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

PRINCIPAL SUBMISSIONS MADE ON BEHALF OF

THE PUBLIC PROTECTOR

TABLE OF CONTENTS

A. CONTEXT

1. This is a political attack waged by a political party on a functionary because the political party did not get its way in Parliament in relation to the appointment of a Public Protector. The DA's bare denial of this in the face of overwhelming evidence that is in the public domain rings hollow.

2. That this application is driven by political considerations is manifest in the manner in which the DA related to the previous Public Protector's work compared to how it relates to the respondent on the same issues. We shall elaborate on this in oral argument.

3. It is public knowledge that the DA opposed the appointment of the respondent as Public Protector alleging that she was a spy for the ruling party. It failed. The respondent was appointed following a rigorous public selection process in Parliament. Since that day, the DA has consistently attacked the respondent and her work. Now it drags this court into its political battle. We ask this court not to oblige it.

4. In **Mazibuko NO v Sisulu NNO**[1] Jafta J observed 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

[1] 2013 (6) SA 249 (CC) at [83]

> appropriately within the domain of other fora established in terms of the Constitution. . .”

5. The DA is aggrieved by Parliament’s recommendation of the respondent as Public Protector in August 2016. Its grief continued upon her appointment in October 2016 and it has not been coy in expressing its disappointment publicly. Now the DA wants this court to give judicial legitimacy to its disappointment.

6. Quite apart from politics, the DA is unhappy that the respondent did not issue a report that confirms the DA’s preconceived view on the culpability of persons it wanted to be found culpable. It is unhappy that the respondent did not pursue, at the time of the DA’s choosing, aspects of the DA’s complaint that the respondent, in her discretion, thought best to defer or not investigate on account of financial constraints or investigation by other organs of state. But it does not avail the DA to have a court say that it would have been better or wiser for the Public Protector to have acted at the time of the DA’s dictation or to have followed a process of investigation preferred by the DA.

7. In the final analysis, orders such as are sought by the DA are intended only to bolster the DA’s attempt to have the Public Protector removed from Office, and it has placed a motion to that effect before Parliament.

8. This is the context in which this application ought to be seen.

B. INTRODUCTION

9. The DA, in its notice of motion, seeks the following orders:

9.1. An order declaring that the Public Protector has acted unlawfully and in violation of her mandate and duties under sections 6 and 7 of the Public Protector Act 23 of 1994 (*"the Public Protector Act"*) and section 182(1) of the Constitution, by –

9.1.1. **Failing to investigate** the complaints of Dr Roy Jankielsohn of 12 September 2013, 28 March 2014 and 10 May 2016 in respect of the Vrede Dairy Project;

9.1.2. **Failing to report** on the alleged or suspected improper conduct committed in the Vrede Dairy Project;

9.1.3. **Failing to take appropriate remedial action**.

9.2. Reviewing and setting aside the Public Protector's Report No. 31 of 2017/18 titled *"Report on an Investigation into complaints of maladministration against the Free State Department of Agriculture in respect of non-adherence to Treasury prescripts and lack of financial*

control in the administration of the Vrede Integrated Dairy Project" issued on 8 February 2018 (*"the Report"*);

9.3. Personal costs on a punitive scale.[2]

10. This application must fail because

10.1. the Public Protector has in fact conducted an investigation;

10.2. the Public Protector has exercised her discretion as she has the power to do in determining what conduct to investigate and when to do so;

10.3. the Public Protector has in fact produced a report;

10.4. there is no evidence that the Public Protector's investigation and report are inappropriate, irrational and not made in good faith;[3]

10.5. it is impermissible to interfere with the means adopted by the Public Protector simply because one does not like the Public Protector's approach, or because there are other methods of investigation and politicians that a rival political party prefers should have been pursued.

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2 Amended NoM, vol 4, p 336-337, prayers 1-3

3 DA's grounds of review. See FA, vol 1, p 46, para 64

C. A BRIEF OUTLINE

11. These submissions are structured as follows:

11.1. First, we set out the complaints.

11.2. Second, we deal with the DA's remaining grounds of review and show that none of them sustain a case for the review of the Report or conduct.

11.3. Third, we demonstrate the issue of financial constraints.

11.4. Fourthly, we deal with the unwarranted attacks in the DA's written submissions.

11.5. Finally, we deal with the issue of costs.

D. THE COMPLAINTS

(a) The first complaint

12. On 12 September 2013, Mr Jankielsohn, a member of the DA, submitted his first complaint with the office of the Public Protector.[4]

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4 Vol 1, p 88

13. In sum, the first complaint was:

13.1. that an agreement entered into between Estina/Paras and the Free State Department of Agriculture (*"the Department"*) was subject to a confidentiality clause (*"the agreement"*);

13.2. that in terms of the agreement Estina/Paras will obtain a 49% share with a R228 million investment in the R570 million project while the 100 local beneficiaries will jointly receive 51% of the shares through a government investment of R342 million;

13.3. that this implies that Estina/Paras will obtain a 49% share with an investment of only 40% of the projected costs of the Vrede Dairy Project (*"the project"*) while Government invests R114 million more in the project than their private sector partners without the beneficiaries receiving the proportionate number of shares;

13.4. that the project plans to milk 500 cows and produce 40 000 litres of milk per day that will be processed by a factory built by Estina/Paras;

13.5. that the Department invested R30 million in the project on designs, an Environmental Impact Assessment, planting of fodder etc;

13.6. that R84 million was to be invested in infrastructure, machinery and cattle; and

13.7. that the Department indicated that 400 pregnant cattle had already been purchased for the project.

14. Mr Jankielsohn requested the Public Protector *"to investigate these issues in an attempt to ensure transparency in the project as well as an equitable share in this project for the local 100 beneficiaries based on the government investment"*.

15. In his second complaint, Mr Jankielsohn made it clear that the request in the first complaint was that an investigation be undertaken into *"the allocation of shares relating to the Vrede Dairy project"*.[5]

(b) <u>*The second complaint*</u>

16. On 28 March 2014, Mr Jankielsohn requested the Public Protector to investigate the following additional matters relating to the project:[6]

16.1. Allocation of shares;

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5 Vol 1, p 89, introductory paragraph
6 Vol 1, p 89-90

16.2. Inflated payments for goods and services;

16.3. Compliance with environmental requirements;

16.4. Cattle deaths.

(c) *The third complaint*

17. On 10 May 2016, more than two years after the second complaint and almost three years after the first, Mr Jankielsohn requested the Public Protector to include the following issues as part of the investigation into the project:[7]

17.1. Whether state procurement processes were followed in the appointment of Estina as the partner in the project.

17.2. Estina misrepresented itself as being in partnership with a large dairy company in India, namely Paras.

17.3. The agreement was approved by the legal department in the Office of the Premier which agreement benefits Estina at the cost of the state, taxpayers and beneficiaries;

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7 Vol 1, p 92-93

17.4. That it was irregular for Estina to be a partner and implementing agent;

17.5. That it was irregular for Estina to receive a 49% share in the project with only 40% contribution;

17.6. Estina was allowed to abscond from the project without any accountability;

17.7. The Mahoma Mobung part of the project, including bank accounts in this name, is unclear and appears to be irregular;

17.8. The beneficiaries have been side lined and used as pawns;

17.9. The National Treasury investigation has revealed various irregularities with recommendations of disciplinary procedures against the HoD and CFO which have been ignored by the provincial government and the Premier. The recommendations should be implemented.

E. THE DA'S GROUNDS OF REVIEW

25. The DA initially founded its case on the basis that the Public Protector's conduct, in investigating the complaints and making the Report, constituted administrative

action as defined in the Promotion of Administrative Justice Act, 3 of 2000 (*"PAJA"*).[8]

26. However, after the Public Protector filed her answering affidavit in which she stated that the SCA recently held that PAJA does not apply to the review of exercises of power by the Public Protector in terms of section 182 of the Constitution and section 6 of the Public Protector Act,[9] the DA subsequently indicated that it will rely on the pleaded grounds of review that are recognised under the principle of legality.[10] It seems to do so grudgingly, but as the law now stands, this court is bound by the decision of the SCA. So is the DA, whatever its reservations. We know of no pending appeal to the Constitutional Court on this issue.

27. The DA's pleaded grounds of review under the principle of legality are:

27.1. non-compliance with section 182(1) of the Constitution;

27.2. irrationality; and

27.3. failure to exercise power and functions in good faith.[11]

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8 FA, vol 1, p 45, para 62

9 AA, vol 7, p 626, para 5. The Public Protector had in mind the judgment of the SCA in **Minister of Home Affairs and Another v Public Protector of the Republic of South Africa** 2018 (3) SA 380 (SCA) at [36]-[37]

10 RA, vol 11, p 1084, para 9.2 and DA's HoA, para 9.4 and 150

11 FA, vol 1, p 46, para 64

28. Before demonstrating why each of these grounds must fail, we address the thrust of the case advanced by the DA.

(a) *The thrust of the case advanced by the DA*

29. The thrust of the case advanced by the DA is that the Public Protector failed to investigate the third complaint at all, and that she failed to investigate the first and second complaints properly and to take appropriate remedial action. It contends that the Public Protector is not vested with a discretion in determining which complaints to investigate. In this regard it proclaims that the Public Protector has a duty to investigate every complaint and tells this court what that duty entails. Anything short of the DA's preference is considered by it to be inadequate and unlawful.

18. This is articulated in paragraphs 15.2 and 16 of the DA's written submissions thus:

> "15.2 … the Public Protector Act – defines and expressly circumscribes the instances where the Public Protector may refuse, or must refuse, to investigate a complaint reported to her office. Section 6 provides for only four such instances…
> 16. …the Public Protector Act does not provide the Public Protector with a carte blanche in deciding whether or not to investigate a complaint. Save for the specific exceptions defined in the Act, the Public Protector is obliged to investigate all complaints submitted to her office that concerns matters in her jurisdiction".

19. The only four instances which the DA says the Public Protector may refuse to investigate are contained in the following sections of the Public Protector Act:

19.1. Section 6(3)(a) and (b);

19.2. Section 6(4)(c);

19.3. Section 6(6); and

19.4. Section 6(9).

20. However, the textual interpretation for which the DA contends is, with respect, strained.

21. In a recent decision of the Supreme Court of Appeal ("the SCA") in **Minister of Home Affairs and Another v Public Protector** 2018 (3) SA 380 (SCA) at [45]-[46], the SCA held that:

> "[45] … As with s 6(1), the Public Protector had a discretion as to whether to take Marimi's complaint or not. The nature of this discretion and the way in which it is to be exercised is shaped by the nature and scope of her mandate as provided for in the Constitution and the Public Protector Act. Section 182 of the Constitution makes it clear that she has the mandate to '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'; and to report on that conduct and 'take appropriate remedial action'. The Public Protector Act widens this already wide mandate even more, extending the Public Protector's

remit to investigation, on her own initiative, of maladministration and similar maladies in respect of, for instance, 'the affairs of government at any level', or by 'a person performing a public function', and also in respect of state-owned enterprises and other public entities.

[46] The only express exclusion of the Public Protector's investigative jurisdiction is in relation to decisions of courts. For the rest, her jurisdiction is extremely wide and her mandate is clear: she must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance. Seen in this context, and the wide discretion vested in her to enable her to achieve this end, the functioning of s 6(3) becomes clear: it provides an opt-out for the Public Protector in the circumstances contemplated by that section. In other words, it allows the Public Protector to decline to take a complaint that is within her jurisdiction if she has reason to do so. The acceptance of a complaint, when the circumstances envisaged by s 6(3) are present, is the default position."

22. A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity.[12] There are three important interrelated *caveats* to this general principle, namely:

22.1. that statutory provisions should always be interpreted purposively;

22.2. the relevant statutory provision must be properly contextualised; and

22.3. all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

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12 **Cool Ideas 1186 CC v Hubbard and Another** 2014 (4) SA 474 (CC) at para [28]

23. From an ordinary grammatical reading of section 6 of the Public Protector Act, the Public Protector's discretion is considerably wide. The only express exclusion is in relation to decisions of courts.[13]

24. The DA's argument that the power to investigate is coupled with a duty to act is not consistent with the wide discretion conferred on the Public Protector, especially when there are cogent reasons (such as financial constraints and investigation by other organs of state) for not acting at the time demanded by the complainant.

25. The office of the Public Protector receives thousands of complaints on an annual basis.[14] It is to ignore the Public Protector's financial and budgetary constraints when the DA states

29.1. that *"the Public Protector is <u>obliged</u> to investigate all complaints submitted to her office that concern matters in her jurisdiction"*;[15]

29.2. that *"the Public Protector <u>must</u> conduct at least a preliminary investigation to determine the merits of a complaint, unless one of the exceptions in section 6 applies. Only after conducting a preliminary*

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13 Section 6(6) of the Public Protector Act
14 Annual Report 2016-2017, vol 8, p 781
15 DA's HoA, para 16

investigation of the merits, may the Public Protector, for good reason, decline to investigate the matter further";[16] and

29.3. that *"the power vested in the Public Protector to investigate . . . must be a power coupled with a duty to exercise it"*.[17]

30. For these propositions the DA places much reliance on the case of **Saidi and Others v Minister of Home Affairs and Others** 2018 (4) SA 333 (CC). However, context in law is everything.[18]

31. In **South African Police Service v Public Servants Association** 2007 (3) SA 521 (CC), the Constitutional Court held that:

> "[17] Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, I examine the context in which the word 'may' is used. The importance of context in statutory interpretation was underlined by Schreiner JA in Jaga v Dönges NO and Another as follows:
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> > 'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts

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16 DA's HoA, paras 20.1 and 20.2

17 DA's HoA, para 24

18 **Minister of Home Affairs and Others v Scalabrini Centre and Others** 2013 (6) SA 421 (SCA) para [89]

> and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.'

[18] Schreiner JA went on to point out that whatever approach is adopted, the Court must be alert to two risks. The first is that the context may receive an exaggerated importance so as to strain the language used. The second is 'the risk of verbalism and consequent failure to discover the intention of the lawgiver'. He emphasised that 'the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene'.

[19] It is necessary to add that the contextual scene has an even deeper significance in our constitutional democracy. All law must conform to the Constitution and be interpreted and applied within its normative framework. The Constitution itself must be understood as responding to our painful history and facilitating the transformation of our society so as to heal the divisions of the past, lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa. Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated by s 1 of the Constitution and the Bill of Rights.

[20] Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution."

32. The interpretation suggested by the DA distorts the language of section 6 and 7 of the Public Protector Act and gives a meaning beyond that which the words can reasonably bear. Such an interpretation is a strained interpretation and ignores the institutional context in which section 6 and 7 function.

33. The DA's primary gripe is that the Public Protector failed to investigate the serious allegations of corruption, money laundering and theft involving the Gupta family and their association in the Free State government.

34. However, what the DA fails to appreciate is

34.1. that the investigation into the Estina Dairy Farm project had already been concluded prior to these issues coming to the fore;

34.2. that the Public Protector is not compelled to investigate every issue on the basis only of media reports;

34.3. that the issues of fraud, theft and money laundering were, and currently are, being investigated by appropriate statutory bodies; and

34.4. the capacity and financial constraints the office of the Public Protector is under.

35. On the financial constraints score, it is rather curious that the DA did not baulk at the Public Protector's identical argument on another occasion. In fact, it supported the argument and the argument was in turn accepted by the court.

36. The DA has demonstrated no basis to have the whole of the Report set aside. The Public Protector made *prima facie* findings that point to serious misconduct. Some of these findings include,

36.1. that the Department was obliged to procure the services of Estina in accordance with a system that is fair, equitable, transparent, competitive and cost-effective;[19]

36.2. that the conduct of the Department was inconsistent with section 195 of the Constitution and sections 38, 39, 40, 51 and 81 of the PFMA;[20]

36.3. that there were several procurement irregularities;[21]

36.4. that the Department failed to manage and monitor implementation of the terms of the agreement;[22]

36.5. that the evidence points to gross irregularities in ensuring the effective and efficient performance of the agreement which resulted in maladministration.[23]

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19 Report, vol 2, p 135, para 5.1.22
20 Report, vol 2, p 145, para 5.2.32
21 Report, vol 2, p 154-155, para 6.1.4
22 Report, vol 2, p 155, para 6.2.1
23 Report, vol 2, p 156, para 6.2.4

37. There is no basis to have these findings set aside.

38. We now turn to the individual grounds of review.

(b) *The alleged failure to conduct any investigation into the third complaint and thus allegedly failing to report on and take remedial action*[24]

39. The issues in respect of the first and second complaints had already been investigated and provisionally reported on prior to this Public Protector coming into office.[25]

40. In exercising her power to investigate and in exercising her discretion which is part and parcel of such power, the Public Protector

40.1. considered that by the time the third complaint was lodged (more than two years after the first and second complaints), it was too late to include the allegations raised in the third complaint into the investigation of the first and second complaints because the issues in that investigation had already been identified and had already been investigated and provisionally reported on by the Public Protector's predecessor, Adv Madonsela;[26]

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24 DA's HoA, para 152.1
25 AA, vol 7, p 646, para 49
26 AA, vol 7, p 646, para 49

40.2. considered that there was nothing in the first and second complaints, and the provisional report, that implicated politicians;[27]

40.3. assessed the third complaint and found that some of the issues raised already fell under the same issues investigated under the first and second complaints;[28]

40.4. considered that the other issues (for example issues pertaining to implicated politicians, the Gupta family and how money was spent and transferred by Estina) were under investigation by other organs of state;[29]

40.5. considered that the office of the Public Protector was operating under severe capacity and financial constraints;[30]

40.6. considered that some issues should be deferred,[31] not abandoned or ignored as the DA claims.

41. There is nothing untoward about the manner in which the Public Protector exercised her discretion as regards the issues to be included in the investigation. The Public Protector was under no obligation to extend the scope of the initial

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27 AA, vol 7, p 646, para 49 and para 61.4
28 AA, vol 7, p 646, para 50
29 AA, vol 7, p 659, para 62.2.5
30 AA, vol 7, p 643, para 45 see also p 651, para 59.1 and p 657, para 62.2
31 AA, vol 7, p 627, para 9

investigation. Even on the DA's strange argument that her discretion was not in fact a discretion to refuse to act, the Public Protector did not refuse to act; she simply deferred the matter owing to financial constraints which is amply explained and justified. She also indicates that some of these issues have been and are being investigated by other organs of state.

42. The DA does not like these answers because it prefers that the Public Protector endorse her predecessor's interim report in all material respects without more, or to follow a process dictated by the DA and arrive at the same remedial action as her predecessor at any cost. Anything that deviates from that, even on good grounds as we shall show, is not acceptable to the DA.

43. The irony is that even when the Public Protector makes the same findings as her predecessor in her interim report, which the DA does not fault but puts up as the standard by which to measure the performance of this Public Protector more than three years later, it now criticises this Public Protector and accuses her of irrationality, failure to perform her constitutional duty and bad faith.

(c) *The alleged failure to conduct a proper investigation into the first and second complaints and thus allegedly failing to properly report thereon and take appropriate remedial action*[32]

44. This attack on the Public Protector's conduct is puzzling.

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[32] DA's HoA, para 152.1

45. It is not immediately clear to us how the Public Protector's approach can possibly be faulted as being irrational or arbitrary or a inconsistent with her constitutional duties on the facts of this case and on applicable principles.

46. The Constitutional Court[33] has reaffirmed the rationality standard. It said:

> [55] . . . All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained.
>
> [56] The discretion to choose suitable means is that of the repository of public power. The exercise of that discretion is not susceptible to review on the ground of irrationality unless there is no rational link between the chosen means and the objective for which power was conferred."

47. Because the Public Protector, *"in concurrence with the Accountant General's Investigation"*[34] not in subversion of it, made findings of *"procurement irregularities"* and took appropriate remedial action including the institution of disciplinary action against *"all implicated officials involved in the Vrede Dairy Farm project"* and the taking of *"corrective measures"*, it is difficult to understand on what basis in law the Public Protector can validly be found to have acted irrationally. That she did not follow the dictates of the DA, in

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33 **Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others** (CCT13/17) [2018] ZACC 20 (5 July 2018)

34 Report, vol 2, p 154, para 6.1.4

circumstances justifying her not doing so, cannot mean that she acted irrationally.

48. On the arbitrariness ground, the Constitutional Court defines the test as follows:

> "Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken."

49. The Public Protector has provided reasons for her approach. She considered that:

49.1. National Treasury had already investigated the matters of adherence to National Treasury Prescripts and value for money and made a finding. So, in light of the office's limited resources, she considered that it would have been imprudent to duplicate an investigation into the same issues;[35]

49.2. the issue relating to the adherence to environmental legislation was unsubstantiated and when the complainant was requested to provide further information he failed to do so;[36]

49.3. the executive authority had no power to discipline a provincial HoD. Only the Premier had such power;[37]

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35 AA, vol 7, p 651, para 59.1 and p 657, para 62.1.2
36 AA, vol 7, p 652, para 60
37 AA, vol 7, p 654, para 61.2.1 and 61.3

49.4. there was nothing in the first complaint, second complaint or Provisional Report that implicated the Premier;[38]

49.5. the Premier was the only person empowered to take disciplinary action against the HoD;[39]

49.6. the Premier should take disciplinary action against "all *implicated officials"*;[40]

49.7. the recovery of irregular expenditure was already under way by the HAWKS and the AFU;[41]

49.8. she did not have the power <u>to instruct</u> the SIU and the Auditor General since the SIU conducts investigations by presidential proclamation and the Auditor General does audits not forensic and due diligence investigations;[42]

49.9. the office of the Public Protector was operating under severe capacity and financial constraints;[43]

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38 AA, vol 7, p 654, para 61.4
39 AA, vol 7, p 654, para 61.3
40 AA, vol 7, p 654, para 61.5
41 AA, vol 7, p 656, para 61.8
42 AA, vol 7, p 656, para 61.9
43 AA, vol 7, p 657, para 62.2

49.10. newspaper articles that surfaced around June 2017 on emails relating to the Gupta family and the Project raised issues which were not part of the scope of the first and second complaints. The issues pertaining to the investigation of those complaints had already been identified and the investigation had already been completed;[44]

49.11. as regards the complaint about side-lining of potential beneficiaries, the Public Protector says her office inquired from the Department which said the documents required to assess the impact of the project on each of the potential beneficiaries had never been in the Department's possession but had been in Estina's possession. An attempt to obtain those documents from Estina was unsuccessful because the company had closed shop and vacated its premises. She considered that a search and seizure process or subpoena in these circumstances would have been a futile exercise.[45]

50. The DA does not like these answers as it wants the Public Protector to rubber stamp a process dictated by it and its own preconceived outcome that implicates persons and politicians. But whether or not the DA likes or approves of the process followed by the Public Protector is not the test for arbitrariness. All that is required, as the Constitutional Court has found, are reasons which justify the action taken. That the DA does not agree with those reasons does not and cannot in law found arbitrariness. It is impermissible to interfere with the means

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[44] Vol 7, p 658, para 62.2.4
[45] Vol 7, p 659, para 62.2.6

adopted by the Public Protector simply because a hostile political party does not like the Public Protector and her approach, or because the political party prefers other methods of investigation and outcomes against politicians of a rival political party and persons thought to be sympathetic to it.

(d) *The allegation that the Report and remedial action are arbitrary, irrational, are vitiated by material errors of law and/or are ineffective*[46]

51. The DA fails to demonstrate on what basis it alleges that the entire Report and remedial action is without foundation or apparent purpose.

52. The test on review is not whether there are other means that could have been used. In **Albutt v Centre for the Study of Violence & Reconciliation 2010 (3) SA 293 (CC)** at [51] the Constitutional Court held that:

> "[51] The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."

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46 DA's HoA, para 152.2 and 152.3

53. In **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC) at [32] the Constitutional Court held that:

> "The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."

54. The Public Protector exercised her statutory discretion. The means she employed was rationally related to the purpose for which the power was conferred.

54.1. Her observations made in the Report constitute *prima facie* findings that point to serious misconduct for which she ordered appropriate remedial action.

54.2. Her remedial action was appropriate having regard to the circumstances of the matter. It included *"corrective measures"* which must mean, in our respectful submission, restoring the status *quo ante*. That, in turn, must mean the recovery of funds irregularly paid. The DA's dismissal of this specific remedial action as vague or imprecise demonstrates its readiness to dismiss any reason advanced by the Public Protector. It appears that this Public Protector can do nothing right in the eyes of the DA short of rubber-stamping the DA's wishes.

54.3. There is a rational connection between the conduct of the Public Protector and the reasons given for it, on the one hand, and between that conduct and the purpose for which the powers are conferred on the Public Protector, on the other.

(e) *The alleged failure to exercise power and functions in good faith*[47]

55. This ground is mentioned in the DA's founding affidavit (without more) and is not pressed as a separate ground in the DA's heads of argument.

56. To the extent that the DA asserts that *"In the absence of a proper explanation for the changes made* [to the Report], *the only reasonable inference to be drawn is that the Public Protector was intent on covering up the irregular expenditure and misappropriation of public money in the Vrede Dairy project"*[48]

56.1. such an inference is unwarranted and is not based on any evidence;

56.2. the Public Protector has explained that the recovery of irregular expenditure was already under way by the HAWKS and the AFU;[49]

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47 FA, vol 1, p 46, para 64.3
48 DA's HoA, para 93
49 AA, vol 7, p 656, para 61.8

56.3. in any event, the remedial action styled *"corrective measures"* entails exactly that, and that includes the recovery of funds paid irregularly.

57. The DA once again seeks to cast aspersions on the Public Protector without objective evidence.

F. CAPACITY AND FINANCIAL CONSTRAINTS

58. 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."

59. 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. 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.

60. 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.

61. 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".[50]

62. It even invoked Public Protector Mkhwebane when it added:

> "[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:
>
> '…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'"[51].

63. There is more:

> "The Public Protector is chronically under-resourced and could not make final determinations of whether individuals were guilty of corruption, or other illegal acts."[52]

64. 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."[53]

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50 See para 89
51 Para 94
52 Para 4
53 Para 126

65. 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."[54]

66. Earlier it 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."[55]

67. Another submission that it made 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 further investigation by other entities with the appropriate powers and resources."[56]

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

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54 Para 99
55 Para 97
56 Para 96

68.1. It 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.

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

68.3. It 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 Public Protector Mkhwebane 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.

68.4. It 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 Public Protector Mkhwebane 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.

68.5. It 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 Public Protector Mkhwebane for not doing her job and acting irrationally and arbitrarily when she leaves some matters for investigation by the Hawks, the AFU and National Treasury.

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

70. We attach, for convenience and ease of reference, only the relevant pages of these documents. They will be available in full should the court require them.

71. The Public Protector has given a detailed account of the financial and capacity constraints faced by her office.[57]

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

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[57] AA, vol 7, p 636-644, para 23-46

G. THE ATTACKS ARE UNWARRANTED AND UNFAIR

73. The DA attacks the Public Protector unwarrantedly and unfairly even in the heads of argument. 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. The rest of the instances of unwarranted and unfair attack will be provided at the hearing should that prove necessary.

(a) Issues Not Investigated

74. The DA attacks the Public Protector for failing to investigate, among other things[58]

74.1. cattle deaths, and

74.2. value for money.

75. 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.[59] That was in November 2014, just under two years before the end of her terms. The DA did not attack her. Yet it feels justified to attack

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58 DA's HoA, para 49

59 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.

this Public Protector over the same issue. This is unfair and unwarranted, and demonstrates the DA's true purpose by this application.

(b) <u>Took only four steps</u>

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

77. The DA attacks her for

77.1. sourcing only four additional documents,[60]

77.2. holding only three interviews,[61]

77.3. conducting one inspection-in-loco of the Vrede Dairy Farm,[62] and

77.4. consulting only one website[63].

78. 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 have generated considerably more documents than her successor who would follow up on work already done and produce a final report. The criticism does

60 DA's HoA, para 57.1
61 DA's HoA, para 57.2
62 DA's HoA, para 57.3
63 DA's HoA, para 57.4

not take account of the complainant's insistence that this Public Protector finalise the report.[64]

79. 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.[65]

80. 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.[66] The DA is not concerned about what further attempts she made over the remaining two years of her term.

81. 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.[67] If that is the standard (which is, with respect, absurd) and this Public Protector had become aware of the matter

64 Vol 7, p 680, paras 95.9 & 95.10
65 Vol 4, p 396, para 4.4.2
66 Vol 4, p 397, para 4.4.4.1
67 Vol 2, p 128, para 4.4.5.1

only in March 2017[68] 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.

(c) *Investigated only Three Issues*

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

83. 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.

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68 Vol 7, p 682, para 97.2.1. The DA says it does not understand this denial: vol 11, p 1120, para 43.1

84. The DA attacks the Public Protector for investigating three issues.[69] But Adv Madonsela investigated only four[70] and refused to investigate two more for the same reasons advanced by the Public Protector. The DA did not attack her.

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

86. The first issue was phrased by Adv Madonsela thus: *"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"*.[71]

87. The Public Protector phrased the same issue thus: *"Whether the Department improperly entered into a Public Private Partnership agreement for the Implementation of the Vrede Dairy Project"*.[72]

87.1. 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

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69 DA's HoA, paras 62-94
70 Vol 4, p 391, para 4.3
71 Vol 4, p 391, para 4.3.1
72 Vol 2, p 101, para (vii)(a)

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.

87.2. But because the DA has already convinced itself of the Public Protector's dishonesty and ulterior motives,[73] nothing she does differently from her predecessor will satisfy it.

87.3. 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 the provincial government . . . [t]his was all the more reason for the Public Protector to investigate the matter further"*[74].

87.4. 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

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73 DA's HoA, para 93
74 DA's HoA, para 71.1

implement those Treasury recommendations? What is required in such circumstances is implementation of the recommendations, not re-investigation, surely? And that is exactly what the Public Protector did. She made findings *"in concurrence with the Accountant General's Investigation"*[75] – 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.[76] Not only has the Public Protector taken the same remedial action,[77] its implementation has already commenced[78].

87.5. But because these similarities are inconvenient for the DA, it resorts to finding fault elsewhere (as it must), namely, that the Public Protector elevates mere formal requirements to the level of inherent requirements[79]. But this does nothing to detract from the fact that the Public Protector got the provincial government to act on at least two of 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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75 Vol 2, p 154, para 6.1.4
76 Vol 5, p 490, paras 7.1.1 & 7.1.2
77 Vol2, p 157, para 7.1.1; vol 2, p 158, para 7.2.2
78 Vol 7, p 659 para 63 to p 661 para 6.1.8; vol 9, pp 896-899
79 DA's HoA, paras 73-78

88. The second issue was phrased thus 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"*[80].

89. 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"*.[81]

89.1. 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 . . ."*.

89.2. But the DA readily sees an ulterior motive in this, even though the Public Protector ultimately found that this charge against the department *"is*

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80 Vol 4, p 392, para 4.3.2
81 Vol 2, p 101, para (vii)(b)

substantiated"[82], and directed by way of remedial action that disciplinary action be taken *"against all implicated officials involved in the Vrede Dairy Farm project"*[83] and that *"corrective measures"* be taken to prevent a recurrence of these failures by the department[84].

89.3. That the implementation of this remedial action against implicated officials has commenced[85] 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[86] as not demonstrating that the Public Protector's investigation and final report were *"adequate, effective and lawful"*[87]. 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.

89.4. Notwithstanding the plausible reasons[88] given by the Public Protector for not following the subpoena and search and seizure route proposed by the DA, the DA still persists in attacking her on this score in its heads of

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82 Vol 2, p 155, para 6.2.1
83 Vol 2, p 157, para 7.1.1
84 Vol 2, p 158, para 7.2.2
85 Vol 7, p 659 para 63.1 to p 661 para 63.1.8
86 Vol 9, pp 896-899
87 Vol 11, p 1112, para 32
88 Vol 7, p 659, para 62.2.6

argument[89]. 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.

89.5. 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.[90] This is incorrect. For one thing, the Public Protector has offered a detailed explanation for the deviation from the provisional report's findings.[91] 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.

89.6. 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.

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89 DA's HoA, paras 79-82
90 DA's HoA, paras 85-87
91 Vol 7, p 694 para 112 to p 699 para 113.2.6

90. 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"*[92].

91. The Public Protector captures this same issue in her final report in exactly the same words, word-for-word and comma-for-comma.[93]

91.1. The DA attacks her for concluding, without explanation, that these costs are *"difficult to determine"*[94] because it expected her simply to follow her predecessor's preliminary findings.

91.2. Again, this attack is unwarranted and unfair. The Public Protector has given plausible reasons justifying her conclusion.[95] She has also explained why no request was necessary for exhibits to the National Treasury report.[96] This is what she says in this regard:

> "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.

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92 Vol 4, p 392, para 4.3.3
93 Vol 2, p 101, para (vii)(c)
94 DA's HoA, paras 89-94
95 Vol 7, p 694 para 112 to p 699 para 113.2.6
96 Vol 7, p 692, para 110

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"**[97]. 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."

91.3. 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.

91.4. When a feasibility study 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.

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97 See Vol 10, p 900 to vol 11, p 1059

92. 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.[98] All the DA has to offer in this regard is a bare denial.[99]

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

(d) *Instructing the SIU and A-G*

94. 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 *"instruction to the SIU [which] was coupled in the provisional Report with a reporting obligation and ongoing monitoring by the Public Protector"*[100].

95. 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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98 Vol 7, p 652, para 60
99 Vol 11, p 1104, para 27.2
100 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"[101].

96. This remedial action was legally incompetent of Adv Madonsela to take. It was also not the same remedial action, as alleged by the DA,[102] that this Public Protector took 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**, as alleged by the DA in its heads of argument.[103]

96.1. 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[104] and in its heads of argument, to issue an instruction to the SIU. She had no power to do that. The DA did not attack her.

96.2. 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.

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101 DA's HoA, para 114.1; see also vol 5, p 454, para 9.1.4.1
102 DA's HoA, para 116
103 DA's HoA, para 117
104 Vol 11, p 1110, para 30.1

96.3. 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 exhausted her powers under the provision.[105] It is not the referral *per se* that the High Court set aside but rather the substance of what was referred.[106]

96.4. 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.[107] 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"*[108].

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105 **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

106 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.

107 Vol 11, p 1110, para 30.1

108 DA's HoA, para 121

96.5. This case was never 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. 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.[109]

96.6. 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.

96.7. 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.

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109 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."

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.

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

97. 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"*[110].

98. 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.

98.1. 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

110 Vol 5, p 454, para 9.1.5.1

Auditor-General to conduct an investigation[111]. Now, in its heads of argument, the DA seeks to shift its case to being about the scope of the Auditor-General's powers[112]. 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.[113]

98.2. 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.

98.3. 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 which will be developed in argument.

98.4. 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

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111 Vol 11, p 1110, para 30.1
112 DA's HoA, paras 122-125
113 See fn 109 above

the Auditor-General, thereby turning the Auditor-General into a super investigative unit.

98.5. 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[114] 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.

98.6. 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.

98.7. Fourth, the Auditor-General can only perform "other functions" if his role as Auditor-General and independence will not be compromised.[115] Adv Madonsela's remedial action instructing the Auditor-General to

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

115 Section 5(1)(a)

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.

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

H. PERSONAL COSTS

100. The DA seeks an order that the Public Protector pay the costs of this application in her personal capacity on an attorney-client scale.

101. The Public Protector, operating always in fear of personal adverse cost orders, can hardly be effective in the performance of his/her constitutional obligations.

102. It is for this reason that the Public Protector has applied to the Constitutional Court for direct access, alternatively direct leave to appeal regarding the judgment in the matter of **ABSA Bank Limited and Others v Public Protector and Others** [2018] 2 All SA 1 (GP). The application is set down for hearing on

27 November 2018 and has a direct bearing on the issue of costs in this application.

103. Such a costs order impacts adversely and directly on the exercise by the Public Protector, a Chapter Nine institution, of her constitutional power, obligations and functions without fear, favour or prejudice. The implications of the costs order against the person of the Public Protector has far-reaching effects and serious implications on the administration of justice and the Rule of Law.

104. The adverse impact is continuing as it is an ever-present threat to the institution's independence, impartiality and ability to act without fear, favour or prejudice. The danger therefore is that these costs against the person of the Public Protector in the review of decisions that the Public Protector has made in the fulfilment of her constitutional obligations may open the floodgates for numerous similar applications for such extraordinary orders.

105. In any event, **Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)**[116] affirms the principle that public officials may be ordered to pay costs out of their own pockets only if they are guilty of bad faith or gross negligence. The DA proves neither type of conduct.[117] The high-watermark of its case in this regard hinges on an inference. It says

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116 At para [9]

117 See also **South African Social Security Agency and Another v Minister of Social Development and Others** (CCT48/17) [2018] ZACC 26 (30 August 2018) at paras [36]-[47]

> "In the absence of a proper explanation for the changes made [to the interim report], the only reasonable inference to be drawn is that the Public Protector was intent on covering up the irregular expenditure and misappropriation of public money in the Vrede Dairy project . . ."[118]

106. But the Public Protector has provided reasons that justify her changes. That the DA does not agree with them, or does not believe the Public Protector when she says these are her reasons, cannot found a case for bad faith.

107. In the absence of bad faith, there can be personal costs order. No gross negligence has been pleaded or proven.

I. CONCLUSION

108. For the reasons set out above, the DA has not made out a case for the relief sought. This application ought to be dismissed with costs, such costs to include the costs of two (2) counsel.

V Ngalwana SC
F Karachi
L Rakgwale

Duma Nokwe Group of Advocates
Chambers, Sandton

7 September 2018

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[118] DA's HoA, para 93

LIST OF AUTHORITIES

1. Absa Bank Limited and Others v Public Protector and Others [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) (16 February 2018)
2. Albutt v Centre for the Study of Violence & Reconciliation 2010 (3) SA 293 (CC)
3. Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)
4. Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC)
5. Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC)
6. Khumalo and another v MEC for education, Kwazulu-Natal 2014 (5) SA 579 (CC)
7. Mazibuko NO v Sisulu NNO 2013 (6) SA 249 (CC)
8. Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others (CCT13/17) [2018] ZACC 20 (5 July 2018)
9. Minister of Home Affairs and Another v Public Protector of the Republic of South Africa 2018 (3) SA 380 (SCA)
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12. Saidi and Others v Minister of Home Affairs and Others 2018 (4) SA 333 (CC)

13. South African Police Service v Public Servants Association 2007 (3) SA 521 (CC)
14. South African Social Security Agency and Another v Minister of Social Development and Others (CCT48/17) [2018] ZACC 26 (30 August 2018)
15. Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T)