IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case 48521/19

In the matter between:

PRAVIN JAMNADAS GORDHAN	Applicant
and	
THE PUBLIC PROTECTOR	First Respondent
BUSISWE MKHWEBANE	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
THE MINISTER OF STATE SECURITY	Fifth Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Sixth Respondent
THE NATIONAL COMMISSIONER OF POLICE	Seventh Respondent
VISVANATHAN PILLAY	Eighth Respondent
GEORGE NGAKANE VIRGIL MAGASHULA	Ninth Respondent
ECONOMIC FREEDOM FIGHTERS	Tenth Respondent

APPLICANT'S HEADS OF ARGUMENT – INTERIM APPLICATION

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THE PURPOSE OF THIS APPLICATION

1 This application seeks the following relief in Part A of the Notice of Motion[1] pending the determination of Part B:

1.1 The suspension of the remedial orders made by the Public Protector in paragraph 8 of her "*Report on an investigation into allegations of violation of the Executive Ethics Code by Mr Pravin Gordhan, MP as well as allegations of maladministration, corruption and improper conduct by the South African Revenue Service*" No 36 of 2019/200[2].

1.2 An interdict restraining the Public Protector from enforcing the remedial orders.

2 The only purpose of Part A is to suspend the operation of the Public Protector's remedial orders pending the final determination of the review in Part B. The Report is the product of serious errors of fact, errors of law and demonstrable bias or ulterior purpose. The suspension is required because, without it, the implementation of the orders (i) may turn out to be wholly unnecessary (and unlawful) and (ii) will have far-reaching implications which may be irreversible if Min Gordhan should one day succeed in having the Report overturned on review under Part B.

3 Such a suspension has been routine in other cases involving remedial action imposed by the Public Protector that have been taken on review.[3] The Public Protector's exercise of her powers is subject to judicial review and her insistence

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1 Notice of Motion vol 1 p 2 para 1.

2 Annexure PG1 vol 2 p 85.

3 RA vol 16 p 1520 para 13 et seq.

that her orders be immediately implemented, regardless of the outcome of the review, undermines the rule of law and the constitutional right of Min Gordhan to challenge the Report on review.

4 If the remedial orders were to be implemented, it would have far-reaching consequences:

4.1 The Report notes[4] that remedial orders imposed by the Public Protector are *"legally binding on the President of the Republic of South Africa, unless a court order directs otherwise"*. The Public Protector cites the Constitutional Court's *EFF* judgment[5] in support of this contention. It held that remedial actions are binding on the functionaries against whom they are made unless and until set aside by a court on review.

4.2 The Public Protector found[6] that Min Gordhan violated the Constitution and the Executive Ethics Code. She requires the President *"to take appropriate disciplinary action against (the applicant) for his violation of the Constitution and the Executive Ethics Code within 30 days of issuing this report."*[7] This deadline expires on 4 August 2019.

4.3 The Public Protector, however, also orders the President *"within thirty (30) days from the date of issuing this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector*

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4 Annexure PG 1 vol 2 p 206 para 9.6.

5 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.

6 Annexure PG 1 vol 2 p 197 paras 7.1.1, 7.1.5, 7.2.5, 7.2.7, 7.4.8 and 7.6.4.

7 Annexure PG 1 vol 2 p 203 para 8.1.1.

indicating how the remedial action referred to in paragraph 7.1 of this Report will be implemented."[8]

4.4 It would moreover clearly be unlawful for the President to discipline Min Gordhan without affording him a hearing.

4.5 It follows that the Public Protector in effect ordered the President to take the following steps before 4 August 2019:

4.5.1 He must afford Min Gordhan a hearing on the manner in which the President should discipline him for his alleged transgressions of the Constitution and the Executive Ethics Code.

4.5.2 He must prepare an implementation plan for the Public Protector's approval on the manner in which he proposes to discipline Min Gordhan.

4.5.3 Once he has obtained the Public Protector's approval, he must discipline Min Gordhan in accordance with the Implementation Plan.

4.6 The Public Protector's remedial orders against the Speaker (paras 8.2 and 9.2), the Minister of State Security (paras 8.3 and 9.3) and the Commissioner of Police (paras 8.5 and 9.5) are to similar effect.[9]

4.7 The one exception, however, is that the Speaker's deadline is even shorter. She must, within 14 working days, refer the findings against Min Gordhan to the Joint Committee on Ethics and Members' Interests.

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[8] Annexure PG 1 vol 2 p 205 para 9.1.

[9] Annexure PG 1 vol 2 p 204- 205.

This deadline expires on 25 July 2019, that is, on Thursday. This deadline seems to be contradicted by paragraph 9.2 in terms of which the Speaker must submit an Implementation Plan within 30 days, that is, by 4 August 2019. The Public Protector does not explain why or how the Speaker must implement the order by 25 July 2019, but is given until 4 August 2019 to submit a plan for doing so.

4.8 The Public Protector also made an odd order against the Minister of State Security to *"implement, in totality the OIGI report dated 31 October 2014"* (paragraph 8.2.1). It is a report prepared by the IGI in 2014, without affording Min Gordhan a hearing at all. The Public Protector also never invited him to respond to the report. She indeed pretends not even to have seen it. She merely recites some of its findings and recommendations (from p 133 in paras 5.2.33 and 5.2.34 of her report) *"on good authority"*.

4.9 Paragraph 9.4 is also odd because it orders the Inspector General of Intelligence to submit an Implementation Plan to the Public Protector for her approval *"indicating how the remedial action referred to in paragraph 7.4 of this Report will be implemented"*. Paragraph 7.4 does, however, not provide for any remedial action. There is in fact no substantive remedial order made against the IGI at all.

4.10 The Public Protector's remedial order in para 8.5 (on p 205 of the Report) is in itself bizarre. She orders the Commissioner of Police to investigate *"the criminal conduct of Messrs Gordhan"* and others *"for violation of section 209 of the Constitution and section 3 of the National Strategic Intelligence Act"*. But neither section creates a criminal

offence. It seems moreover that the Public Protector's mistake on this score is not a mere oversight. She persists[10] with her contention that contraventions of these two sections constitute criminal offences. It is a display of remarkable ignorance of the basic principles of criminal law.

5 It is thus clear that the immediate implementation of the Public Protector's remedial orders will inevitably have far-reaching consequences by no later than 4 August 2019.

6 There is, on the other hand, no reason for the urgent implementation of the remedial action. The conduct, for which the Public Protector seeks to punish Min Gordhan, occurred many years ago. There is absolutely no reason to punish him before this court has determined whether the Public Protector's findings against him are lawful.

7 The Public Protector advances an extraordinary argument[11] to the effect that it would be unconstitutional for this court to grant the interim relief Min Gordhan seeks in Part A:

7.1 She argues, in the first place (in para 23), that the interim relief would be unconstitutional because it would fetter the President's powers to act against members of his Cabinet. She puts it as follows:

"If granted, an interdict will place unlawful limitations on the President to take steps against a member of the National Executive for any reasons. The interdict, in essence, would mean that the President is prevented from speaking to or admonishing the Applicant on any aspect of the remedial order involving discipline. The interdict order would therefore

[10] PP AA vol 12 p 1134 para 44.

[11] PP AA vol 12 p 1127 paras 23-27.

be an unconstitutional restraint on the powers of the President to act in order to address a crisis involving the findings of the Public Protector."

7.2 The Public Protector advances the same argument to the effect that the interim relief would unconstitutionally fetter the exercise of the powers of the Speaker (para 25), the Minister of State Security (para 27) and the South African Police Service (para 28).[12]

8 But this argument is incompatible with the applicant's prayers in Part A.[13] It is indeed hard to imagine that the Public Protector has read the prayers in Part A:

8.1 Prayer 1.2 merely asks for an order suspending the Public Protector's remedial orders in paragraph 8 of the Report.

8.2 Prayer 1.3 merely asks that the first and second respondents, that is, the Public Protector, be interdicted from enforcing the remedial orders.

8.3 The interim relief will accordingly not impose any constraint on the President or any of the other functionaries against whom the Public Protector has made remedial orders. The effect of the interim relief will merely be to relieve them of the duty imposed on them by the Public Protector to implement her remedial orders. They will remain entirely at liberty to exercise their own powers and perform their own functions as they see fit.

8.4 It follows that the Public Protector's opposition to the grant of the interim relief is based on a fundamental misconception of the purpose and effect of Part A.

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[12] PP AA vol 12 p 1128-1130.

[13] NOM vol 1 p 2.

9 The EFF, for its part, argues that the implementation of the Public Protector's remedial orders will be of little consequence.[14] That will be so, says Mr Malema, because the remedial orders merely require the President and the other functionaries, against whom they are made, to initiate proceedings against Min Gordhan. The President and the other functionaries will not, in those proceedings, be bound by the Public Protector's findings against Min Gordhan. They will be at liberty to reconsider those findings and determine afresh whether Min Gordhan was indeed guilty of the alleged transgressions of which the Public Protector has purportedly reached a conclusion.

10 But this interpretation is clearly wrong. It is contradicted by the terms of the Public Protector's orders:

10.1 The Public Protector orders the President (p 203 para 8.1.1) *"to take appropriate disciplinary action against (Min Gordhan) for his violation of the Constitution and the Executive Ethics Code"*. The Public Protector clearly requires the President to discipline Min Gordhan for the transgressions of which the Public Protector has already found him guilty. Her order does not permit the President to inquire afresh into the question whether Min Gordhan was indeed guilty of the alleged transgressions.

10.2 The same is true of the orders against the Speaker (p 204 para 8.2.1). The Public Protector requires the Speaker to *"refer Mr Gordhan's violation of the Code of Ethical Conduct"* to the Joint Committee *"for consideration"*. This mandatory order does not allow the Speaker or the

[14] EFF AA vol 14 p 1387 para 46.4, p 1389 paras 50 to 59.

Committee to reconsider afresh whether Min Gordhan has indeed contravened the Code.

10.3 The Public Protector also orders the Commissioner of Police to *'investigate the criminal conduct of Messrs Gordhan"* and others (p 205 para 8.5.1). The order again asserts as a fact that Min Gordhan and others have engaged in criminal conduct.

10.4 It follows that the EFF's opposition to this application is also based on a fundamental misconception about the far-reaching consequences of the implementation of the Public Protector's remedial orders.

REQUIREMENTS FOR AN INTERIM INTERDICT

11 The Constitutional Court restated the requirements for an interim interdict in its *OUTA* judgment.[15] The judgment makes it clear that, in a case such as this one, the requirements are as follows.

12 The starting point is the conventional test set out in *Setlogelo*[16] and refined, 34 years later, in *Webster*.[17] The test requires that an applicant for an interim interdict to establish (a) a *prima facie* right even it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy.[18]

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[15] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).

[16] *Setlogelo v Setlogelo* 1914 Ad 221.

[17] *Webster v Mitchell* 1948 (1) SA 1186 (W).

[18] Outa para 41.

13 Our courts annotated the common law test in *Gool*[19] where an interim interdict is sought to restrain the exercise of a statutory power. The Constitutional Court described the *Gool* annotation in OUTA as follows:

> *"The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself."*[20]

14 The Constitutional Court endorsed the *Setlogelo* test as adapted by *Gool*.[21]

15 The court also highlighted the following two examples (in paragraph 46) which are particularly germane to the present case:

15.1 *"If the right asserted in a claim for an interim interdict is sourced from the Constitution, it would be redundant to inquire whether the right exists."*

This is such a case, Min Gordhan's application for review is based on his right to the lawful and rational exercise of public power entrenched in section 1(c) of the Constitution.

15.2 *"Similarly, when a court weights up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought."*

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[19] *Gool v Minister of Justice* 1955 (2) SA 682 (C).

[20] Outa para 44.

[21] Outa para 45.

In this case, this consideration cuts both ways. The Public Protector seeks to interfere with the performance of the public functions of Min Gordhan, the President, the Speaker, the Minister of State Security, the NDPP and the Commissioner of Police. The applicant merely asks for a suspension of her interference pending this Court's determination of the lawfulness of her orders.

URGENCY

16 The urgency here is inherent and obvious. The imminent deadlines for implementation of the Public Protector's remedial orders are 25 July and 4 August 2019.[22]

17 If this matter is enrolled on the ordinary roll and not heard on an urgent basis, Min Gordhan will not only be prejudiced, but the relief sought in the main review will be rendered nugatory and impotent. By the time the review is heard, he will already have been subjected to the punitive and prejudicial processes contemplated in the remedial action, and will continue to suffer baseless, but engineered, reputational damage.

18 The Public Protector makes it clear that, in her view, the impact of the implementation of her remedial orders on Min Gordhan may be catastrophic and irreversible. She puts it as follows:

> *"The fear of the Applicant that he will be dismissed by the President, while within the realm of possibility, cannot be prevented by a court interdict. The President could dismiss the Applicant on the basis of my findings against him and a successful review cannot assist him to return to his position."*[23]

19 The EFF argues[24] that there is no urgency because the President and the other functionaries will merely initiate proceedings and that Min Gordhan will, in those proceedings, have an opportunity to defend himself. We have already explained that this interpretation is wrong.

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[22] FA vol 1 p 73 paras 189-202, Replying Affidavit ("RA") vol 16 p 1546 paras 74-76.

[23] PP AA vol 12 p 1128 para 24.

[24] EFF AA vol 14 p 1389 paras 50 to 53.

A *PRIMA FACIE* RIGHT

The Public Protector's jurisdiction under section 6(9)

20 The first ground of review is that the Public Protector has no jurisdiction over the complaints under section 6(9) of the PP Act.[25] The section reads:

> "*Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.*"

It seems that the Public Protector may not entertain a complaint more than two years after the event except that she has a discretion to do so in special circumstances.

21 In this case, all the complaints are more than two years old – some of them are more than a decade old.

22 When asked to identify what "special circumstances" upon which she based her decision to investigate the complaints, the Public Protector failed to identify any rational grounds for her decision, evaded the question and on occasion contradicted herself:

22.1 On 27 March 2019, Min Gordhan's attorney, Mr Malatji, asked the Public Protector to identify the "special circumstances" required by section 6(9) of the PP Act.[26]

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[25] Section 6(9) of the PP Act provides that she may not entertain a complaint more than two years after the event at issue, except where, in special circumstances, the Public Protector exercises her discretion to do so.

[26] Annexure PG 4 vol 1p 206.14 para 2.1.

22.2 The Public Protector failed to respond.

22.3 On 16 April 2019, Mr Malatji wrote a further letter to the Public Protector again requesting that she identify the special circumstances.[27]

22.4 On 24 April 2019, the Public Protector responded that "special circumstances" were present in this matter as she had been reliably informed that "*the surveillance equipment illegally acquired at astronomical costs, is still being utilised to intercept communications between people by the unit which was not completely disbanded. So this was a matter of special interest as public funds are still being used for illegal purposes*."[28]

22.5 This might, at best, be a reason to entertain the complaint about the procurement of equipment by the SARS investigative unit but not the other complaints in fact entertained.

22.6 In an unexplained about turn, on 3 June 2019, the Public Protector furnished Min Gordhan with a section 7(9) notice in which she set out a generic set of factors which, she said, constituted the required "special circumstances."[29] These factors are markedly different from and make no mention of the prior reason she had given just a week before. These generic factors are also present in any complaint submitted to her Office and render section 6(9) of the PP Act meaningless.[30]

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27 Annexure PG 4 vol 3p 206.16 para 2.1.

28 Annexure PG 27 vol 3 p 993 para 4.

29 Annexure PG 29 vol 10 p 1019 para 6

30 FA vol 1 p 30 para 51.

22.7 On 20 June 2019, Min Gordhan responded to the section 7(9) notice. In light of the inadequacy and generic nature of her earlier response, Min Gordhan again called on the Public Protector to furnish full particulars of the special circumstances she actually relied upon when she exercised her discretion in this case.[31]

22.8 The Public Protector again failed to respond.

22.9 On 5 July 2019, the Public Protector released her Report. Despite the requests to respond fully, the Report merely parroted the generic list of factors as constituting "special circumstances."[32]

23 The inescapable conclusion is that the Public Protector did not have any rational grounds for her decision to entertain these old complaints. She thus has no jurisdiction to entertain them.

24 The Public Protector does not address Min Gordhan's attack based on her lack of jurisdiction in her answering affidavit before this Court, save to deny the allegations relating to the review application and baldly assert that they are without merit.[33] Her silence on this issue is a further indication that no rational reasons exist for the exercise of her discretion in these circumstances.

25 The EFF makes two arguments in support of the Public Protector jurisdiction over the complaints:

25.1 First, the EFF asserts that Min Gordhan has given evidence before the Nugent and Zondo Commissions respectively about the Unit and never

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31 Annexure PG 31 vol 11 p 1092 para 9.

32 Annexure PG 1 vol 2 p 93 para g & p 107 para 3.5.

33 AA vol 12 p 1131 para 32.

objected to them adjudicating a complaint related to events from over two years ago.[34]

25.2 This argument is meritless. Both Commissions had jurisdiction over the issue of the Unit fell as it fell within their terms of reference. The PP Act on the other hand, requires the Public Protector to identify the necessary special circumstances in this circumstance, in order to exercise jurisdiction.[35] It is her failure to do so which results in the lack of jurisdiction.

25.3 Second, the EFF advances an argument that the determination of the lawfulness of the Unit is in the public interest.[36]

25.4 That is not the test. The question is whether the Public Protector's decision was actually based on rational grounds. And it has been shown not to be. The EFF's attempt to justify it does not assist the Public Protector. The special circumstances proffered by the EFF, are those of the EFF and do not reflect the Public Protector's actual reason. The reasons of the EFF, in any event, only justify the enquiry into the establishment of the Unit and not the other complaints.

26 In conclusion, the Public Protector had no lawful, rational or factual basis on which to exercise jurisdiction over the complaints.[37] The review should succeed in its entirety on this dispositive ground of review.

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[34] EFF AA vol 14 pp 1362 - 1363 paras 17 – 18.

[35] PP Act section 6(9).

[36] EFF AA vol 14 p 1363 para 21.

[37] FA vol 1 p 30 para 54.

The Ambani meeting

27 The second ground of review relates to the Public Protector's flawed finding that Min Gordhan violated the Executive Ethics Code, by deliberately misleading the National Assembly, by failing to disclose in 2016 that a member of the Gupta family had been present at his meeting with a Mr Ambani in 2010.[38]

28 The Public Protector's finding that Min Gordhan dishonestly concealed the fact that there had been a Gupta present at his meeting with Mr Ambani is absurd.[39] The deficiencies in her reasoning are as follows.[40]

28.1 Min Gordhan's evidence, that he did not and still does not recall that there was a Gupta present at the meeting with Mr Ambani, is uncontradicted. There is no evidence in support of the finding to the contrary.

28.2 He has been unwaveringly consistent in this regard.[41] Min Gordhan did not recall it in 2016 when he spoke in Parliament[42] and he also did not recall it when he gave evidence before the Zondo Commission in 2019.[43] The only difference was that, in preparation for his evidence before the Zondo Commission, his chief of staff told him that there had been a Gupta present at the Ambani meeting.[44]

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38 Annexure PG 1 vol 2 p 197 - 198 para 7.1.

39 FA vol 1 p 36 para 61; EFF AA vol 14 p 1366 paras 29 – 32.

40 FA vol 1 pp 31 – 361 paras 55 to 63.

41 RA vol 16 p 1537 para 49.2.

42 FA vol 1 p 35 para 58.1.

43 FA vol1 p 35 para 58.4.

44 FA vol 1 p 35 para 58.4.

28.3 Min Gordhan had no motive to conceal the fact that there may have been a Gupta present at his meeting with Mr Ambani. His meeting was with Mr Ambani and not Mr Gupta.[45] The Guptas were moreover not as notorious in 2010 as they later became[46]. He indeed disclosed that he had on other occasions come across the Guptas in the same way, for instance, at a meeting with the then President Zuma.[47]

28.4 There is thus no rational basis for the Public Protector's finding.

29 The EFF argues that Min Gordhan made the disclosure before the Zondo Commission only because he knew that his chief of staff would, in evidence before the Zondo Commission, disclose that there had been a Gupta present at the Ambani meeting.[48] This submission, however, is pure speculation, mischievous, baseless and far-fetched.[49]

30 The EFF also contends that it is irrelevant that Min Gordhan's failure to disclose the presence of Mr Gupta at the Ambani meeting might have been inadvertent or an innocent mistake.[50] They say that it is a transgression of the Executive Ethics Code even if it is a mere inadvertent or innocent mistake. That is not so. Paragraph 2.3(a) of the Executive Ethics Code reads:

> *"Members of the Executive may not … **wilfully** mislead the legislature to which they are accountable".*

[45] FA vol 1 p 35 para 58.2.

[46] FA vol 1 p 36 para 62.2.

[47] FA vol 1 p 32 para 56.4.

[48] EFF AA vol 14 p 1372 para 31.3.

[49] RA vol 16 p 1537 para 49.3.

[50] EFF AA vol 14 p 1367 para 31.1; EFF AA p 1403 paras 94 – 95.

31 Min Gordhan did not wilfully mislead Parliament. The Public Protector's finding to the contrary is irrational.

Establishment of the SARS investigative unit

Introduction

32 The Public Protector found that the establishment of the SARS investigative unit was *"improper and in violation of section 209 of the Constitution and therefore amounts to maladministration as envisaged in section 182(1) of the Constitution and abuse of power as envisaged in section 6(4)(ii) of the Public Protector Act"*.[51] But this finding is fundamentally flawed for the following reasons.

The purpose of the SARS investigative unit

33 The law enabled, and, indeed, required, SARS to establish an investigative unit to investigate economic crime with tax implications. There is no basis, in fact or law, for the Public Protector's finding to the contrary.

34 The purpose of the SARS investigative unit is detailed in the Founding Affidavit[52]:

34.1 SARS is established in terms of the South African Revenue Service Act, 34 of 1997 as an organ of state within the public administration, but as an institution outside the public service.

34.2 Section 3 of the SARS Act provides that its objectives are "the efficient and effective (a) collection of revenue; and (b) control over the import,

[51] Public Protector's Report p 198 para 7.2 and particularly paras 7.2.5 and 7.2.7.

[52] FA vol 1 p 40 paras 67- 77.

export, manufacture, movement, storage or use of certain goods", including those subject to customs and excise duty.

34.3 Section 4 provides that SARS *"must secure the efficient and effective, and widest possible, enforcement"* of all tax laws.

34.4 SARS is the sole administrator and revenue collecting agency responsible for investigating and enforcing compliance with tax and customs legislation. Any disruption of SARS' capabilities has dire consequences for both the fiscal situation and the compliance culture in South Africa, as evidenced by successive tax collection shortfalls and weaker levels of tax compliance in the post-2014 period.[53]

34.5 During Min Gordhan's tenure as Commissioner of SARS, he authorised the establishment of an investigative unit in 2007. The unit did not initially have a name but was later successively known as The Special Projects Unit, The National Research Group and The High Risk Investigations Unit. The Manager of the unit reported to Mr Pillay, in his capacity as General Manager: Enforcement and Risk. Mr Pillay reported to Min Gordhan until May 2009, when he was appointed Minister of Finance.

34.6 The unit was established against the backdrop of government's commitment to crack down on crime generally and on organised crime in particular. Former President Mbeki mentioned this commitment in his State of the Nation Address of 9 February 2007 when he said that government would, amongst other things:

[53] Annexure PG13 vol 6 p 517; Annexure PG14 vol 6 p 547.

"start the process of further modernising the systems of the South African Revenue Services, especially in respect of border control, and improve the work of the inter-departmental co-ordinating structures in this regard;

intensify intelligence work with regard to organised crime, building on the successes that have been achieved in the last few months in dealing with cash-in-transit heists, during drug trafficking and poaching of game and abalone."[54]

34.7 It became apparent that SARS had to enhance its intelligence gathering capacity to combat organised tax crime and the illicit trade. It set up the investigative unit as part of its broader Enforcement Division. It was very similar to, and modelled on, the enforcement units of most other tax and customs administrations in the world.

35 SARS has always had its own investigation and enforcement units engaging in a wide range of investigations, including criminal investigations with tax implications. The SARS unit was a further manifestation of SARS' long-standing capacity to investigate tax- and customs-related crimes, so as to protect legitimate South African businesses from the illicit trade, and enhance revenue collection and compliance. It had the mandate to take decisive steps to minimise:

35.1 Importation, exploitation and manufacturing of drugs.

35.2 Illegal harvesting of abalone and its supply.

35.3 Illegal importation of second-hand vehicles.

35.4 Importation of counterfeit goods.

[54] Annexure PG5 vol 3 p 206.18 at 206.25.

35.5 Smuggling of cigarettes.

36 The SARS unit was responsible for cracking down on organised tax crime and tax evasion, and did so in collaboration with various government departments, such as Home Affairs, Trade and Industry, Environmental Affairs and other law enforcement agencies.

37 This commendable work came under attack in recent years from powerful business people and politicians whose unlawful gains were being threatened by the work of the SARS investigative unit. Simultaneously, disgruntled former members of the SARS investigative unit spread falsities and rumours about the SARS investigative unit. This became knowns as the so-called "rogue unit narrative", to which we turn later.

The history of the SARS investigative unit

38 The salient facts of the establishment of the SARS investigative unit are set out in the Founding Affidavit[55] and the affidavits filed by other respondents.[56]

39 SARS has always had its own investigation and enforcement units engaged in a wide range of investigations including criminal investigations with tax implications.

40 SARS and the National Intelligence Agency had earlier commenced formal discussions with a view to develop a dedicated capacity within the NIA to support SARS in investigating economic crimes with tax implications. In September 2002, SARS and the NIA concluded a Memorandum of

[55] FA vol 1 p 40 paras 67- 77.

[56] Annexure PG10 vol 3 p 234 paras 31.8 – 31.29, p 278 para 32 – vol 4 p 301 para 46.

Understanding agreeing to cooperate so as to enhance the fulfilment of their respective mandates.[57]

41 It was originally envisaged that SARS would recruit and train the members of the SARS investigative unit and that they would be transferred to the NIA. This unit would be ring-fenced within the NIA and be dedicated to supporting SARS.

42 In a memorandum dated 2 February 2007, Mr Pillay and Minister Gordhan sought ministerial approval for the establishment of the SARS investigative unit within the NIA.[58] He sought ministerial approval only because the proposal, to establish the SARS investigative unit within the NIA, required a transfer of funds from SARS to the NIA. The memorandum is clear that it was necessary "to fund a special capability within NIA to supply SARS and law enforcement with the necessary information to address the illicit economy." Min Gordhan, as Commissioner of SARS, the Deputy Minister and the Minister approved Mr Pillay's proposal.

43 The NIA, however, lost appetite for this project after the 2 February 2007 memorandum was approved. SARS decided to retain the SARS unit within its Enforcement Division.

44 On 8 February 2007, Mr Pillay recommended that SARS create a specialist, internal capability to focus on the illicit economy. On 13 February 2007, this proposal was approved by the Chief Officer for Corporate Services, Mr Magashula.[59] Mr Pillay's memorandum explained that this internal capability within SARS was required because

[57] Annexure PG6 vol 3 p 206.28.

[58] Annexure PG7 vol 3 p 206.31.

[59] Annexure PG8 vol 3 p 206.34.

> "*[c]ombating smuggling of prohibited goods and substance is part of SARS' mandate and as you may know a need exists for a special capability to enable SARS to make inroads in understanding the illicit economy in order to take decisive steps to minimize the following:*
>
> *(a) Importation, exportation and manufacturing of drugs;*
>
> *(b) Illegal harvesting of abalone and its supply;*
>
> *(c) Illegal importation of 2nd hand vehicles;*
>
> *(d) Importation of counterfeit goods:*
>
> *(e) Smuggling of cigarettes.*
>
> *Fundamental to combating the illicit economy is the capability to penetrate and intercept the activities of crime syndicates."*

The memorandum envisaged the creation of a 26-person unit, under the Enforcement and Risk Division (after transfer from the CBCU – a unit that the Public Protector confuses with the SARS investigative unit).

45 In 2008, SARS adopted a strategy to deal with the illicit economy. A number of units were formed in order to implement this strategy, including the SARS investigative unit. A presentation illustrating the proposed approach[60] confirms that these units were part of fulfilling the "*statutory obligation by SARS to address crimes [in respect of] tax and customs.*"

46 As a result, the SARS investigative unit came into being and began its important work of tackling the crimes of illicit trade and organised crime with tax implications.

[60] Annexure PG9 vol 3 p 207.

The establishment of the unit was lawful

47 In terms of section 3 of the SARS Act 34 of 1997, the objectives of SARS are "the efficient and effective (a) collection of revenue; and (b) control over the import, export, manufacture, movement, storage or use of certain goods" including those subject to customs and excise duty.

48 Section 4(1)(a) provides that, to achieve its objectives, SARS must, "secure the efficient and effective, and widest possible, enforcement of (i) the national legislation listed in Schedule 1".

49 When the unit was established in 2007, the national legislation listed in Schedule 1 included:

49.1 The Customs and Excise Act 91 of 1954.

49.2 The Tax Administration Act 28 of 2011.

49.3 The Income Tax Act 58 of 1962 (before its amendment by the Tax Administration Act).

49.4 The Value-Added Tax Act 89 of 1991 (before its amendment by the Tax Administration Act).

50 These tax laws vested SARS with wide powers for the investigation of tax matters including the investigation of crimes with tax implications. Sections 4 and 4A to 4D of the Customs Act for instance demonstrate the point:

50.1 Customs officers are required to preserve confidentiality in the course of their duties, save to disclose such information as is required to law enforcement agencies, government agencies such as the South African

Reserve Bank, Financial Intelligence Centre or the International Trade Administration Commission, and other organs of state regulating the movements of persons or goods so as to enforce legislation regulating such movements.

50.2 Officers may enter any premises on authority of a warrant issued by a magistrate or judge, or enter any premises without a warrant in particular circumstances, for purposes of enforcing the Customs Act.

50.3 Officers may then conduct an inspection, examination, enquiry or search of those premises, including utilising X-ray scanners and other non-intrusive inspection methods.

50.4 Persons may be examined and goods may be secured where the officer reasonably believes that a contravention of the Customs Act has been or is likely to be committed.

50.5 Officers are permitted to carry and use firearms, and to arrest individuals, for purposes of enforcing the Customs Act.

51 It is clear that the Customs Act requires SARS to have internal investigative capability to prepare for and perform these type of operations for which the SARS unit was established.

52 Section 5(1)(j) of the SARS Act moreover empowers SARS in the widest terms as follows:

> *"SARS may do all that is necessary or expedient to perform its functions properly, including to … engage in any activity, whether alone or together with any other organisations in the Republic or elsewhere, to promote proper, efficient and effective tax administration, including customs and excise duty administration."*

It thus expressly empower SARS to engage in any activity *"to promote proper, efficient and effective tax administration"*. It clearly includes the prevention and investigation of tax related crime.

53 Given the wide powers vested on SARS by this legislative framework to enforce and ensure compliance with the applicable tax and customs and excise laws, its need for internal investigative capability was clear, and was lawfully satisfied with the establishment of the SARS investigative unit. It was thus lawfully established.

The Sikhakhane panel's finding

54 The Sikhakhane panel concluded that the SARS investigative unit was unlawful because it was in breach of section 3 of the National Strategic Intelligence Act 39 of 1994. This conclusions was, however, based on a reading of section 3 that was plainly wrong.

55 Section 3(1) of the NSI Act read as follows (before its amendment in 2013) when the SARS unit was established:

> *"If any law expressly or by implication requires any department of State, other than (the NIA) or (SASS), to perform any function with regard to the security of the Republic or the combatting of any threat to the security of the Republic, such law shall be deemed to empower such department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function; provided that such department of State-*
>
> *(a) …*
>
> *(b) …*
>
> *shall not gather departmental intelligence within the Republic in a covert manner … ."*

56 The SARS unit clearly did not contravene this section for two reasons:

56.1 First, section 3(1) did not impose a general prohibition. It applied only to those departments of State that were required by law to perform functions *"with regard to the security of the Republic or the combatting of any threat to the security of the Republic"*. SARS was not such a department. It was not a department of State and was not required by law to perform any functions with regard to state security. It was accordingly not subject to the prohibition in section 3(1) at all. The section was simply not applicable to SARS.

56.2 Second, section 3(1) in any event did not prohibit all covert intelligence gathering. It only prohibited the gathering of *"departmental intelligence"* in a covert manner. Section 1 of the NSI Act defined *"departmental intelligence"* as *"intelligence about any threat or potential threat to the national security and stability of the Republic"*. The SARS unit was never engaged in the gathering of intelligence of this kind. Its activities thus fell well beyond the scope of the prohibition because it was not in the business of gathering intelligence about threats or potential threats to the national security and stability of the Republic.

57 The Sikhakhane panel's interpretation moreover implied that it was unlawful for anybody to engage in the covert gathering of information about crime. But such an interpretation is clearly absurd. Very many public and private bodies engage in the covert gathering of crime intelligence to combat crime.

58 The suggestion that the SARS unit was unlawful has been widely repudiated.[61] His lordship Mr Justice Meyer for instance recently commented on the Sikhakhane finding as follows:

> *"However, the Commissioner of Inquiry into Tax Administration and Governance by SARS appointed by President Cyril Ramaphosa and chaired by retired Judge Nugent (the Commission), made findings in its final report that support SARS' stance that Mr Wingate-Pearse's allegations about the existence of a rogue unit within the ranks of SARS are without a sound factual basis. The Commission found inter alia that there was an onslaught upon those who managed SARS founded upon allegations once peddled by the Sunday Times to a beguiled public for a year or more, about a "rouge" unit that was alleged to have existed within SARS; the Sunday Times itself withdrew its allegations and apologised some two years later; although the establishment of HRIU was termed unlawful by a panel chaired by Adv Sikhakhane SC, there was nothing in the report to persuade the Commission why that was so; and the SARS Advisory Board chaired by Judge Kroon, reported to the Minister, and issued a media statement, saying the unit was unlawful, but in evidence he told the Commission that was not a conclusion reached independently by the Board, but had been adopted from the Sikhakhane panel, and he had come to realise it was wrong. Indeed, he supported the re-establishment of capacity to investigate the illicit trades, which he recommends. In his testimony before the Commission, Judge Kroon said: 'Yes, as I have said in my report, my first comment was that the statement relating to the unlawfulness of the establishment of the unit were not thought through properly and were (sic) in fact incorrect.'"*[62]

[61] FA vol1 p 45 paras 81 to 84 and p 48 paras 97 to 104.

[62] *Wingate-Pearse v Commissioner, SARS* [2019] ZAGPJHC 218 (17 July 2019) para 28.

The Public Protector's new argument

59 The Public Protector now argues that the establishment of the SARS unit *"was in breach of section 209 of the Constitution in terms of which only the President may establish such covert information gathering unit"*.[63]

60 This finding is based on a clear distortion of section 209. It does not deal with the establishment of *"covert information gathering units"* at all. Section 209(1) reads as follows:

> *"Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation."*

61 The section in other words regulates the establishment of *"intelligence services"*. Such a service is one that gathers covert intelligence to protect or advance national security. This understanding is for instance illustrated by section 1 of the NSI Act. It defines many forms of *"intelligence"* but makes it clear, in its definition of *"intelligence"*, that, what all of them have in common, is the gathering of information *"for purposes of informing any government decision or policy-making process carried out in order to protect or advance the national security"*. Section 209 is thus confined to the establishment of intelligence services dedicated to the protection of national security.

62 That was never the aim of the SARS unit. Its purpose was to fight tax evasion, illicit trade and organised crime with tax implications. It never had anything whatsoever to do with national security. It was never an *"intelligence service"*.

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[63] Report p 199 para 7.2.5.

The Public Protector's assertion to the contrary is clearly misdirected and irrational.

The EFF's new argument

63 The EFF now attempts to justify the Public Protector's finding, that the establishment of the SARS unit was unlawful, by its own recharacterisation of the purpose of the unit. It contends, without reference to any evidence, that the unit's purpose was to engage in *"spying"* and *"espionage"*, by which it seems to mean the interception of communications between citizens in breach of the Regulation of Interception of Communications and Provisions of Communications-Related Information Act 70 of 2002.

64 The EFF's deponent, Mr Malema, makes the point as follows:

64.1 He says on page 1357 in para 10.4 that the purpose of the unit was to gather covert intelligence which, he says, means *"spying on citizens without the need for warrants which are overseen by Judges"*. He adds that spying of this kind *"violates a range of constitutionally protected rights"*.

64.2 He repeats on page 1375 I para 35 that *"SARS spied; no warrants, no correct channels, no proper oversight"*.

64.3 He repeats his accusations of *"spying"* from page 1376 in paras 36.3 and 36.4.

64.4 On page 1380, he describes the activities for which the unit was set up in para 36.10 as follows:

"That kind of government intrusion is rightly reserved for the most serious and sensitive national-security issues, to be done by specialised intelligence agencies, subject to strict strategy controls."

64.5 He says on page 1380 in para 37 that the unit engaged in serious *"espionage activities"*.

65 These descriptions are compatible only with the interception of communications of the kind regulated by the Interception Act. But there is no evidence that the unit was established to engage in the unlawful interception of communications or indeed the interceptions of communications at all.

66 There is in any event no evidence that Min Gordhan approved the establishment of the unit for such a purpose or knew that it would engage in unlawful activities of this kind.

67 The EFF's attempt to save the Public Protector's conclusion is accordingly also unfounded.

68 It follows that the Public Protector's finding, that the establishment of the SARS unit was unlawful, is entirely baseless and irrational.

Recruitment for the SARS investigative unit

69 The Public Protector makes adverse findings against Min Gordhan relating to the recruitment of staff for the SARS investigative unit at paragraphs 5.4.1 to 5.4.33 and 7.4 of the Report.[64]

70 Min Gordhan refutes this accusation in his founding affidavit from page 55 in paragraphs 118 to 124. He points out that the only evidence upon which the

[64] Annexure PG 1 vol 2.

Public Protector bases her finding, is that he had been involved in the recruitment of Mr van Loggerenberg in 1998, that is, almost a decade before he joined the SARS investigative unit in 2007. The Public Protector's finding is thus entirely irrational.

Conduct of the SARS investigative unit

71 The Public Protector has not made any adverse findings against Min Gordhan relating to the conduct of the SARS Unit.

Mr Pillay's qualifications

72 The Public Protector finds that Mr Pillay was not qualified for appointment as Deputy Commissioner and that his appointment was accordingly irregular and in violation of section 195 of the Constitution.[65]

73 This finding is an appalling slur on the reputation of a highly skilled and conscientious public servant who has served his country, in the struggle against apartheid and in the reconstruction of a democratic South Africa, with great distinction.[66] The Public Protector owes him an apology.

74 There is no prescribed requirement in law for appointment as Deputy Commissioner of SARS.[67]

75 Mr Pillay, like many other South Africans who dedicated their lives to the struggle against apartheid, does not have any tertiary qualification. The Public Protector says that "*SARS and Mr Gordhan conceded that Mr Pillay did not*

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65 Annexure PG 1 vol 2 p 202 para 7.6.

66 FA vol 1 p 57 para 128.

67 FA vol 1 p 57 paras 129-130.

possess a Degree qualification nor a Matric certificate."[68] But that is not so. Min Gordhan knows that Mr Pillay matriculated.[69]

76 He has proved himself to be a public servant of great skill and dedication.[70] Mr Pillay's experience in the public service from January 1995 was a rational, proper and lawful basis for Cabinet to approve his appointment as one of three Deputy SARS Commissioners.[71]

77 Mr Pillay's knowledge and experience and his leadership as Deputy Commissioner were invaluable in the development of SARS. He helped make SARS the highly respected organisation it was until September 2014 when it was 'captured' by Mr Moyane (as found by the Nugent Commission).[72] Society owes him a vote of gratitude and not insult.[73]

78 There is no rational basis on which to take issue with the appointment of Mr Pillay as Deputy Commissioner of SARS. His appointment was, in fact, entirely consistent with section 195 in that it cultivated good human-resource management and career-development practices to maximise his human potential. The Public Protector's finding to the contrary was irrational and malicious.

No *audi* on remedy

79 The Public Protector was obliged, in accordance with the *audi alteram partem* principle, to afford Min Gordhan, the President, the Speaker, the Minister of

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68 Annexure PG 1 vol 2 p 182 para 5.6.26.

69 FA vol 1 p 59 para 133.

70 FA vol 1 p 57 paras 129-103.

71 Annexure PG 11 vol 4 p 416.

72 FA vol 1 p 58 para 130.3.

73 FA vol 1 p 58 para 130.4.

State Security, the NDPP and the Commissioner of Police opportunities to make representations to her before making remedial orders against them:

80 She was in the first place obliged to do so in terms of section 7(9)(a) of the Public Protector Act which reads as follows:

> *"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."*

This duty is triggered *inter alia* when an adverse finding may be made against any person. The Public Protector is then obliged to give that person an opportunity to respond *"in connection therewith"*. It includes an opportunity to make representations to the Public Protector on any adverse order she might make against the implicated person, including an adverse remedial order.

81 Her duty arises in the second place under the common law principle of *audi alteram partem.* The SCA described this principle in Traub as follows:

> *"The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken … unless the statute expressly or by implication indicates the contrary."*[74]

[74] *Administrator, Transvaal v Traub* 1989 (4)SA 731 (AD) 748.

The Constitutional Court endorsed this description of the *audi* principle in *Masetlha*[75] and again in *Malan*.[76]

82 The rule of law thirdly also requires procedural rationality in the exercise of all public power. It includes an opportunity to be heard when it is rationally required. The SCA held that to be so in *Minister of Home Affairs.*[77] The Constitutional Court recently again affirmed this principle in *NERSA*.[78]

83 The Public Protector failed to afford Min Gordhan any opportunity to make representations on the remedial orders she made against him despite his request for such an opportunity:

83.1 The Public Protector addressed a letter to Min Gordhan on 3 June 2019 in terms of section 7(9) of the Public Protector Act. She only invited him to comment on her proposed findings on the merits of the complaints against him.[79] She said that the appropriate remedial action, if any, *"will only be taken once an investigation is completed, having taken into account your response, if any, to my preliminary findings herein"*.[80]

83.2 Min Gordhan's response to the section 7(9) notice, dated 20 June 2019, expressly called on the Public Protector to afford him an opportunity to address her on any proposed remedial action.[81]

83.3 The Public Protector ignored this request.

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75 *Masethla v President of the RSA 2008* (1) 566 (CC) paras 74 and 75.

76 *Malan v City of Cape Town* 2014 (6) SA 315 (CC) para 135.

77 *Minister of Home Affairs v Public Protector* 2018 (3) SA 380 (SCA) para 38 footnote 25.

78 *NERSA v PG Group* 2019 ZACC 28 (15 July 2019) paras 47 to 51, 64 and 114 to 119.

79 Annexure PG 27 vol 10 p 1085 para 17.1.

80 Annexure PG 27 vol 10 p 1085 para 17.6.

81 Annexure PG 31 vol 11 p 1093 paras 15 – 16.

84 The Public Protector was also obliged, at common law and under the rationality requirement of the rule of law, to afford an opportunity to the President, the Speaker, the Minister of State Security, the NDPP and the Commissioner of Police to make representations to her before she made remedial orders binding on them. She is not entitled to prescribe to them how to exercise their powers and perform their functions without affording them an opportunity to address her on the matter. Her failure to afford them such an opportunity also vitiated her remedial orders.

85 The EFF, for its part, submits that a right to *audi* was not required because the effect of the Public Protector's remedial action is merely to order others to initiate proceedings against Min Gordhan.[82] We have already submitted that this interpretation is wrong.

86 The Public Protector's failure to adhere to the audi principle renders all her remedial orders unlawful. That is in itself sufficient ground for the interim relief sought in this application.

The Public Protector's bias and ulterior purpose

87 Finally, Min Gordhan applies for review of the Report on the basis of bias and ulterior purpose.[83] These grounds of review are not merely advanced for purposes of special orders for costs. They constitute substantive grounds of review of the Public Protector's entire report. That is so because the exercise of her powers with bias and ulterior purpose is in breach of,

87.1 the rule of law entrenched in section 1(c) of the Constitution; and

[82] EFF AA vol 14 p 1388 para 46.4.

[83] FA vol 1 p 67 paras 176-185.

87.2 section 3(13)(a) of the Public Protector Act which requires all members of the Office of the Public Protector to *"serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice."*

88 The Public Protector deals with this matter at length[84], but seems to labour under the misconception that Min Gordhan's accusations of bias and ulterior purpose are mere insults made for political purposes. But that is a fundamental misconception. They are accusations of bias and ulterior purpose, based on clear inferences from the Public Protector's conduct, in support of substantive grounds of review that the Public Protector rendered her report in breach of section 1(c) of the Constitution and section3(13)(a) of the PP Act.

89 The EFF accuses Min Gordhan of gratuitous insults of the PP.[85] But that is not so. Min Gordhan makes a legitimate attack on the Public Protector's report on the grounds of bias and ulterior purpose.

90 This debate, however, is not relevant in the determination of Part A. This court is not called upon to make any findings on the issue at this stage. It will stand over for determination under Part B.

[84] PP AA vol 12 p 1115 paras 4-17.

[85] EFF AA vol 14 p 1350 paras 3 – 7, p 1389 para 48 .

IRREPARABLE HARM

91 The erroneous findings and remedial orders made by the Public Protector have had an adverse personal and political impact on Min Gordhan.[86]

91.1 They have been used to cast aspersions on his character, malign his reputation and adversely affect his standing as Minister of Public Enterprises.

91.2 The EFF exploits the Report in a political campaign against Min Gordhan that has culminated in unlawful intimidation and assault of him, and an unprecedented attempt to physically prevent him from addressing Parliament, on 11 July 2019. A week later, on 17 July 2019, Mr Malema used the Report to launch another vitriolic, conspiratorial and baseless attack on Min Gordhan in Parliament.[87] All of this is part of a campaign of personal and political attacks on Min Gordhan by the EFF.

91.3 The temporary suspension of the implementation of the remedial orders may not halt this political campaign, but would ensure that the rule of law is maintained in a heated political climate.

92 Should this Court not grant the suspension, the harm to Min Gordhan's physical, personal and political rights will be compounded by being subjected to the prescribed disciplinary process based on an unlawful Report. He will suffer further irreparable harm since this will be unlawful itself and likely irreversible.

[86] FA vol 1 p 79 paras 214 – 218.

[87] RA vol 16 p 1545 para 72.4-72.7.

93 Finally, the grant of the urgent relief would ensure that the review remains legally viable and not moot. It would ensure no further harm comes to Min Gordhan's rights under the rule of law and the Constitution to challenge the Report.

BALANCE OF CONVENIENCE

94 The balance of convenience also favours the grant of the interdict.[88]

95 There will be no prejudice to the Public Protector should the relief be granted.

96 Min Gordhan, on the other hand, stands to be seriously prejudiced should this application be dismissed. If he is subjected to disciplinary proceedings and criminal investigations, but later vindicated by the review court, that relief will be nugatory as the remedial action would already have been implemented against him. The suspension order allows the review court to pronounce on the merits of the review, vindicating Min Gordhan's right to access justice and upholding the rule of law.

97 It also prevents a parallel process, in which he is pursuing the review application and simultaneously being subjected to a disciplinary process and criminal investigation. A parallel process would be an unnecessary waste of public resources, particularly judicial resources and public funds. All of which are already scarce and are better utilised in more deserving circumstances than this.

98 The Constitutional Court emphasised in OUTA that, in assessing the balance of convenience, the rule of law and the separation of powers are weighty considerations. The question is ordinarily whether the court should interfere with the exercise of statutory powers. This case, however, is different. That is because it is in the first place the Public Protector who seeks to interfere with the exercise of statutory powers by directing Min Gordhan, the President, the Speaker, the Minister of State Security, the NDPP and the Commissioner of

[88] FA vol 2 p 80 paras 219 – 223.

Police how to exercise their powers and perform their functions. The effect of an interim order would merely be to suspend her interference until this court has had an opportunity to determine whether it is lawful. The balance of convenience, including the weighty considerations of the rule of law and separations of powers, thus favour the interim order.

NO OTHER SATISFACTORY REMEDY

99 No suitable alternative remedy is available to Min Gordhan, given the binding nature of the remedial action.[89]

100 The Public Protector herself acknowledges, at least in other cases, that an interdict preventing enforcement of the remedial action pending the outcome of a review is required.[90] There is nothing exceptional about this case that explains her change in attitude.

101 Accordingly, the requirements for interim relief are amply satisfied.

[89] FA vol 1 p 81 paras 224 – 226.

[90] FA vol 1 p 1520 paras 13-20.

CONCLUSIONS

102 Min Gordhan litigates for the vindication of his constitutional rights. The normal Biowatch rule applies in terms of which he is awarded costs if he succeeds and is not ordered to pay costs if he fails.[91]

103 Min Gordhan asks for the following orders:

103.1 Part A of this application must be dealt with as one of urgency. The applicant's failure to comply with the rules of this court is condoned.

103.2 The remedial orders, in paragraph 8 of the Public Protector's Report 36 of 2019/20 of 5 July 2019, are suspended pending the final determination of Part B of this application.

103.3 The Public Protector is interdicted from enforcing the remedial orders pending the final determination of Part B.

103.4 The first, second and tenth respondents are ordered jointly and severally to pay the applicant's costs including the costs of two counsel.

[91] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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22 July 2019

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