**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Case No: 13394/18

In the matter between:

**COUNCIL FOR THE ADVANCEMENT OF THE**

**SOUTH AFRICAN CONSTITUTION** Applicant

and

**THE PUBLIC PROTECTOR** Respondent

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# HEADS OF ARGUMENT

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*"[A] review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with the discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below … was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted. …*

*[W]hen a functionary is entrusted with discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide."*[1] *[own emphasis]*

## INTRODUCTION

1. This is an application in which CASAC seeks a declaratory order that the Public Protector failed in her duties under sections 6 and 7 of the Public Protector Act, *("the Act")* and section 182 of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") in relation to the Public Protector's Report No. 31 of 2017/2018 (*"the Report"*); reviewing and setting aside and declaring unconstitutional, unlawful and invalid the Report; and a punitive costs order as against the Public Protector personally, alternatively the Office of the Public Protector.

[1] MEC for Environmental Affairs & Development Planning v Clairisons CC 2013 (6) SA 235 (SCA) at 439, paras [65] and [68]. (*"MEC for Environmental Affairs"*)

*The Relief is not competent*

2. The declaratory relief is not competent in that the Public Protector received complaints regarding the Vrede Dairy Farm Project; investigated the conduct referred to in those complaints; reported on that conduct; and took appropriate remedial action. This the Public Protector did in terms of her powers under the Act being sections 6 and 7.

3. CASAC states that the alleged failure stems from the fact that the Public Protector did not expand her scope of work to include the allegations of corruption as complained of in the letters of complaint; the conduct of senior politicians in the Vrede Dairy Farm Project were not investigated; the issue of the *#GuptaLeaks* was ignored; and that she should have taken into consideration all the information in the public domain regarding the Vrede Dairy Farm.

4. This, we submit, are not failures. The factors raised as failures, are adequately explained by the Public Protector, which explanation is rationally connected with her constitutional mandate. The issues of corruption (*#GuptaLeaks* and information in the public domain) and the conduct of senior politicians are matters that were being investigated by other organs of state. This factor is relevant as the financial constraints placed on the Public Protector meant that she was unable to deal with all the issues raised but ultimately, she was aware that those issues were being

investigated. The necessity to issue a report due to the time taken to investigate and to report on that investigation also played a role in whether the additional factors raised in the 2016 complaint should also be investigated. Had the Public Protector chosen to investigate the issues raised in the 2016 letter of complaint, that would mean that the report would be delayed substantially due to the lack of adequate financial resources.

5. CASAC wants this Court to review and set aside the Report without any remittal. This relief is not competent as CASAC is not seeking any consequential relief. The crux of CASAC's case is that they want some findings and remedial action taken in respect of the Vrede Dairy Farm Project. Reviewing and setting aside the Report without a remittal will not provide conclusion to the complaints raised. If, as CASAC alleges, this matter is of public concern, then seeks no finality with regards to the concern, it must raise the following red flags namely:

5.1. Why would CASAC require the complaints that have been dealt with, be reviewed and set aside without more;

5.2. What is the purpose of the declarator, if not to get finalisation of the complaints;

5.3. What would become of the complaints if the Report is reviewed and set aside;

5.4. Whose public interests would this serve; and

5.5. What would be gained by having the Report reviewed and set aside.

6. The only inference that can possibly be drawn is that the issues raised by CASAC have nothing to do with the public's interest in the finalisation of the complaints but some ulterior purpose which CASAC has not disclosed to this Court. Without consequential relief, the reviewing and setting aside of the Report brings into sharp focus that the entire application by CASAC regarding the alleged failures of the Public Protector to investigate properly is not to, as they say, hold the Public Protector accountable for her reports and to ensure that she deals correctly with investigations, but must show some other ulterior motives on the part of CASAC.

7. The issue of a punitive costs order will be dealt with later.

**BRIEF OUTLINE**

8. It is helpful to provide this Court with a brief outline of what these heads will deal with:

8.1. All three complaints raised with the Public Protector;

8.2. Powers of the Public Protector;

8.3. Review;

8.4. Respondent's submissions;

8.5. Grounds of Review;

8.6. Resource Constraints and Delay in finalising the Report;

8.7. Personal costs; and

8.8. Conclusion.

## THE COMPLAINTS

9. The Public Protector had the following complaints brought before her Office in relation to the Report.

10. The first complaint was received on 12 September 2013 ("*the main complaint*") and this provided, *inter alia* that the complaint alleged that: the contract between the Free State Department of Agriculture and Estina (a private company) had a confidentiality clause which the complainant avers was contrary to good governance; that the National Department of Agriculture invested R30M in the 2012/2013 financial year and would invest R84M in the 2013/2014 year; the partnership between the private company and the Government was inconsistent with Treasury Prescripts as the private company would invest R228M for a 49% stake while Government would invest R342M for a 51% stake; that the 400 pregnant

cows' price was inflated and the private company would contribute 40% of the funds for the 49% share[2].

11. The second complaint was received on 28 March 2014 and made, *inter alia,* essentially the same claims as the ones before. The complaint made the further claim that: there was inflation of prices of the goods and services provided; that up to 100 cows had died since being purchased and that environmental legislation has not been followed.

12. In addition, the second complaint essentially questioned: if the Treasury guidelines in respect of the Public Private Partnership ("*PPP*") were followed and if the contribution of 40% of the funds for the 49% share allocation was contrary to the guidelines; whether the terms of the agreement had been adhered to especially on the part of the Department implementing the appropriate monitoring and management procedures in regards to performance, etc; whether the prices of goods and services were inflated and if environmental laws had been followed during farming[3].

13. The third complaint was received on 10 May 2016 and claimed, *inter alia,* that processes were not followed in terms of state procurement and that Estina had lied about being in partnership with Paras. Further claims made in the third complaint were that the contract prejudiced the State, taxpayers and beneficiaries; that the contract was an irregularity as Estina was both a

[2] AA Vol 8 pages 698 - 699
[3] AA Vol 8 pages 699 - 701

partner and agent; that the costs of the project were inflated and the beneficiaries had been used as pawns to justify the project and they had been robbed of the 9% in the 40% contribution; that Estina had been allowed to abscond with no accountability; that the Mahoma Mobung part of the project was not clear and was irregular; that the provincial government had ignored the National Treasury recommendations; that questions in the Portfolio Committee on Economic Affairs had been ignored; and that the Department continued making monthly payments[4].

## POWERS OF THE PUBLIC PROTECTOR

14. 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*

[4] This is comprehensively dealt with in the AA Vol 8 page 713 - 715

*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.*

*(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."*

15. Section 182(1) of the Constitution empowers the Public Protector to *"(a) investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action."*

16. In *Public Protector v Mail & Guardian Ltd and Others*[5] the court held that *"the office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be exercised 'without fear, favour or prejudice.' Those words are not mere material for rhetoric, as words of that kind are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose."*[6]

17. The leading cases on the nature of the Public Protector's remedial action powers are the Constitutional Court judgment in *Economic Freedom Fighters v*

[5] 2011 (4) SA 420 (SCA)
[6] Ibid at para 8

*Speaker of the National Assembly*[7] ("*EFF*") and the SCA's judgment in *SABC v DA*[8]. The relevant principles are as follows:

17.1. 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."*[9]

17.2. 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*"[10].

17.3. The Public Protector's powers are "*very wide powers that leave no level of government power above scrutiny, coincidental 'embarrassment' and censure*"[11].

17.4. The Constitution requires that the Public Protector's powers be an effective tool to remedy state misconduct:

[7] 2016 (3) SA 580 (CC)
[8] 2016 (2) SA 522 (SCA)
[9] EFF at para 50
[10] EFF at para 51 - 52
[11] EFF at para 53

17.4.1. The Public Protector's powers must be effectual if she is to be capable of performing her constitutional function.[12] Her effectiveness is constitutionally guaranteed as an "*indispensable requirement for the proper execution of [her] mandate.*"[13]

17.4.2. "*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.*"[14]

17.4.3. 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 in addressing the investigated complaint, it often has to be binding."*[15] *[own emphasis]*

[12] EFF at para 49
[13] EFF at para 50
[14] SABC v DA 2016 (2) SA 522 (SCA) at para 52
[15] EFF at para 68

17.4.4. 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*."[16]

17.4.5. "'*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*."[17]

17.4.6. In the light of *Fose*[18], "*appropriate*" remedial action means "*effective*" remedial action.[19] 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:[20] *"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*

[16] EFF at para 65
[17] EFF at para 71
[18] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)
[19] EFF at para 67
[20] EFF at para 69

*application, but situational. What remedial action to take in a particular case, will be informed by the subject-matter of the investigation and the type of findings made."*[21] *[own emphasis]*

18. These judgments establish that:

18.1. The powers of a Public Protector are to be exercised without fear, favour or prejudice;

18.2. The Public Protector protects the public from any conduct in state affairs or sphere of government that could result in impropriety or prejudice;

18.3. The office of the Public Protector fights against corruption, unlawful enrichment, prejudice and impropriety; and

18.4. 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.

**REVIEW**

19. In *Democratic Alliance v President of the Republic of South Africa and Others*[22] the Constitutional Court held that:

[21] EFF at para 70 - 71

*"[39] This Court in SARFU said that 'the exercise of the President's constitutional power to appoint a commission of enquiry is not directly governed by the principle in the Johannesburg Exchange case. It follows that this principle would not directly govern the President's power to appoint the National Director either. That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of a case, there is a failure to take into account relevant material, that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage enquiry is negative, is whether ignoring relevant facts is of a kind that colours the whole process with irrationality and thus renders the final decision irrational.*

*[40] I must explain here that there may rarely be circumstances in which facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a*

[22] 2013 (1) SA 248 (CC)

*rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose." [own emphasis]*

20. In *Minister of Home Affairs v Scalabrini Centre*[23] Nugent JA described what rationality entails as follows:

*"[65] But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one that the Court considers to be reasonable…..(R)ationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."*

*"[66] Whether a decision is rationally related to its purpose is a factual enquiry blended with a measure of judgment. It is here that Courts are enjoined not to stray into executive territory."*[24]

[23] 2013 (6) SA 421 (SCA) at 439, para [65] and [66]

[24] See also *Kannaland Municipality v Minister of Local Government Environmental Affairs & Development Planning in the Western Cape* (20763/13) [2014] ZAWCHC 42 (24.3.2014), where Traverso DJP said: *"The separation of powers requires that where the Constitution or legislation has entrusted specific powers and functions to a branch of government, courts may not usurp those powers or functions by reconsidering the issues and making decisions according to their own preferences."*

21. Therefore, to justify a review on the grounds of legality, CASAC must show that the investigation and report of the Public Protector are not rationally connected to the constitutional mandate given to her and that decisions taken are not rationally related.

**RESPONDENT'S SUBMISSIONS**

22. CASAC seeks to have this Court set aside the Report on the basis that the Public Protector did not investigate and report in a manner that CASAC would prefer[25] and/or that the Public Protector failed to comply with her legal and constitutional obligations under the Constitution[26]. Essentially, CASAC is saying that the Public Protector did not investigate every issue raised in the complaints but only investigated some of the issues raised.

23. CASAC only points to the fact that the Public Protector must investigate all complaints but does not state under which section she is compelled to investigate every issue raised in a complaint. We submit that no such section exists. The Public Protector has the power in terms of section 7(1)(a) of the Act to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with, and under section 7(1)(b) the format and the procedure to be followed in conducting

[25] AA Vol 8 page 693 para 1 - 2
[26] RA Vol 13 page 1156 para 10

any investigation shall be determined by the Public Protector with due regard to the circumstances of each case. Thus, the Public Protector can opt out of investigating any particular conduct[27].

24. The Public Protector has indeed done what she is empowered to do in terms of her constitutional mandate and the Act. The Public Protector received a complaint; decided the issues to be determined; investigated that conduct; reported on that conduct; and took remedial action. This is what she is empowered to do. The Public Protector did not consider additional complaints regarding corruption due to the fact that the issues arising from those complaints were already being investigated by other organs of state, coupled with the fact that financial constraints would have meant that the Public Protector could not complete the investigation in regard to all the matters raised in the complaint and not only in respect of the issues of corruption.

25. The explanation tendered for not investigating all the issues raised in the complaint is not irrational, *mala fide*, unlawful or unconstitutional. These factors were weighed by the Public Protector when exercising her discretion. She also took into consideration that the issues relating to corruption, and that resource and capacity constraints will not affect the eventual outcome of the matter. She therefore determined that the matter of corruption was being investigated by other organs of state and with the

[27] AA Vol 8 page 695 para 7

office's financial and capacity constraints sought a procedure to deal with the balance of the issues.

26. The Supreme Court of Appeal ("*SCA*") in the *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others*[28] has held that Chapter Nine institutions, such as the Public Protector, do not perform an administrative function and are not organs of state within the national sphere of government.[29] Therefore the reliance by the applicant on a PAJA review is misplaced.

27. CASAC states in the replying affidavit that it brings this application in terms of PAJA and a legality review[30], in that they sought in the Notice of Motion to have the Report declared unconstitutional, unlawful and invalid[31]. Therefore, in the matter of *MEC for Environmental Affairs v Clairisons* (mentioned on p.3 above), the SCA laid out the basis for a legality review and thus the following finds application:

27.1. The court is not concerned with the correctness of the decision;

27.2. The court is concerned with whether the functionary performed the function they are entrusted with; and

[28] 2016 (2) SA 522 (SCA)

[29] Supra at para 25 *"Thus, even though these institutions perform their functions in terms of national legislation, they are not organs of state within the national sphere of government. Nor are they subject to national executive control. Accordingly, they should be, and must manifestly be seen to be, outside government.*"

[30] See also, AA Vol 8 page 693 - 694 para 3 - 4

[31] RA Vol 13 page 1156 para 11

27.3. If the functionary is in law entrusted with a discretion, then it is not open to a court to second-guess the evaluation of that discretion.

28. As stated above, the Public Protector complied with her constitutional duty and exercised her discretion when she conducted her preliminary investigation and concluded that some issues could not be investigated.

29. CASAC seems to be reviewing the decision to defer parts of the investigation due to lack of resources. However, there is no such application before this Court[32].

**GROUNDS OF REVIEW**

30. We turn now to deal with the grounds of review together with the purported fatal flaws in the Public Protector's investigation and Report.

*The failure to investigate the complaints of 12 September 2013 and 28 March 2014; the failure to investigate the complaint of 10 May 2016*

31. CASAC alleges that the Public Protector failed to investigate further after finding maladministration to deal with aspects of corruption and that the Public Protector failed to investigate the Free State senior politicians who were allegedly complicit in this corruption.

[32] AA Vol 8 page 695 para 7

32. The response to these allegations is as follows:

32.1. The complaint of 10 May 2016 dealing with corruption of the Free State senior politicians came at a stage when the Public Protector's provisional report was concluded and when the investigations were almost completed;

32.2. Certain issues raised in the above complaint fell within the scope of the issues/conduct already investigated in the earlier complaints of 2013 and 2014[33]. The only outstanding issues were the section 7(9) notices which were sent out on 7 June 2017;

32.3. Other organs of state were already dealing with similar issues raised in the complaint of 10 May 2016 and which related to aspects of corruption[34];

32.4. The office had financial constraints which proved to limit the scope of any further investigation.

33. Thus, we submit that the Public Protector did not act contrary to what she was entrusted to do despite being an anti-corruption watchdog, she correctly evaluated the new complaints raised with regards to corruption; whether her office could indeed investigate further given the financial

[33] AA Vol 8 page 716 para 48
[34] This can be seen from the affidavits of the AFU, signed in December 2017 and the court order given in January 2018 prior to the Report being issued.

constraints; and the fact that there were other organs of state dealing with those matters.

34. The Public Protector's considerations were practical and legitimate. She was entitled to take these considerations into account in her evaluation. Nothing in the Constitution or the Public Protector Act prohibits her from taking these considerations into account. We submit that her conduct was rational and fell squarely within the prescripts of the Constitution, more specifically section 182(1).

*Ignoring evidence of corruption in the public domain*

35. CASAC alleges that the Public Protector should not have noted and ignored reports regarding the involvement of the Gupta Family and that of corruption. In terms of the guidance provided by *Democratic Alliance v President of the Republic of South Africa*[35]this Court must undergo a 3-stage enquiry to determine the effect of the allegation that certain information was ignored. These are:

35.1. Whether the factors ignored are relevant;

35.2. Whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power is conferred; and

[35] Supra

35.3. Whether ignoring relevant facts is of a kind that colours the whole process with irrationality and thus renders the final decision irrational.

36. We submit that CASAC will not overcome the 3-stage enquiry for the reasons that follow.

37. The Public Protector stated that there were no direct references in the 2013 and 2014 complaints relating to certain politicians and the Gupta Family. These came later in the May 2016 complaint. She did not investigate these matters as she had to evaluate what her office could investigate under their current financial constraints coupled with the fact that other organs of state were already dealing with these issues.

37.1. The National Treasury report did not implicate the Free State senior politicians in any alleged activities of wrongdoing, much less corruption. That report merely stated that they delegated their powers and that Zwane advised Thabethe of the availability of land and requested the MEC for Finance that an urgent payment be made to Estina. CASAC's reliance on the National Treasury report to suggest any wrongdoing on the part of either Zwane or Magashule is wholly misplaced.

37.2. At the time of finalising this Report, the Public Protector who previously in office had already recommended that a commission of

inquiry be established to investigate state capture specifically in relation to the Gupta Family, and therefore the current Public Protector need not have dealt with these complaints in the final Report. The state capture commission of inquiry is currently underway and its scope of work includes the *#GuptaLeaks*. The Public Protector's decision not to deal with allegations involving the Gupta Family on the ground that the state capture commission of inquiry was set to deal with the issue was entirely rational.

38. It is apparent that CASAC is expressing a preference here. The Public Protector's failure to satisfy that preference could never qualify as a ground of review. As mentioned before, the Public Protector's ability to conduct investigations is a practical consideration which is influenced by available financial resources. The Public Protector need not replicate investigations being carried out by other organs of state, in fact, the Public Protector has the power to require other organs of state to investigate certain aspects of a complaint. In this instance, the Public Protector need not invoke section 6(4)(c) of the Act as the various public bodies were already investigating the issues raised. We submit that the Public Protector's decision was unassailably rational in these circumstances.

39. Therefore, in terms of the 3-stage enquiry:

39.1. the factors allegedly ignored are relevant;

39.2. the failure to consider the material concerned is rationally related to the purpose for which the power is conferred. The Public Protector explained why these factors were ignored and the fact that other organs of state were comprehensively dealing with these aspects.

39.3. the factors that were allegedly ignored are not of a kind that would colour the whole process with irrationality and thus would not render the final decision irrational. This step is only required if the answer to the second step is negative. However, as submitted, the answer to the second step is positive.

40. Therefore, the fact that the Public Protector did not deal with those factors does not render the decision taken to only deal with the issues of maladministration as irrational.

*The failure to devise an appropriate, proper, fitting, suitable or effective remedy*

41. CASAC alleges that the Premier should not have been directed to institute disciplinary measures against the Head of Department, Mr Thabethe as the Premier himself was implicated in the maladministration and corruption that plagued the project.

42. This is incorrect. The provisional report and the National Treasury report did not implicate the Premier in any wrongdoing. Yes, it stated that the

Premier delegated his powers and that he as chairperson of the Provincial Executive Committee approved the request to implement the project. That is as far as his alleged involvement goes. There is no conflict of interest on the part of the Premier.

43. Thus, the remedial action which required the Premier to discipline the implicated officials, being the Head of Department as one such official, is an effective, suitable and proper remedy to cure the root cause of the complaint being that of maladministration in the procurement and implementation of the project.

44. The Public Protector found three issues arising from the complaints that required investigation, namely, whether the Department improperly entered into a PPP agreement for the implementation of the Vrede Dairy Project; 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; and whether or not prices for goods and services procured were inflated, specifically alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs. The Public Protector found, in summary, that there was no PPP agreement entered into, in terms of the Treasury Regulations; that there were procurement irregularities; that the Department failed to manage and monitor

implementation in terms of the agreement. The remedial action was to cure the maladministration within the Department in relation to this project. Therefore, the implicated persons were disciplined through disciplinary procedures and the Department had to capacitate its employees in the Supply Chain Management Division on the proper prescripts to be followed in respect of procurement.

45. The remedy speaks to the findings which ultimately addresses the conduct complained of. The correctness of this decision does not found a ground of review under the principle of legality.

*Unexplained alterations to the Provisional Report*

46. Firstly, CASAC complained that the Public Protector changed the word "*finding*" to "*observation*" in relation to the conduct of the accounting officer and that there was no proper PPP". This they say is a disturbing alteration as it watered down/sanitised the findings.

47. This does not impact on the remedial action taken by the Public Protector which addresses directly this observation/finding and requires that the implicated official, in this case the accounting officer, be subjected to disciplinary procedures. This has in fact been done.

48. In *President of the Republic of South Africa v the Office of the Public Protector and Others*[36] the Court held with regards to the issue of observations against findings of a Public Protector that:

> *"[100] On a proper interpretation of s 182(1) of the Constitution, read together with the relevant provisions of the Public Protector Act, the taking of remedial action by the Public Protector is not contingent upon a finding of impropriety or prejudice. The Public Protector's powers are clearly set out in s 182(1) of the Constitution.*
>
> *[101] There is nothing in the wording of the section that links the remedial action to a finding of improper conduct It is clear from the wording of the section that the Public Protector is afforded three separate powers: (1) to investigate conduct that is alleged or suspected to be improper; (2) to report on that conduct, and (3) to take appropriate remedial action.*
>
> *[102] Section 7(1)(a) of the Act provides as follows:*
>
> *"The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in sections 6(4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint. allegation or information and the manner in which the matter concerned should be dealt with. "*
>
> *[103] Section 8(1) of the said Act reads:*

[36] 2018 (2) SA 100 (GP)

*"The Public Protector may .. in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her."*

*[104]* *Thus, under these provisions, the Public Protector is expressly empowered to make "findings ... or recommendation[s]'. Read together with the Public Protector's constitutional powers to take binding remedial action, the Public Protector is constitutionally and statutorily empowered to take such action on the basis of preliminary or prima facie findings.*

*[105]* *The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the Court.*

*[106]* *It is common cause that the Report does not reach any firm findings on whether the evidence collected established wrongdoing by the President, the Gupta family and others. But that does not preclude the Public Protector from taking appropriate remedial action.*

*[107]* *The Public Protector's observations set out in paragraph 7 of the Report constitute prima facie findings that point to serious misconduct or impropriety on the part of the President, the Gupta family and the persons, functionaries and entities referred to in the Report. These observations are supported by a considerable body of corroborative evidence." [own emphasis]*

49. Therefore, the change from "findings" to "observations" is not ominous and no negative inference can be drawn from it. As the Court stated, observations are *prima facie* findings. Therefore, there is no disturbing alteration or any watering down or sanitisation of the findings.

50. Secondly, the complaint by CASAC that the referral to a forensic audit investigation was removed is misplaced. The Public Protector relying on the National Treasury report found there were irregularities and provided an appropriate remedial action.

51. Thirdly, CASAC complains that if the Public Protector wished to broaden the remedial action proposed in the provisional report, then she should have stated that the Premier should initiate and institute disciplinary action against Thabethe, and against other implicated officials. This is a preference as to what CASAC would have liked to see. This does not affect the remedial action as Thabethe is already included in the words "*implicated official*". This is not a ground of review.

52. CASAC complains that the removal of the referral to the SIU without more, is disturbing. This has been dealt with in the answering affidavit of the Public Protector[37]. The Public Protector removed this remedial action as at the time of the final Report, the Hawks and the AFU were investigating this issue. This is evinced by the preservation order and affidavits filed by the AFU being in December 2017 and the order granted on 18 January 2018.[38]

[37] AA Vol 8 page 725 para 59.7 – 59.9
[38] Annexure PN4 Vol 2 page 150; Annexure PN11 Vol 3 page 231; Annexure PN12 Vol 3 page 251

53. CASAC stated that the Public Protector does not deal with these alterations. This is incorrect. They were in fact addressed in paragraph 57 of the answering affidavit.

54. The unexplained alterations to the Provisional Report are indeed explained by the Public Protector. The explanation tendered is rational in light of the time lag between the provisional report and the conclusion of the final Report. In that time, the following factors played a material part in the remedial action taken, namely

54.1. The investigation by the Hawks and AFU;

54.2. The pending State Capture Commission of Inquiry; and

54.3. The financial constraints on the Office of the Public Protector.

55. Thus, the alterations to the provisional report took into consideration all the above factors and circumstances, some of those factors and circumstances were not prevalent at the time of the provisional report but were indeed prevalent at the time of the conclusion of the Report. No adverse inference can be drawn from these alterations.

*The Report is unlawful and unconstitutional*

56. CASAC submits that the Public Protector admitted that the Report is unconstitutional and unlawful. This is incorrect. A notice to abide is merely a statement that the party does not wish to enter the fray. The Court may

still find the Report to be constitutional and lawful on the basis that CASAC had not made out a case for the relief sought. Even unopposed applications are not guaranteed an order if the Applicant's papers are defective or do not support the relief sought.

57. The Public Protector has not failed to comply with sections 6(4)(a) and 6(5) of the Act or with section 182(1)(a) and 182(1)(c) of the Constitution.

*The Report is irrational*

58. We have dealt with this section under the head ignoring evidence of corruption in the public domain and failure to investigate the complaints.

59. We however, submit that the relevant evidence that was allegedly ignored, was considered by the Public Protector and she determined that other organs of state were dealing with these issues and that her office's financial and capacity constraints would not allow for her to investigate that aspect of the complaint.

*The Report is marred by bad faith and ulterior purpose*

60. CASAC has not provided any concrete evidence that the Public Protector acted in bad faith or with an ulterior purpose. CASAC only relies on conjecture.

61. CASAC also states that the Public Protector was given ample opportunity to answer their allegations and that she has not done so. This, they say, the

Court must view negatively and draw an inference that the Public Protector acted in bad faith and for an ulterior purpose.

62. We submit that these submissions are incorrect. CASAC also relies on the case of *Tantoush v Refugee Appeal Board and Others*[39] to state that without answering allegations a court must draw a negative inference.

63. The Court in *Tantoush* states that there was no conclusive evidence to show bias raised by the applicants in that matter. The Court went further to state that the Refugee Board of Appeal erred in not disclosing this information and therefore a perception of bias could be justified[40].

64. This is not the case here. The Public Protector has answered comprehensively all the allegations raised by CASAC in their founding and supplementary affidavits. CASAC is simply not happy with the answers and wishes this Court to make an adverse finding that no such answers were provided.

65. Therefore, this Court on the facts before it, cannot find that the Public Protector acted with an ulterior purpose or acted in bad faith.

[39] 2008 (1) SA 232 (T)
[40] Supra at para 84

## RESOURCE CONSTRAINTS AND DELAY IN THE FINALISATION OF THE REPORT

66. Again, in the *President of the Republic of South Africa v the Office of the Public Protector and Others*[41] the Court held with regards to the issue of lack of resources of the Office of Public Protector to complete an investigation that:

> *"[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."[own emphasis]*

67. This is true of this case as well. CASAC does not seriously dispute the lack of financial resources of the Public Protector. CASAC merely states that this case is different to that the of the State Capture report in which the Public Protector requested additional funds, which ultimately was provided late, and only R1.5million was provided. CASAC states that the Public

[41] supra

Protector in that matter had done more in an effort to obtain additional funding, which is not the case in this matter.

68. We submit this is incorrect. What is not disputed by CASAC is the following:

68.1. The Public Protector states that the Office is running at a deficit of some R24 million[42];

68.2. The Public Protector persisted in requesting additional funding and received a bail-out of R15million[43];

68.3. Additional funds in the amount of R21 million were provided for capacitating the office, which funds were not nearly sufficient[44];

68.4. 16397 complaints were received in 2016/2017[45];

68.5. The current budget was reduced again by R8million[46];

68.6. Difficult decisions had to be taken regarding allocation of resources and the investigation of complaints[47].

69. CASAC 'disputes' the explanation tendered by the Public Protector and states that the explanation raises further numerous unanswered questions[48].

[4242] AA Vol 8 page 705 para 23
[43] AA Vol 8 page 705 para 24
[44] AA Vol 8 page 707 para 29
[45] AA Vol 8 page 707 para 30
[46] AA Vol 8 page 710 para 37
[47] AA Vol 8 page 712 para 42

CASAC further states that the inadequacy of the resource constraints defence and without a comprehensive report on it, this Court must infer on the probabilities that bad faith and improper purpose.

70. CASAC thereafter distinguishes this case from the State Capture matter in that the Public Protector requested additional funds, and adopted measures that made the most of what she had. However, we submit that this case is not unlike the State Capture matter but is exactly like that matter. In fact, the State Capture Commission of Inquiry is investigating the issues of corruption surrounding the Gupta Family and their relationships with senior politicians. This is the very issue that the Public Protector stated could not be dealt with knowing well that another organ of state was set to deal with it.

71. What should be contrasted is what CASAC argued in the State Capture matter, and what they are arguing now on the same issue of resource constraints of the Public Protector. An extract of those heads of argument are annexed hereto marked PP-HOA1.

> *"65 It must be highlighted that the financial challenges of the Public Protector's Office are historical and have prevailed on the office for several years. They are evidenced by the following:*
>
> *65.1 In the 2009/2010 Annual Report, it is recorded that the Office of the Public Protector is not fully staffed and that some posts are*

[48] RA vol 13 page 1161 para 17.1

*unfunded and cannot be filled due to financial constraints. That year the Office reported a deficit of R6 million plus;*

*65.2 The organisation continued to operate under severe financial constraints during the 2014/15 financial year. In fact, the Public Protector began the 2014/15 financial year with an operating deficit of R26 million. It stated that approximately 45% of the approved Public Protector South Africa organogram is unfunded;*

*65.3 In its 2015/2016 Annual Report, it reported that financial constraints have impacted the work of the Office negatively. Several cost cutting measures were taken including the closing down of several offices and the freezing of posts; and*

*65.4 In addition to this the Public Protector has on several occasions since 2010 and to date requested additional funding from Parliament."*

72. CASAC thus knew and understood and argued that the resource constraints of the Public Protector is a basis for the Public Protector to refrain from dealing with a complaint. The Public Protector raises the same arguments here and still states that Parliament has reduced her budget, yet CASAC is crying foul and requires this Court to infer bad faith and improper purpose. CASAC does not state what has changed since 2017 that requires the Public Protector to do more with regards to its financial constraints.

73. Therefore, without any evidence to the contrary, this Court must accept that the financial constraints placed on the Office of the Public Protector is a rational explanation for not being able to investigate every issue in a

complaint, knowing well that there are other organs of state dealing with those issues.

74. The delay in the finalisation of the Report has also been comprehensively addressed by the Public Protector. What is of importance is the fact that there were 267 matters that were identified as ones that required to be completed by 2017/2018 as these matters have been open for more than 2 years. This delay in finalising the Report and the need to allocate resources to additional matters, required of the Public Protector to make a difficult decision. This we submit is rationally connected to the purpose for which the Public Protector is constitutionally mandated.

**PERSONAL COSTS**

75. In *South Africa Social Security Agency & Another v Minister of Social Development & Others*[49] the Court found that it was settled that public officials who act in a representative capacity, and are therefore not cited in an application before the Court in their personal capacity, may be ordered to be personally liable for the costs of the application where the public official is guilty of bad faith or gross negligence in conducting litigation, or where the public office is guilty of bad faith or gross negligence in the performance of his/her constitutional functions.

[49] [2018] ZACC 26

76. The Constitutional Court's position is that before an order is made to hold a public official personally liable for the costs of an application, an inquiry is necessary to determine whether the official should in fact be held personally liable. To this end, the Court made an order calling on the public officials, the CEO of SASSA and the Minister of Social Development, to show cause why they should not be held personally liable for the costs of the application. The process to follow from then on was for the public officials to file affidavits with written submissions. This process ensured that the public officials were afforded the opportunity to address the Court before a personal cost order was made. The process also ensures that fairness prevails.

77. We submit that there is no basis whatsoever upon which it may be concluded that the Public Protector is conducting litigation in bad faith or is grossly negligent in conducting litigation. The Public Protector did not initiate these legal proceedings and is not *dominus litis* in this suit. We further submit that there is no basis whatsoever for the conclusion that the Public Protector discharged her constitutional functions in bad faith, or that she was grossly negligent in doing so. In the circumstances, CASAC's contention that a cost order be made against the Public Protector in her personal capacity is wholly misplaced and irrational.

78. We submit that there is no basis made in the application for a personal costs order as against the Public Protector.

**CONCLUSION**

79. We therefore submit that the review application must fail on the grounds that:

79.1. The Public Protector investigated the complaints received by her on 12 September 2013 and 28 March 2014;

79.2. The Public Protector determined that certain issues in the complaint of 10 May 2016 were dealt with in the earlier complaints and that the balance of the issues raised could not be dealt with due to financial and capacity constraints together with the fact that other organs of state were already dealing with those issues;

79.3. The Public Protector did not merely "note" the contents of reports regarding the involvement of the Gupta Family, but knew that this issue was being determined by a different body;

79.4. The Public Protector's remedial action which placed Magashule in charge of disciplinary proceedings was correct in light of the fact that only he has the power to discipline the Head of Department.

The Public Protector determined that on the facts before her, there was no conflict of interest; and

79.5. The Public Protector did not attempt to protect officials within the Free State Department of Agriculture and did not act in bad faith and for an ulterior purpose. All the allegations raised on this ground is based on conjecture and is speculative at best.

80. We submit that the declarator must also fail on the basis that CASAC has not identified the basis upon which the Public Protector can be said to have failed in her constitutional mandate.

81. We finally submit that no personal costs order should be raised as against the Public Protector as there is no evidence of *mala fide* on the part of the Public Protector in relation to conducting the litigation and in exercising her constitutional mandate.

**AL PLATT SC**

**CI DAUDS**

**COUNSEL FOR THE RESPONDENT**

**CHAMBERS**

**7 SEPTEMBER 2018**

**LIST OF AUTHORITIES**

1. MEC for Environmental Affairs & Development Planning v Clairisons CC 2013 (6) SA 235 (SCA)

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

3. Economic Freedom Fighters v Speaker of the National Assembly 2016 (3) SA 580 (CC)

4. SABC v DA 2016 (2) SA 522 (SCA)

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

6. Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC)

7. Minister of Home Affairs v Scalabrini Centre 2013 (6) SA 421 (SCA)

8. Kannaland Municipality v Minister of Local Government Environmental Affairs & Development Planning in the Western Cape (20763/13) [2014] ZAWCHC 42

9. South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others 2016 (2) SA 522 (SCA)

10. President of the Republic of South Africa v the Office of the Public Protector and Others 2018 (2) SA 100 (GP)