does not indicate with reasonable certainty either to the Speaker or the members of the NA what is required of them. What is meant by ‘*consider within her discretion, for deliberations by Members of Parliament in terms of the Rules of the National Assembly*’

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<sup>62</sup> Cf. Speaker’s Founding Affidavit, 6: 653: 45.1

is far from clear. Does this mean all the Speaker must do is apply her mind, and if she decides to do nothing, then so be it, or is something more required?

68. The difficulty of knowing what is required is compounded by the vague reference to ‘*issues relating to my observations under paragraphs 6.1 to 6.6 of this Report*’, as well as by the imprecise content of those paragraphs (which are quoted in paragraph 41 above).
69. The second difficulty with the direction in paragraph 8.1.2 of the Report is that, whatever its precise meaning, it undoubtedly encroaches upon one of the primary obligations imposed on the NA by the Constitution, namely its power and duty, conferred by section 57(1), to determine and control its internal arrangements, proceedings and procedures and make rules and orders concerning its business.
70. We submit there is no valid reason for this encroachment for the reasons given by the High Court in paragraph 175 of its judgment<sup>63</sup> and for the following further reasons.
71. It is not as though there is a *lacuna* in the NA’s control of its internal arrangements. On the contrary, NA rule 9 recognises that conventions and practices relating to the business of the NA may be established and varied

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<sup>63</sup> Judgment, 13: 1365-1366: 175

by agreement amongst political parties and parliamentary office-bearers, and reviewed from time to time as decided by the Rules Committee.<sup>64</sup>

72. Insofar as the Public Protector is concerned about President Ramaphosa's letter to the Speaker of 14 November 2018 correcting his oral reply in the NA on 6 November 2018 to Mr Maimane's question, more specifically a lack of clarity in the Rules of the NA as to whether members of the Executive may later correct or clarify in writing an oral answer given in the NA, we submit the High Court cannot be faulted for its findings that:

*'this was not foreshadowed in either complaint and it is remarkable that the Public Protector actually ventured this far. The fact of the matter is the Speaker received the President's subsequent written clarification without demur. That was the end of the matter. We fail to grasp what just cause the Public Protector had to deal with this aspect, especially as the Speaker had no issues with it.'*<sup>65</sup>

73. Further as regards the Public Protector's concern about *'whether members of Parliament are allowed to make subsequent written submissions in order to correct or clarify the oral replies they may have provided to the question posed to them'* (paragraph 6.5 of the Report), the evidence is there is an

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<sup>64</sup> Speaker's Founding Affidavit, 6: 652: 44.2.1

<sup>65</sup> Judgment, 13: 1365: 173

established practice in the NA that allows members of the Executive to supplement or clarify, in writing, oral replies given in the NA.<sup>66</sup>

## **J. CONCLUSION**

74. We accordingly submit the High Court was right to hold that paragraphs 8.1.1, 8.1.2 and 8.1.3 of the Report fell to be reviewed and set aside.

75. We further submit that, as a consequence, paragraphs 9.1, 9.2 and 9.3 of the Report fell to be reviewed and set aside as well.<sup>67</sup>

76. Consequently, we submit, if leave to appeal is granted to the Public Protector and/or the EFF, then, regardless of the outcome in this Court of the other issues raised by them, the High Court's order reviewing and setting aside the Report should be confirmed to the extent that it applies to paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 thereof.

77. We submit that, in line with the recent decision of this Court in line with *Gordhan*,<sup>68</sup> if this Court dismisses the appeal it should not order the EFF to pay the Speaker's costs (because the EFF is private party acting in the public interest by pursuing arguments of genuine constitutional concern and is

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<sup>66</sup> Speaker's Founding Affidavit, 6: 652: 44.2.3

<sup>67</sup> Judgment, 13: 1364: 172

<sup>68</sup> *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) BCLR 916 (CC) paras 83-85

consequently protected by the *Biowatch* principle). The Public Protector, on the other hand, has litigated in her official capacity and should therefore be ordered to pay the Speaker's costs (in that capacity), including the costs of two counsel.

78. The Speaker accordingly prays that, to the extent the appeals by the Public Protector and the EFF related to the High Court's order reviewing and setting aside paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the Report, they be dismissed, and that the Public Protector be ordered to pay the Speaker's costs, including the costs of two counsel.

**A M BREITENBACH SC**

**R MATSALA**

Counsel for the Second Respondent

Chambers, Cape Town

28 August 2020

## LIST OF AUTHORITIES

1. *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others (Corruption Watch as amicus curiae)* 2016 (2) SA 522 (SCA)
2. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC)\*\*\*
3. *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC)
4. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)
5. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC)
6. *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC)
7. *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 (SCA)
8. *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) BCLR 916 (CC)