IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) ~~REVISED~~.

29/7/2019

DATE SIGNATURE

Case Number: 48521/19

In the matter between:

PRAVIN JAMNADAS GORDHAN	Applicant
and	
THE PUBLIC PROTECTOR	First Respondent
BUSISIWE 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	Eight Respondent
GEORGE NGAKANE VIRGIL MAGASHULA	Ninth Respondent
ECONOMIC FREEDOM FIGHTERS	Tenth Respondent

JUDGMENT

POTTERILL J

[1] The applicant, Pravin Jamnadas Gordhan ["Gordhan"] is on an urgent basis seeking that the remedial orders in paragraph 8 of the Public Protector's report No 36 of 2019/20 ["the Report"] of 5 July 2019 be suspended pending the final determination of Part B of this application. The first respondent, the Public Protector ["the PP"], and the second respondent, Busisiwe Mkhwebane ["Mkhwebane"] are to be interdicted from enforcing the remedial order pending the determination of Part B of this application. [For ease of reference I refer to the PP and Mkhwebane as the PP]. In Part B Gordhan is seeking the review and setting aside of the PP's report from which the remedial action flows.

[2] The third respondent, the President of the Republic of South Africa ["the President"], the eight respondent, Visvanathan Pillay ["Pillay"] and the ninth respondent, George

Ngakane Virgil Magashula ["Magashula"] abided and supported the application of Gordhan. The sixth respondent, the National Director of Public Prosecutions ["the NDPP"] and the seventh respondent, the National Commissioner of Police ["the Commissioner"] abided the court's decision. The Economic Freedom Fighters ["EFF"] brought an application to intervene in the application, it was unopposed and I accordingly ordered that the EFF is to intervene as the 10th respondent.

[3] The fifth respondent, the Minister of State Security, informed this court that they were to serve and file an application to strike a report attached to the EFF's opposing affidavit from the record. The EFF had not seen the application and had instructions to oppose same. By agreement between the EFF and the Minister of State Security the EFF would not, in opposition to this application, refer to that report and the Minister of State Security would approach the Deputy Judge-President for an urgent date to hear this interlocutory application before Part B is to be heard. Counsel for the Minister of State Security was excused from the proceedings.

Urgency

[4] On the papers the EFF and the PP opposed the urgency of the matter. Urgency was however correctly conceded in argument; the matter being inherently urgent.

Issue to be decided

Can this court grant an interim interdict to suspend the operation of the PP's remedial orders pending the final determination of the review?

Remedial orders of the PP

[5] The order of the PP is set out in paragraph 8 of the report and reads as follows:

> *"8. REMEDIAL ACTION*
>
> *The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following:-*
>
> *8.1 The President of the Republic of South Africa*
>
> *8.1.1 To take note of the findings in this report in so far as they related to the erstwhile Minister of Finance, Mr Gordhan and to take appropriate disciplinary action against him for his violation of the Constitution and the Executive Ethics Code within 30 days of issuing of this report.*
>
> *8.2 The Speaker of the National Assembly:*
>
> *8.2.1 Within 14 working days of receipt of this Report, refer Mr Gordhan's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the Joint*

Committee on Ethics and Members' interests for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics.

8.3 The Minister of State Security to:

8.3.1 Within 60 days of the issuing of this Report, acting in line with Intelligence Services Amendment Act, implement, in totality the OIGI report dated 31 October 2014.

8.3.2 Within 30 days ensure that all intelligence equipment utilised by the SARS intelligence unit is returned, audited and placed into the custodian of the State Security Agency.

8.3.3 Within 14 days of the issuing of this report avail a declassified copy of the OIGI report dated 31 October 2014

8.4 The National Director of Public Prosecutions to note:

8.4.1 That I am aware that there are currently criminal proceedings underway against implicated former SARS officials and that therefore effective steps should be taken to finalise the court process as the matter has been remanded several times.

8.5 The Commissioner of the South African Police Service to:

8.5.1 Within 60 days, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, for violation

of section 209 of the Constitution and section 3 of the National Intelligence Act including Mr Magashule's conduct of lying under oath."

[6] Paragraph 9 of the report is also relevant and reads as follows:

"9. MONITORING

9.1 The President of the Republic of South Africa must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.1 of this Report will be implemented.

9.2 The Speaker of the National Assembly must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.2 of this Report will be implemented.

9.3 The Minister of State Security must, within thirty (30) days from the date of the issuing of this Report and for approval by the Public

Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.3 of this Report will be implemented.

9.4 *The Inspector-General of Intelligence must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.4 of this Report will be implemented.*

9.5 *The National Commissioner of the South African Police Service must, within sixty (60) days from the issuing of this Report, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, including Mr Magashula's conduct of lying under oath.*

9.5 *The National Commissioner of the South African Police Service must, within sixty (60) days from the issuing of this Report, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, including Mr Mgashula's conduct of lying under oath.*

9.6 In line with the Constitutional Court decision in Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the President of the Republic of South Africa, unless a court order directs otherwise."

Will the granting of an interim interdict fail to promote the objects, spirit and purport of the Constitution?

[7] An interlocutory interdict is granted *pendent lite* and designed to protect the rights of the complaining party pending an application to establish the respective rights of the parties. It is aimed at ensuring, as far as reasonably possible, that the party that is ultimately successful will receive adequate and effective relief. Already in ***Pikoli v President*** **2010 (1) SA (GNP)** at p404B-C Du Plessis J found that:

"... the court considering whether to grant or refuse an interim interdict must also bear in mind that the courts have a constitutional obligation to uphold the Constitution and to 'declare that any ... conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'"[1]

[1] s172(1) of the Constitution

[8] This test is formulated thus in ***National Treasury v Opposition to Urban Tolling Alliance*** **2012 (6) SA 223 (CC)** at paragraph [45]: [The *OUTA*-decision]

> *"It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Consitution."*

The ***Setlogelo*** test, requires an applicant to establish:

(a) a *prima facie* right though open to some doubt;

(b) a reasonable apprehension of irreparable and imminent harm to the right;

(c) the balance of convenience; and

(d) the applicant must have no other remedy.

[9] Applications for suspensions of mandatory orders, pending reviews befit interim interdicts, and are granted daily in busier High Courts and Magistrates' Courts. In fact, quite often, the PP's remedial action has been suspended with interim orders pending reviews of the PP's reports. It was thus correctly conceded by counsel for the PP that normally these interim orders are not opposed by the PP. In accordance with this "normal practice" the President applied and expressed this practice in a letter to the PP dated 19 June 2019 and is set out as follows:

> *"6. In relation to your direction to submit my Implementation Plan, I reply as follows:*
>
> *6.1 I have noted the findings against Minister Gordhan in your report;*
>
> *6.2 I have noted, too, the assertions made by Minister Gordhan in his review application that your report falls to be reviewed and set aside because it is allegedly ultra vires section 6(9) of the Public Protector Act, issued by means of an unfair procedure and tainted by misdirections of law and fact.*
>
> *6.3 One of the legal complains raised by Minister Gordhan is that the direction that I take appropriate disciplinary action against him is 'vague*

and impossible to implement in the absence of an employment relationship between the President and myself.'

6.4 *Having considered the findings against Minister Gordhan in your report and his challenges to those findings in his review application, I have concluded that it would be inappropriate to take disciplinary action against Minister Gordhan at a time when*

6.4.1 *not only is there a dispute pending before the High Court over the legality of the findings on which to base such disciplinary action, but also*

6.4.2 *my alleged power to exercise such disciplinary action is, itself, legally contested by Minister Gordhan in that dispute pending before the High Court.*

7. *In the circumstances, my Implementation Plan in respect of the remedial action set out in paragraph 7.1 of your report is the following:*

7.1 *I have complied with the order to take note of the findings against Minister Gordhan in your report;*

7.2 *I have concluded that the process of taking appropriate disciplinary action against Minister Gordhan would best be*

served by waiting until the legal processes of his review proceedings have clarified

7.2.1 what disciplinary powers, if any, the Constitution allows me to exercise over Minister Gordhan beyond removing him from the Cabinet; and

7.2.2 whether there are lawful grounds for the exercise of any such disciplinary powers.

7.3 I intend, accordingly, to defer my decision on what disciplinary action if any to take against Minister Gordhan until final determination of his review application.

8. I trust that you are satisfied with this Implementation Plan. If you are not so satisfied, and require me to exercise any disciplinary powers I may have over Minister Gordhan before his review proceedings have been finally determined, I invite you to approach the High Court for an order compelling me forthwith to do so."

[10] In the PP's response dated 26 June 2019 she replies as follows:

"3. ... It is clear from the above that any advice to the effect that a review application stays the implementation of the remedial action is incorrect

and is a sheer display of cluelessness on the person giving such advice.

4. *To this end, the President's letter is not only based on the wrong understanding of the law but on a mere assurance by a third party that the President should not comply with my remedial action.*

5. *The President's refusal to act on my remedial action is a failure on the President's part to uphold the Constitution.*

7. *The Public Protector will therefore persist with the enforcement of the implementation of the remedial action to the parties directed against, until such time that an interim order interdicting same is obtained."*

[11] The President reacts to this letter on the 3rd of July 2019 setting out that he fears that the PP has misunderstood his letter of 19 June 2019 in that he has not refused to act on the PP's remedial action. He, *inter alia,* also states:

"I believe that, applying the principle of the SCA judgment to the present situation, it is perfectly in keeping with public and legal policy for me not to undermine the legal process by determining that which the High Court has been called upon to decide in the dispute between Minister Gordhan and yourself.

As proceedings in the review applications unfold, the state of affairs in relation to appropriate action may well change. Should this happen I will promptly notify you of any resultant changes to my implementation plan."

In her further response the PP in paragraph 9 of a letter dated 9 July 2019 sets out as follows:

"9. I fear that the Honourable President's persistence on wilful non-compliance with my remedial action, which is based on the Honourable President's incorrect interpretation of the law, is not only ostensibly contemptuous of my office by also borders on a breach of the Honourable President's constitutional duties, as spelt out in the Constitution.

12. I therefore plead with the Honourable President to avert the constitutional crisis alluded to above by taking head of my advice and implementing the remedial action as set out in the Report or obtaining a court interdict to stay the implementation pending the outcome of the review proceedings or even causing the implicated and/or affected public officials to do so. Such orders are sought and obtained daily in our courts in respect of review applications targeted at ordinary

administrative action, let alone the remedial action of the Public Protector, which almost ranks as a court order in its binding effect."

[12] The question thus is why does the PP not follow the "normal practice" as confirmed in her correspondence in this application, but labels it as extra-ordinary? It was submitted that the PP is opposing the granting of the application because of her duty to defend the independence, impartiality and dignity of the Office of the PP as well as her person. This flows from the averred vexatious, scandalous and irrelevant matter set out in the founding affidavit of Gordhan.

[13] It is also opposed on the basis that in terms of the ***OUTA***-decision this court will intrude in entering the exclusive terrain of another branch of government, will negate the separation of powers and is not the clearest of cases wherein an interim order should be granted. The EFF expanded hereon in that this application does not warrant judicial intrusion into the exclusive terrain of a Chapter 9 institution.

Does Gordhan, as supported by the President, Pillay and Magashula, make out a *prima facie* right even if it is open to some doubt?

[14] The first ground of review is that the PP has no jurisdiction in that she is barred to entertain the complaints under s6(9). S6(9) of the PP Act reads as follows:

> *"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 of the occurrence of the incident or matter concerned."*

As the complaints relating to Gordhan flows from a meeting in 2010 and the establishment of an investigative unit in 2007 the Public Protector was not entitled to entertain these complaints.

[15] In the report, para 3.5 the Public Protector regurgitates the factors setting out that could constitute special circumstances. Surprisingly, no factors are set out as to what she considered, and why, *in casu* it constitutes special circumstances. In view of the provisions of this section and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this claim. It is thus argued that on the report itself, without establishing jurisdiction, Gordhan has a *prima facie* right on review.

[16] In the Public Protector's answering affidavit she baldly avers that all the review grounds are without merit and are denied.[2]

[17] In argument counsel for the PP did not address the jurisdiction issue at all.

[18] The EFF in the papers justify the jurisdiction of the PP in that Gordhan testified before the Nugent and Zondo Commissions about the "Rogue Unit" without a complaint about the events occurring many years ago. It was argued that this argument is unmeritorious and is rejected. The Commissions had terms of reference whereas the PP has to execute her duty in terms of the PP Act. In terms of s6(9) the PP shall not *"entertain complaints after two years unless per special circumstances exist"*. It is trite that the PP would have to identify the special circumstances, not the EFF.

[19] Gordhan in a letter dated 27 March 2019 requested identification of the special circumstances, however the PP never responded thereto. On 16 April 2019 Gordhan again requested the special circumstances to be identified. In the PP's response she submitted that the special circumstances related to illegally acquired surveillance equipment which was acquired at an astronomical cost, which is still being utilised to intercept communications and therefore it constituted a special interest as public funds

[2] Paragraph 32 of the answering affidavit

were still being used for illegal purposes. Even if this could constitute special circumstances, this is not forwarded as a special circumstance in the report and can in any event not sustain a special circumstance about the averred misleading of the Parliament by Gordhan.

[20] The EFF then proffers a special circumstance, not proffered by the PP, i.e. the public interest to an unlawful unit at SARS. The PP, not the EFF, must exercise a discretion; the PP has not forwarded the public interest as a special circumstance.

[21] On these submissions and arguments Gordhan has established a *prima facie* right for the interdict to be granted.

The finding that Gordhan violated the Executive Ethics Code in deliberately misleading the National Assembly

[22] Paragraph 2.3(a) of the Executive Ethics Code reads as follows:

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

The review grounds set up by Gordhan is that he did not wilfully mislead the National Assembly. The PP found that Gordhan dishonestly concealed the fact that at the "Ambani meeting" there was a Gupta present. Gordhan sets out that until today he cannot recall that a Gupta was present, but his Chief of Staff informed him in preparation for his evidence at the Zondo Commission that there was a Gupta present at that meeting; he without an independent recollection thereof disclosed this fact to the Commission.

[23] The EFF submitted that it matters not that Gordhan may not wilfully have misled the Legislature, an innocent mistake is sufficient. This is of course *contra* the wording of paragraph 2.3(a) of the Code specifying that it must be done wilfully.

[24] On these facts Gordhan has established a *prima facie* right.

The establishment of the SARS Investigative Unit

[25] In this ground of review Gordhan submits the decision of the PP is irrational and fundamentally flawed. SARS has as its objective the efficient and effective collection of revenue and control over the import, export, manufacture, movement, storage or

use of certain goods.[3] SARS has always had investigative and enforcement units that investigated *inter alia* tax evasion and elicit trade. It had a mandate to minimise the importation, exportation and manufacturing of drugs, as well as the illegal harvesting of abalone and its supply, the illegal importation of second-hand vehicles and the importation of counterfeit goods. It also had a mandate to curb the smuggling of cigarettes. Sections 4A to 4D of the Customs Act clothes SARS with wide investigative powers.

[26] To crack down on elicit trade and to combat organised crime SARS needed to enhance its intelligence gathering. To this end SARS and the National Intelligence Agency ("NIA") entered into discussions to develop within NIA a capacity to support SARS in investigating economic crimes with tax implications. An unsigned MOA followed, due to the NIA losing its appetite to proceed with such a unit within the NIA.

[27] On 8 February 2007 Pillay recommended that SARS create a specialist internal capacity to focus on the elicit economy. On 13 February 2007 this proposal was approved by the Chief Officer for Corporate Services, Magashula. A unit to investigate and clamp down was thus established lawfully in terms of SARS' objectives, mandate and legislation.

[3] s3 of SARS Act 34 of 1997

The PP relies on the Sikhakhane panel's finding that the SARS investigative unit was unlawful because it contravened section 3 of the National Strategic Intelligence Act 39 of 1994 ["NSI Act"]. S3(1) of the NSI Act prior to its amendment in 2013 reads as follows:

> *"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 ..."*

Gordhan submits that this section was not contravened because it applied only to

those departments of state that were by law required to perform functions *"with regard to the security of the Republic or the combatting of any threat to the security of the Republic."*[4] SARS was clearly not such a department. Furthermore s3(1) did not prohibit all covert intelligence gathering, only covert *"departmental intelligence"*. *"Departmental intelligence"* is defined in the NSI Act as: *"intelligence about any threat or potential threat to the national security and stability of the Republic."*

[28] The PP found 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."*[5] Section 209(1) reads: *"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."* It was submitted that SARS is not an intelligence service and the definition of *"intelligence"* in the Act is in fact: *"for purposes of informing any government decision or policy-making process carried out in order to protect or advance the national security."* SARS is thus not affected by s209 as its application is confined to the establishment of intelligence services dedicated to the protection of national security.

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[4] Section 3(1)
[5] Paragraph 7.2.5 of the report

[29] The EFF strongly submits that SARS was spying on citizens without warrants, correct channels and no proper oversight. This submission seemingly relates to interception of communications. Nowhere did the PP find that the investigative unit was a spying unit and this *ex post facto* justification on behalf of the PP, it was argued, is to be rejected.

[30] There was no evidence that this was the purpose of this unit and that is in fact what occurred.

I am satisfied that on these grounds raised there is a *prima facie* right established on behalf of Gordhan.

Mr. Pillay's qualifications

[31] The PP finds that Pillay was not qualified for appointment as Deputy Commissioner. Pillay's appointment was thus irregular and in violation of s195 of the Constitution.

[32] On behalf of Pillay and Gordhan it was submitted that it is common cause that there is no prescribed requirements in law or policies for appointment as Deputy Commissioner of SARS. On this basis the fact that Pillay has no tertiary education

does not offend any law or policy. Pillay's experience in the public service from January 1995 was the basis for his appointment and his appointment was accordingly proper, regular and lawful.

[33] Pillay under oath stated that the finding that he has no matric certificate is malicious and fatally flawed. Pillay will, on return from overseas, launch review proceedings in his own name or asked to be joined in these review proceedings. Pillay associated himself with the contentions raised by Gordhan. It was submitted there is in law or fact no reason for the PP and the EFF to oppose the interim relief sought by Gordhan.

This ground raised by Gordhan, supported by Pillay establishes a further *prima facie* right for the interim relief.

The PP did not afford Gordhan an opportunity to be heard by making representations before meting out the remedial orders

[34] As Gordhan has already established a *prima facie* right I cursorily address this issue. I do not do so as it is unimportant, or has no prospects of success, but simply in urgent matters time is a luxury and to belabour further *prima facie* rights is essentially redundant.

[35] For this reason I do not address the ground on review pertaining to recruitment of personnel for the SARS' investigative unit.

[36] Gordhan relies on s7(9)(a) of the PP Act which renders it mandatory for the PP to afford any person an opportunity to respond to adverse findings. It is argued that even on a narrow interpretation this would include an opportunity to submissions prior to a penalty. An analogy was drawn with making submissions in a criminal trial prior to sentencing.

[37] Gordhan also relies on the common law principle of *audi alteram partem* as endorsed in ***Masethla v President of the RSA*** **2008 (1) SA 566 (CC)** at paras 74 and 75. In support of this ground a further argument raised and relied on is the rule of law itself; one must be heard when it is rationally required. This principle was enunciated in the matter of ***MERSA v PG Group*** **[2019] ZACC 28** (15 July 2019) paras 47 -51, 64 and 114-119.

[38] Gordhan has once again set out a *prima facie* right for an interim interdict to be granted.

The PP's bias and ulterior purpose

[39] Gordhan in no uncertain terms avers that the PP is incompetent, irrational and negligent in the performance of her duties.

[40] In this application however, these averments have no influence on the judgment and no cognisance is taken of these averments, simply because these averments are not relied on for the interim order. Mr. Trengrove on behalf of Gordhan did not argue this issue because this debate is not relevant to the determination of Part A.

Adv. Masuku (SC) for the PP however argued that these averments are the foundation for the opposition of the PP and her office; i.e. to preserve the dignity of the PP and the office of the PP. This is crucial because for the PP to fulfil her functions she must have the cooperation of all the organs of state. If this court were to grant the suspension order it would weaken her office and suspension would prevent accountability. The allegations made by Gordhan in unacceptable court language undermines the dignity, independence, impartiality and effectiveness of the Public Protector.

[41] The argument on behalf of the PP is to be rejected. The bias and ulterior purpose, if proven, constitute grounds for the review of the PP's decision. These allegations do not form a basis for the interim interdict and accordingly has no role to play. It would be premature for this court to strike out any allegations not relevant to Part A of the application. Gordhan relies on this ground of review as a breach of the PP's duty in terms of s1(1) and 181(2) of the Constitution as well as s3(13)(a) of the PP Act.

[42] The suspension of the order of the PP does not weaken her office; as she herself has set out suspension of her orders are granted pending review. Much criticism was levelled at the President in not supporting the PP as is required from him in terms of the Constitution. The President cannot be criticised for awaiting a court's decision on suspension of the remedial orders before acting. The President is acting in accordance with the law of the land before he implements any remedial action. In any event, the PP has conceded that the President is uncertain about his power to discipline members of the Executive given that they do not fall within the classical definition of employees, but serve at his pleasure. In contrast, the EFF argued that there is no bar to the President taking disciplinary steps, like shouting, at Gordhan. The mere fact that the opposing parties differ on this question renders the review application apposite.

[43] In summary thus: this court need not and did not rely on the review grounds that the PP acted with ulterior purpose and bias when finding as the PP did and ordered as she did. This is a debate for the review application.

[44] Gordhan has thus established a *prima facie* right for the interim relief sought.

Irreparable harm

[45] The harm to Gordhan in that he must be *inter alia* disciplined by the President, appear before the Parliamentary Ethics Committee, be criminally investigated seemingly by the Commissioner of Police himself, has serious consequences for him. The report maligns him as being untruthful and a spy and would impact his political career and his personal circumstances.

[46] Before I address the above-mentioned argument on behalf of Gordhan it would be remiss of this court not to remark on the remedial orders of the PP. This court had to study the report and remedial orders in order to ascertain whether in fact there is irreparable harm to Gordhan. Much of the orders are vague, contradictory and/or nonsensical. The President is ordered in paragraph 8.1.1 of the report to take note of the PP's findings and to take appropriate disciplinary action against Gordhan. The

expiry date attached to this order is the 4th of August 2019. In para 9.1 it is ordered that the President must within 30 days of the issuing of the report submit an Implementation Plan to the PP for her approval, *"indicating how the remedial action referred to in paragraph 7.1 of her report will be implemented."* There is no remedial order in paragraph 7.1; the order is thus nonsensical. Furthermore the order to within 30 days submit a plan for approval detailing the disciplinary action and at the same time ordering that the disciplinary action be taken within 30 days is inexplicable.

[47] The remedial action ordered against the Speaker has the same contradiction; the Speaker must within 14 days refer the findings against Gordhan to the Joint Commission on Ethics and be implemented. Paragraph 7.4 has no remedial action set out therein.

[48] In paragraph 8.5 the PP orders the Commissioner of Police to investigate the criminal conduct of Messrs Gordhan "and others" for violation of s209 of the Constitution and s3 of the NSI Act. Both sections do not create criminal offences.

[49] On behalf of the PP and EFF it was argued that if the remedial orders are suspended then Parliament would be prevented from performing its oversight functions and frustrate the oversight role of Parliament. An interdict would interfere with the Minister

of State Security's executive and legislative functions. An order interdicting the NDPP from performing constitutional functions is incompetent. Furthermore an interdict preventing the Commissioner of the Police to exercise his duty would be unconstitutional.

[50] When assessing irreparable harm the court must also carefully probe whether and to which extent the restraining order will probably interfere into the exclusive terrain of another branch of Government. *"The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm."*[6]

[51] The harm to Gordhan speaks for itself. The harm would be irreparable if the interdict is not granted. Being prosecuted, disciplined and investigated most certainly constitutes harm and the harm may be irreparable and irreversible by the time the review application is heard, especially so if the review application is successful. There is no harm to the PP or her office if the remedial action is suspended pending review. This is not a final order and if the review is to be unsuccessful the remedial actions are to commence. This matter constitutes a clear case where judicial interference is warranted. The PP and her office can fulfil their constitutional duties in her office with the suspension order not interfering with her constitutional duties at all. Suspension

[6] *OUTA* decision para 47

of her orders has most certainly not interfered with her constitutional duties in other matters. The mere fact that parties have abided to the court's decision is not an acquiescence to the remedial orders of the PP.

Balance of convenience

[52] *"The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government."*[7]

[53] The EFF and the PP placed must reliance on this factor as a bar to granting the interim interdict. It was argued that the PP is the constitutional last line of defence and interim relief at the behest of the Executive, the branch of Government the PP is meant to supervise would be blurred to a mere Maginot line. The PP acted within her statutory powers and a court cannot interfere therewith. If the interdict is granted the judiciary will be intruding with the legislative and constitutional terrain of the constitutional institutions tasked with executing the remedial actions. These arguments are askew simply because the *ratio* and test set out in the *OUTA* decision favours Gordhan in these circumstances. This is so, because it is the PP who seeks to interfere with the exercise of statutory powers by directing the President, the

[7] *OUTA* decision para [47]

Speaker, the Minister of State Security, the NDPP and the Commissioner of Police how to exercise their powers and perform their fuctions.

[54] The balance of convenience favours Gordhan as the incidents complained of happened a decade ago, there is no urgency thus in awaiting a determination on the review application.

[55] There is no harm to the PP in awaiting the outcome of the review decision versus the harm that will befall Gordhan if the interdict is not granted. The balance of convenience thus favours the granting of the interdict.

No other satisfactory remedy

[56] There is simply no suitable alternative remedy available to Gordhan in view of the binding nature of the remedial action. No serious argument on behalf of the EFF and the PP was in any event raised pertaining to this requirement. Gordhan accordingly also satisfies this requisite for an interim interdict.

Magashula's opposition

[57] Magashula also abides the court's decision, but supports Gordhan in this application as well as in the review application. I do not find it necessary to deal in this application with any further submissions made by Magashula, except that in the remedial action the Commissioner of Police is to within 60 days investigate Magashula's *"conduct of lying under oath."* This averred perjury is placed in dispute.

Costs

[58] The costs would generally follow the result. It was however argued that the EFF and PP and the PP's office should not pay the costs on the *Biowatch* principle.[8]

[59] The *Biowatch* principle is however to be distinguished from the matter at hand. This principle can be summarised as follows:

> *"It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken*

[8] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC)

to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken." [9]

Thus in the words of Sachs J: "

"What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution."[10]

[60] Part A of the application before this court does not constitute constitutional litigation. It is an interim interdict to suspend remedial orders pending a review. The EFF and PP has attempted to label the litigation as constitutional, but the character of the litigation before me is not of parties claiming their constitutional rights, but rights to prevent a harm flowing from a report that is challenged. It is conceded on behalf of the PP and her office that this is normal practice; to now assert that suspension threatens the office of the PP as a Chapter 9 institution is far-fetched, ingenious nor substantive and does not raise truly constitutional considerations relevant to the adjudication of Part A.

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[9] *Biowatch* matter para [20]
[10] *Biowatch* matter para [17]

[61] It would be incorrect to start the costs enquiry with a characterisation of the parties, it matters not that it is a Minister of the Executive versus a Chapter 9 institution. It matters not that the EFF is averdly opposing the interim interdict in the public interest. The EFF should not get a privileged status simply because it is acting in the public interest.[11] Equal protection under the law requires that the costs award not be dependent on whether the parties are acting in their own interests or in the public interest.[12] Suspension of a remedial order does not threaten the entrenched rights of the PP. The separation of powers harm on the balance of convenience favours Gordhan. Gordhan will, if the suspension is not granted and the review is subsequently upheld, be seriously prejudiced. It defies all logic to proceed with the execution of the remedial action when the report as the basis for remedial action, is the subject of judicial review. A mere suspension of a remedial order does not weaken the PP's office. Every person under the Constitution has a right to review a report, this includes a Minister. The mere fact that the Minister does so, does not weaken the PP's powers. The fact that the President is abiding the decision and also raises an issue to be decided in the review application pertaining to what disciplinary steps a President can take against a Minister is a valid point and in fact will serve as guidance to the PP, if and when, another Minister is the subject of a PP report. Thus opposing the suspension in Part A, was baseless, with both the EFF and the PP and

[11] *Biowatch* matter para [18]
[12] *Biowatch* matter para [16]

her office not seriously attacking the requirements necessary for an interim interdict and accordingly as unsuccessful litigants should carry the costs.

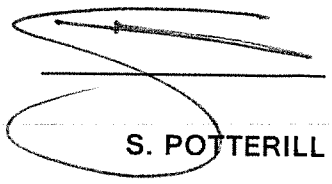
[62] I accordingly make the following order:

62.1 Part A of this application is dealt with as one of urgency. The applicant's failure to comply with the Rules of this Court is condoned.

62.2 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.

62.3 The Public Protector or the office of the Public Protector are interdicted from enforcing the remedial orders pending the final determination of Part B.

62.4 The first, second and tenth respondents are ordered, jointly and severally, to pay the applicant's, eighth respondent's and ninth respondent's costs, which costs will include the costs consequent upon the employment of two counsel.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 48521/19

HEARD ON: 23 July 2019

FOR THE APPLICANT: ADV. W. TRENGROVE SC

ADV. M. LE ROUX

ADV. O. MOTLHASEDI

INSTRUCTED BY: Malatji & Co Attorneys

FOR THE 1st and 2nd RESPONDENTS: ADV. T. MASUKU SC

ADV. T. MANKGE

INSTRUCTED BY: Seanego Attorneys Inc.

FOR THE 3rd RESPONDENT: ADV. M. CHASKALSON SC

ADV. B. LEKOKOTLA

INSTRUCTED BY: State Attorney, Pretoria

FOR THE 5th RESPONDENT: ADV. H.O.R. MODISA

INSTRUCTED BY: State Attorney, Pretoria

FOR THE 8th RESPONDENT: ADV. R. HUTTON SC

ADV. C. VAN CASTRICUM

INSTRUCTED BY: Werksman Attorneys

FOR THE 9th RESPONDENT: ADV. P.J. DE JAGER SC

INSTRUCTED BY: Savage Jooste & Adams Attorneys

FOR THE 10th RESPONDENT: ADV. T. NGCUKAITOBI

ADV. P.J. DANIELL

DATE OF JUDGMENT: 29 July 2019