IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: 11311/18

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

THE PUBLIC PROTECTOR Respondent

COURT ADDRESS:
THE PUBLIC PROTECTOR

A. INTRODUCTION

1. The relief for which the DA contends has nothing to commend it.

2. There is no unlawful conduct. There is no violation of the constitutional mandate. There is no basis for review. There is no basis for a personal costs order on any scale.

3. All this we shall demonstrate as clear not only from the applicable legal principles but also from the text of the report itself.

4. We do so by demonstrating that

4.1. the Public Protector has in fact investigated the issues that the DA claims she has not; she has reported on them; she has made appropriate remedial action in relation to them; and

4.2. where the Public Protector has not investigated an issue, she has given perfectly rational reasons for that course.

5. In the final analysis, this application is not about the Public Protector failing to do her job properly or at all; it is about the DA trying (1) to impose its preferred method of investigation on the Public Protector; (2) to impose the issues that must be investigated on the Public Protector regardless of any constraints the Public Protector may have; and (3) impose its own preferred outcome of that investigation upon the Public Protector.

6. The intention is then to have this Court act as the DA's conduit for the DA's preferred approach and the DA's preferred outcome. This latter intention is manifest in the fact that the DA wants this Court to substitute its own outcome for that of the Public Protector. In other words, the DA wants this Court to act as if IT were the Public Protector. Worse, it wants this Court to clothe itself in the powers that the Constitution reserves for the Public Protector and do the DA's political bidding.

7. This is an abuse of the court process of review. Review proceedings are not designed to serve as fronts for political contestation. If the DA wants to govern the Free State province, it must contest and win an election there. It should not be allowed to use the courts and the Public Protector to fight its political battles.

8. In **Mazibuko NO v Sisulu NNO 2013 (6) SA 249 (CC)** Jafta J observed, poignantly, that:

> "[83] Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution. . ."

9. The DA is represented at the Free State provincial legislature. It should have raised its political issues about the Premier, the MEC and senior officials in that forum. If that forum does not address those issues, it should then have taken the decision of that forum, or its failure to make a decision, on review.

10. It has not done that. Instead the DA has opted for its *"whipping boy"* in the form of this Public Protector, in the hope that the general public sentiment against her (if the general tenor that the media has assumed is to be the barometer) will carry the day in this Court.

11. We ask that this Court determines this matter on the facts and on established principles of law; nothing else. Public sentiment – real or imagined – is irrelevant. The DA's preferred method of investigation is irrelevant. The DA's preferred outcome of the Public Protector's investigations is irrelevant.

12. We demonstrate the vacuous nature of the DA's application by way of four tables each of which is a summary of the Public Protector's approach both as pleaded and as contained in her report.

    12.1. The first table deals with issues that the DA says have not been properly investigated by the Public Protector. The table shows that these issues have in fact been investigated. Reference is made to the report itself in this regard.

    12.2. The second table deals with issues in the third complaint that the DA says have not been investigated at all. The table shows that these issues formed part of the first and second complaints and were dealt with. Reference is made to the report itself.

12.3. The third table deals with issues in the third complaint that the DA says have not been investigated at all. This table gives plausible reasons why this was not done.

12.4. The fourth table compares the DA's treatment of the Public Protector's argument with its treatment of her predecessor's argument on the same issues. This is to demonstrate the personal nature of the attack and its political purpose.

13. In the fifth table, we compare requirements, qualifications and protections for judges, on the one hand, and the Public Protector, on the other. The purpose is to impress upon this Court the legal fact that the Public Protector is not a mere administrative organ of state to be treated with contempt as if she were a disposable liquor board official. While she is subject to the same strictures as a Judge, she is also entitled to the same protections as a Judge. That means the Public Protector should not be lightly mulcted in personal costs merely for adopting an approach towards a complaint that the complainant disagrees with.

14. But first, we address 2 important issues that are the pivot of the DA's approach, namely:

14.1. the DA's treatment of the Public Protector's capacity and financial constraints argument; and

14.2. the DA's unwarranted and unfair attacks on the Public Protector.

B. <u>CAPACITY AND FINANCIAL CONSTRAINTS</u>

15. In **President of The Republic of South Africa v Public Protector and Others** 2018 (2) SA 100 (GP) (**"the State Capture case"**) this Court held that:

> [90] An investigation may take many forms and it is for the Public Protector to decide what is appropriate in each case. Because of the financial and other constraints mentioned in the Report, the Public Protector considered it appropriate that the second phase of the investigation into allegations of state capture be undertaken by a commission of inquiry.
> . . .
>
> [163] The President asserts that the lack of financial resources, if true, could have been addressed by approaching Parliament for funds. The Public Protector counters this assertion by pointing out that she has never been provided with sufficient financial and other resources, to complete the investigation into state capture. The investigation has been 'hamstrung' by the late release of funds and this situation was compounded by the inadequacy of the funds allocated (R1,5 million). In her answering affidavit, the current Public Protector, emphatically states that it is not possible for the office of the Public Protector to finalise the investigation, due to a lack of resources. These allegations are not seriously disputed by the President. The President's assertion must thus be rejected."

16. In that case, the DA filed papers in which it did not dispute the Public Protector's financial constraints claim. Why? Because both the previous Public Protector's cause and that of the present Public Protector, on the one hand, and the DA's cause, on the other, coalesced in that case.

17. The DA now views the same financial constraints argument with scepticism. Why? It is the same office which, during the period under consideration, received its funds from the same source under the same President. So what is different? The answer is plain: the DA does not like the present Public Protector for her perceived alliance with a rival political party. It also does not like the outcome of the investigation and the investigation method used by the Public Protector in her discretion and as financial resources allow. Nothing short of implicating and convicting politicians of a rival political party and its presumed benefactor will do for the DA. So it wants her removed from office and is using the courts to mount an attack on her which (if it gets its way) it can use as evidence in Parliament in the fitness for office probe that it has initiated in Parliament against this Public Protector. We ask that this court decline being

dragged into the DA's political campaign against the ruling party through the Public Protector.

18. Below, we highlight some of the glaring inconsistencies of the DA on the issue of the financial constraints facing the Public Protector's office in order to show that the DA's stance in respect of Adv Madonsela on this issue was supportive, while its stance on the same issue in respect of this Public Protector is trenchantly hostile. This, we respectfully submit, places the DA's application in its proper (political) context and should be taken into account by this court in determining this application.

19. In its answering affidavit filed in the **State Capture case**, the DA supported Adv Madonsela's financial constraints argument. It said:

> "The lack of adequate funding for the Public Protector to perform her role has been a recurrent theme in her reports to Parliament".[1]

20. It even invoked this Public Protector when it said the following in its answering affidavit in the **State Capture case**:

> "[I]n the current Public Protector's most recent appearance in Parliament on 31 March 2017, she was presenting on her first 100 days in office and her Annual Performance Plan. She told the Committee on Justice and Correctional Services the following:
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> > '…Another matter of financial concern was the fact that National Treasury had ring-fenced R5m for the 21 cases currently on their books but each case would take between one and three years to finalise and could cost R1m per case, so there was a real risk of underfunding'"[2].

21. There is more. The DA also said:

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1 See para 89
2 Para 94

> "The Public Protector is chronically under-resourced and could not make final determinations of whether individuals were guilty of corruption, or other illegal acts."[3]

22. And more still:

> "Given the Public Protector's lack of resources, she could not do so herself. It was therefore rational to instruct the President to establish a commission of inquiry to investigate the problem."[4]

23. In its heads of argument in the **State Capture case**, the DA has this to say in support of Adv Madonsela's financial constraints argument:

> "To prevent the Public Protector from ever requiring other organs of state – including the subject of a complaint – to take steps to finalise an investigation would impose an unnecessary intolerable burden on the office that is already underfunded and under-resourced. It would mean that the Public Protector could never finalise an investigation until she had finally determined every single allegation, no matter the resource constraints."[5]

24. Earlier, in the same heads of argument, the DA had said:

> "The Public Protector has concluded that there are serious reasons to suspect wrongdoing. She states that she lacks the resources to complete the investigation. She has reasoned that a commission of inquiry is the appropriate remedial action in light of her findings and constraints."[6]

25. Another submission that the DA made in its heads of argument in the **State Capture case** was this:

> "…the Public Protector Act envisages that the Public Protector will exercise her powers with the assistance of other relevant entities. It expressly allows her to require other parties 'to make appropriate recommendations' after she has concluded an investigation. That is precisely what she has done in this instance. Nor is it unusual for the Public Protector to leave some matters for

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3 Para 4
4 Para 126
5 Para 99
6 Para 97

further investigation by other entities with the appropriate powers and resources."[7]

26. The common themes that run through these submissions by the DA in support of Adv Madonsela's financial constraints argument are these:

26.1. The DA accepts that the office of the Public Protector is *"chronically under-resourced"*. Yet it does not accept the argument at face value when advanced by this Public Protector and insists on additional justification.

26.2. The DA accepts that this has been *"a recurrent theme"* over the years. In this regard, it even invokes this Public Protector's presentation in Parliament of as recently as March 2017. Yet, in this case, it wants this Public Protector to do more and justify why she did not prioritise ITS own complaint.

26.3. The DA accepts that it is rational for the Public Protector to look to other organs of state where her office is chronically under-resourced. Yet it says this Public Protector acted irrationally when she says the reason she did not pursue investigation of some issues was that National Treasury had investigated them and that the Hawks and the AFU were investigating others.

26.4. The DA accepts, implicitly, that to expect the Public Protector to accept and act on every complaint without leaning on other organs of state would be to *"impose an intolerable burden on the office that is already underfunded and under resourced"*. Yet the DA now argues that this Public Protector has a duty to accept and pursue every single complaint that is lodged with her office, regardless of the chronic under-funding and under-resource her office has been experiencing recurrently.

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7 Para 96

26.5. The DA accepts that there is *"nothing unusual"* for the Public Protector to leave some matters for investigation by other entities with appropriate resources, powers and expertise. Yet the DA attacks this Public Protector for not doing her job, and of acting irrationally and arbitrarily, when she leaves some matters for investigation by the Hawks, the AFU and National Treasury.

27. This attack by the DA on Public Protector Mkhwebane is not about vindicating the Rule of Law. It is politically motivated.

28. The Public Protector has given a detailed account of the financial and capacity constraints faced by her office.[8]

29. In the circumstances of this case, to duplicate investigations that were already underway by other statutory bodies would not have been financially prudent.

C. THE ATTACKS ARE UNWARRANTED AND UNFAIR

30. The DA attacks the Public Protector unwarrantedly and unfairly even in the heads of argument in this case. It is to that topic that we turn. We do not cover all such attacks (there are many). We simply give a few examples of the sort of thing that we invite this court to take into consideration when assessing this case within its proper context.

(a) The First Attack: Issues Not Investigated

31. The DA attacks the Public Protector for failing to investigate, among other things[9]

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8 AA, vol 7, p 636-644, para 23-46

9 DA's HoA, para 49

31.1. cattle deaths, and

31.2. value for money.

32. But Adv Madonsela also did not investigate the cattle deaths and value for money issues. She said so in her provisional report and offered the same reasons as this Public Protector does.[10] That was in November 2014, just under two years before the end of her term. The DA did not attack her. Yet it feels justified to attack this Public Protector over the same issue. This is unfair and unwarranted, and demonstrates the DA's true purpose by this application.

(b) <u>The Second Attack: Took only four steps</u>

33. Another unwarranted and unfair attack is that the Public Protector took only four steps towards investigating the issues raised in the first two complaints.

34. The DA attacks her for

34.1. sourcing only four additional documents,[11]

34.2. holding only three interviews,[12]

34.3. conducting one inspection-in-loco of the Vrede Dairy Farm,[13] and

34.4. consulting only one website[14].

35. Firstly, the effectiveness of an investigation is not dependant necessarily on bean counting the documents sourced. The DA now turns this case into a matter about a race over the number of documents collected. It should stand to reason that Adv Madonsela, who had been in office when the two complaints came, would

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10 Vol 4, p 392, para 4.3.5. This Public Protector gave an additional reason in respect of the cattle deaths issue, namely, the intervention of the Minister of Water Affairs.

11 DA's HoA, para 57.1

12 DA's HoA, para 57.2

13 DA's HoA, para 57.3

14 DA's HoA, para 57.4

have generated considerably more documents than her successor who would follow up on work already done and produce a final report. The criticism does not take account of the complainant's insistence that this Public Protector finalise the report.[15]

36. Secondly, investigation is not about the number of interviews held, especially when much of the work had already been done by the office when this Public Protector took office. In any event, it is instructive that the DA did not attack Adv Madonsela who appears to have held two interviews over a period of a year, on 17 September 2013 and 30 September 2014.[16]

37. Thirdly, the DA attacks the Public Protector for conducting one inspection-in-loco but did not attack Adv Madonsela for the one attempt she made but failed back on 4 September 2014, some two years before her term ended.[17] The DA is not concerned about what further attempts she made over the remaining two years of her term – apparently none.

38. Fourthly, as regards the attack for consulting one website, the DA simply looks at the date that coincides with this Public Protector's term of office (20 April 2017) alongside the website cited and concludes that this was the only website consulted and the only occasion it was consulted.[18] If that is the standard (which is, with respect, absurd) and this Public Protector had become aware of the matter only in March 2017[19] and had consulted a website by 20 April 2017, what does that say about her predecessor's enthusiasm on the website stakes as she had been aware of the complaint for over a year by the time she issued the provisional report? It is, with respect, an untenable measure of commitment to performing one's constitutional duty.

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15 Vol 7, p 680, paras 95.9 & 95.10
16 Vol 4, p 396, para 4.4.2
17 Vol 4, p 397, para 4.4.4.1
18 Vol 2, p 128, para 4.4.5.1
19 Vol 7, p 682, para 97.2.1. The DA says it does not understand this denial: vol 11, p 1120, para 43.1

(c) *The Third Attack: Investigated only Three Issues*

39. Much of the DA's attack centres around differences between the provisional report as prepared by Adv Madonsela and the final Report under this Public Protector's hand.

40. Lost in all this, is that the provisional report has no legal status at all. All it is, is a working document or work in progress. It is no different from a draft judgment that a judge, sitting in chambers, may prepare. Many things could happen to move the judge to amend the draft judgment, including changing his or her initial orders. The judge could even realise that an aspect of law in the draft (or in his or her earlier judgment in another case) is not quite correct and seek to remedy that. That does not warrant an attack of bad faith or dishonesty or ulterior motive. Thus, the testing of a 2018 final report against a 2014 provisional report is an exercise in futility.

41. The DA attacks the Public Protector for investigating three issues.[20] But Adv Madonsela investigated only four[21] and refused to investigate two more for the same reasons as those advanced by this Public Protector. The DA did not attack her.

42. Three of the four issues investigated by Adv Madonsela are the same issues that this Public Protector considered, made findings on and in relation to which she took remedial action. The DA prefers that the Public Protector maintain the language of her predecessor and not assume her own style and language.

43. The first issue was phrased by Adv Madonsela thus:

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[20] DA's HoA, paras 62-94
[21] Vol 4, p 391, para 4.3

> "Whether or not the Treasury prescripts in respect of a Public Private Partnership were adhered to and whether or not the contribution of 40% of the funds for an allocation of 49% of the shares in the company was contrary to Treasury prescripts".[22]

44. The Public Protector phrased the same issue as follows:

> "Whether the Department improperly entered into a Public Private Partnership agreement for the Implementation of the Vrede Dairy Project".[23]

44.1. Both versions are about a probe into compliance of the Public Private Partnership agreement with Treasury prescripts. The fact that the Public Protector does not mention contribution and share allocation percentages is of no significance because the question still remains whether those percentages comply with Treasury prescripts. In fact, the Public Protector's phrasing would seem to cover a wider compass as it looks not only into compliance with Treasury prescripts but also with other requirements, hence it looks into the propriety of the conclusion of the Public Private Partnership agreement. That extends the inquiry; it does not narrow its ambit.

44.2. But because the DA has already convinced itself of the Public Protector's dishonesty and ulterior motives,[24] nothing she does differently from her predecessor will satisfy it.

44.3. It criticises the Public Protector for not investigating adherence of the agreement with Treasury prescripts. When the Public Protector says this had already been investigated by National Treasury, the DA changes tack and says, because Treasury recommendations *"had not been acted on by*

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22 Vol 4, p 391, para 4.3.1
23 Vol 2, p 101, para (vii)(a)
24 DA's HoA, para 93

the provincial government . . . [t]his was all the more reason for the Public Protector to investigate the matter further"[25].

44.4. But, we ask befuddled, how does a re-investigation of non-compliance with Treasury prescripts that had already been investigated by Treasury which made recommendations, cure a failure by the department to implement those Treasury recommendations? What is required in such circumstances is implementation of the recommendations, not re-investigation, surely?

44.5. And that is exactly what the Public Protector did. She made findings *"in concurrence with the Accountant General's Investigation"*[26] – that is, National Treasury – and took remedial action that corrective measures be taken and disciplinary action be instituted against all implicated officials. These are exactly the recommendations that National Treasury made. It recommended disciplinary action against the HoD and the CFO.[27] Not only has the Public Protector taken the same remedial action,[28] its implementation has also already commenced[29].

44.6. But because these similarities are inconvenient for the DA, it resorts to finding fault elsewhere (as it feels it must), namely, that the Public Protector elevates mere formal requirements to the level of inherent requirements[30]. But this does nothing to detract from the fact that the Public Protector got the provincial government to act on National Treasury's recommendations. So, it was not a re-investigation that was required; it was the implementation of Treasury recommendations.

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25 DA's HoA, para 71.1
26 Vol 2, p 154, para 6.1.4
27 Vol 5, p 490, paras 7.1.1 & 7.1.2
28 Vol2, p 157, para 7.1.1; vol 2, p 158, para 7.2.2
29 Vol 7, p 659 para 63 to p 661 para 6.1.8; vol 9, pp 896-899
30 DA's HoA, paras 73-78

45. The second issue was phrased as follows by Adv Madonsela:

> "Whether or not the contents of the agreement between the Department and the Private Company were adhered to in that the Department implemented appropriated (sic) monitoring and management procedures in respect of financial, performance, budget evaluation and expenditure control"[31].

46. The Public Protector captures the same issue in these words:

> "Whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to budget evaluation, expenditure control and performance by ESTINA".[32]

46.1. Both versions look into the management and monitoring of budget evaluation, expenditure control and performance management in the implementation of the agreement between the department and Estina. But, significantly, while Adv Madonsela's phrasing asks in general terms *"whether or not the contents of the agreement . . . were adhered to"*, the Public Protector places the department at the centre of this inquiry by asking *"whether the Department failed to manage and monitor implementation of the terms of the agreement . . ."*.

46.2. But the DA readily sees an ulterior motive in this, even though the Public Protector ultimately found that this charge against the department *"is substantiated"*[33], and directed by way of remedial action that disciplinary action be taken *"against all implicated officials involved in the Vrede Dairy Farm project"*[34] and that *"corrective measures"* be taken to prevent a recurrence of these failures by the department[35].

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31 Vol 4, p 392, para 4.3.2
32 Vol 2, p 101, para (vii)(b)
33 Vol 2, p 155, para 6.2.1
34 Vol 2, p 157, para 7.1.1
35 Vol 2, p 158, para 7.2.2

46.3. That the implementation of this remedial action against implicated officials has commenced[36] is of no moment to the DA because it wants the heads of politicians of a rival political party and their presumed benefactors. It dismisses evidence of this implementation[37] as not demonstrating that the Public Protector's investigation and final report were *"adequate, effective and lawful"*[38]. This is a clear demonstration that the DA will stop at nothing to oppose everything this Public Protector does, however laudable, because it never wanted her appointed as Public Protector in the first place. By this case, the DA wants to vindicate its position that it held alone in Parliament during public deliberations on the appointment of a new Public Protector in 2016.

46.4. Notwithstanding the plausible reasons[39] given by the Public Protector for not following the subpoena and search and seizure route demanded by the DA, the DA still persists in attacking her on this score in its heads of argument[40]. These reasons justify the Public Protector's approach. That is the standard she needs to meet in order to avoid a finding of arbitrariness. That the DA does not agree with her reasons, or disbelieves her, or would rather she went ahead with the subpoenas and search and seizures are irrelevant considerations.

46.5. The DA also attacks the Public Protector on this issue on the ground that she has, without explanation, omitted from her findings any reference to *"irregular expenditure"* which is contained in the provisional report findings.[41] This is incorrect. For one thing, the Public Protector has offered a detailed explanation for the deviation from the provisional

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36 Vol 7, p 659 para 63.1 to p 661 para 63.1.8
37 Vol 9, pp 896-899
38 Vol 11, p 1112, para 32
39 Vol 7, p 659, para 62.2.6
40 DA's HoA, paras 79-82
41 DA's HoA, paras 85-87

report's findings.[42] For another, the remedial action taken by the Public Protector entails the recovery of funds irregularly paid. That is what *"corrective measures"* entails. The idea is to restore the *status quo ante* the irregular payments.

46.6. In the final analysis, the Public Protector found the charge against the department substantiated and took remedial action the implementation of which has commenced. Therefore, it cannot be said that her conduct on this score was not rationally connected to the purpose of the power conferred upon her by the Constitution.

47. The third issue is phrased by Adv Madonsela in these words:

> "Whether or not the prices for goods and services procured were inflated and specific alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs"[43].

48. The Public Protector captures this same issue in her final report in exactly the same words, word-for-word and comma-for-comma.[44]

48.1. The DA attacks her for concluding, without explanation, that these costs are *"difficult to determine"*[45] because it expected her simply to follow Adv Madonsela's preliminary findings.

48.2. Again, this attack is unwarranted and unfair. The Public Protector has given plausible reasons justifying her conclusion.[46] She has also explained why no request was necessary for exhibits to the National Treasury report.[47] This is what she says in this regard:

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42 Vol 7, p 694 para 112 to p 699 para 113.2.6
43 Vol 4, p 392, para 4.3.3
44 Vol 2, p 101, para (vii)(c)
45 DA's HoA, paras 89-94
46 Vol 7, p 694 para 112 to p 699 para 113.2.6
47 Vol 7, p 692, para 110

"110.1 The exhibits were not annexed to the National Treasury report that was provided to me. So, my final report was not *"informed"* by the exhibits.

110.2 My office requested the National Treasury Report in May 2014 from National Treasury Director-General and received it two months later. The report was sent without exhibits. My office then studied the report to determine what precisely National Treasury had investigated so that we did not duplicate efforts. In the light of the findings regarding value for money and recommendations made to National Treasury, it was not necessary for us to make further investigations by reference to exhibits because the report had made findings and recommended further a feasibility study which was done in April 2014 by the Free State Department of Agriculture together with Estina. I attach the feasibility study as **"DPP7"**[48]. It was supposed to be part of the Rule 53 (it appears in the index) but was inadvertently omitted. It is mentioned in paragraph 4.4.1.24 of the final report."

48.3. The DA ignores this explanation in its heads of argument because it is inconvenient for its narrative that the department did not act on the Treasury recommendations, therefore necessitating the Public Protector (according to the DA) to re-investigate the non-compliance with Treasury prescripts issue.

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[48] See Vol 10, p 900 to vol 11, p 1059

48.4. When a feasibility study is done in an attempt to comply with Treasury recommendations, the DA also attacks the department's feasibility study as not being in compliance with the principles of a feasibility study. But that does not detract from the fact that there was an attempt at implementation of the Treasury recommendations. They were not simply ignored.

49. The only issue identified by Adv Madonsela that the Public Protector did not pursue further was the fourth issue listed in the Provisional Report (that is, whether or not environmental legislation had been adhered to during the farming operations). The Public Protector explains that this was not listed as an issue in the final report because it was an unsubstantiated complaint, and that the complainant was requested to provide further information which he failed to do.[49] All the DA has to offer in this regard is a bare denial.[50]

50. There is no basis in law or fact for these attacks.

(d) <u>The Fourth Attack: Instructing the SIU and A-G</u>

51. The DA attacks the Public Protector unwarrantedly for omitting from the final report her predecessor's remedial action in which Adv Madonsela, on the DA's version, gave an *"<u>instruction to the SIU</u> [which] was coupled in the provisional Report with a reporting obligation and ongoing monitoring by the Public Protector"*[51].

52. The instruction in Adv Madonsela's provisional report was that the head of the SIU must *"conduct a forensic investigation into serious maladministration in connection with the Vrede Dairy Integrated Project of the Free State Department*

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49 Vol 7, p 652, para 60
50 Vol 11, p 1104, para 27.2
51 DA's HoA, para 114.2

of Agriculture, the proper conduct by officials of the Department and the unlawful appropriation or expenditure of public money or property with the view of the recovery of losses by the State"[52].

53. This remedial action was legally incompetent of Adv Madonsela to take. The DA says this is rich of the Public Protector to criticise Adv Madonsela for this because, it says, she took the same remedial action in her 19 June 2017 report into the Reserve Bank's failure to recover misappropriated funds and which was set aside in **ABSA Bank v Public Protector**.[53] [54] This is incorrect.

53.1. Adv Madonsela's remedial action in respect of the SIU was legally incompetent because she purported, as the DA claims both in its replying affidavit[55] and in its heads of argument, to issue an instruction to the SIU. She had no power to do that. Yet the DA did not attack her.

53.2. Section 5(6)(b) of the Special Investigating Units and Special Tribunals Act, 74 of 1996 (*"the SIU Act"*), confers on the Public Protector only the power to refer a matter to the SIU that falls within its terms of reference. It does not confer upon her the power to instruct the SIU and monitor its investigation. It does not impose an obligation on the SIU to report to the Public Protector as the DA claims.

53.3. Public Protector Mkhwebane did not instruct the SIU in her 19 June 2017 report on the South African Reserve Bank. She rightly referred the matter to the SIU *"in terms of section 6(4)(c)(ii) of the Public Protector Act"*. The High Court confirmed that this provision (1) does not empower the Public Protector to instruct the SIU; (2) that it empowers her to refer a matter to the SIU; and (3) that once referred, the Public Protector has

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52 DA's HoA, para 114.1; see also vol 5, p 454, para 9.1.4.1
53 DA's HoA, para 116
54 DA's HoA, para 117
55 Vol 11, p 1110, para 30.1

exhausted her powers under the provision.[56] It is not the referral *per se* that the High Court set aside but rather the substance of what was referred.[57]

53.4. In its replying affidavit the DA's case was that the Public Protector has the power to instruct the SIU as that is what Adv Madonsela did.[58] Now in its heads of argument it seeks to shift its case to being about referral when it says the fact that the Public Protector cannot instruct the SIU how to exercise its powers *"does not mean that the Public Protector cannot refer a matter to the SIU for investigation, as is specifically provided for in s 5(6)(b) of the SIU Act"*[59].

53.5. This case was <u>never</u> about a referral under section 5(6)(b) of the SIU Act. It was never even about a referral under section 6(4)(c)(ii) of the Public Protector Act. On the DA's own version in its replying affidavit, the remedial action taken by Adv Madonsela was to instruct the SIU. The DA must be held to what it has pleaded. It cannot change its case in heads of argument.[60]

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56 **Absa Bank Limited and Others v Public Protector and Others** [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) (16 February 2018) (**"Absa Bank"**) at para 69

57 The High Court found, at para 70, that the Public Protector does not have the power to impose a duty on the SIU to re-open an investigation. It also found, at para 72, that section 2 of the SIU Act, on which the Public Protector relied in ordering the SIU to approach the President, does not empower the SIU to approach the President to re-open an investigation. Also, at paras 81 & 82, the High Court found that the President does not have the power to re-open an investigation that has been completed or amend a proclamation after the investigation has been completed.

58 Vol 11, p 1110, para 30.1

59 DA's HoA, para 121

60 In **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others** 1999 (2) SA 279 (T) at 323F-H the court held that: "It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits."
See also **Khumalo and Another v MEC for Education, Kwazulu-Natal 2014 (5) SA 579 (CC)** at [87] where Zondo J observed that: "It is trite that in motion proceedings an applicant must make his or her case in the founding affidavit. A litigant who has not made his or her case in the founding affidavit cannot escape the consequences of that omission by making it in his or her heads of argument."

53.6. Public Protector Mkhwebane does not believe that the Public Protector has such power of instruction. She realised this even before the High Court handed down its judgment in **Absa Bank** saying the Public Protector has no power to instruct the SIU. That is why she removed that specific remedial action.

53.7. In any event, even if the Public Protector had erred by instructing the SIU in her 19 June 2017 report on the Reserve Bank, the DA has no basis in fact for supposing that she had not realised her error by February 2018 when she removed that remedial action from her final report in this case. The Absa Bank case was argued on 5 and 6 December 2017. Pleadings and written submissions had been exchanged before then. It is not unthinkable that a reasonable person would have considered these submissions dispassionately, and on their merits, and then tailor her subsequent remedial action in accordance with her view of the merits in those submissions. She did not have to wait for the judgment.

53.8. But the DA, expecting nothing short of the worst from this Public Protector, cannot bring itself to accepting this possibility.

54. Adv Madonsela also took remedial action in the provisional report that instructed the Auditor-General to *"commission a forensic and due diligence audit with a view to verify all transfers and expenditure of public money in respect of the Vrede Dairy Integrated Project of the Free State Department of Agriculture in order to determine whether or not value for money was received by the State"*[61].

55. This remedial action was, we submit, also legally incompetent as the Public Protector has no power to instruct the Auditor-General to do an investigation.

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61 Vol 5, p 454, para 9.1.5.1

55.1. The DA attacks Public Protector Mkhwebane for removing this remedial action from the final report. Again, the basis for its attack in its replying affidavit was that the Public Protector does have the power to instruct the Auditor-General to conduct an investigation[62]. Now, in its heads of argument, the DA seeks to shift its case to being about the scope of the Auditor-General's powers[63]. It is impermissible for a party to change its case in heads of argument from what it was in its pleadings and we ask that this court not allow the DA to do so.[64]

55.2. But, in any event, even if this court were to find (somehow) that the Public Protector has the power to instruct the Auditor-General, the Public Audits Act, 25 of 2004 does not confer on him the wide powers that the DA confers on him.

56. A proper reading of section 5(1)(d) together with section 29 of the Public Audits Act does not countenance the Auditor-General performing *"a forensic and due diligence audit"* at the behest of the Public Protector, and being *"monitored on a bi-monthly basis"* by the Public Protector. There are numerous indicators in this regard in both provisions. Here are some of them:

56.1. First, when the Public Audits Act talks of *"investigations or special audits"*, the word *"investigation"* must be read *eiusdem generis* with *"special audit"*. The sections do not create a new non-audit function for the Auditor-General, thereby turning the Auditor-General into a super investigative unit. The investigation envisaged in the Act is that done within the audit function of the Auditor-General's office.

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62 Vol 11, p 1110, para 30.1
63 DA's HoA, paras 122-125
64 See **Khumalo and Another v MEC for Education, Kwazulu-Natal 2014 (5) SA 579 (CC)** at [87]

56.2. Second, the Auditor-General cannot in any event perform a forensic and due diligence investigation into an organ of state which he is ultimately constitutionally mandated to audit[65] as that would create a conflict of interest with the Auditor-General (or his office) ultimately auditing his (or its) own work that he (or it) would have rendered under section 5(1)(d) of the Public Audits Act. It is precisely this sort of blurred lines that have given rise to "accounting and audit irregularities" in the audit profession and which are the subject of investigation by the South African Institute of Chartered Accountants (SAICA) and the Independent Regulatory Board for Auditors (IRBA). What the DA is proposing runs counter to generally accepted auditing standards.

56.3. Third, it is clear from a plain reading of section 29(3) of the Act that the section does not envisage investigations of the kind ordered by Adv Madonsela and supported by the DA.

56.4. Fourth, the Auditor-General can only perform "other functions" if his role as Auditor-General and independence will not be compromised.[66] Adv Madonsela's remedial action instructing the Auditor-General to commission a forensic and due diligence audit was, as the DA confirms, coupled with a reporting obligation and ongoing monitoring by the Public Protector. This runs counter to the Public Audits Act as it would compromise the Auditor-General's independence if the Auditor-General now becomes accountable to the Public Protector.

57. Adv Madonsela's remedial action in relation to the Auditor-General was legally incompetent. Public Protector Mkhwebane was correct in not following it. The DA's attack on her for this is unwarranted and unfair. There is nothing irrational

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65 See section 5(1)(a)(i) of the Public Audits Act

66 Section 5(1)(a)

or arbitrary or unconstitutional about Public Protector Mkhwebane's removal of that remedial action. We ask this court to so find.

D. THE FIRST TABLE: ISSUES THE DA SAYS HAVE NOT BEEN PROPERLY INVESTIGATED. IN FACT THEY HAVE BEEN

Item	Issues the DA says have not been properly investigated but in fact have been	PP's comments, observations and/or findings in the Report	Ref in the Report
1.	State procurement processes were not followed in the appointment of Estina as a partner in the Project/Non-compliance with statutory and treasury requirements	The PP in concurrence with the AG observed that	
		- The HoD did not follow the normal procurement processes as prescribed by the Constitution, the PFMA and National Treasury Regulations	Report, Vol 2, p 155, para 6.1.4.1
		- Payments to Estina were not in line with Treasury prescripts	Report, Vol 2, p 155, para 6.1.4.2
		- The agreement between the Department and Estina seems to be invalid due to non-compliance with procurement processes	Report, Vol 2, p 155, para 6.1.4.3
		- The Department failed to comply with section 81 and 86 of the PFMA which prescribed the process to be followed when there is allegations of financial misconduct	Report, Vol 2, p 155, para 6.1.4.4
		- The prescripts in respect of the procurement of the agreement was not adhered to	Report, Vol 2, p 155, para 6.1.5
		- It was common cause that the agreement was entered into without following any procurement procedures as the AG found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts	Report, Vol 2, p 129, para 5.1.3
		- The Department was obliged to procure the services of Estina in accordance to a system that is fair, equitable, transparent, competitive and cost-effective	Report, Vol 2, p 135, para 5.1.22
		- In order for a PPP to be valid, the Accounting Officer must obtain prior	Report, Vol 2, p 138, para 5.1.34

		approval from the relevant Treasury. In this case, the accounting officer did not obtain prior approval from the relevant treasury	
2.	PP did not investigate the role played by the Head of the Department and Chief Financial Officer of the Department	The HoD did not follow the normal procurement processes as prescribed by the Constitution, the PFMA and National Treasury Regulations It was common cause that the agreement was entered into without following any procurement procedures as the AG found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts	Report, Vol 2, p 155, para 6.1.4.1 Report, Vol 2, p 129, para 5.1.3
3.	PP did not engage in any analysis or examination of the true, inherent nature of the arrangement between the Free State Department of Agriculture and Estina	The Department was obliged to procure the services of Estina in accordance to a system that is fair, equitable, transparent, competitive and cost-effective The arrangement between the Department and Estina was not a PPP The Department did not enter into a PPP with Estina in the context of Treasury Regulations	Report, Vol 2, p 135, para 5.1.22 Report, Vol 2, p 138, para 5.1.36 Report, Vol 2, p 154, para 6.1.2
4.	PP failed to investigate and report on the nature, extent and effect of the maladministration and irregularities committed by the Department	The conduct of the Department was inconsistent with section 195 of the Constitution and sections 38, 39, 40, 51 and 81 of the PFMA The evidence points to gross irregularities in ensuring the effective and efficient performance of the agreement which resulted in maladministration	Report, Vol 2, p 145, para 5.2.32 Report, Vol 2, p 156, para 6.2.4
5.	PP failed to direct that the accounting officer be subjected to a disciplinary inquiry. PP directed the Premier to initiate disciplinary proceedings against all implicated officials resulting in Mr Thabethe not being identified as a primary instigator and held responsible as the accounting officer. No effect was given to Treasury Regulation 4.1.3	It was common cause that the agreement was entered into without following any procurement procedures as the AG found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts The Department failed to comply with section 81 and 86 of the PFMA which prescribes the	Report, Vol 2, p 129, para 5.1.3 Report, Vol 2, p 155, para 6.1.4.4

		process to be followed when there are allegations of financial misconduct The Premier must initiate and institute disciplinary action against all implicated officials involved		Report, Vol 2, p 157, para 7.1.1

E. THE SECOND TABLE: ISSUES IN THE THIRD COMPLAINT THAT THE DA CLAIMS HAVE NOT BEEN INVESTIGATED AT ALL. IN FACT THESE FORMED PART OF THE FIRST AND SECOND COMPLAINTS AND WERE DEALT WITH

Item	Third Complaint (10 May 2016)	Conduct investigated	PP's comments, observations and/or findings	Ref in the Report
1.	State procurement processes were not followed in the appointment of Estina as a partner in the Project	Fell under the issue regarding whether the Department improperly entered into a PPP in violation of treasury prescripts	The PP in concurrence with the AG observed that - The HoD did not follow the normal procurement processes as prescribed by the Constitution, the PFMA and National Treasury Regulations	Report, Vol 2, p 155, para 6.1.4.1
			- Payments to Estina were not in line with Treasury prescripts	Report, Vol 2, p 155, para 6.1.4.2
			- The agreement between the Department and Estina seems to be invalid due to non-compliance with procurement processes	Report, Vol 2, p 155, para 6.1.4.3
			- The Department failed to comply with section 81 and 86 of the PFMA which prescribed the process to be followed when there is allegations of financial misconduct	Report, Vol 2, p 155, para 6.1.4.4
			The prescripts in respect of the procurement of the agreement were not adhered to	Report, Vol 2, p 155, para 6.1.5
			It was common cause that the agreement was entered into without following any procurement procedures as the AG found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management	Report, Vol 2, p 129, para 5.1.3

			processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts	
			The Department was obliged to procure the services of Estina in accordance with a system that is fair, equitable, transparent, competitive and cost-effective	Report, Vol 2, p 135, para 5.1.22
			In order for a PPP to be valid, the Accounting Officer must obtain prior approval from the relevant Treasury. In this case, the accounting officer did not obtain prior approval from the relevant treasury	Report, Vol 2, p 138, para 5.1.34
2.	The contract approved by the legal department in the Office of the Premier benefits Estina at the cost of the State, taxpayers and beneficiaries	Fell under the issue regarding whether the Department improperly entered into a PPP in violation of treasury prescripts	The Department was obliged to procure the services of Estina in accordance to a system that is fair, equitable, transparent, competitive and cost-effective	Report, Vol 2, p 135, para 5.1.22
			The arrangement between the Department and Estina was not a PPP	Report, Vol 2, p 138, para 5.1.36
			The Department did not enter into a PPP with Estina in the context of Treasury Regulations	Report, Vol 2, p 154, para 6.1.2
3.	It was highly irregular for Estina to be both a partner and an implementing agent	Fell under the issue regarding whether the Department improperly entered into a PPP in violation of treasury prescripts	It was common cause that the agreement was entered into without following any procurement procedures as the AG found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts	Report, Vol 2, p 129, para 5.1.3
			The Department was obliged to procure the services of Estina in accordance with a system that is fair, equitable, transparent, competitive and cost-effective	Report, Vol 2, p 135, para 5.1.22

			In order for a PPP to be valid, the Accounting Officer must obtain prior approval from the relevant Treasury. In this case, the accounting officer did not obtain prior approval from the relevant treasury	Report, Vol 2, p 138, para 5.1.34
			The arrangement between the Department and Estina was not a PPP	Report, Vol 2, p 138, para 5.1.36
			The Department did not enter into a PPP with Estina in the context of Treasury Regulations	Report, Vol 2, p 154, para 6.1.2
4.	Estina would receive a 49% share with only a 40% contribution. This would result in taxpayers and beneficiaries being robbed of 9%	Fell under the issue regarding whether the Department improperly entered into a PPP in violation of treasury prescripts	Same as item 2 above	See item 2 above
5.	The National Treasury investigation has revealed various irregularities with recommendations of disciplinary procedures against the HOD and CFO which has been ignored by the provincial government and the Premier. The recommendations should be implemented	Fell under the issue regarding whether the Department improperly entered into a PPP in violation of treasury prescripts	The PP in concurrence with the AG observed that - The HoD did not follow the normal procurement processes as prescribed by the Constitution, the PFMA and National Treasury Regulations	Report, Vol 2, p 155, para 6.1.4.1
			- The Department failed to comply with sections 81 and 86 of the PFMA which prescribe the process to be followed when there are allegations of financial misconduct	Report, Vol 2, p 155, para 6.1.6
			It was common cause that the agreement was entered into without following any procurement procedures as the AG found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts	Report, Vol 2, p 129, para 5.1.3
				Report, Vol 2, p 157, para 7.1.1

			The Premier must initiate and institute disciplinary action against all implicated officials involved	
6.	The Department of Agriculture and Rural Development continues to make monthly payments for running costs such as food into the Project	Fell under the issue regarding whether the Department improperly entered into a PPP in violation of treasury prescripts and whether the Department failed to manage and monitor implementation of the agreement	The Department failed to manage and monitor implementation of the agreement Evidence points to gross irregularities in ensuring the effective and efficient performance of the agreement and resulted in maladministration This amounts to gross negligence and also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act	Report, Vol 2, p 155, para 6.2.1 Report, Vol 2, p 156, para 6.2.4 Report, Vol 2, p 156, para 6.2.4

F. THE THIRD TABLE: ISSUES IN THE THIRD COMPLAINT WHICH THE DA CLAIMS HAVE NOT BEEN INVESTIGATED AT ALL. BUT PLAUSIBLE REASONS HAVE BEEN GIVEN FOR THAT COURSE

Item	**Issues in third complaint which DA claims have not been investigated**	**Reasons given by PP**	**Ref**
1.	State procurement processes were not followed in the appointment of Estina as a partner in the Project	This was investigated by National Treasury: AG. The PP concurred with the AG's findings in this regard. See item 1 of the second table above	AA, Vol 7, p 651, para 59.1
2.	Estina misrepresented itself as being in partnership with a large dairy company in India, Paras	Misrepresentation by Estina does not fall under the Public Protector's jurisdiction as Estina is a private company. However, the issue was considered in the context of whether the Department improperly entered into a PPP agreement	AA, Vol 7, p 647, item 2
3.	The costs were inflated and the processing plant paid for was dysfunctional	The allegation that the prices for goods and services were inflated was difficult to determine Due to the lack of resources and financial constraints, the Public Protector was unable to conduct a comprehensive investigation in order to determine the fair market value for goods and services procured. The PP was not provided with all the invoices and proof of payments for the	Report, Vol 2, p 156, para 6.3.1 Report, Vol 2, p 156, para 6.3.1.2 Report, Vol 2, p 156, para 6.3.1.3

		goods and services procured by Estina on behalf of the Department	
4.	Estina was allowed to abscond from the project without any accountability	The matter was investigated by the Hawks and arrests were made and preservation orders were obtained before the publication of the PP's Report. It would in any event not have been appropriate to take remedial action on issues which had been investigated or under investigation by the Hawks	AA, Vol 7, p 648-649, item 7
5.	The impact of the project on Mahoma Mobung and on the 80-odd beneficiaries who were supposed to benefit as stakeholders	The PP did not have information that would enable her to verify the accuracy of the list and make an assessment of how each had been impacted/prejudiced by the project	AA, Vol 7, p 679, para 95.5
6.	Recovery of irregular expenditure*	By the time the final Report was finalised the recovery of the irregular expenditure was already under way by the Hawks and the AFU	AA, Vol 7, p 655-656, para 61.8
7.	Value for money obtained by the Government*	This had already been investigated by National Treasury: Accountant General	AA, Vol 7, p 658, para 62.2.3
8.	How the money transferred to Estina was spent by Estina*	This is being dealt with by the Hawks	AA, Vol 7, p 659, para 62.2.5
9.	Fraud, theft, money laundering and corruption*	Fraud, theft and money laundering was investigated by the Hawks. The Hawks is the appropriate statutory body to investigate these allegations	AA, Vol 7, p 673-674, para 91.4 and 91.6
10.	The Guptas were the true beneficiaries of the fraudulent and unlawful scheme*	These issues are already the subject matter of other investigations within and outside the office of the Public Protector	AA, Vol 7, p 675, para 93.4
11.	The issues raised in the June 2017 media reports*	The media reports cited by the DA either predate PP's appointment or came after the investigation had already been completed and the draft report prepared. The issues raised in the June 2017 media reports were being investigated by the Hawks. The President has also set up a commission of inquiry in January 2018 to look into these matters	AA, Vol 7, p 676, para 94.2
12.	Cattle deaths*	The deaths did not occur recently. The Minister of Water Affairs intervened	Report, Vol 4, p 121, para 4.3.5.1
13.	Whether or not environmental legislation had been adhered to during the farming operations*	Unsubstantiated complaint. Complainant was requested to provide further information which he failed to do	AA, Vol 7. P 652-653, para 60

* issues that do not appear prima facie the third complaint but which the DA alleges have not been investigated

G. THE FOURTH TABLE: COMPARISON OF THE DA's TREATMENT OF THE PUBLIC PROTECTOR'S ARGUMENT WITH ITS TREATMENT OF HER PREDECESSOR'S ARGUMENT ON THE SAME ISSUES

Issue	**PP's argument**	**Madonsela's argument on same issues**
Cattle Deaths	Did not investigate due to - deaths did not occur recently - Minister of Water Affairs intervened	Did not investigate due to - deaths did not occur recently
Value for money	Did not investigate because the issue was investigated by National Treasury: Accounting General	Did not investigate because the issue was investigated by National Treasury: Accounting General
Narrowing the first issue re compliance with treasury prescripts in respect of the PPP	Whether the Department improperly entered into a PPP agreement for the implementation of the project The PP in concurrence with the AG observed that - The HoD did not follow the normal procurement processes as prescribed by the Constitution, the PFMA and National Treasury Regulations - Payments to Estina were not in line with Treasury prescripts - The agreement between the Department and Estina seems to be invalid due to non-compliance with procurement processes - The Department failed to comply with section 81 and 86 of the PFMA which prescribed the process to be followed when there is allegations of financial misconduct The prescripts in respect of the procurement of the agreement was not adhered to It was common cause that the agreement was entered into without following any procurement procedures as the AG found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts The Department was obliged to procure the services of Estina in accordance to a system	Whether or not the Treasury prescripts in respect of a PPP were adhered to and whether or not the contribution of 40% of the funds for an allocation of 49% of the shares in the company was contrary to Treasury prescripts The evidence provided by the Department in respect of the process followed to conclude the agreement with Estina supported the conclusion that the prescripts in respect of the procurement of the agreement was not adhered to. This was confirmed by the Accounting General's report dated January 2013 and constitutes maladministration The Accounting General informed the Public Protector that a report on the Vrede Dairy Project was drafted and submitted for comments during January 2013 to the Minister of Finance, the Free State Premier and the Member for the Executive Council: Free State Department of Agriculture and Rural Development. The accounting officer of the Department proceeded after the recommendation of the Accounting General to pay a further R143, 950 million to Estina in respect of the project. This amounted to gross irregularity and maladministration The evidence discussed above, which includes failure to adhere to Treasury prescripts in respect of procurement and specifically the conclusion of a PPP leaves me with no option other than to conclude that the Department did not maintain a procurement system that is fair, equitable, transparent, competitive and cost effective as required by section 217 of the

	that is fair, equitable, transparent, competitive and cost-effective In order for a PPP to be valid, the Accounting Officer must obtain prior approval from the relevant Treasury. In this case, the accounting officer did not obtain prior approval from the relevant treasury It is clear from the evidence that the arrangement between the Department and Estina was not a PPP as it did not meet the requirements outlined above	Constitution and Treasury regulations on SCM. It did not comply with the above basic supply chain management requirements, and thus rendered the conclusion of the agreement improper. The conduct of the accounting officer in concluding the agreement amounts to improper conduct, abuse of power and maladministration. This was confirmed by the report of the Accounting General dated January 2014 The distribution of shares on the Agri-BEE company in relation to the monetary contributions required from the parties to the agreement is irregular and contrary to Treasury prescripts in respect of PPP agreements and this constitutes maladministration
Implementation/monitoring of the agreement by the Department	The allegation that the Department failed to manage and monitor implementation of the terms of agreement is substantiated No documents and/or policies or measues were provided by the Department that proper financial cotrol and risk management of the Project were in place. the Public Protector could find no evidence or indication that the Accounting Officer invoked the provisions of the agreement in respect of the control over Project and this raises serious concerns. This concern was supported by the report of eth Accountant General and the lack of effective, efficient and transparent systems of financial and risk management and internal control amounts to gross negligence and maladministration No supporting evidence in the form of actual invoices/receipts was submitted to substantiate the expenditure as claimed in the financial statements submitted, except for nine (9) invoices for procurement cattle The evidence outlined earlier points to gross irregularities in ensuring the effective and efficient performance of the agreement and resulted in maladministration From the above it is clear that this amounts to gross negligence and also constitutes improper conduct as envisaged in section 162(1) of the Constitution and	No documents and/or policies or measures were provided by the Department that proper financial control and risk management of the project were in place. I could find no evidence or indication that the accounting officer invoked the provisions of the agreement in respect of the control over the project and this raises serious concern. This concern was supported by the report of the Accounting General and the lack of controls amounts to gross negligence and maladministration No supporting evidence in the form of actual invoices/receipts was submitted to substantiate the expenditure as claimed in the financial statements submitted. In fact the payment vouchers for the disbursement of the R173, 950 million to Estina were substantiated only by the project proposal of Estina/Para and the agreement concluded between the Department and Estina From the above it is clear that this amounts to gross negligence, maladministration and ultimately irregular expenditure in terms of Treasury prescripts In terms of the Regulations a PPP agreement does not divest the accounting officer of the responsibility for ensuring that the relevant institutional function is effectively and efficiently performed in the public interest. The evidence I have outlined

	maladministration as envisaged in section 6 of the Public Protector Act	earlier points to gross irregularities in ensuring the effective and efficient performance of eth agreement and resulted in irregular and fruitless expenditure
Inflated prices	The allegation that the prices for goods and services procured were inflated, specifically expenses in respect of construction, processing equipment, procurement of cows and administration costs is difficult to determine. This us due to the following: - Estina did not follow public procurement processes when procuring the services of the service providers in the project; - Due to the lack of resources and financial constraints, the Public Protector was unable to conduct a comprehensive investigation in order to determine the fair market value for goods and services procured - The Public Protector was not provided with all the invoices and proof of payments for the goods and services procured by Estina on behalf of the Department The expenses for administration and professional fees were paid from the amounts paid by the Department to Estina despite the explanation from the Department that Estina received 9% more shares in relating to the contribution to be made due to the fact that they will supply the administration and professional services. Although we have established the information regarding the expenditure incurred by Estina during the implementation of the project it was difficult for the Public Protector to make or draw an inference that prices of goods and services were inflated, due to the fact that there was no procurement process followed and the Public Protector could not test the markets to determine market value of goods and services procured without the necessary documents which prove the actual price for the goods and services procured	The independent evidence submitted indicates that the prices of the processing equipment and the cows were considerably higher than the current market prices. The evidence further confirms that the accounting officer of the Department had no measures in place to ensure proper procurement procedures in acquiring assets for the project The evidence submitted by the Department is contradictory in that the MEC submitted that the additional 9% of shares allocated to Estina for the management and administration costs of the project. However from the analysis of the financial statements this could not be verified. This would only be determined through a proper accounting forensic investigation and audit The lack of proper monitoring and control measures to ensure value for public money expended is the reason for the discrepancies and this amounts to gross negligence, maladministration and resulted in irregular and fruitless expenditure

H. THE FIFTH TABLE: REQUIREMENTS, QUALIFICATIONS AND PROTECTIONS FOR PUBLIC PROTECTOR AS COMPARED TO JUDGES

Judges	**Reference**	**Public Protector**	**Reference**
Judicial independence: - Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice	s165(2) Constitution	PP independence: - Chapter nine 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	s181(2) Constitution
No person or organ of state may interfere with the functioning of the courts	s165(3) Constitution	No person or organ of state may interfere with the functioning of these institutions	s181(4) Constitution
Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts	s165(4) Constitution	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	s181(3) Constitution
Appointment: - Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. - The President as head of the national executive, after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly,	s174 Constitution	Appointment: - The Public Protector must be women or men who are South African citizens, who are fit and proper persons to hold the particular office and comply with any other requirements prescribed by	s193 Constitution s1A Public Protector Act 23 of 1994

appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal. - The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly - The President must appoint the judges of all other courts on the advice of the Judicial Service Commission - Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.		national legislation - The President, on the recommendation of the National Assembly, must appoint the Public Protector	
Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.	s174(8) Constitution	The Public Protector strengthens constitutional democracy The Public Protector is subject only to the Constitution and the law	s 181(1) and 181(2) Constitution
Removal: A judge may be removed from office only if - the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and - the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.	s177 Constitution	Removal: The Public Protector may be removed from office only on - the ground of misconduct, incapacity or incompetence; - a finding to that effect by a committee of the National Assembly; and - the adoption by the Assembly of a resolution	s194 Constitution

		calling for that person's removal from office - A resolution of the National Assembly concerning the removal from office of the Public Protector must be adopted with a supporting vote of at least two thirds of the members of the Assembly	
Judicial immunity (common law) As a general rule judicial officers are immune against actions for damages arising out of the discharge of their judicial functions. The only exception is if the conduct of the judicial officer was malicious or in bad faith. Mere possibility of bias apparent to a layman, on the part of a judicial officer, is insufficient in the absence of an extrajudicial expression of opinion in relation to the case, or in the absence of one of the other recognized grounds. The applicant must found the required exceptio recusationis (or exceptio suspecti judicis) on a reasonable cause (justa causa recusationis) which must be proved	Claassen v Minister of Justice and Constitutional Development 2010 (6) SA 399 (WCC) at 407B–410B. In this case it has also been held that the doctrine of judicial immunity is consonant with the provisions of the Constitution, notably s 165 thereof.	Liability of Public Protector - The office of the Public Protector shall be a juristic person. - The State Liability Act, 1957 (Act 20 of 1957), shall apply with the necessary changes in respect of the office of the Public Protector, and in such application a reference in that Act to 'the Minister of the department concerned' shall be construed as a reference to the Public Protector in his or her official capacity - Neither a member of the office of the Public Protector nor the office of the Public Protector shall	s 5 Public Protector Act 23 of 1994

		be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitution	
Contempt of Court - Any person who, during the sitting of any Superior Court— a) wilfully insults any member of the court or any officer of the court present at the sitting, or who wilfully hinders or obstructs any member of any Superior Court or any officer thereof in the exercise of his or her powers or the performance of his or her duties; b) wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in the place where the sitting of the court is held; or c) does anything calculated improperly to influence any court in respect of any matter being or to be considered by the court, may, by order of the court, be removed and detained in custody until the court adjourns - Removal and detention does not preclude the prosecution in a court of law of the person concerned on a charge of contempt of court - At common law contempt of court is an injury committed	s 41 Superior Courts Act 10 of 2013	Contempt of Public Protector - No person shall insult the Public Protector or the Deputy Public Protector - No person shall in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court	s 9 Public Protector Act 23 of 1994

against a person or body occupying a judicial office, by which injury the dignity and respect to which are due to such office or its authority in the administration of justice is intentionally violated. It may be committed either *in facie curiae* or *ex facie curiae*			

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23 October 2018