CONSTITUTIONAL COURT OF SOUTH AFRICA

Public Protector v South African Reserve Bank

CCT 107/2018

Date of Hearing: 27 November 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 27 November 2018 at 10h00, the Constitutional Court will hear an application for leave to appeal, alternatively direct access, against a portion of the order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court had reviewed and set aside certain recommendations by the Public Protector in her report on the "Alleged Failure to Recover Misappropriated Funds" (Report) by the South African Reserve Bank (SARB). The High Court ordered the Public Protector to pay 15% of the costs in her personal capacity.

In the mid-1980s and through the creation of what became known as the "Bankorp lifeboat" the SARB, acting as lender of last resort, came to the rescue of Bankorp that was then experiencing financial difficulties. A series of back-to-back lending agreements were concluded between the SARB and Bankorp. There is a dispute about whether or not Bankorp paid back the money. Bankorp was later, together with other banks, subsumed into ABSA, with specific dates for the repayments of several loan amounts extended over almost a decade. In 1996, an investigative unit was established which concluded that the transaction was, in many respects, unlawful. This remained a concern to the public and a complaint was laid with the Public Protector in 2010. The matter was investigated and on 19 June 2017, the Public Protector issued a final report making certain findings and recommendations.

The SARB, ABSA, the Minister of Finance and the National Treasury instituted a review application in the High Court seeking the setting aside of certain paragraphs of the remedial action recommending the involvement of the Special Investigating Unit. The applicants alleged that these paragraphs were flawed in both the manner in which the investigation was conducted and the remedial action recommended. Before the release

of the final report, the Public Protector consulted with the Presidency and the State Security Agency but did not consult with the parties directly affected by the Report, that is, SARB and ABSA. They further submitted that the Public Protector was not forthcoming or honest during litigation about her failure to include these meetings. The applicants argued that this revealed that the Public Protector was biased in her findings.

The High Court set aside the implicated paragraphs and ordered the Public Protector, in her personal capacity, to pay 15% of the costs of the SARB on an attorney and client scale, including the costs of three counsel. This, the High Court held, was because there was a reasonable apprehension that the Public Protector was biased in her investigation and that she did not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice. The High Court held that the Public Protector failed to make full disclosure in various aspects of her investigation leading to the Report. The High Court also held that she also exceeded the bounds of her indemnification. An application for leave to appeal was refused by the High Court. Her application suffered a similar fate at the Supreme Court of Appeal.

In this Court, the Public Protector applies for direct access against the order of costs that she has to bear personally. In the alternative, she applies for leave to appeal. She argues that the High Court misdirected itself in its reasoning for granting the personal costs order against her. The Public Protector argues that the procedure followed in the High Court in seeking the costs order against was flawed and thus the costs order should not have been granted against her. Further that the Public Protector is similar to a judge and is similarly indemnified from costs in her personal capacity for action taken in her official role as a Public Protector.

The SARB opposes the application and seeks conditional leave to cross-appeal against that part of the High Court judgment that dismissed its application for a declaration that the Public Protector abused her office during the investigation that led to her Report. The SARB also seeks a punitive costs order against the Public Protector in her personal capacity in the proceedings before this Court.