IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 48123/2017

52883/2017

46255/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

16/2/2018 Pretoria
DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED — **APPLICANT (CASE NO.: 48123/2017)**

SOUTH AFRICAN RESERVE BANK — **APPLICANT (CASE NO.: 52883/2017)**

MINISTER OF FINANCE — **APPLICANT (CASE NO.: 46255/2017)**

NATIONAL TREASURY — **APPLICANT (CASE NO.: 46255/2017)**

And

PUBLIC PROTECTOR

FIRST RESPONDENT

SPECIAL INVESTIGATING UNIT

SECOND RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

THIRD RESPONDENT

JUDGMENT

THE COURT,

INTRODUCTION:

(1) The Public Protector issued a final report, Public Protector's Report 8 of 2017/2018 into the *"Alleged Failure to Recover Misappropriated Funds"* (the Report) on 19 June 2017. The Public Protector made certain factual findings and came to certain conclusions in the Report that includes that the South African Government had improperly failed to implement the CIEX report which dealt with alleged stolen state funds, after commissioning the report from CIEX and paying for it; the Government and the Reserve Bank had improperly failed to recover R3,2 billion from Bankorp Limited/ABSA, and that the South African public was prejudiced by the conduct of the South African Government and the Reserve Bank.

(2) These findings and conclusions by the Public Protector lead to her prescribing certain remedial actions in her report. The remedial actions are set out in paragraphs 7 and 8.1 of the Report as follows:

"7. ***REMEDIAL ACTION***

7.1 The Special Investigating Unit:

7.1.1 The Public Protector refers the matter to the Special Investigating Unit in terms of section 6(4)(c)(ii) of the Public Protector Act to approach the President in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996, to:

7.1.1.1 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion; and

7.1.1.2 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated May 1998 in order to investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report.

7.1.2 The South African Reserve Bank must cooperate fully with the Special Investigating Unit and also assist the Special Investigating Unit in the recovery of misappropriated public funds

mentioned in 7.1.1.1 and 7.1.1.2.

8. MONITORING

8.1 The Special Investigating Unit, the South African Reserve Bank and the Chairman of the Portfolio Committee on Justice and Correctional Services must submit an action plan with (sic) *60 days of this report on the initiatives taken in regard to the remedial action above."*

(3) This caused the South African Reserve Bank, the Minister of Finance and the Treasury, and ABSA, respectively, to institute review proceedings, challenging the Report. The Public Protector is the first respondent in all three applications. These applications were consolidated, hence the present hearing dealing with all the relevant review applications. All the parties challenged the Report and requested the Court to review and set aside paragraphs 7.1.1, 7.1.1.1 and 7.1.2 of the Report, as well as paragraph 8.1.

(4) The Reserve Bank had previously instituted a review application, on an urgent basis, that the court should review and set aside paragraph 7.2 of the Report. The Public Protector consented to the relief sought in the urgent application and Murphy J[1] made it an order of court on 15 August 2017. Throughout, however, the Reserve Bank had reserved

[1] SARB v Public Protector 2017(6) SA 198 (GP)

its rights to challenge the remainder of the Report and does so in these proceedings. The Reserve Bank instituted the review in terms of Uniform Rule 53 of the Uniform Rules of Court. The Reserve Bank requested the court to review and set aside the whole of paragraphs 7.1.1, 7.1.1.1 and 7.1.2 of the Report.

(5) ABSA's application is to review and set aside the remedial action in paragraphs 7.1.1, 7.1.1.1 and 7.1.2, as well as paragraph 8.1, of the Report, which imposes the obligation on the second respondent, the Special Investigating Unit (SIU) and the fourth respondent, the South African Reserve Bank. ABSA brings the application for review under the provisions of **PAJA**[2], in the alternative in terms of the principle of legality.

(6) The Minister and Treasury's review application is on the basis of **PAJA**, in the alternative on the principle of legality in terms of section 1(c) of the **Constitution**[3]. The Minister and Treasury argued that, should the court set aside paragraphs 7 and 8.1, then the court should review and set aside the entire report.

(7) The applicants' applications for the review and setting aside of the Public Protector's recommended remedial action is based on the

[2] Promotion of Administrative Justice Act 3 of 2000
[3] Constitution of the Republic of South Africa Act 108 of 1996

following grounds:

7.1 that the Public Protector was not authorised either by the **Public Protector Act** or any other law and therefore acted contrary to section 6(2)(a)(i) of **PAJA**.

7.2 that the recommended remedial action was materially influenced by an error of law contrary to section 6(2)(d) of **PAJA**.

7.3 that the action taken by the Public Protector was for an ulterior purpose or motive contrary to section 6(2)(e)(ii) of **PAJA**.

7.4 that the Public Protector failed to take into account relevant considerations and had taken into account irrelevant considerations contrary to section 6(2)(e)(iii) of **PAJA**.

7.5 that the Public Protector acted arbitrarily contrary to section 6(2)(e)(vi) of **PAJA**.

7.6 that the Public Protector imposed remedial action which is not rationally connected to the purpose for which it was taken on the information before her, contrary to section 6(2)(f)(ii)(aa) and (cc) of **PAJA**.

7.7 that the remedial action imposed was so unreasonable that no reasonable person would have exercised the power or performed the function, contrary to section 6(2)(h) of **PAJA**.

7.8 that the process undertaken in recommending the remedial action was procedurally unfair, contrary to section 6(2)(c) of **PAJA**.

7.9 that the Public Protector was biased or reasonably perceived to

be biased as contemplated in section 6(2)(a)(iii) of **PAJA**.

(8) In the alternative, the applicants contend that the imposed remedial action is contrary to the principle of legality. ABSA Bank and the Reserve Bank are challenging the Public Protector's Report on the following grounds:

8.1 that the Public Protector lacks the jurisdiction to re-open the investigation into the transfer of funds by the Reserve Bank during the period 1986 to 1995. The Public Protector's office was established on 1 October 1994, the transactions in issue, took place before the establishment of the Public Protector's office. Therefore the Public Protector, in purporting to exercise her powers in terms of section 6(9) of the **Public Protector Act**[4], lacked jurisdiction to investigate the matter which took place prior to the establishment of the office of the Public Protector. She had failed to consider the effect of the reopening of the investigation into ABSA Bank on the financial stability of the banking system; and

8.2 that the debt, if any, the Public Protector seeks to recover has prescribed in terms of the provisions of section 11(d) of the **Prescription Act**[5] (Prescription).

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[4] Act 23 of 1994
[5] Act 68 of 1969

(9) The Reserve Bank, belatedly, in the replying affidavit, requested the court to issue a declarator that the Public Protector had abused her office. No such relief had been requested in the Notice of Motion and it only became relevant when the Reserve Bank filed its replying affidavit to the Public Protector's answering affidavit.

APPLICATION BY AMICUS CURIAE:

(10) Open Secrets Non-Profit Company (*"Open Secrets"*) applied to be admitted as amicus curiae. The application was opposed by all the reviewing parties.

(11) According to the founding affidavit of Open Secrets the purpose of the application was *"to place limited evidence and submissions before this Court on the nature and existence of apartheid era economic crimes which have never been fully investigated or remediated"*. Open Secrets also contended that there was public interest in having the investigation into apartheid era economic crimes remitted to the Public Protector for comprehensive investigation and reconsideration of the nature and extent of all such crimes.

(12) This application is subject to the provisions of Rule 16A. The relevant part thereof provides in sub-rule (6) that an application of this nature shall clearly and succinctly set out the submissions which will be

advanced, the relevance thereof to the proceedings and reasons for believing that the submissions will assist the Court and are different from those of the other parties. If these requirements are not met, the Court should, in the exercise of its discretion, refuse the application[6].

(13) The main reason, set out by Open Secrets, to be admitted as an amicus curiae is to place evidence and submissions before this Court about a number of apartheid era economic crimes that have not been fully investigated or remediated. These alleged crimes, as well as the question whether they had been fully investigated or not, are not relevant to the issues in the main proceedings. The main issue before us is whether this Court should in three different review applications, which have since been consolidated, review and set aside certain conclusions, findings and remedial actions taken by the Public Protector in her Report dated 9 June 2017.

(14) Open Secrets sought to introduce new issues relating to the nature and existence of a number of apartheid era economic crimes which fall outside the scope of these proceedings. Furthermore, submissions or even evidence with regard to these new issues would not assist the Court in considering and deciding the main issue. After hearing argument, the application was dismissed.

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[6] Brummer v Minister for Social Development 2009 (6) SA 323 (CC) at par 21 and 22

LEGAL AND CONSTITUTIONAL FRAMEWORK:

(15) In terms of section 181(1) of the **Constitution** the office of the Public Protector was established *"to strengthen constitutional democracy in the Republic"*. Section 181(2) clearly provides:

> *"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."*

This is confirmed in section 181(3) and (4), which guarantees the independence and no interference in the Public Protector's work. In **Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others**[7] Mogoeng CJ held:

> *"We learn from the sum-total of sections 181 and 182 that the institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation. In appreciation of the high sensitivity and importance of its role, regard being had to the kind of complaints, institutions and personalities likely to be investigated, as with other Chapter Nine institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. The obligation to keep alive these essential*

[7] 2015(3) BCLR 268 (CC) at paragraph 50

requirements for functionality and the necessary impact is placed on organs of State. And the Public Protector is one of those deserving of this constitutionally-imposed assistance and protection. 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 role and powers must be understood."

(16) This power, as set out in the above judgment, must be exercised with respect for the organs of State the Public Protector investigates and she has to give due deference to the expertise within these organs of State and, in this instance, the Reserve Bank. In **Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others**[8] Khampepe J stated:

"A level of deference is necessary – and this is especially the case where matters fall within the special expertise of a particular decision-making body. We should, as this Court counselled in Bato Star, treat the decisions of administrative bodies with "appropriate respect" and "give due weight to findings of fact . . . made by those with special expertise and experience"."

(17) The functions of the Public Protector had been set out in section 182 of

[8] 2015(3) BCLR 268 (CC) at paragraph 79

the **Constitution**[9]:

"(1) The Public Protector has the power, as regulated by national legislation-

(a) 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;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation."

(18) The **Public Protector Act**[10] in section 6(4)(b) empowers the Public Protector, in her sole discretion, to resolve any dispute or rectify any act or omission by *"mediation, conciliation or negotiation"*. Section 6(4)(c)(ii) allows the Public Protector to *"make an appropriate recommendation regarding the redress of the prejudice"*. Section 8(1) of this Act provides:

"The Public Protector may, subject to the provisions of subsection (3), 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."

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[9] *Supra* section 182(1)(a), (b), (c) and (2)
[10] Act 23 of 1994

(19) Section 7(9)(a) and (b)(i) provide that any person implicated in the matter being investigated or subject to a potential adverse finding has a right to be heard. This was confirmed by the Supreme Court of Appeal in **South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others**[11] and by the Constitutional Court in **Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others**[12].

(20) Section 1(c) of the **Constitution** provides that the democratic state of South Africa was founded on the supremacy of the Constitution and the rule of law. Therefor the Public Protector has to act according to the rule of law in all, or any decisions, she makes.

(21) Section 223 of the **Constitution** establishes the Central Bank, the Reserve Bank. Section 224 of the **Constitution** provides:

> *"(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.*
>
> *(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for*

[11] 2016(2) SA 522 (SCA) at paragraph 38
[12] 2016(3) SA 580 (CC) at paragraph 60

national financial matters."

(22) Section 225 prescribes the powers and functions of the Reserve Bank. One of the functions of the Reserve Bank is to act as lender of last resort to prevent instability in the banking sector. These powers and functions are customarily and internationally, exercised and performed by central banks. These powers must be exercised with great skill and care by experts in financial matters. Other organs of State, such as the Public Protector, ought not lightly to interfere with the discretionary exercise and powers of the Reserve Bank. The Public Protector's mandate is to pursue maladministration and not to interfere with experts in other spheres of government.

(23) The provisions of the **Special Investigating Units and Special Tribunals Act**[13] (the **SIU Act**) are important. Section 2 of the **SIU Act** provides that the President may establish special investigating units. Section 4 refers to the functions of a SIU whereas section 5 sets out the powers of such a unit. Subsection (6)(b) provides:

> *"The Head of a special investigating unit may refer any matter which, in his or her opinion, could best be dealt with by the Public Protector, to the Public Protector and the Public Protector may, if he or she deems it appropriate, refer any matter which comes to his or her attention and which falls within the terms of*

[13] Act 74 of 1996

reference of a special investigating unit, to such unit."

Again, the operative words applying to both a SIU and the Public Protector are *"may refer"*. This subsection allows the Public Protector and the head of a SIU to refer matters to one another. The SIU is a statutory institution established by the President in terms of section 2 of this Act. It has, like the Public Protector, only those powers assigned to it by statute. This subsection does not create a hierarchy between the two. Each can bring a matter to the attention of the other, but neither can instruct the other on how to deal with a matter.

FACTUAL BACKGROUND:

(24) A complaint was lodged in 2010 by Advocate Paul Hoffman SC of the Institute for Accountability in Southern Africa (IFAISA), complaining about the alleged failure of the South African Government to implement the findings of CIEX Ltd ("CIEX") and to recover the money from ABSA.

(25) The alleged debt arises from what has become known as the "lifeboat transactions" entered into during the mid-1980s between the Reserve Bank and several small banking institutions, which included Bankorp Ltd, which was in financial distress at the time. A detailed exposition of the three agreements the Reserve Bank and Bankorp/ABSA Bank concluded is set out by Murphy J in **South African Reserve Bank v**

Public Protector & Others[14]. In brief the facts are that between 1985 and 1991 the Reserve Bank had provided financial assistance to Bankorp in the amount of R1,25 billion, of which R300 million was at an interest rate of 3% per annum and the balance at 16% interest per annum. Part of the agreement was that Bankorp would invest R400 million in the Reserve Bank. R600 million would be invested at 15% interest per annum, which would be used to buy government bonds to serve as security for the loans. On 1 April 1992 ABSA Bank acquired Bankorp for an amount of R1.230 million. The acquisition of Bankorp by ABSA Bank was conditional upon the existing financial assistance arrangements between the Reserve Bank and Bankorp being extended to ABSA bank. The agreement between ABSA Bank and the Reserve Bank was terminated.

(26) CIEX is a UK based assets recovery agency which was headed by a certain Mr Michael Oatley. In 1997 CIEX had approached the Government with a proposal to assist it investigating and recovering misappropriated public funds and assets, that had, allegedly, been misappropriated prior to the coming into being of the democratic government in 1994. Subsequently, in October 1997, the Government and CIEX concluded a Memorandum of Agreement ("MOA"). In terms of the MOA, CIEX undertook to investigate and advise the Government on the recovery of a debt allegedly owed by ABSA Bank and other entities to the Reserve Bank. In return, and in the event that CIEX

[14] *Supra*

recovered any illicit funds, the government undertook to pay it a certain percentage of the recovered funds as commission. CIEX thus, allegedly, operated as a bounty hunter on behalf of the government.

(27) In pursuance of its mandate CIEX produced three reports. In the final report, CIEX concluded that there were corruption, fraud and maladministration committed in relation to the financial assistance the Reserve Bank rendered to Bankorp/ABSA Bank. The agreement between CIEX and the government terminated in 1998 and was not renewed. Only the final CIEX report forms part of the record before the court.

(28) In 1998 the State President published Proclamation R47 of 1998 for the establishment of the Heath Commission which was headed by retired Judge Willem Heath. The Heath Commission was mandated to investigate the possible recovery of alleged financial assistance to Bankorp/ABSA Bank made by the Reserve Bank during the nineteen eighties. In its findings, according to newspaper reports, the Heath Commission concluded that the financial assistance given to Bankorp by the Reserve Bank was a simulated loan transaction which was in fact a donation by the Reserve Bank to Bankorp/ABSA bank. However, the Heath Commission decided not to recommend the recovery of the monies/funds allegedly donated to Bankorp/ABSA Bank based on certain financial market related considerations. One of

the considerations which influenced the decision by the Heath Commission on non-recovery of the funds, allegedly owed, is that should legal steps be taken to recover the funds from ABSA Bank, this could lead to a serious run by investors on ABSA Bank and the banking sector in general. These alleged facts pertaining to the Heath Commission, are hearsay, as the Heath Commission report does not form part of the record, neither has it, inexplicably, been confirmed by Heath J.

(29) On 15 June 2000 the Governor of the Reserve Bank appointed a panel of experts headed by Judge Dennis Davis to investigate, inter alia, whether the Reserve Bank acted lawfully in giving financial assistance to Bankorp/ABSA Bank. If it had acted unlawfully, the Davis commission had to determine the legal consequences of such illegality. The Davis panel came to the conclusion that the financial assistance to Bankorp/ABSA Bank was unlawful, in that the Reserve Bank had acted *ultra vires* its powers as set out in the **Reserve Bank Act**[15] and/or in terms of its protocols. The panel concluded that there was a possible enrichment claim, but it would have been difficult to identify the actual beneficiaries against whom claims could be lodged. In the Davis commission's opinion, the real beneficiaries of the financial assistance were Sanlam policyholders and pension fund beneficiaries. Furthermore, the panel concluded that ABSA Bank did not benefit from the financial assistance given to Bankorp, in that it had

[15] Act 90 of 1989

paid fair value for its acquisition of Bankorp. Any recovery of the funds from ABSA would be unwarranted, according to the findings of the panel.

(30) In pursuance of the complaint submitted by Advocate Hoffman SC, the Public Protector invoked her powers in terms of section 6(9) of the **Public Protector Act** to investigate the 'lifeboat' transactions the Reserve Bank concluded with Bankorp/ABSA and other entities. In December 2016, the Public Protector released a preliminary report for comment. In this report the Public Protector made findings and conclusions which included, *inter alia*:

* that the loan provided by the Reserve Bank to Bankorp was not repaid by ABSA Bank;
* that ABSA Bank had made provision in respect of the lifeboat given to Bankorp by the Reserve Bank; and
* that the government and the Reserve Bank improperly failed to recover an amount of R3.2 billion from ABSA Bank.

(31) The remedial action proposed by the Public Protector in her preliminary report included the following:

31.1 that Treasury and the Reserve Bank must recover the money owed from ABSA, being an alleged amount of

R1.125 billion which constitute 16% allegedly not paid by ABSA bank.

31.2 that Treasury and the Reserve Bank must put in place systems, regulations and policies to prevent *'this anomaly in providing loans/lifeboats to banks in future'*.

(32) Both ABSA and the Reserve Bank responded to the Public Protector's preliminary report. Subsequent thereto, on 19 June 2017, the Public Protector issued her final Report with findings and conclusions. She recommended remedial action as set out in paragraph 2 above. As appears from this Report, prior to finalising it, the Public Protector had interviews/meetings with an official from the State Security Agency (SSA) and a certain Mr Stephen Mitford Goodson, an economist. However, the Public Protector did not disclose that she had also met with officials from the Presidency and representatives of an organisation known as Black First Land First (BFLF). Furthermore, in the final Report the Public Protector's recommended remedial action is totally different to that proposed in the preliminary report. This was done without affording the applicants an opportunity to comment on the conclusions reached in paragraph 6 of the Report and the intended remedial action.

THE PUBLIC PROTECTOR RAISED TWO POINTS *IN LIMINE*:

REMEDIAL ACTION IS NOT ADMINISTRATIVE ACTION:

(33) The Public Protector submits that the applicants' rights were not materially affected by her remedial action. The first and second applicants brought the application in terms of **PAJA** or in the alternative, in terms of section 1(c) of the **Constitution**, or under the principle of legality.

(34) According to the Public Protector the remedial action in paragraph 7.1 of the Report is not administrative action as it does not have a direct external legal effect on the applicants' rights. She contends that it is a mere recommendation and therefor the applicants did not prove that their rights, in terms of **PAJA**, were adversely affected.

(35) ABSA argues that the remedial action is peremptory, but even if the court should find that it is not peremptory, it still has a direct external effect on ABSA's rights, as well as the rights of the Reserve Bank, as both these parties are specifically mentioned and implicated in the remedial action in paragraph 7.1.

(36) In **Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others**[16] Nugent JA explained the requirements of *"which adversely affects the rights"* and *"which has a direct, external legal effect"*:

> *"While PAJA's definition purports to restrict administrative action*

[16] 2005(6) SA 313 (SCA) at paragraph 23

to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

(37) Although obiter, the persuasive value of this *dictum* should not be under-estimated. There is support for a wider interpretation of *"rights"* in this context, as opposed to the literal meaning thereof. In **Minister of Defence and Others v Dunn**[17] Lewis JA also referred to the *dictum* in **Grey's Marine Hout Bay**[18], emphasising that, with regard to the *"rights"* of any person, a literal meaning could not have been intended

[17] 2007 (6) SA 52 (SCA) at par 4
[18] *Supra*

by the Legislature. In **Steenkamp v Provincial Tender Board, Eastern Cape**[19] the Constitutional Court has indicated that a decision awarding or refusing a tender, constitutes administrative action as such a decision materially and directly affects *"the legal interests or rights of tenderers"* concerned.

(38) The learned authors **Currie & De Waal**[20] explain it as follows:

> *"The verb 'to affect' is ambiguous in the context of rights, as it may mean either to 'deprive' someone of a right or to 'determine' someone's rights ... since much official action concerns applications of this kind, or 'mere applications', taking 'affect' to mean 'deprive' considerably narrows the class of administrative action – whereas taking it to mean 'determine' makes for a much broader class ... Here it is important to remember that the Act is intended to give effect to the constitutional rights to administrative justice, and the Constitution (and the jurisprudence relating to it) imposes no such qualification on the meaning of administrative action. The 'determination' meaning, which does not restrict the application of the Act to decisions affecting established rights, is therefore preferable."*

(39) There seems to be support for this view. **Cora Hoexter**[21] also holds

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[19] 2007 (3) SA 121 (CC) at paragraph 21
[20] The Bill of Rights Handbook, 6th ed, p 661
[21] (Administrative Law in South Africa, 2nd ed, p 221)

the view that the phrase *"adversely affects ... rights"* would create an unacceptably high threshold for admission to the category of administrative action if it is intended to import the stricter *"deprivation theory"*. According to her:

> *"If the phrase 'adversely affects ... rights' refers to ... the 'determination theory', then its limiting effect is negligible. However, if the phrase is intended to import the stricter 'deprivation theory', which implies the abolition of existing rights, the effect is to create an unacceptably high threshold for admission to the category of administrative action ... while the language of the PAJA does not yield up a clear answer overall, I would suggest on the basis of s 33 of the Constitution that determination ought to be accepted as the meaning of the Act."*

(40) We associate ourselves with this approach. It accommodates both the determining of potential or future rights, as well as the affecting or abolishing of established rights. Such an interpretation would also give effect to the provisions of section 33(1) as required by section 33(3) of the **Constitution**[22].

(41) In these review applications there is a comparable two-stage process, which, taken together constitutes administrative action. The SIU investigation impacts on basic rights of ABSA and the Reserve Bank.

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[22] cf Hoexter, supra, p 222

In the present instance the Public Protector went further than was found in **Special Investigating Unit v Nadasen**[23]:

> *"A unit such as the appellant is similar to a commission of inquiry. It is as well to be reminded, in the words of Corbett JA in S v Naudé 1975 (1) SA 681 (A) 704 B-E, of the invasive nature of commissions, how they can easily make important inroads upon basic rights of individuals and that it is important that an exercise of powers by a non-judicial tribunal should be strictly in accordance with the statutory or other authority whereby they are created. The introductory part of s 4(1) of the Act emphasises the point. This accords with the approach of the Constitutional Court (South African Association of Personal Injury Lawyers v Heath and Others supra par 52). Appellant's reliance upon a "liberal" construction (meaning in the context of the argument "executive-minded") is therefore misplaced. A tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly (cf Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A) 613F-J)."*

(42) Even if the meaning of the Public Protector is to *"recommend"* then the second stage is the President's decision to let the SIU investigate or

[23] 2002(1) SA 605 (SCA) at paragraph 5

not. The requirement is that the President re-open the investigation by the SIU into ABSA and that the Reserve Bank is ordered to *"co-operate fully with the Special Investigating Unit"*.

(43) The outcome of the investigation is predetermined as the Public Protector informed the SIU that ABSA is guilty. She does not leave the investigation to the SIU to determine whether ABSA is guilty and has to pay back R1,25 billion. She has already found ABSA to be liable and decided that the money must be paid back. The transaction relates to time periods which occurred during the nineties. The proposed investigation concerns transactions which occurred decades ago. It was pointed out, by counsel, that it is far more difficult for ABSA to find people now, and obtain documentary evidence required to defend itself after such a lengthy period. Potential prejudice in this regard is thus a real threat. There has already been three investigations into the matter by the SIU, the Davis Panel and the Public Protector. This would then be the second investigation into the same facts by the SIU. The further argument by both ABSA and the Reserve Bank is that, in any event, should the court find that **PAJA** does not apply, then the principle of legality should apply.

(44) In **South African Reserve Bank v Public Protector and Others**[24] Murphy J had already found that the contention by the Public Protector

[24] 2017(6) SA 198 (GP)

that paragraph 7.2 was a mere recommendation was *"disingenuous"*. He set out in paragraph 55:

> *"The attempt to pass off the remedial action as a mere recommendation is disingenuous. The language in which the remedial action is formulated is peremptory."*

This finding is confirmed in the present review application, as the same applies to paragraphs 7.1.1, 7.1.1.1, 7.1.1.2 and 7.1.2. The language used throughout is peremptory, there can be no doubt.

(45) The Public Protector makes her findings clear in paragraphs 6.3 of the Report:

> *"6.3* ***Whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank and if so, what would it take to ensure justice:***
>
> *6.3.1 The allegations whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank is substantiated;*
>
> *6.3.2 The South African Government wasted an amount of 600 000 British Pounds on services which were never used;*
>
> *6.3.3 The amount given to Bankorp Limited/ABSA Bank belonged to the people of South Africa. Failure to*

recover the illegal gift from Bankorp Limited/ABSA Bank resulted in prejudice to the people of South Africa as the public funds could have benefitted the broader society instead of a handful of shareholders of Bankorp Limited/ABSA Bank;

6.3.4 The conduct of the South African Government and the South African Reserve Bank goes against the ethos laid in the preamble of the Constitution and section 195 of the Constitution in respect of redressing social injustices and promoting efficiency;

6.3.5 The conduct further is contrary to the Batho Pele Principles that requires redress and the view held in the Khumalo case, mentioned above, that requires a public functionary to arrest reported irregularities; and

6.3.6 The conduct of the South African Government and the South African Reserve Bank constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act."

(46) She clearly makes findings and conclusions in these paragraphs, which by no means can be regarded as recommendations and which have to be taken into account when dealing with the meaning in paragraphs 7.1.1, 7.1.1.1 and 7.1.2 read with paragraph 8.1. The peremptory, prescribed legal action, according to the Public Protector,

as set out in paragraphs 7 and 8, is to recover the *"illegal gift"* of R1,25 billion from ABSA.

(47) The Public Protector's powers were set out in the **Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others**[25] where the Constitutional Court held that compliance with remedial action taken in terms of section 182(1)(c) of the **Constitution** is peremptory and not optional.

(48) The argument by the Public Protector is found to be constrained. The Public Protector submits that the remedial action merely creates an obligation which is placed on the SIU to request the re-opening and amendment of the 1998 Proclamation to the President. This, despite the finding in paragraph 7.1.1.1, that misappropriated public funds which had been given to ABSA unlawfully, in the amount of R1,25 billion, must be recovered. There is no room for doubt that the action is against ABSA Bank. Furthermore, the Reserve Bank is directed to co-operate fully with the SIU and to assist in recovering *"the misappropriated public funds"*. Paragraph 7.1.2 specifically refers to ABSA Bank. Then the Public Protector goes even further in paragraph 8.1 where the Reserve Bank is included as part of the team that has to submit an action plan within 60 days on the implementation of the

[25] *Supra*

remedial action.

(49) Even if the provisions of section 8 of the **Public Protector Act**, which draw a distinction between a finding, a point of view or recommendation, are taken into account there can be no doubt that the Public Protector has made findings and came to conclusions and did not make recommendations.

(50) Once this court applies the principles and the findings in respect of administrative action by the Constitutional Court in **Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others**[26], as well as section 182(1)(c) of the **Constitution**, then it is clear that the decision and remedial action set out in the report by the Public Protector is administrative action which falls squarely in the definition of administrative action, according to the provisions of **PAJA**.

(51) If we have misdirected ourselves that **PAJA** applies, then both ABSA and the Reserve Bank argued that in the alternative, the principle of legality should apply. Section 33 of the **Constitution** is applicable as the Public Protector exercises a public power when making a decision. In such an instance it is not necessary to consider whether the decision affects the rights of the applicants. See **Minister of Public**

[26] *Supra*

Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)[27]

(52) The doctrine of legality is one of the constitutional controls through which the Constitution regulates the exercise of public power. Therefore, when making a decision, her decision must be lawful, reasonable and procedurally fair. The Reserve Bank relies on section 1(c) of the **Constitution** which sets out that one of the values the Republic of South Africa has been founded on is *"Supremacy of the constitution and the rule of law"*. It is thus incumbent on the Public Protector to respect the rule of law, act in good faith and deliver outcomes that can be justified. The Public Protector did not deal with the principle of legality in the heads of argument, but only dealt with the question whether **PAJA** should apply. Even though the court has found that **PAJA** does apply, it is clear that, in the alternative, the principle of legality will apply as the Public Protector had made a decision. She had to comply with the rule of law as defined in the **Constitution**, when making such a decision. Having regard to all these considerations, we are of the view that the decision on remedial action does constitute administrative action, both according to the provisions of **PAJA** and the principle of legality, and therefore the first point *in limine* should be dismissed.

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[27] 2001(3) SA 1151 (CC) at paragraph 54

UNREASONABLE DELAY:

(53) The Public Protector's second point *in limine* is that there was an unreasonable delay in bringing the review applications without a proper explanation for the delay. According to the Public Protector the review is out of time as it should have been brought in 2012 when the parties became aware that she was investigating the matter. According to her, the review application is outside of the 180 day period prescribed by **PAJA**. The argument is founded upon the provisions of section 7(1) of **PAJA**[28]. The argument goes on to say that, because the Public Protector's jurisdiction to investigate this matter is challenged, such a challenge *"ought to have been brought without unreasonable delay, and not later the 180 days from the point in 2012 when the applicants became aware of the fact that the Public Protector was investigating the complaint by the Director of IASA".* This view is contrary to the position held in the first point *in limine*, where the Public Protector argues that **PAJA** does not apply. It was decided in **National Director of Public Prosecutions v King**[29] that the law generally waits for the outcome of a process before rushing to court to review the exercise of the public power. See **Take and Save Trading CC and Others v Standard Bank of SA Ltd**[30]. Therefor a

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[28] Which provides that *"any proceedings for judicial review"* must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of it or might reasonably have been expected to have become aware of it.

[29] [2010]3 All SA 304 (SCA) at paragraphs 4 and 5

[30] 2004(4) SA 1 (SCA) at paragraph 4:

> "[4] A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on

party should wait for the outcome before deciding to launch a review application.

(54) Two different stages are envisaged by section 7(1), i.e. a stage before the effluxion of 180 days and another one thereafter (**Opposition to Urban Polling Alliance v Sanral**[31]). The onus is on an applicant who has delayed in bringing review proceedings to make out a proper case that the delay be condoned in the interests of justice (section 9(2) of **PAJA**).

(55) The ABSA application (case number 48123/17) was issued on 13 July 2017; the SARB application (case number 52883/17) on 31 July 2017; and the application by the Minister of Finance (case number 46255/17) on 6 July 2017. In all three applications the relief sought is similar, i.e. a review of and setting aside the remedial action as stipulated in certain parts of paragraphs 7 and 8 of the Report. The Minister of Finance goes further to also include the *"conclusion and findings"* referred to in the said report. It is common cause that this report is dated 19 June 2017, which we shall accept to be the date on which it was made public.

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appeal, taking into account the degree of the trial court's aberration. In any event, an appeal in medias res in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed."

[31] [2013] 4 All SA 639 (SCA) at par 26

(56) It is clear from the formulation of the point *in limine* that the Public Protector is focusing on a date during 2012, when the applicants became aware of the fact that she was *investigating* the complaint concerned. Her decision to investigate is not under attack. It is the conclusions, findings and remedial action, consequent upon her investigation, which is the subject-matter of the review applications.

(57) Both ABSA and the Reserve Bank had continuously communicated with the Public Protector since 2012, when the investigation was instituted.

(58) While it is possible that the applicants could have reviewed the decision to investigate on the basis that the Public Protector lacked jurisdiction, it is clear that the balance of the review applications, based on the alleged procedural unfairness, errors of fact, substantial unlawfulness and bias, could not have been brought before the finalisation and publication of the report on 17 June 2017. The law generally requires parties to wait for the outcome of a process before rushing to Court to review the exercise of public power[32].

(59) Taking into account the above considerations, the fact that the report was finalised and published on 17 June 2017 and that all the review

[32] (cf Take and Save Trading CC & Others v Standard Bank of SA Limited (supra) with regard to appeal proceedings)

applications were instituted shortly thereafter, during July 2017, there can be no doubt that these proceedings were instituted without any unreasonable delay and before the expiry of 180 days as required by **PAJA**. It therefore follows that the second point *in limine* should be dismissed.

GROUNDS OF REVIEW:

(60) In considering the grounds of review we remind ourselves of the principle that a review is not concerned with the correctness of a decision made by a functionary, but with whether (and how) it performed the function with which it was entrusted[33]. Judicial review is therefore essentially concerned with the judicial detection and correction of maladministration[34]. In **Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another**[35] Navsa ADP dealt with rationality review and held:

> *"Rationality review is 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 on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only*

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[33] MEC for Environmental Affairs and Development Planning v Clairison's CC 2013(6)SA 235 (SCA) at paragraph 18
[34] Hoexter, supra, p 9
[35] [2017] 4 All SA 726 (SCA) at paragraph 82

whether the means employed are rationally related to the purpose for which the power was conferred. Rationality review also covers the process by which the decision is made. So, both the process by which the decision is made and the decision itself must be rational. If a 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."

(61) We also take into account the constitutional principle of the separation of powers. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism**[36] O'Regan J sounded a warning (in par 48) that a court should be careful *"not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government"*. It was also pointed out that a court should therefore give due weight to findings of fact and policy-decisions made by those with special expertise and experience in their field.

(62) The main grounds of review advanced by the reviewing parties fall into two main categories. The first relates to the unlawfulness of the remedial action and the second pertains to the procedure followed by the Public Protector. There are also other grounds of review such as jurisdiction and prescription to which we shall refer later, if necessary.

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[36] 2004 (4) SA 490 (CC)

LAWFULNESS OF REMEDIAL ACTION:

(63) It was contended on behalf of ABSA that the remedial action is substantially unlawful because it is *ultra vires* the **Public Protector Act**, as well as the **SIU Act**. Counsel for the SARB further argued that the remedial action is unlawful as the President is not empowered to reopen an investigation that was concluded and where a final report had been issued years ago.

(64) It was argued on behalf of the Public Protector that the reviewing parties do not enjoy the necessary standing to challenge the remedial action, as it places a primary obligation only upon the President and the SIU. According to this argument the remedial action does not direct that the misappropriated public funds must be recovered from ABSA. The argument goes on to say that no person or entity has been identified from whom the funds should be recovered.

THE *ULTRA VIRES* ARGUMENT:

(65) The *ultra vires* argument, as we understand it, is founded upon section 6(2)(a)(i) of **PAJA**. It provides that a court has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision. This means that what would have been *ultra vires* under common law by reason of

a functionary exceeding his or her power is now invalid under the Constitution and the provisions of **PAJA**.

(66) According to paragraph 7 of the report the remedial action is taken in terms of section 182(1)(c) of the **Constitution**. In terms of paragraph 7.1.1 of the report the matter is referred to the SIU to approach the President in terms of section 2 of Act No 74 of 1996 to reopen and amend Proclamation R47 of 1998 *"in order to recover misappropriated public funds unlawfully given to ABSA Bank and in order to investigate alleged misappropriated public funds given to various institutions"* as mentioned in the CIEX Report. Having regard to the wording of this part of the remedial action, a duty has been placed upon the SIU to perform three different functions, i.e. to approach the President to reopen and amend the proclamation, to recover misappropriated public funds unlawfully given to ABSA, and to investigate alleged misappropriated public funds given to various institutions.

(67) The Public Protector confirms in her answering affidavit[37] that there is *"a duty upon the SIU to approach the President"* and to request him to amend the relevant proclamation with a view to reopening the investigation. The suggestion from the Public Protector, as we understand it, is that the remedial action is not binding upon the President as he retains a discretion as to whether to issue the

[37] Paragraph 26

proclamation or not. Should we assume, without deciding, that the Public Protector is correct in her interpretation that the remedial action binds the SIU, but not the President, the question remains as to whether the Public Protector may lawfully order the SIU to approach the President, to recover misappropriated public funds and to investigate misappropriated public funds given to other institutions.

(68) When subsection 6(4)(c) of the **Public Protector Act** is considered holistically, it appears that the Public Protector may at any time prior to, during or after an investigation:

(a) bring the matter to the notice of the relevant authority;

(b) refer any matter which has a bearing on an investigation to the appropriate public body or authority or to make an appropriate recommendation to the affected public body or authority.

(69) The operative words are *"to bring to the notice of"* and *"to refer any matter ... or to make an appropriate recommendation"*. It does not empower the Public Protector to be prescriptive or to instruct the SIU as to how to deal with the matter she brings to its notice. Once the Public Protector has referred a matter to the SIU, or has made an appropriate recommendation, she has exhausted her powers under

this subsection. The decision as to how the matter must be handled is not that of the Public Protector, but the prerogative of the public body or authority concerned, in this instance the SIU.

(70) Taking into account the wording of paragraph 7.1 of the remedial action, we find it difficult to interpret the purpose of the referral as an appropriate recommendation to the SIU. The purpose of the referral has been made clear, i.e. to approach the President, to recover and to investigate. It is peremptory. The Public Protector acted in a manner inconsistent with the provisions of the **Constitution** and the **Public Protector Act**, by placing a duty on the SIU to re-open the investigation and to recover the misappropriated public funds from ABSA. She exceeded the powers entrusted to her by the **Constitution** and the **Public Protector Act**.

(71) This is, however, not the end of the *ultra vires* argument. It was also contended that the remedial action is *ultra vires* the provisions of the **SIU Act**[38]. Section 2 of the **SIU Act** provides that the President may establish special investigating units.

(72) In terms of paragraph 7.1.1 the remedial action places a duty upon the SIU to approach the President in terms of section 2 of this Act to reopen the proclamation. Section 2 does not make provision for the SIU to approach the President to reopen and amend a proclamation.

[38] Act 74 of 1996

The SIU is not authorised by statute to do so and neither can the Public Protector instruct such a unit to perform such a function, which it does not have.

(73) According to the wording of paragraph 7.1 of the report two of the reviewing parties have been identified. The one is ABSA to whom misappropriated public funds had been *"unlawfully given"*. The instruction is clear that these misappropriated public funds must be recovered from ABSA. Furthermore, in terms of the remedial action the SARB must cooperate fully with the SIU in the recovery of misappropriated public funds. The instruction is furthermore that the SARB is obliged to assist the SIU to recover the alleged misappropriated public funds unlawfully given to ABSA. The argument raised, on behalf of the Public Protector, that none of the reviewing parties have the necessary standing to challenge the remedial action as they have not been identified, is therefore without any merit, as they are all implicated in the remedial action to be taken. We therefore conclude that the remedial action referred to in paragraph 7.1 of the report is *ultra vires* the **SIU Act**.

THE *FUNCTUS OFFICIO* ARGUMENT:

(74) It was contended on behalf of the SARB that the President has no power under the **SIU Act** to reopen a completed investigation as such conduct would militate against the *functus officio* doctrine. Counsel for

the Public Protector submitted that the directive that the SIU must approach the President, with a view to reopening the investigation, is a proper mandate as there was only a media statement issued by the then Head of the SIU, but no report submitted to the President.

(75) It has been pointed out, in the founding affidavit of the SARB, that the SIU concluded its investigation and issued a final report on 1 November 1999. A copy of this document is attached to the founding affidavit of ABSA[39]. These allegations have not been denied by the Public Protector in her answering affidavit.

(76) However, the document referred to by the SARB as a *"final report"* appears to be an official statement, issued as a media release, dated 1 November 1999. It records that this investigation was referred to the SIU by the President by way of Proclamation R47 of 1998 published in the Government Gazette of 7 May 1998. According to this document the SIU concluded, *inter alia*, as follows:

> *"The unit accordingly arrived at the conclusion that although it believes there is a legal basis to attack the validity of the 'Lifeboat' contract, there are other compelling reasons not to proceed with litigation in this matter."*

(77) In the next paragraph of this document it has been pointed out that:

[39] Annexure "MR10"

"The Unit has conveyed its attitude to the office of the President. The Unit believed that in the light of the surrounding circumstances in this matter, that it was proper to inform the President before a public release was made. Due to the President's temporary absence from the country representatives of the Unit could not meet with him immediately."

(78) Taking into account this evidence we are satisfied the inference is justified that the SIU concluded its investigation and finally reported to the President regarding the so-called *"Lifeboat case"*. There is no evidence to suggest otherwise as the Heath report has not formed part of the record. In view of this conclusion, we should now consider whether the SIU is competent to approach the President and to request him to amend the relevant proclamation, with a view to reopening the investigation on the one hand, and whether the President has the power to reopen a completed investigation in terms of the SIU Act, on the other hand.

(79) The doctrine of *functus officio* is founded upon the principle of finality. In **Minister of Justice v Ntuli**[40] the Court stated that public policy demands that the principle of finality in litigation should generally be preserved rather than eroded. This principle, in our view, also applies to administrative decisions. It was explained as follows by Navsa J (as

[40] 1997 (3) SA 772 (CC) at par 23

he then was) in **Carlson Investments Shareblock v Commissioner, SARS**[41]:

> *"In my view, the Chandler and Katnich cases supra place the functus officio principle in proper perspective. As we saw, in the discussion of the functus officio principle in Baxter's Administrative Law (supra) the general principle is that finality of administrative decisions is to be favoured. However, our law and comparable legal systems recognise that statutes may provide how and when a decision is to be finalised and may provide for revisiting of a particular administrative decision in the public interest and in the interests of justice."*

(80) Section 2(1) of the **SIU Act** gives the President the power to establish, by proclamation, a special investigative unit, or to refer a matter to an existing special investigating unit to investigate the matter as set out in subsection (2). In terms of section 2(4) the President may at any time amend a proclamation issued by him in terms of subsection (1). Section 4(1)(g) empowers the SIU, upon conclusion of the investigation, to submit a final report to the President.

(81) Although section 2 of the **SIU Act** is broadly framed, this does not mean that the President can reopen an investigation that was concluded and finalised more than 17 years ago. Although the general

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[41] 2001 (3) SA 210 (WLD) at 232F

principle of finality in administrative decisions still applies, there may be instances in which an express power to revisit such a decision is necessary. However, there is no such indication, either expressly or by necessary implication, in the **SIU Act**. Section 2(4) has to be read together with section 4(1)(g) of the Act, which empowers the SIU, *"upon the conclusion of the investigation, to submit a final report to the President"*. Once that step is taken, the investigation, that was authorised by the President, is completed. There is no power given to the President under this Act to reopen such an investigation. The President's power under section 2(4) of the Act to amend a proclamation *"at any time"* is a power that can only lawfully be exercised while the investigation that was proclaimed, is still under way. It would serve no purpose to amend a proclamation after the investigation, that was authorised by the President, has been concluded. Furthermore, the rationale behind this principle is that there should be both certainty and finality on matters that have already been decided to enable parties to arrange their affairs appropriately[42] - even more so after 17 years.

(82) Taking into account the evidence and considerations referred to above, we have to conclude that the Public Protector has imposed remedial action on the President and the SIU that is unlawful. The remedial action should therefore be reviewed and set aside under section 6(2)(d) and 6(2)(f)(ii)(bb) of **PAJA**.

[42] cf Ka Mtuzi v Bytes Technology Group and Others 2013 (12) BCLR 135 (CC) par 18

PROCEDURAL UNFAIRNESS:

(83) Both the SARB and ABSA contend that the Public Protector failed to conduct a fair and unbiased investigation. Both parties refer to this ground of review as a *"reasonable apprehension of bias"*.

(84) The substance of this complaint is that notes of the Public Protector reveals that after publication of her provisional report, she met with the Presidency, as well with the SSA, without affording the reviewing parties a similar opportunity. It was contended that this conduct of the Public Protector violated her constitutional obligation under section 181(2) of the **Constitution** to be independent and to perform her functions without favour or prejudice. It is not denied by the Public Protector that she had meetings with the Presidency and the SSA during the course of finalising the final report. According to her these meetings were not improper and correctly conducted during the course of her investigation.

(85) In its supplementary founding affidavit the SARB points out that the meeting with the Presidency took place on 7 June 2017, i.e. 12 days before the Public Protector issued her report. This meeting took place after the SARB had responded to the Public Protector's preliminary report. It occurred after the Public Protector, without notice to the SARB or ABSA, decided substantially to change the focus and

remedial action of her investigation. By this stage, the Public Protector's aim was to amend the Constitution to deprive the Reserve Bank of its independent power to protect the value of the currency. This is an aspect of the remedial action that had nothing to do with the Presidency and should have been discussed with experts at the Reserve Bank.

(86) Reference was also made to a note of a meeting with the SSA on 3 May 2017. This note was originally included in the confidential section of the record, but the claim of confidentiality has since been waived. In this note there is a section dealing with the Reserve Bank in which the following question is posed: *"How are they vulnerable?"*. It is alleged that the discussion of this topic with the SSA indicates that the Public Protector's investigation was aimed at undermining the Reserve Bank. This question was not posed to the experts at the Reserve Bank, who is ultimately qualified to answer the question, and she should have consulted with them.

(87) In its supplementary founding affidavit ABSA also referred to the notes of the Public Protector. It is alleged that according to the note of a meeting held with the Presidency's legal advisors on 7 June 2017, the idea of ordering the SIU to reinvestigate the *"Lifeboat"* was discussed. The Public Protector never alerted ABSA to the prospect that she would incorporate the SIU in her remedial action. This was a material

omission that violates ABSA's right to procedural fairness and is also an indication of further one-sided conduct by the Public Protector.

(88) Reference was also made to a meeting between the Public Protector and the SSA. The note of this meeting records a discussion of the remedial action, including that the operations of the SARB *"be aligned to social responsibility"*. There is also a discussion of what appeared to be options for recovery of the money, supposedly owing by ABSA, including the payment thereof in instalments, or that the State should be given ABSA shares as a form of repayment. It is recorded that ABSA is deeply disturbed as to why the SSA should have any views on the remedial action being considered by the Public Protector against ABSA. She failed to alert ABSA of this meeting.

(89) The Public Protector points out in her report that she had made certain findings concerning the government and the SARB's failure to recover the misappropriated funds and direct them to take remedial action to rectify this. Therefore, both the President, as the primary representative of government, and the SIU, are implicated as contemplated in section 7(9) of the **Public Protector Act**. In terms of this subsection the Public Protector must afford such person(s) an opportunity to respond. The Presidency responded in writing on 28 February 2017.

(90) On 29 March 2017 the Public Protector received an email from the Presidency in which the President called for a meeting. She agreed to a meeting, which subsequently took place on 25 April 2017. From the discussion during this meeting the Public Protector became concerned that her draft remedial action, to direct the President to establish a judicial commission, may face similar difficulties as she is currently facing in the State Capture Report. This was not discussed with either ABSA or the Reserve Bank before she issued the final report. There are no transcripts of the meeting of 25 April 2017.

(91) The agreement between CIEX and the Government was signed by the then Director-General of the South African National Intelligence Agency (NIA) on behalf of the Government. The NIA has now become the State Security Agency (SSA). According to the Public Protector it was therefore necessary to have a follow-up meeting with this entity to confirm the agreement, and also to enquire why the SSA failed to follow up the matter on its implementation. She did not alert ABSA or the Reserve Bank of this important meeting or did not share the outcome of this meeting with either of the two parties.

(92) Although the rule against bias finds application essentially in judicial and *"quasi-judicial"* contexts, the Constitutional Court has made it clear that the rule against bias applies in all types of decisions[43]. It should

[43] President of the RSA v South African Rugby Football Union 1999 (4) SA 147 (CC) par 35

immediately be pointed out that absolute neutrality on the part of a judicial or administrative officer can hardly, if ever, be achieved and a reasonable person should expect that triers of fact will probably be influenced in their deliberations by their individual perspectives[44]. It would be a mistake to assume that a fundamental breach of administrative justice necessarily indicates bias on the part of the administrator[45]. The mere fact that a party considers that the decision-maker erred at the level of substance or procedure to their prejudice does not necessarily amount to bias.

(93) The following facts appear not to be in dispute:

(a) the Public Protector attended a meeting with the SSA on 3 May 2017 without informing the reviewing parties about this meeting;

(b) the Public Protector did not afford the reviewing parties a similar opportunity to meet with them after 3 May 2017;

(c) the Public Protector attended two meetings with the Presidency. The first took place on 25 April 2017 and the second on 7 June 2017;

(d) the Public Protector did not inform the reviewing parties about these meetings, neither did she afford them an opportunity to meet with her and inform them of these meetings;

(e) the Public Protector did not attach any transcripts of these meetings.

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[44] President of the RSA v South African Rugby Football Union, supra, par 42

[45] (Commissioner, Competition Commission v General Council of the Bar of South Africa 2002 (6) SA 606 (SCA) at par 16 where Hefer AP said that the mere fact that *audi alteram partem* was not observed does not by itself justify an inference of bias)

(94) These facts should be understood in their proper context. In her report the Public Protector has disclosed, under the heading *"CORRESPONDENCE SENT AND RECEIVED"*, that there is correspondence between her and the Presidency. Under the heading *"INTERVIEWS CONDUCTED AND MEETINGS HELD"* there is a list of meetings held with various persons as well as the meeting on 3 March 2017 with the SSA. It is, however, important to point out that there is no reference to any meeting with the Presidency. It was only in her answering affidavit that she had admitted to her meeting with the Presidency on 25 April 2017, but she is totally silent on the second meeting, which took place on 7 June 2017. The reviewing parties only became aware of this meeting when a handwritten note of such a meeting was found in the record of proceedings made available in terms of Rule 53. In addition to this, during the meeting which she had with the SSA it was also discussed how the SARB was *"vulnerable"*. Also this topic only became known to the reviewing parties on inspection of the record of proceedings.

(95) The reason that the Public Protector gives for affording the Presidency and the SSA the opportunity to consult with her, after she had decided to change the focus and remedial action of her investigation substantially without affording the reviewing parties a similar opportunity, is disingenuous. According to the Public Protector the

President as the primary representative of Government and the SIU have been implicated as contemplated in section 7(9) of the **Public Protector Act** in the final report. It is further common cause that the Public Protector had met with the BFLF at their request, but turned down a similar request for a meeting or consultation from ABSA. This, after the BFLF had embarked upon an unlawful campaign of intimidation against ABSA, after the Report had been published. As a matter of fact it was concluded[46] by the Public Protector that the South African Government and the SARB did not protect the interest of the public in regard *"to the irregular and unlawful 'lifeboat' granted to Bankorp Ltd/ABSA Bank"*. It was also concluded that the Ministry of Finance failed to exercise its obligation in terms of section 37 of the South African Reserve Bank Act *"by ensuring that there is compliance of the Act by the South African Reserve Bank"*. Under the heading "FINDINGS" it was found[47] as follows:

> *"The allegation whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an amount of R3.2 billion cited in the IEX Report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995 is substantiated."*

(96) The Public Protector did not give the same opportunity of consulting

[46] In par 5.3.20 of the Report
[47] In par 6.2.1

with the reviewing parties, or to allow them the opportunity to respond to this adverse finding that directly implicates the SARB and ABSA. There can be no doubt that the findings in paragraph 6.2.1 are adverse conclusions and findings as contemplated in section 7(9) of the **Public Protector Act**.

(97) Section 181(2) of the **Constitution** provides that the Public Protector should be *"independent"* and she has to perform her functions without *"fear, favour or prejudice"*. The test to establish bias was set out in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**[48] *"whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case"*. This test similarly applies in the present matter, where the Public Protector is a functionary performing administrative action.

(98) The Public Protector is subject to a higher duty and higher standards than ordinary administrators taking administrative action. This differentiation should still be read subject to the requirement of reasonableness, i.e. that both the person who apprehends bias, and the apprehension itself must be reasonable[49]. No doubt, the party who relies on bias, or reasonably suspected bias bears the onus to prove

[48] 1999(4) SA 147 (CC) at paragraph 48
[49] cf Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC) par 34

this ground of review.

(99) It cannot be doubted that the appearance or perception of independence plays an important role in evaluating whether the Office of the Public Protector is sufficiently independent[50]. This is a constitutional imperative. Section 7(9) sets out that should there be an adverse finding against any person, then *"the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances"*. It is thus couched in peremptory terms that she *"shall"* afford an opportunity. The right to be heard is integral to the Constitutional scheme. In **Joseph and Others v City of Johannesburg and Others**[51] the Constitutional Court observed:

> *"Both this court and the Supreme Court of Appeal have already expressed support, albeit obiter, for a purposive approach to the concept of 'rights' under s 3 of PAJA. In Premier, Mpumalanga O'Regan J remarked that '(i)t may be that a broader notion of "right" than that used in private law may well be appropriate'. The importance of procedural fairness is well described by Hoexter:*
>
> *'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those*

[50] cf Van Rooyen & Others v The State & Others 2002 (5) SA 246 (CC) par 32
[51] 2010(4) SA 55 (CC) at paragraph 42

decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'"

(100) The Public Protector engaged with the Presidency and the SSA without affording a similar opportunity to the reviewing parties. This cannot be an administrative oversight as she was clearly aware of the provisions of section 7(9) of the Public Protector Act when she decided to have an interview with the Presidency on 25 April 2017. Furthermore, if it was an oversight, one would have expected the Public Protector to have said so in her answering affidavit.

(101) The Public Protector did not disclose in her report that she had meetings with the Presidency on 25 April 2017 and again on 7 June 2017. It was only in her answering affidavit that she admitted to the meeting of 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017. She gave no explanation in this regard when she had the opportunity to do so. Having regard to all these considerations, we are of the view that a reasonable, objective and informed person, taking into account all these facts, would reasonably have an apprehension that the Public Protector would not have brought an impartial mind to bear on the issues before her. We therefore conclude that it has been proven that the Public

Protector is reasonably suspected of bias as contemplated in section 6(2)(a)(iii) of **PAJA**.

(102) It is further the applicants' contention that the manner in which the Public Protector concluded her final Report was informed by an unfair procedure. It was argued that the Public Protector did not provide the applicants with two reports preceding the final CIEX report to enable them to respond if they so wished, before preparing her final Report. In this regard the applicant relied on the decision in **Minister of Health and Another v New Clicks South Africa**[52] where the Constitutional Court held that affected parties cannot make meaningful representations when they do not know what factors will weigh against them in a decision to be taken. In this instance they were not informed at all before the final Report was published.

(103) It was submitted that although the Public Protector has recommended that the State President should, through the SIU, reopen the investigation into the alleged stolen funds, she has not furnished any reasons as to why the Heath report's findings are irrelevant to the extent that there is a need for another investigation by the SIU. It is the applicants' contention that they have a right as affected persons to know the reasons for the discounting of the Heath report and, in terms of the *audi alteram partem* rule, to respond thereto. It was argued that

[52] 2006(3) SA 311 (CC) at [152]

the Public Protector's conduct in failing to provide the applicants with the above-mentioned documents, she denied them an opportunity to respond to those documents before the final report was prepared. The court finds that in terms of section 6(2)(c) of **PAJA** this conduct by the Public Protector was procedurally unfair. Therefor the remedial action in paragraphs 7.1 and 8.1 of the Report has to be set aside. They were the product of a procedurally unfair process and are unlawful. The process was not impartial and therefor there is a reasonable apprehension that the Public Protector was biased against ABSA and the Reserve Bank.

APPLICATION FOR DECLARATOR:

(104) The Reserve Bank requests the court to issue a declaratory order in terms of section 172(1)(a) of the **Constitution** which provides:

> *"(1) When deciding a constitutional matter within its power, a court-*
>
> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;"*

(105) According to the Reserve Bank Ms Mkhwebane had abused her office and therefor the court should grant the declaratory order. The request for the declaratory order was only dealt with in the Reserve Bank's replying affidavit and during argument.

(106) According to counsel for the Reserve Bank a declaratory order is

sought as the Public Protector has abused her office. This submission is based on the actions of the Public Protector when filing the answering affidavit out of time and doing so after the court had ordered her to do so. The Public Protector had applied for a postponement which application was heard by Mothle J on 17 November 2017. At the hearing she withdrew her application, causing severe prejudice to all the parties, who then had to deal with her answering affidavit and the submission of heads of argument in the limited time available.

(107) The Public Protector relies on new reasons in her answering affidavit which do not accord with the reasons she set out in her report. She justifies her findings *ex post facto* in the answering affidavit. She attaches documents that were not filed and were not included in the record of proceedings filed in terms of Rule 53. Her averment that she had received advice from economic experts whilst compiling the Report, is doubtful[53]. Dr Mokoka's report was only obtained after the Report had been issued and the review applications had been served. The Public Protector herself sets out in the answering affidavit that she engaged Dr Mokoka *"following receipt of the three review applications…to consider the true nature of the Lifeboat schemes"*. It has already been decided that the Public Protector has heightened obligations to be frank and candid when dealing with the court.

[53] Paragraph 2 of the answering affidavit

(108) The Public Protector had two meetings with the Presidency, after the release of the preliminary report, but failed to address the second meeting and also failed to disclose what was discussed. The Public Protector's meeting with the SSA and the former Minister of State Security on 3 May 2017 and her discussion pertaining to the Reserve Bank cannot be justified in any manner. She should have engaged directly with the Reserve Bank if she was concerned about the security of the Reserve Bank. She further failed to record these meetings, although it was customary to record all meetings. She cannot supply transcripts of these meetings, nor any minutes of the meetings. She failed to mention the second meeting with the Presidency in her final report.

(109) The new reasons set out in her answering affidavit are:

102.1 She now relies on *"special circumstances"* for investigating outside the two year time limit – these circumstances were not set out in her Report.

102.2 Her rationale for overcoming prescription differs completely in her answering affidavit to that in the Report.

(110) She directs that the SIU must recover the R1.125 billion that was purportedly unlawfully given to ABSA. She quite clearly directs and it is obvious that she has found that ABSA owes R1.125 billion. She is wrong, where she declares in the answering affidavit that the remedial

action only advises the state of *"available remedies in law"*. This is in total contrast to the remedial action set out in paragraphs 7 and 8 of the final report.

(111) Ms Mkhwebane did not engage either ABSA or the Reserve Bank after her meetings with the Presidency and State Security and before issuing her final Report. The applicants did not have the opportunity to comment on the final report, whilst parties who should not have been consulted, were consulted and their views taken into consideration. She should have informed all parties of these meetings, requested their comments, if any, before releasing the final report.

(112) These actions by the Public Protector only became known when she filed her answering affidavit. This was the first opportunity for the Reserve Bank to deal with it. Therefor the Reserve Bank argues that it could not have requested the court earlier for a declaratory order as it only became evident, once her answering affidavit was filed, to what an extent she had abused her office.

(113) Rule 28 of the Uniform Rules of Court deals with amendments. In the current matter there is no formal application for an amendment to the prayers in the Notice of Motion to add an additional prayer. Generally, the court will allow an amendment of a prayer if the main issue between the parties remain the same, but will not do so where a new

cause of action is added at a late stage during the proceedings which could cause prejudice to the other party. In **Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others**[54] Miller AJ held:

> *"...that a litigant who seeks to add new grounds for relief at the eleventh hour does not claim such amendment as a matter of right but rather seeks an indulgence."*

(114) In **Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another**[55] the Full Bench held:

> *"Subsequent thereto, however, no further submissions from interested parties were entertained or even invited by the DG, notwithstanding the fact that the final EIR differed materially from the earlier report on which the applicant did comment. Furthermore, the DG made his decision without having heard the applicant and without even being aware of the nature and substance of the applicant's submissions. In these circumstances, I am driven to the conclusion that the process that underlay the decision of the DG was procedurally unfair and falls to be set aside."*

This authority strengthens the case for review, but does not pertinently deal with an amendment without an application to amend.

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[54] 1978 (1) SA 914 (A) at 928D
[55] 2005(3) SA 156 (WCC) at paragraph 78

(115) In this instance the Reserve Bank is relying on section 172(1)(a) of the **Constitution**. In **Merafong City Local Municipality v AngloGold Ashanti Limited**[56] Cameron J dealt with the contents of section 172(1) as follows:

> *"These consequences follow from the wording of section 172(1) itself, which requires a court to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency, but requires the court to do so only "when deciding" a constitutional matter within its jurisdiction. The provision does not dictate to courts when or how they must decide. It contemplates that a court may decline to decide a matter because the right complainant is not before it, or because the challenge is not warranted in the particular proceedings before it."*

The Reserve Bank submits that the Public Protector had breached the provisions of the **Constitution**, and in particular section 181(2) and therefor section 172(1)(a) applies and permits the court to issue the requested declaration.

(116) The Public Protector vehemently opposes this application as an inappropriate attack on the Public Protector and argues that it undermines the institution of the Public Protector. According to

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[56] (CCT106/15) [2016] ZACC 35 at paragraph 37

counsel for the Public Protector it has not been proven on the papers that the Public Protector had acted in bad faith. She had no malice or a sinister purpose when meeting with the Presidency and the State Security Agency without alerting ABSA and the Reserve Bank that she had done so. The question remains unanswered as to why she had acted in such a secretive manner and she does not give an explanation for doing so.

(117) It is possible that the Public Protector had not fully taken the court into her confidence when deposing to paragraph 2 of the answering affidavit, where she set out: *"Where I make averments relating to economics I do so on the basis of advice received from economic experts during the investigation of the complaint referred to below, which advice I accept as correct"*. Dr Mokoka's report was obtained after the final report had been issued and the applications for review had been served. The second meeting with the Presidency, was not divulged in the Report.

(118) Counsel for the Public Protector argued that the Reserve Bank at no stage requested an amendment to the Notice of Motion, nor was there any such application at any stage during the proceedings. The argument is that the Public Protector would be severely prejudiced if such an order is made as the Public Protector did not have an opportunity to oppose the granting of a declaratory order. The

Reserve Bank's argument is that the Public Protector had known of the Reserve Bank's stance since the replying affidavit had been served, but chose not to depose to a supplementary answering affidavit and to explain these complaints and untruths.

(119) The court has to agree that if an amendment had been sought in terms of Rule 28, the Public Protector could have dealt with it. The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice that cannot be cured by an order for costs or a postponement[57].

(120) The Public Protector did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector. In these proceedings and the Reserve Bank's submissions in this regard are warranted. She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and that a higher standard is expected from her. She failed to explain her actions adequately. There may be a case to be made for a declaratory order.

(121) However, the Reserve Bank failed to apply for an amendment to the prayers in the Notice of Motion, but relied strictly on the provisions of section 172 of the **Constitution** and only dealt with it in the replying

[57] Erasmus Superior Court Practice, RS4, 2017, D1-329

affidavit and during argument.

(122) If the court applies the dictum in **Merafong**[58] then the challenge should have been brought explicitly by an application for an amendment and not only when the replying affidavit was filed. The circumstances set out above may warrant an application for a declaratory order, but it should not be granted when it is raised for the first time in the replying affidavit. This court will not issue a declaratory order, although it will be possible, in these circumstances, as set out above, to apply to court in a proper application, for such an order.

CONCLUSION:

(123) All the reviewing parties applied for the reviewing and setting aside of certain paragraphs of the remedial action. The Minister and Treasury also applied for the reviewing and setting aside of the report in its entirety. Should all the review applications succeed in the reviewing and setting aside of the remedial action, we are of the view that it is not necessary to also set aside the remaining part of the report itself. Once the remedial action has been set aside the report itself has no force. This Court should be reluctant to encroach unnecessarily on the preserve of the Public Protector as an administrator and should keep in mind the separation of power. In view of our conclusion regarding the unlawfulness of the remedial action as well as the reasonable

[58] *Supra*

apprehension of bias, we do not deem it necessary to deal with all the other grounds of review as we have found that the Public Protector was biased and the remedial action should be set aside. If we apply the principles as set out in **Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another**[59] it is not necessary to deal with all the grounds of reviewing and setting aside the decision. The court has found the remedial action to be unlawful and that there is a reasonable apprehension of bias. The court further finds no reason to remit the report. It is clear that the Public Protector unlawfully, *ultra vires* and breached several provisions of **PAJA**. In these circumstances it would be untenable to remit the Report to the Public Protector.

COSTS:

(124) It was submitted on behalf of ABSA Bank that a punitive cost order should be granted against the Public Protector in her official capacity. However, counsel for the SARB contended that the Public Protector should be ordered to pay the costs *de bonis propriis*, i.e. from personal funds. Counsel for the Public Protector argued that there is no justification for granting an order *de bonis propriis*. It was also pointed out that in terms of section 5(3) of the **Public Protector Act** there is a general indemnification against personal liability.

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[59] 2016(3) SA 1 (SCA) in paragraphs 44 and 45
"[44] It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated."

(125) The issue as to what order of costs would be appropriate falls primarily within the discretion of a Court which must be exercised in a judicial manner. Generally speaking, a Court will not grant an order for costs to be paid personally where a litigant is acting in a representative capacity. **Herbstein & Van Winsen**[60] give the following summary of the law in this regard:

> *"A representative litigant whose conduct is so unreasonable as to justify this special order can, despite acting in good faith, be ordered to pay the costs de bonis propriis. The Court will not, however, make such an order lightly, and mere errors of judgment will not be sufficient. It has been held that such an order should not be granted in the absence of some really improper conduct, and that the fairness or unfairness of proceedings honestly brought should not be scrutinised too closely. The criterion has been stated to be actual misconduct of any sort or recklessness, and the reasonableness of the conduct should be judged from the point of view of the person of ordinary ability bringing an average intelligence to bear on the issue in question, not from that of the trained lawyer."*

(126) In **Gauteng Gambling Board & Another v MEC for Economic**

[60] The Civil Practice of the High Court of South Africa, 5th Ed, Vol II, p 983

Development, Gauteng Provincial Government[61] the following was said by Navsa JA with regard to the personal liability of public officials for the payment of legal costs:

> *"The MEC, in her responses to the opposition by the board, appeared indignant and played the victim. She adopted this attitude while acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for Courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office-bearers."*

(127) In the matter before us it transpired that the Public Protector does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice. She failed to disclose in her report that she had a meeting with the Presidency on 25 April 2017 and again on 7 June 2017. As we have already pointed out above, it was only in her answering affidavit that she admitted the meeting on 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017. She failed to realise the importance of

[61] 2013 (5) SA 24 (SCA) par 54

explaining her actions in this regard, more particularly the last meeting she had with the Presidency. This last meeting is also veiled in obscurity if one takes into account that no transcripts or any minutes thereof have been made available. This all took place under circumstances where she failed to afford the reviewing parties a similar opportunity to meet with her.

(128) The Public Protector failed to make a full disclosure when she pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report. We have already pointed out that Dr Mokoka's report was obtained after the final report had been issued and the applications for review had been served. Section 5(3) of the **Public Protector Act** provides for an indemnification with regard to conduct performed *"in good faith"*. The Public Protector has demonstrated that she exceeded the bounds of this indemnification. It will therefore be of no assistance to her. It is necessary to show our displeasure with the unacceptable way in which she conducted her investigation as well as her persistence to oppose all three applications to the end.

(129) Having regard to all the above considerations, we have to conclude that this is a case where a simple punitive costs order against her in her official capacity will not be appropriate. This is a case where we should go further and order the Public Protector to pay at least a

certain percentage of the costs incurred on a punitive scale. We therefore conclude that all three review applications should succeed. The Public Protector, in her official capacity, should be ordered to pay 85% of the costs of the application by the South African Reserve Bank on an attorney and client scale, and the balance of 15% should be paid by the Public Protector in her personal capacity. This does not include costs for the Minister of Finance and Treasury, as they did not request costs.

(130) ABSA requested costs on an attorney and client scale, including the costs of three counsel. The Minister of Finance and Treasury argued that it was entitled to costs, but left it for the court to decide. The Reserve Bank requested costs *de bonis propriis* against the Public Protector.

(131) In the result the following orders are made:

1. Both points *in limine* raised by the Public Protector are dismissed;
2. The remedial action as set out in paragraphs 7.1.1, 7.1.1.1, 7.1.1.2 and 7.1.2 of the Public Protector's Report 8 of 2017/2018 into the "Alleged Failure to Recover Misappropriated Funds" ("the Report") issued by the Public Protector on 19 June 2017 is reviewed and set aside;
3. The remedial action imposing the obligation referred to in

paragraph 8.1 of the report to submit an action plan to the Public Protector in relation to paragraphs 7.1.1, 7.1.1.1, 7.1.1.2, and 7.1.2 of the Report is reviewed and set aside;

4. 4.1 The first respondent, in her official capacity, to pay the costs of ABSA, on an attorney and client scale, including the costs of three counsel;

4.2 The first respondent, in her official capacity, to pay 85% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel in her capacity as Public Protector;

4.3 The first respondent, in her personal capacity, is ordered to pay 15% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel, *de bonis propriis*.

Judge C Pretorius

I agree.

Judge N P Mngqibisa-Thusi

I agree.

Judge D S Fourie

Case number	: 48123/2017
	52883/2017
	46255/2017
Matter heard on	: 5 and 6 December 2017
For ABSA	: Adv. G Marcus SC
	Adv C Steinberg
	Adv M Musandiwe
	Adv M ela Phukubje
Instructed by	: Webber Wentzel Attorneys
For the Reserve Bank	: Adv D Unterhalter SC
	Adv K Hofmeyr
	Adv C Tabata

Instructed by	: Werksmans Attorneys
For the Minister of Finance and	
Treasury	: Adv T Ngcukaitobi
	Adv E Richards
Instructed by	: State Attorney Pretoria
For the 1st Respondent	: Adv P Kennedy SC
	Adv P Khoza
	Adv T Manchu
	Adv M Manala
	Adv T Mankge
Instructed by	: Motsoeneng-Bill Attorneys Inc.
Date of Judgment	: 16 February 2018