IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 91139/16

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Applicant

and

OFFICE OF THE PUBLIC PROTECTOR	First Respondent
THE PUBLIC PROTECTOR	Second Respondent
ECONOMIC FREEDOM FIGHTERS	Third Respondent
THE UNITED DEMOCRATIC MOVEMENT	Fourth Respondent
THE CONGRESS OF THE PEOPLE	Fifth Respondent
THE DEMOCRATIC ALLIANCE	Sixth Respondent
MABEL PETRONELLA MENTOR	Seventh Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICA CONSTITUTION	Eighth Respondent

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PUBLIC PROTECTOR'S HEADS OF ARGUMENT

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Introduction

1 This application concerns the legality of paragraph 8.4 of the remedial action contained in the Public Protector's State of Capture Report ("the Report").[1]

2 The Report is the result of the Public Protector's investigation into complaints of alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of state owned entities resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses.[2]

3 Paragraph 8.4 of the remedial action says:

> "*The President to appoint, within 30 days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President.*"

4 The President seeks to set aside this element of the Public Protector's remedial action.

5 The Public Protector opposes the President's challenge to the remedial action. Her case is that:

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[1] In terms of an amendment to the notice of motion, the President also seeks to set aside paragraphs 8.7 and 8.8 of the Report, which relate to the powers of the commission and the timeframes within which it is to complete its work.

[2] Report, Executive Summary, page 4, para (ii).

5.1 It will ordinarily be impermissible for the Public Protector to require the President to appoint a commission of inquiry, or to determine the mode of operation of a commission of inquiry.

5.2 However, the Constitution confers on the Public Protector the power to take effective remedial action to remedy the complaints that come before her. This power must be reconciled with the fact that the Constitution confers the responsibility to appoint a commission of inquiry on the President alone.

5.3 In the extraordinary circumstances of this case, the President's responsibility to appoint a commission of inquiry must be construed as a power coupled with a duty.

5.4 The common cause factual circumstances which compel this conclusion are that:

5.4.1 First, the President is conflicted from deciding whether to appoint a judicial commission of inquiry; and

5.4.2 Second, a judicial commission is the only effective remedial action that can be taken in the circumstances of this case because the Public Protector lacks the resources to conclude the second stage of her investigation.

5.5 If this Court does not adopt the approach set out above and sets aside the remedial action, it should order, as part of the just and equitable remedy or pursuant to the counter-application brought by the Public Protector, that the President (in his capacity as head of the national

executive) ensure that the Public Protector has sufficient resources to conduct the second phase of the investigation.[3]

Common cause facts

6 There are no material disputes of fact in this application. The application accordingly falls to be decided on the common cause facts.

7 We submit that the following common cause facts form the critical factual background against which both the review application and the Public Protector's counterapplication must be decided:

7.1 The allegations of state capture contained in the Report are cause for serious concern and cause loss of public confidence in the country's future, including by international investors.[4]

7.2 It is urgent and in the public interest that allegations of state capture and the evidence set out in the Report be fully investigated and determined.[5]

7.3 The President has already taken a decision that a commission of inquiry into allegations of state capture must be established because "*the issues raised in the Public Protector's Report are of sufficient public interest*".[6]

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[3] Public Protector AA p76 paras 37-39.

[4] Public Protector's AA p 67 para 15

[5] Public Protector's AA p 59 para 7.2; not denied by the President in reply

[6] President's RA p 433 para 9.3

7.4 The President is conflicted from exercising his power to appoint a commission of inquiry because he and his family are personally implicated in the Report.[7]

7.5 The office of the Public Protector cannot conduct the second phase of the investigation due to a lack of resources.[8] The Public Protector's existing staff members are over-stretched in dealing with their case load. They have no capacity to conduct an investigation on the scale required.[9] The Public Protector estimates that the total financial resources required for her office to be able to conduct the second stage of the investigation is approximately R31m.[10]

7.6 It is presently impossible for the Public Protector to conduct the second stage of the investigation due to a lack of resources.[11]

7.7 The second phase of the investigation must be conducted to get to the bottom of the serious allegations contained in the Report.[12]

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7 Public Protector's AA pp 60-70 para 23; not denied by the President in reply

8 Public Protector's AA p 71 para 27; not denied by the President in reply

9 Public Protector's AA p 72 para 27.3; not denied by the President in reply

10 Public Protector's AA p 73 para 27.6; not denied by the President in reply

11 Public Protector's AA, p78 para 43.3, not denied by the President in reply

12 Public Protector's AA, p77 para 43.2, not denied by the President in reply

The content of the Report

8 The Public Protector issued the Report in terms of section 182(1)(b) of the Constitution, section 3(1) of the Executive Members Ethics Act 82 of 1998 ("Ethics Act") and section 8(1) of the Public Protector Act 23 of 1994.[13]

9 The Report does not make final findings of fact. Instead, it contemplates that the second phase of the Public Protector's investigation will be conducted by a judicial commission of inquiry to be appointed by the President.[14]

9.1 The Report says that the investigation has been "*divided into two phases*" in order "*to accommodate the time and resource limitations by addressing the pressing questions threatening to erode public trust in the Executive and SOEs while mapping the process for the second and final phase of the investigation.*"[15]

9.2 For example, the Report says that the issue of whether any state functionary or any other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta-linked companies or persons "*will be attended to further in the next phase of the investigation*."[16]

9.3 The issues that are expressly reserved for the next phase of the investigation are:

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13 Report, Executive Summary, page 4, para (i).

14 Public Protector AA p62 para 12.

15 Report pp11-12.

16 Report p351 para 7.10.

9.3.1 "*Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons.*"[17]

9.3.2 "*I decided to investigate contracts awarded by Transnet to Regiments Capital and Trillian. The investigation into Transnet will however form part of the next phase of the investigation*."[18]

9.3.3 "*I have decided to investigate contracts concluded between Denel and VR Laser Services as referenced in the above media article. The investigation into Denel will however form part of the next phase of the investigation*."[19]

9.3.4 "*I have decided to investigate the contract awarded by SAA to the New Age newspaper for circulation to its customers. The investigation into SAA will however form part of the next phase of the investigation*."[20]

9.3.5 "*I have decided to investigate any contract(s) awarded to the New Age newspaper and/or TNA Media by the SABC. The investigation into SABC will however form part of the next phase of the investigation*."[21]

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[17] Report at 23.

[18] Report at 59.

[19] Report at 66.

[20] Report at 67.

[21] Report at 68.

9.3.6 "*The conduct of the Bank of Baroda in relation to the purchase of all shares in OCH by Tegeta and the rehabilitation fund has not been evaluated. This aspect will form part of the next phase of the investigation*."[22]

9.3.7 "*Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons.*"[23]

10 The Report concludes with the remedial action taken by the Public Protector.[24] The following aspects of the remedial action are relevant:

10.1 The Public Protector says that it was not possible for her to investigate all the issues before her, due to a lack of resources:

> *"The investigation has proven that the extent of issues it needs to traverse and resources necessary to execute it is incapable of being executed fully by the Public Protector. This was foreshadowed at the commencement of the investigation when the Public Protector wrote to government requesting for resources for a special investigation similar to a commission of inquiry overseen by the Public Protector. This investigation has been hamstrung by the late release which caused the investigation to commence later than planned. The situation was compounded by the inadequacy of the allocated funds (R1.5 Million)."*[25]

10.2 The Public Protector refers to the fact that the President has the constitutional power to appoint judicial commissions of enquiry, and

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[22] Report at 337.

[23] Report at 337 and 351.

[24] Report p353ff, para 8.

[25] Report p353, para 8.2.

alludes to a potential conflict of interest that would arise were he to consider doing so himself.[26]

10.3 The Public Protector requires the President to appoint, within 30 days, a commission of enquiry, headed by a judge selected by the Chief Justice.[27]

10.4 The Public Protector then sets out certain requirements for the conduct of the commission:

10.4.1 The National Treasury is to ensure that the commission is adequately resourced.[28]

10.4.2 The judge appointed to head the commission must be given the power to appoint his or her own staff.[29]

10.4.3 The judge must be given the power to "*investigate all the issues using the record of this investigation and the report as a starting point*".[30]

10.4.4 The commission is to be given powers of evidence collection that are no less than those of the Public Protector.[31]

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[26] Report p353, para 8.3.

[27] Report p353, para 8.4.

[28] Report p354, para 8.5.

[29] Report p354, para 8.6.

[30] Report p354, para 8.6.

[31] Report p354, para 8.7.

10.4.5 The commission is to complete its task and present its report with findings and recommendations to the President within 180 days.[32]

10.4.6 The President is to submit a copy with an indication of his implementation of the commission's recommendations to Parliament within 14 days of releasing the report.[33]

10.5 The Public Protector will monitor the implementation of the remedial action.[34]

The President's power to appoint a commission

11 Section 84 of the Constitution entrusts the responsibility for appointing a commission of inquiry to the President. It provides, in relevant part:

> *"(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.*
>
> *(2) The President is responsible for—*
>
> *. . .*
>
> *(f) appointing commissions of inquiry."*

12 Similarly, section 1 of the Commissions Act 8 of 1947 ("Commissions Act") provides for a commission of inquiry to be appointed by the President. Section 1 of the Commissions Act provides:

> *"Whenever the Governor-General [President] has, before or after the commencement of this Act, appointed a commission*

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[32] Report p354, para 8.8.

[33] Report p354, para 8.8.

[34] Report p355, para 9.1.

> *(hereinafter referred to as a 'commission') for the purpose of investigating a matter of public concern. . ."*

13 In interpreting these two provisions the Constitutional Court has held:

> "*It is clear also that section 84(2)(f) of the Constitution confers the power to appoint commissions of inquiry upon the President alone. The Commissions Act also confers the power to declare its provisions applicable to a commission of inquiry upon the President alone."* [35]

13.1 The Constitutional Court categorised the power to appoint a commission of inquiry as "*an original constitutional power vested in [the President] alone*" which *"[n]either the subject matter, nor the exercise of [the] power [are] administrative in character*".[36]

13.2 The power is "*closely related to policy*".[37]

13.3 This power is by nature incapable of delegation.[38]

14 Although the power to appoint a commission of inquiry is not administrative in nature, it is not unconstrained:

> *"The constraints upon the President when exercising powers under s 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; until 30 April 1999 the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power. They arise*

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[35] President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (SARFU) at para 38.

[36] SARFU at para 147.

[37] SARFU at para 146.

[38] SARFU at para 43.

> *from provisions of the Constitution other than the administrative justice clause."* [39]

15 The power to appoint a commission of inquiry is accordingly one that lies with the President alone.

16 There may nonetheless be circumstances in which the President is legally required to appoint a commission. If so, the power to appoint a commission may amount to a power coupled with a duty.

17 Our courts have often interpreted provisions that confer a discretion as providing an authorisation to exercise a power coupled with a duty to use it if the requisite circumstances are present. This is sometimes necessary to render the conferral of the discretion consistent with the Constitution:

17.1 In *Van Rooyen*, a statutory provision said that the Minister of Justice "may" confirm a recommendation that a magistrate be suspended in certain circumstances.

17.2 The Constitutional Court held that this would be inconsistent with judicial independence if it meant that the Minister could decline to do so and instead impose lesser penalties on the magistrate. Chaskalson CJ held that:

> *"The first question to consider is whether it is possible to read the Act and the regulations in a way that would be consistent with judicial independence. As far as the Act is concerned, if 'may' in [the] s 13(3)(aA) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him*

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[39] SARFU at para 148.

any discretion not to do so. In my view this is the constitutional construction to be given to s 13(3)(aA)."[40]

17.3 The Constitutional Court cited Wade and Forsyth as saying:

"The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case." [41]

17.4 Several other judgments have adopted the same approach.[42]

The Public Protector's remedial action power

18 The constitutional status of the Public Protector is entrenched in Section 181 of the Constitution. Section 181 of the Constitution provides:

"(1) The following state institutions strengthen constitutional democracy in the Republic:

(a) The Public Protector.

. . .

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

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[40] Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) at paras 180-182.

[41] Van Rooyen fn 163, citing Administrative Law 8 ed (Oxford University Press 2000) at 239.

[42] South African Police Service v Public Servants' Association 2007 (3) SA 521 (CC) at paras 14 – 16; Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) at para 73; Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A) at 937; Commissioner for Inland Revenue v I H B King; Commissioner for Inland Revenue v A H King 1947 (2) SA 196 (A) at 209 - 210 and South African Railways and Harbours v New Silverton Estate Ltd 1946 AD 830 at 842.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

19 Section 182(1)(c) of the Constitution empowers the Public Protector "*to take appropriate remedial action.*"

20 The leading cases on the nature of the Public Protector's remedial action powers are the Constitutional Court judgment in *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) ("EFF") and the SCA's judgment in *SABC v DA* 2016 (2) SA 522 (SCA**)**. The relevant principles are as follows:

20.1 The Public Protector's role and powers must be understood in the context of her constitutional status. The Constitutional Court held that:

> *"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 roles and powers must be understood."*[43]

20.2 The Public Protector 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*". She is an "*invaluable constitutional gift to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs for the betterment of good governance*".[44]

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[43] EFF at para 50.

[44] EFF at paras 51-2.

20.3 The Public Protector's powers are "*very wide powers that leave no level of government power above scrutiny, coincidental 'embarrassment' and censure*".[45]

20.4 Critically, the Constitution requires that the Public Protector's powers be an effective tool to remedy state misconduct:

20.4.1 The Public Protector's powers must be effectual if she is to be capable of performing her constitutional function.[46] Her effectiveness is constitutionally guaranteed as an "*indispensable requirement for the proper execution of [her] mandate.*"[47]

20.4.2 "*The Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation*."[48]

20.4.3 The Constitutional Court characterised the Public Protector's constitutional power to "*take appropriate remedial action*" as—

> *"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. For it to be effective*

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45 EFF at para 53.

46 EFF para 49

47 EFF para 50

48 SABC v DA 2016 (2) SA 522 (SCA**)** at para 52.

in addressing the investigated complaint, it often has to be binding."[49]

20.4.4 The Constitutional Court held that "*one cannot really talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way*."[50]

20.4.5 "'*Appropriate' means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case*."[51]

20.5 In the light of *Fose*[52], "*appropriate*" remedial action means "*effective*" remedial action.[53]

20.6 However, the Public Protector's remedial action will not necessarily be binding. This depends on the nature of the issues being investigated and the findings made:[54]

"Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It needs to be restated that, 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.

In sum, the Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. Moreover, the remedial action is always open to judicial scrutiny. It is also not inflexible in its application, but situational. What remedial action to take in a

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49 EFF at para 68.

50 EFF at para 65

51 EFF at para 71

52 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

53 Economic Freedom Fighters above n 9 at para 67.

54 EFF at para 69.

> *particular case, will be informed by the subject-matter of the investigation and the type of findings made."*[55]

21 These judgments establish that any remedial action adopted by the Public Protector must be effective, in the sense of being capable of remedying the complaint before the Public Protector.

An exceptional case

22 It is accordingly clear that there is an apparent conflict in this matter, between the President's constitutional power to appoint a commission; and the constitutional requirement that any remedial action issued by the Public Protector must be effective to remedy the complaint before her. This Court is required to reconcile this apparent tension.

23 We accept that it is almost always constitutionally impermissible for the Public Protector to require the President to appoint a commission of inquiry, or to determine the mode of operation of a judicial commission of inquiry. This is for the following reasons:

23.1 The Constitution confers the power to appoint commissions of inquiry on the President alone.

23.2 The power to appoint commissions of inquiry is an original constitutional power which lies close to the heartland of executive power.

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[55] EFF at paras 70-1.

23.3 The appointment of a commission of inquiry by the President will not ordinarily be necessary to render the Public Protector's remedial action effective.

23.4 There are accordingly separation of powers reasons why the Public Protector cannot ordinarily require the President to appoint a commission of inquiry.

24 However, the circumstances of this matter are extraordinary. We submit that the circumstances render the remedial action permissible under the Constitution. This can be done by construing the President's discretion to appoint a commission as a power coupled with a duty in these circumstances.

25 There are two facts that require this approach. They are that:

25.1 The Public Protector's report implicates the President personally. The President is genuinely conflicted, and is accordingly precluded by the Constitution from exercising his power to appoint a commission.

25.2 Second, the only effective remedy in the circumstances is a commission of inquiry.

The President is conflicted

26 Section 96 of the Constitution prohibits the President from exposing himself to the risk of a conflict between his official responsibilities and private interests.

26.1 Section 96 of the Constitution provides that Members of Cabinet[56] "*may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests*".

26.2 The standard in section 96 of the Constitution is a low one. All that needs to be proven is a risk of a conflict of interest. This risk need not even materialise.[57]

27 Common conflicts include:

27.1 a financial interest;[58] and

27.2 a personal interest, such as a relationship, friendship or enmity.[59]

28 The President's official responsibility to determine whether to appoint a commission of inquiry into the issues raised in the Report conflicts with his personal interests, as he is personally implicated in the report. It is apparent from the title of the Report and the observations at paragraph 8.3 that there is indeed a risk that the President has a financial or personal interest in the matter. This is clear from the following:

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[56] Section 91(1) of the Constitution says that: "The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers."

[57] Economic Freedom Fighters above n 9 at para 9.

[58] Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape 2001 (4) SA 120 (Ck) at para 33.

[59] SARFU at para 7.

28.1 The complaints forming the basis of the investigation directly implicated the President.[60]

28.2 All seven issues concerning the alleged breach of the Ethics Act[61] identified as relevant for investigation directly implicated the President.[62]

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[60] "State of Capture" Report No: 6 of 2016/17 ("Report") at 7. Mr. Musi Maimane stated in his complaint:

> "It is our contention that President Jacob Zuma may have breached the Executive Ethics Code by (i) exposing himself to any situation involving the risk of a conflict between their official responsibilities and their private interests; (ii) acted in a way that is inconsistent with his position and (iii) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

See also the Public Protector's analysis of the complaint at page 33 provides:

> "The complaint relates to allegations of improper conduct in state affairs and unethical conduct by the President of the Republic, and accordingly falls within my ambit as the Public Protector."

[61] 82 of 1998.

[62] Report at 10. The following issues implicated the President:

"(a) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of removal and appointment of the Minister of Finance in December 2015;

(b) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to engage or be involved in the process of removal and appointing of various members of the Cabinet;

(c) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of appointing members of Boards of Directors of SOEs;

(d) Whether President Zuma has enabled or turned a blind eye, in violation of the Executive Ethics Code, to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointments to quid pro quo conditions;

(e) Whether President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies;

(f) Whether President Zuma improperly and in violation of the Executive Ethics Code exposed himself to any situation involving the risk of conflict between his official duties and his private interest or used his position or information entrusted to him to enrich himself and or enabled businesses owned by the Gupta family and his son to be given preferential treatment in the award of state contracts, business financing and trading licences; and

(g) Whether anyone was prejudiced by the conduct of President Zuma."

28.3 The investigative process itself was conducted on the basis of the President being conflicted.[63]

28.4 The Public Protector sent the President a section 7(9) notice.[64]

28.5 The Public Protector observed on numerous grounds that the President may have violated his obligations to avoid a conflict of interest under section 2.3 of the Executive Ethics Code.[65]

28.6 The Public Protector observed on numerous grounds that the President may not have acted in line with his duty of professional ethics under section 195 of the Constitution.[66]

28.7 The Public Protector observed that the President may not have acted in line with his duty to not act when faced with a conflict of interest under section 96 of the Constitution.[67]

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63 Report at 13:

> "Regarding the standard that was expected of President Zuma as the President of South Africa and the sole custodian of Executive Authority of the republic, the provisions of sections 96, 195 and 237 of the Constitution were taken into account together with the provisions of the Executive Ethics Code, Section 6 of the Public Protector Act and general principles of good governance as outlined below."

64 Report at 80. Section 7(9) of the Public Protector Act provides:

> "(9)(a) 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."

65 Report at 344-6.

66 Report at 344-6.

67 Report at 346.

29 On the peculiar facts of this matter, therefore, the President may not decide whether or not to exercise his constitutional power to appoint a judicial commission of inquiry. Nor can he determine any aspects of its functioning, such as who is to chair the commission or its terms of reference. Any attempt to do so would bring his personal and official interests into conflict, and is accordingly constitutionally prohibited by section 96 of the Constitution.

A commission is the only effective remedy

30 The Report gives the following reasons for the Public Protector's conclusion that only a commission of inquiry can get to the bottom of the matters forming the subject of the investigation:

30.1 The investigation, being conducted pursuant to section 3 of the Ethics Act, is by nature a high-priority one.[68]

30.2 The preliminary investigation alone demanded additional resources of R1.5 million so that it could be "*[handled] like a Commission of Inquiry*".[69]

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[68] Report at 9:

> "Given that the Executive Members' Ethics Act requires investigations under it to be concluded within 30 days, the investigation was given priority. It was also given priority because of the allegations having the potential of undermining public trust in the Executive and SOEs."

[69] Report at 9:

> "Additional resources were requested from government with a view to handling it like a Commission of Inquiry and R1.5 million was allocated by the Department of Justice and Correctional Services for this purpose."

30.3 The scope of the investigation warranted it being divided into two phases, of which only the first features in the Report.[70]

30.4 The investigation has proven that the extent of issues it needs to traverse and resources necessary to execute it is incapable of being executed fully by the Public Protector.[71]

30.5 The commission's mandate to "*complete its task and to present the report with findings and recommendations to the President within 180 days*"[72] is in line with the investigative framework set out in section 3 of the Ethics Act.[73]

31 In essence, the Report says that it is not possible for the office of the Public Protector to finalise the investigation due to a lack of resources.

32 Moreover, it is common cause in these proceedings that the Public Protector lacks the resources to finalise the investigation. [74] The Public Protector's existing staff members are over-stretched in dealing with their case load. They

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[70] Report at 12:

> "I must also indicate that the investigation has been divided into two phases and that the first phase of the investigation did not touch on the award of licenses to the Gupta family and superficially touched on state financing of the Gupta-Zuma business while only selecting a few state contracts. The division of work was to accommodate the time and resource limitations by addressing the pressing questions threatening to erode public trust in the Executive and SOEs while mapping the process for the second and final phase of the investigation."

[71] Report at 24.

[72] Report at 25.

[73] Section 3(2)(a) of the Ethics Act provides that:

> "The Public Protector must submit a Report on the alleged breach of the code of ethics within 30 days of receipt of the complaint to the President, if the complaint is against a Cabinet Member, Premier or Deputy Minister."

[74] Public Protector's AA p 71 para 27; not denied by the President in reply

have no capacity to investigate on the scale required.[75] The Public Protector estimates that the total financial resources required for her office to be able to conduct the second stage of the investigation is approximately R31m.[76]

33 There is accordingly a tension between section 84(2)(f) of the Constitution (which gives the President the power to appoint a commission) and the remedial action taken by the Public Protector in this case (which remedial action is required to be effective and appropriate by section 182(1)(c) of the Constitution.

34 We submit that this Court will seek to avoid this apparent conflict to the extent possible:

34.1 The Constitutional Court has held that provisions "*are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either. There is no principial or practical reason why such provisions cannot operate together harmoniously in the same field*."[77]

34.2 Where there is an apparent conflict between provisions of the Constitution, the courts are enjoined to attempt to resolve the conflict in a way that gives best effect to both provisions.

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[75] Public Protector's AA p 72 para 27.3; not denied by the President in reply

[76] Public Protector's AA p 73 para 27.6; not denied by the President in reply

[77] Ex Parte Speaker Of The Kwazulu-Natal Provincial Legislature: In Re Certification Of The Constitution Of The Province Of Kwazulu-Natal, 1996 1996 (4) SA 1098 (CC) at para 24

34.3 The Constitutional Court has repeatedly held that courts are obliged "*to construe the sections of the Constitution in a manner that strikes harmony between them and gives effect to each and every section*."[78]

34.4 It has held that:

> *"A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give effect to all of them."* [79]

35 We submit that interpreting the President's discretion as a power coupled with a duty resolves the apparent conflict:

35.1 The President is precluded from acting due to his conflict of interest, and the only genuinely effective remedial action is the appointment of a judicial commission of inquiry by the President.

35.2 The Court should accordingly find that the Constitution imposes a duty on him to appoint a commission in accordance with the remedial action, in the narrow and extraordinary circumstances of this case.

35.3 Any other interpretation would mean that there is no possibility of the Public Protector issuing remedial action that is appropriate and effective, in the sense of being capable of addressing apparent breaches of the Constitution. This would render section 182(1)(c)

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[78] Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) at para 61.

[79] United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) 2003 (1) SA 495 (CC) at para 83.

nugatory in the circumstances. It would also be inconsistent with the supremacy of the Constitution and the rule of law.

36 The President says that upholding the remedial action would amount to requiring him to act under unlawful dictation.[80] But the President has already decided, in the exercise of his discretion, to appoint a commission.[81] There can accordingly be no question of unlawful dictation. The only question is whether, having decided that a commission is required, it is permissible for the President to retain control over the appointment of the person to chair it and its terms of reference. It is impossible for him to do so lawfully because he is implicated in the subject matter of the commission.

37 For the same reason, the interpretation we advance does not trench on separation of powers. On the contrary, it preserves the separation of powers by carefully balancing the requirement that the Public Protector's remedial action be appropriate and effective with the President's power to appoint commissions of inquiry. It is the President's approach that impermissibly breaches the separation of powers, because obliterates the requirement of effective remedial action in favour of a wholly unconstrained presidential discretion to appoint commissions – even when the extraordinary circumstances are acknowledged to require a judicial commission of inquiry to be established.[82]

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[80] President's HOA paras 10-12

[81] President's RA p 433 para 9.3

[82] President's HOA para 16

Delegation

38 The President says that the Public Protector's remedial action is an impermissible delegation of her investigative powers to the commission.[83]

39 The legal principles applicable to a complaint of unlawful delegation or abdication are as follows:

39.1 The exercise of powers must accord with the principle of legality. The Constitutional Court has held that:

> *"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."* [84]

39.2 The principle of legality also requires the holder of a public power to act in good faith and not to misconstrue his or her powers.[85]

39.3 As a result, where legislation confers a power on a functionary, if that functionary abdicates the power to another person, the abdication is invalid.[86]

39.4 In other words, a discretionary power vested in one functionary must be exercised by that functionary in the absence of a power to delegate.[87]

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[83] President's HOA para 27ff

[84] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council And Others 1999 (1) SA 374 (CC) at paras 57 - 59

[85] Masetlha v President of the Republic Of South Africa and Another 2008 (1) SA 566 (CC) at para 81

[86] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) ("SARFU") at para 38

[87] Hofmeyr v Minister of Justice and Another 1992 (3) SA 108 (C) at 117F

"An abdication of power violates the principle that the responsibility for a discretionary power rests with the authorised body and no one else." [88]

39.5 However, it is often practically impossible for the designated administrator to exercise the power personally. For this reason it has always been open to original legislators to stipulate that their delegatees may further delegate their powers to other administrators.[89]

39.6 The Constitutional Court has found delegation to be permissible.[90]

40 We submit that that Public Protector was entitled to delegate to the commission the task of completing her investigation. This is for the following reasons:

40.1 The Public Protector Act makes specific provision for the delegation of the Public Protector's investigative power. Section 7(3) of the Public Protector Act provides:

"(3)(a) The Public Protector may, at any time prior to or during an investigation, request any person—

(i) at any level of government, subject to any law governing the terms and conditions of employment of such person;

(ii) performing a public function, subject to any law governing the terms and conditions of the appointment of such person; or

(iii) otherwise subject to the jurisdiction of the Public Protector,

to assist him or her, under his or her supervision and control, in the performance of his or her functions with regard to a particular investigation or investigations in general.

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[88] Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP) at para 216.

[89] Hoexter Administrative Law in South Africa 2ed (2012, Juta, Cape Town) at 265.

[90] Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Bengwenyama) 2011 (4) SA 113 (CC) at para 45.

(b)(i) The Public Protector may designate any person to conduct an investigation or any part thereof on his or her behalf and to report to him or her and for that purpose such a person shall have such powers as the Public Protector may delegate to him or her.

(ii) The provisions of section 9 and of the regulations issued by the Treasury under section 76 of the Public Finance Management Act, 1999 (Act 1 of 1999), in respect of Commissions of Inquiry, shall apply with the necessary changes in respect of that person."

40.2 This power of delegation applies equally to an investigation in terms of section 3 of the Ethics Act. Section 3(4) of the Ethics Act provides:

> *"When conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act, 1994 (Act 23 of 1994)."*

40.3 Section 7(3)(b)(i) expressly empowers the Public Protector to delegate the performance of "*any part*" of an investigation to "*any person*".

40.4 An expressly conferred power of delegation does not trigger the common-law presumption against sub-delegation:

> *"The maxim delegatus delegare non potest is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."* [91]

41 In the absence of a constitutional attack against the above statutory provisions, the President cannot succeed in the challenge against the delegation by the Public Protector.[92]

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[91] Chairman, Board on Tarrifs and Trade v Teltron (Pty) Ltd 1997 (2) SA 25 (A) at 34E-F.

[92] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2006 (11) BCLR 1255 (CC) para 47-48.

42 The Public Protector will monitor the implementation of the remedial action.[93]

43 The President's complaint that the remedial action amounts to an unlawful delegation of the Public Protector's powers is therefore unsustainable.

A finding of maladministration is not necessary for remedial action

44 The President says that the Public Protector only has the power to take remedial action where the Public Protector has completed an investigation and made a finding of improper conduct. The President describes such a finding as "*a jurisdictional fact necessary for the Public Protector to take remedial action*."[94]

45 This submission is unsustainable:

45.1 The President cites the judgment of the SCA in the *Mail and Guardian* case.[95] The passage cited does not support the proposition. It says only that the Public Protector is required to conduct investigations with an open and enquiring mind.

45.2 The President also relies on the recent judgment of Murphy J in the *SARB* case. But this reliance is misplaced. Murphy J held only that, where the Public Protector investigates misconduct, and makes a finding of improper conduct, then the remedial action she grants must

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93 Report p355, para 9.1.

94 President's HOA para 40

95 Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) at 426B-C.

be properly related to the misconduct that she has found.[96] In that matter, Murphy J held, there was no relationship between the material the Public Protector investigated and her remedial action. There was simply no allegation before her that related to the Reserve Bank's mandate.

45.3 By contrast, in this matter the remedial action is precisely correlated with the material that was before the Public Protector, and is designed to address the allegations contained in the Report.

45.4 Moreover, section 182(1) of the Constitution empowers the Public Protector to:

45.4.1 investigate any conduct "*that is alleged or suspected to be improper or to result in any impropriety or prejudice*";

45.4.2 report on that conduct; and

45.4.3 to take appropriate remedial action.

45.5 There is no suggestion in the text of the section that a finding of impropriety is a necessary condition for remedial action. On the contrary, the section contemplates that the Public Protector must investigate and may then take any remedial action that is alleged or suspected to be appropriate, whether or not she makes a finding of misconduct.

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[96] SARB v Public Protector and Others (43769/17) ZAGPPHC 443 (15 August 2017) para 41

45.6 For the reasons we have already explained, the appointment of a judicial commission is the only appropriate remedial action in the circumstances.

Irrationality

46 The President says that the remedial action is irrational because there are documents in the Rule 53 Record which indicate that the former Public Protector was in a rush to complete the investigation because her term of office was coming to an end.[97]

47 The *ipse dixit* of the former Public Protector could never sustain a finding of irrationality.

48 The test for irrationality review is well established. It is that:

48.1 There must be a rational connection between the legislative scheme and a legitimate government purpose.

48.2 The rationality test creates an extremely low threshold which will be overcome by most decisions:[98]

> *"The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A*

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[97] President's HOA paras 33-38.

[98] Ex parte President of the Republic of South Africa and Others, In re: Pharmaceutical Manufacturers Association of SA and Another 2000 (2) SA 674 (CC) at para 90 (emphasis added)

> *decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."*
>
> *"[R]ationality is a mere threshold requirement for the exercise of all public power."*[99]

49 The test for irrationality is accordingly an objective one. It is that there is no rational relationship between the decision and any legitimate purpose.

50 The subjective views and comments of the former Public Protector could never demonstrate that the remedial action is objectively irrational. For the reasons we have already explained, the remedial action is entirely rational. It is the only effective remedial action possible in the extraordinary circumstances of this matter.

The counter application

51 The Public Protector has brought a conditional counter application in terms of which she seeks an order directing the President to ensure that her office is provided with sufficient funding to conduct the second phase of the investigation, if the review application succeeds.[100] This relief can also be granted pursuant to this Court's just and equitable remedial powers in terms of section 172(1)(b) of the Constitution.

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[99] Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) at para 38

[100] NOM in the counter application, pp450-452

52 The President says that this is not an appropriate remedy because only Parliament has the power to make an appropriation from the state Revenue Fund, and that it is open to the Public Protector to approach Parliament for a special appropriation if the investigation is remitted to her.[101]

53 We submit that this response is inadequate, for the following reasons:

53.1 The relief is sought against the President in his capacity as the head of the National Executive.[102]

53.2 The relief does not require the President to make an appropriation from the State Revenue Fund without regard to Parliament. It requires him only to do whatever is in the National Executive's power to ensure that there is adequate funding for the second phase of the investigation.

53.3 It is not correct that the National Executive has no role to play in the allocation of funds from the National Revenue Fund. On the contrary, the National Executive plays a critical role in the budgeting process, and ultimately in the allocation of revenue:

53.3.1 Money is withdrawn from the National Revenue Fund in terms of an appropriation by an Act of Parliament.[103]

53.3.2 This appropriation is made annually in terms of a budget prepared by the National Treasury.[104]

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[101] President's RA, p435 para 12.

[102] NOM in the counter application, pp450-452; Public Protector's AA, p76; paras 38 and 40

[103] Section 213(2)(a) of the Constitution.

[104] Chapter 4 of the Public Finance Management Act 1 of 1999 ("PFMA")

53.3.3 The National Treasury is "*in charge of the National Revenue Fund*".[105]

53.3.4 The Minister of Finance and National Treasury are in control of the budgeting process:

(a) The Minister is required to submit to Parliament a medium-term budget policy statement three months before the introduction of the national budget.[106]

(b) This is required to include, inter alia, the "*proposed division of revenue between the spheres of government and between arms of government within a sphere for the next three years*".[107]

(c) The Minister must then table the national annual budget in the National Assembly before the start of that financial year,[108] together with the Appropriation Bill.[109]

(d) When the National Assembly passes the proposed Appropriation Bill,[110] it becomes the Appropriation Act contemplated in section 213(2) of the Constitution.

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[105] Section 11(1) of the PFMA.

[106] Section 6(1) of the Money Bills Amendment Procedure and Related Matters Act 9 of 2009 ("Money Bills Act").

[107] Section 6(2)(d) of the Money Bills Act.

[108] Section 27(1) of the PFMA.

[109] Section 7 of the Money Bills Act.

[110] Section 10 of the Money Bills Act

(e) Every year, the Minister of Finance also prepares an Adjustments Appropriation Bill together with a national adjustments budget.[111]

(f) The National Executive also has the power to propose special appropriation bills, which would be enacted, for example where a state-owned entity requires additional funds.[112]

53.4 The National Executive accordingly has significant power, in the budgeting process, to ensure that sufficient funds are made available to the Office of the Public Protector to conduct the second stage of the investigation.

53.5 In the same way, the responsible member of cabinet (the Minister of Justice and Constitutional Development) made funding available for the Marikana and Arms Deal Commissions.

53.6 The order that the Public Protector seeks does not require that the National Executive effect an appropriation from the National Revenue Fund without going through the normal budgetary and appropriations process.

53.7 It merely requires them to do whatever is in their considerable power in the budgeting process to ensure that the second stage of the investigation is properly funded.

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[111] Section 12 of the Money Bills Act and section 30 of the PFMA.

[112] Section 13 of the Money Bills Act.

53.8 It would also be open to the President as the head of the National Executive to direct / enquire / engage with the relevant government department to re-order or redirect funds towards the investigation, as was done for the Marikana and Arms Procurement Commissions. This would not require an appropriation.

54 The President says that *Soobramoney* stands for the proposition that "*it is not competent for a court to make an order which involves spending money from either state or revenue funds.*"[113]

55 This is wrong in law:

55.1 The President relies on a dictum from the High Court in *Soobramoney*[114] without referring to the Constitutional Court's judgment in the appeal.[115]

55.2 Although the Constitutional Court confirmed the High Court's order on appeal, it did not find that it is incompetent for courts to make orders which involve spending from state or revenue funds. The primary basis of the Constitutional Court's judgment was that the determination of medical budgets "*involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and*

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[113] President's HOA para 50

[114] Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 430 (D)

[115] Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC)

medical authorities whose responsibility it is to deal with such matters."[116]

55.3 Even the High Court did not go so far as to find that it is not competent for courts to make orders which involve spending money from state or revenue funds. The High Court said only that it was not for the court, in the circumstances of that case, to make an order requiring treatment to be made available "*in the face of uncontroverted evidence that there just is not sufficient money to provide the treatment.*"

55.4 Even if the President's interpretation of the High Court judgment in *Soobramoney* were correct (which we deny), the proposition he contends for has been repeatedly overruled by the Constitutional Court.

55.5 In the *Certification* judgment, the Constitutional Court expressly considered and rejected it:

> *"The second objection was that the inclusion of these rights in the NT is inconsistent with the separation of powers required by CP VI because the Judiciary would have to encroach upon the proper terrain of the Legislature and Executive. In particular the objectors argued it would result in the Courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily*

[116] Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) at para 29

conferred upon them by a bill of rights that it results in a breach of the separation of powers."[117]

55.6 The Constitutional Court confirmed in *Grootboom* that in appropriate circumstances the courts must enforce socio-economic rights, which will have budgetary implications.[118]

55.7 In *Blue Moonlight*, the Constitutional Court addressed a claim by the City that it lacked adequate resources to provide occupiers with emergency accommodation following an eviction. Far from finding that orders with budgetary consequences are incompetent, the Constitutional Court rejected the City's defence and held that:

"This court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."[119]

55.8 The Constitutional Court has frequently granted orders which entail spending money from state or revenue funds.

55.8.1 In *Khosa* the Constitutional Court held that the exclusion of non-citizens from welfare grants was unconstitutional. It recognised that the budgetary implications of its order would be

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[117] Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA744 (CC) paras 77–8.

[118] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 94

[119] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) at para 74

"*far-reaching*."[120] The state respondents had argued that the effect of the order "*would impose an impermissibly high financial burden on the State.*"[121] The Constitutional Court nonetheless granted the order.[122]

55.8.2 In *Rail Commuters*, the Constitutional Court imposed a duty on Transnet, the South African Rail Commuter Corporation and the Minister of Transport to ensure safety on trains, in addition to the obligations falling on the Minister of Safety and Security and the South African Police Services. It did so despite recognizing that its order would have consequences for the budgets of these organs of state.[123]

55.8.3 In *NICRO* the Constitutional Court ordered the Department of Home Affairs to make special arrangements to allow prisoners to vote despite the fact that this would put "*a strain on the logistical and financial resources available to the [Electoral] Commission for the purpose of conducting the elections*."[124]

56 It is accordingly clear that the order the Public Protector seeks in the counter application is competent and justified in the circumstances.

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[120] Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC**)** at para 22.

[121] Khosa at paras 60-61

[122] Khosa at para 98.

[123] Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others 2005 (2) SA359 (CC) at para 88

[124] Minister of Home Affairs v NICRO & others 2005 (3) SA 280 (CC) at paras 40; 48-51

Prayer

57 The Public Protector seeks an order:

57.1 Dismissing the President's application with costs; alternatively

57.2 If the Court sets aside paragraph 8.4 of the remedial action, directing the President as the head of the national executive to do whatever is in his power to ensure that the Office of the Public Protector is provided with sufficient funding to conduct the second phase of the investigation.

N H MAENETJE SC

N C FERREIRA

4 October 2017

TABLE OF AUTHORITIES

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2006 (11) BCLR 1255 (CC)

Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape 2001 (4) SA 120 (Ck)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Bengwenyama) 2011 (4) SA 113 (CC)

Chairman, Board on Tarrifs and Trade v Teltron (Pty) Ltd 1997 (2) SA 25 (A)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC)

Commissioner for Inland Revenue v I H B King; Commissioner for Inland Revenue v A H King 1947 (2) SA 196 (A)

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA744 (CC)

Ex parte President of the Republic of South Africa and Others, In re: Pharmaceutical Manufacturers Association of SA and Another 2000 (2) SA 674 (CC)

Ex Parte Speaker Of The Kwazulu-Natal Provincial Legislature: In Re Certification Of The Constitution Of The Province Of Kwazulu-Natal, 1996 1996 (4) SA 1098 (CC)

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council And Others 1999 (1) SA 374 (CC)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP)

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Hofmeyr v Minister of Justice and Another 1992 (3) SA 108 (C)

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)

Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC)

Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC**)**

Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC)

Masetlha v President of the Republic Of South Africa and Another 2008 (1) SA 566 (CC)

Minister of Home Affairs v NICRO & others 2005 (3) SA 280 (CC)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)

Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA)

Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others 2005 (2) SA359 (CC)

SABC v DA 2016 (2) SA 522 (SCA**)**

SARB v Public Protector and Others (43769/17) ZAGPPHC 443 (15 August 2017)

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 430 (D)

South African Police Service v Public Servants' Association 2007 (3) SA 521 (CC)

South African Railways and Harbours v New Silverton Estate Ltd 1946 AD

United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) 2003 (1) SA 495 (CC)

Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC)

Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A)