CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 107/18

In the matter between:

PUBLIC PROTECTOR Applicant

and

SOUTH AFRICAN RESERVE BANK Respondent

Neutral citation:	*Public Protector v South African Reserve Bank* [2019] *ZACC* 29
Coram:	Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgments:	Mogoeng CJ (dissenting): [1] to [130] Khampepe J and Theron J (majority): [131] to [250]
Heard on:	27 November 2018
Decided on:	22 July 2019
Summary:	Public Protector Act 23 of 1994 — personal costs — punitive costs — representative litigant — personal indemnity exceeded — accountability

---

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. The Public Protector's application for leave to appeal is granted.
2. The appeal is dismissed with no order as to costs in this Court.
3. The Reserve Bank's application for leave to cross-appeal is dismissed with no order as to costs in this Court.

JUDGMENT

MOGOENG CJ (Goliath AJ concurring):

Essential context

[1] Accountability, equality before the law and transparency are some of the values on which our constitutional democracy was founded. It ought therefore never to matter who a person, natural or juristic, is whenever the need arises to breathe life into these values.

[2] In order to strengthen our constitutional democracy with the aid of these values, the State's undiluted capacity to investigate and expose unethical conduct or improprieties is essential. That critical obligation is located in, among others, the Office of the Public Protector – one of the institutions that is indispensable for winning the fight against corruption and the realisation of good governance. A Public Protector, liked or disliked, must therefore not be lightly discomfited in the execution of her mandate. This would explain why this Court went to great lengths to clarify and reinforce her role in holding all, including the high and mighty, accountable for their alleged or perceived wrongdoing.[1]

[1] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*Economic Freedom Fighters I*) at paras 48-56, 66-8, 83 and 99.

[3] For centuries preceding our constitutional democracy, untouchability was so entrenched or virtually institutionalised that it was unthinkable for some to challenge the apparent or actual criminality, naked injustice or corruption that reigned in our country. So normalised was impunity and injustice that some citizens were not only expected to accept their unjustly prescribed inferiority, but to also succumb to the "preferred" impermissibility for them to be critical of the untouchables.

[4] Harsh consequences including smear or other writings bereft of intellectual integrity could flow from displaying the nerve to speak or act out against injustice, corruption or sectional beneficial use or abuse of institutional power or public resources. It was potentially career-limiting and even life-threatening for those who were supposed to know their place to seek to have the right thing done by challenging the "entitled" perpetrators of injustice or their allies.

[5] It was during that era that the South African Reserve Bank (Reserve Bank), now a constitutional institution critical to our economic well-being, entered into a lifeboat agreement for over R3 billion with Bankorp Limited (Bankorp), subsequently taken over by ABSA Bank Limited (Absa). Several investigations by reputable personalities and institutions concluded that the lifeboat agreement by the Reserve Bank smacked of impropriety or illegality. Litigation relating to the Public Protector's investigation of this alleged impropriety or illegality, led to her being ordered to pay costs out of her own pocket on a very high scale, hence this application.

[6] This matter highlights the need to vigilantly guard against making personal costs against State functionaries acting in their official capacities fashionable, which is likely to have a chilling effect on their willingness to confront perceived or alleged wrongdoing especially by the rich, powerful or well-connected.[2] That obviously has to be contrasted with the need to guard against and eradicate abuse of State power, gross negligence and bad faith that should, where appropriate, attract an order for personal

[2] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) (*Economic Freedom Fighters II*) at para 240.

costs, even on a highly punitive scale. A proper appreciation of this judgment will be aided by highlighting certain principles, observations and conclusions upfront, as I hereby do.

[7] The oath or affirmation of office demands of all our Judicial Officers to—

> "uphold and protect the Constitution and the human rights entrenched in it, administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law."[3]

And Judicial Officers are required to take an oath or affirm in these terms before they "begin to perform their functions".[4] The Constitution that they undertake to "uphold and protect" enjoins them to make only "just and equitable" orders.[5] This means that it would be a renegation on that oath to make any order that is irreconcilable with considerations of justice and equity, by reason only of some legal technicality.

[8] Ours are courts of substantive justice. No litigant ought to be left exposed to undeserved ruination just because she did not expressly plead non-compliance with legal requirements that are very loud in their cry for the attention of lady justice. Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court—

> "[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."[6]

---

[3] Item 6(1) of schedule 2 of the Constitution.

[4] Section 174(8) of the Constitution.

[5] Section 172(1)(b) of the Constitution.

[6] *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC) (*Plastic Converters Association of South Africa*).

[9] In all cases where this order was made, harm, actual or potential, was apparent. And so should it be in this case. It should only be in relation to conduct that is clearly and extremely scandalous or objectionable that these exceptional costs are awarded. I hasten to say that such conduct has not been shown to exist here. More importantly, no attempt has been made to demonstrate how the stringent legal requirements for awarding personal costs on a punitive scale were met. Not only does that inestimably harsh punishment remain unexplained but so is the disinclination to interfere with an order that is in my view not just and equitable. That the need to meet the requirements for punitive costs may not have been separately raised by a litigant cannot justify keeping an inexplicably gross injustice and inequity alive. An unequivocal expression of opposition to personal punitive costs ought to suffice.

[10] To mulct a litigant in punitive costs "[for opposing] all three applications to the end" requires a proper explanation grounded in our law.[7] A failure to provide an explanation for punishing the exercise of one's constitutional right would be unjustifiable. It strikes one as a glaring consequence of being influenced by a wrong principle – a failure to act judicially – that would warrant interference with the order.

[11] Here, the High Court judgment is even more concerning because not only has no harm, as in *Black Sash II*,[8] been shown to exist but the personal costs definitional requirements of gross negligence and bad faith do not even seem to have been known nor have they been shown to have been met. Quite surprisingly, because when it handed down its judgment, this Court had long laid down those requirements. But, the High Court finds it extremely reprehensible that the Public Protector does not know what it says she should have known. Additionally, factors that were never relied on by the High Court as the bases for making both an out-of-own-pocket order and doing so on an attorney and client scale have now emerged for the first time in an appeal judgment. For example, that (a) the provisional report "did not direct" but required the

[7] *Absa Bank Limited v Public Protector* 2018 JDR 0190 (GP) (High Court judgment) at para 128.

[8] *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash II*).

President "to consider" whether to establish a judicial commission of enquiry; (b) the Public Protector acted in a "grossly unreasonable manner"; (c) there was a proposed amendment of the Constitution; (d) Mr Goodson is not an economic expert; (e) the Public Protector's affidavit was misleading because she did not delineate between when and how she relied on the views of Mr Goodson and Dr Mokoka; and (f) the Public Protector's failure to meet the rule 53 of the Uniform Rules of Court derived standard of "full and frank disclosure" expected of public officials in litigation.

[12] Central to the principles to be examined in this application is therefore the need to determine whether ordering costs on an attorney and client scale against a representative litigant is in keeping with the dictates of justice. Or, whether it constitutes a misdirection or improper application of the law and facts that calls for corrective intervention. A proper and definitive determination of this issue would ensure that clarity is given and that the Public Protector's capacity to fearlessly hold everybody under her jurisdiction transparently and equally accountable, is not unnecessarily weakened or threatened, while at the same time ensuring that abuse of State power or its use in pursuit of illegitimate agendas is appropriately censured.

Background

[13] Between 1986 and 1995 the Reserve Bank lent an amount of R3.2 billion to Bankorp. Indications seem to be that the money was never fully paid back in terms of the agreement for its advancement. Absa acquired Bankorp on 1 April 1992 for an amount of R1.230 billion. That acquisition was, on Absa's insistence, subject to the lifeboat agreement being kept alive.

[14] In 1997 CIEX, a UK based assets recovery entity, was asked by the South African Government, represented by the Director-General of the National Intelligence Agency (now State Security Agency), to investigate and possibly recover public funds and assets misappropriated during the apartheid era. In its final report, CIEX concluded that corruption, fraud and maladministration characterised the financial assistance given by the Reserve Bank to Bankorp and by extension to Absa.

[15] In 1998 the President appointed Heath J to look into the possible recovery of those reportedly ill-gotten gains by Bankorp/Absa. Heath J's findings seem to have been just as unfavourable. But, he apparently considered several factors and proposed to let bygones be bygones.

[16] On 15 June 2000, the Governor of the Reserve Bank appointed a panel led by Davis J to investigate whether the Reserve Bank acted lawfully in coming to the rescue of Bankorp that appeared to be financially destitute, and by extending that lifeline to Absa as a consideration for its takeover. If the transaction was marred in illegality, the Panel was required to determine the legal consequences thereof. It concluded that the lifeboat transaction was against the law. And the basis for that conclusion was that the Reserve Bank had acted contrary to the provisions of the Reserve Bank Act[9] and in breach of its own protocols. The Panel also identified a possible enrichment claim. That said, they could not identify against who appropriate legal steps could be taken against. They took the view that Absa paid a fair value for its acquisition of Bankorp. That however did not extinguish everybody's curiosity about this financial transaction.

[17] As a result, in 2010 Mr Paul Hoffman, of the then Institute for Accountability in Southern Africa,[10] lodged a complaint with the Public Protector about the alleged failure of Government to recover what the CIEX findings said was recoverable from Absa.

[18] The Public Protector took another look at the matter and consulted with a number of parties including Absa and the Reserve Bank. About seven years later, the investigation had still not been finalised. Eventually, the new incumbent Public Protector issued the pre-existing provisional report and remedial action in respect of which the Banks were again consulted.[11] Before she could finalise the report and the subsequently impugned final remedial action, she consulted with State Security

[9] 90 of 1989 (Reserve Bank Act).

[10] Now known as Accountability Now.

[11] I will hereafter refer to the Reserve Bank and Absa collectively as the Banks.

Agency and its Minister, Mr Stephen Mitford Goodson, who is an economist, the Presidency and Black First Land First (BLFL). She however did not consult with the Banks again after these consultations.

[19] The Reserve Bank contended that the Public Protector failed to conduct a fair and unbiased investigation. This, it argues, constitutes a reasonable apprehension of bias. That she met with the Presidency and the State Security Agency just before publishing the final report, but did not afford the Banks the same opportunity for engagement, is said to support the contention that she was reasonably apprehended to be biased. In particular, because she brought about substantial changes to the provisional remedial action in her final report as a result of the Presidency's input. The criticism is that she should not only have been upfront about her meetings with the Presidency, but she should also have solicited the views of the Banks again at that stage.

[20] Noteworthy is said to be the fact that the Presidency commented on the preliminary report twelve days before the final report was issued. Much is made of the fact that the remedial action taken was substantially different from the provisional report that was shared with the Banks. Part of it entailed the proposed amendment of the Constitution in relation to which the High Court said:

> "[T]he Public Protector's aim was to amend the Constitution to deprive the Reserve Bank of its independent power to protect the value of the currency. This is an aspect of the remedial action that had nothing to do with the Presidency and should have been discussed with experts at the Reserve Bank."[12]

[21] Another concern raised is that the Public Protector did not alert Absa to the possibility of its further investigation by the Special Investigating Unit being part of the remedial action. This the High Court says "was a material omission that violates Absa's

[12] High Court judgment above n 7 at para 85.

right to procedural fairness and is also an indication of further one-sided conduct by the Public Protector".[13]

[22] The final remedial action provides:

> "The appropriate remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution, with a view of addressing the maladministration, is as follows:
>
> 7.1 the Special Investigating Unit:
>
> 7.1.1 the Public Protector refers the matter to the Special Investigating Unit in terms of section 6(4)(c)(ii) of the Public Protector Act to approach the President in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996, to:
>
> 7.1.1.1 re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion; and
>
> 7.1.1.2 re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated May 1998 in order to investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report.
>
> 7.1.2 the South African Reserve Bank must cooperate fully with the Special Investigating Unit and also assist the Special Investigating Unit in the recovery of misappropriated public funds mentioned in 7.1.1.1 and 7.1.1.2.
>
> 7.2 the Portfolio Committee on Justice and Correctional Services:
>
> 7.2.1 the Chairperson of the Portfolio Committee on Justice and Correctional Services must initiate a process that will result in the amendment of section 224 of the Constitution, in pursuit of improving socio- economic conditions of the citizens of the Republic, by introducing a motion in terms of section 73(2) of the Constitution in the National Assembly and thereafter deal with the matter in terms of section 74(5) and (6) of the Constitution:
>
> Section 224 of the Constitution should thus read:

[13] Id at para 87.

> (1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected.
> (2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socio-economic transformation.
>
> 8. Monitoring
>
> 8.1 The Special Investigating Unit, the South African Reserve Bank and the Chairman of the Portfolio Committee on Justice and Correctional Services must submit an action plan within 60 days of this report on the initiatives taken in regard to the remedial action above."[14]

[23] Among those who successfully challenged the validity or legality of the remedial action were the Reserve Bank and Absa. Absa asked for a punitive costs order against the Public Protector in her official capacity. But the Reserve Bank took it several steps further. It not only asked for a punitive costs order against the Public Protector in her personal capacity, but also asked for a declaration that she abused her office in her investigations.

[24] The High Court set aside the remedial action almost in its entirety, but dismissed the application for the declaration that she abused her office.[15] It awarded punitive costs against her office wholly in favour of Absa and 85% in favour of the Reserve Bank.[16] But 15% of punitive costs awarded to the Reserve Bank is against the Public Protector in her personal capacity. And this is what her application to this Court is confined to.

[25] A reading of the High Court's judgment left me uncertain as to the bases on which personal costs were ordered against the Public Protector. The unspecified but

[14] Office of the Public Protector: *Alleged failure to Recover Misappropriated Funds* (Report 8 of 2017/18, July 2017).

[15] High Court judgment above n 7 at para 131.

[16] Id.

arguably deductible allusion to gross negligence and a somewhat unexplained but vaguely implied bad faith, albeit by converse reference.[17]

Issues

[26] The issues are whether:

(a) the test of gross negligence or bad faith was relied on;
(b) the legal requirements for awarding personal costs against a representative litigant were met;
(c) correct legal principles for awarding costs on an attorney and client scale were relied on and complied with; and
(d) there is any basis for interfering with the costs order.

Leave

[27] The Public Protector seeks leave to approach this Court directly from the High Court. This would allow her to bypass the Supreme Court of Appeal. Her application will be dealt with as one for leave to appeal. For it is not a direct access application in the strict sense, but more of an application for leave to appeal directly to this Court in terms of section 167(6)(b) of the Constitution.[18]

[28] It is now settled that appeals from the High Court should ordinarily go to the Supreme Court of Appeal barring special circumstances that warrant deviation from the set constitutional practice for processing appeals.[19] And the question is whether there

[17] Id at para 125.

[18] Section 167(6)(b) of the Constitution provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court
>
> . . .
>
> (b) to appeal directly to the Constitutional Court from any other court."

[19] *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at paras 22-8; *Mazibuko N.O. v Sisulu N.O.* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 35; and *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 12.

exists a sound basis for placing this application in a category that justifies the departure pleaded for.

[29] The provisions of sections 181 and 182 of the Constitution are implicated in so far as the application relates to costs that flow directly from the execution of that constitutional mandate by the Public Protector.

[30] The award of personal costs on an attorney and client scale against a senior constitutional office-bearer acting in her official capacity is a novelty.[20] It is a development so serious that if lightly imposed or its application not clarified, it could undermine their ability to perform their duties properly, pending the finalisation of this matter. When personal costs on an attorney and client scale are lightly or injudiciously imposed on public office-bearers, it is very likely to undermine their ability to discharge their functions without fear, favour or prejudice. For they are likely to fear some because of the serious financial harm or impoverishment likely to flow from their predictably vigorous pursuit of personal costs.

[31] All of the above therefore call for expeditious finality to be achieved in case this novelty was ventured into, in a legally impermissible way. Besides, these kinds of costs could be devastatingly higher if left to accumulate at every appellate level against a salaried office-bearer like the Public Protector.

[32] That the sole purpose of this application is to challenge a costs order, does not necessarily debar it from being entertained by this Court. We have recently departed from a hitherto established legal tradition and entertained applications that dealt exclusively with costs because a travesty of justice would otherwise have been left to live on had this Court not intervened.[21] An application for leave to appeal always turns

[20] *Black Sash Trust v Minister of Social Development (Corruption Watch (NPC) RF and South African Post Office Soc Limited Amicus Curiae)* [2018] ZACC 36; 2018 JDR 1677 (CC); 2018 (12) BCLR 1472 (CC) (*Black Sash III*) at para 16.

[21] *Limpopo Legal Solutions v Vhembe District Municipality* [2017] ZACC 30; 2018 (4) BCLR 430 (CC) (*Limpopo Legal Solutions II*) at para 9.

on whether it is in the interests of justice to grant leave or whether a legal point it raises is not only arguable, but would also address interests that are of importance to a significantly high number of citizens and is of a kind that this Court needs to deal with for that reason.[22]

[33] This application does raise an arguable point of law of general public importance. It relates to when it is legally permissible to award personal costs, especially on a punitive scale, against a representative litigant and that legal issue deserves the attention of this Court without delay. The interests of justice demand that leave be granted particularly because this is a novelty and the Public Protector does have reasonable prospects of success. Leave to appeal should thus be granted.

Costs in general

[34] Legal principles that guide the grant of litigation costs have been refined over the years. Some costs are strictly outcome-specific. Others depend on the character of the case being prosecuted or the specific issues to be determined.

[35] Where a relationship of trust, like an employment relationship, would still continue after the disposition of a case, each party would ordinarily be ordered to pay their own costs, regardless of the outcome.[23] Principles that govern constitutional litigation against the State or its organs generally proscribe the award of costs against unsuccessful private parties to avoid the probable chilling effect of mulcting the latter in costs if they lose.[24] And costs do not arise in relation to proceedings that are purely criminal in nature.[25]

[22] Section 167(3)(b)(ii) of the Constitution.

[23] See *Long v South African Breweries (Pty) Limited* [2019] ZACC 7; 2019 JDR 0218 (CC); 2019 (5) BCLR 609 (CC) at paras 28-32.

[24] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-3 (*Biowatch Trust*) and *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

[25] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC)

[36] All of the above said, there are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes.[26] They are meant to punish natural or legal persons, acting on their own behalf, who would in any event have had to bear ordinary costs should they not succeed. They, for instance, come in the form of costs on an attorney and client scale.

[37] But there is a special category of ordinary costs that is inherently punitive in effect and could have ruinous consequences for those ordered to pay them. And those are ordinary costs awarded against people acting in a representative capacity to be paid out of their own pockets.[27] And personal costs against representative litigants are even more punitive when they are to be paid on an attorney and client scale.[28] To not regard personal costs on a normal scale against representative litigants as punitive could only be a consequence of a failure to appreciate their true nature and impact compared to what is regarded as punitive costs in relation to those litigating on their own behalf. A proper appreciation of the nature and seriousness of awarding personal costs on an attorney and client scale on representative litigants would reveal that they fall in a

---

at para 59 and *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 44.

[26] See *Madyibi v Minister of Safety and Security* 2008 JDR 0505 (Tk) (*Madyibi*) at para 31, in which Petse ADJP states that—

> "[t]he principle that I have been able to extract from other decisions of our courts that I have had recourse to . . . is that our courts have awarded costs on the punitive scale in order to penalise dishonest, improper, fraudulent, reprehensible, or blameworthy conduct or where the party sought to be mulcted with punitive costs was actuated by malice or is otherwise guilty of grave misconduct so as to raise the ire of the court in which event a punitive costs order would be imperatively called for."

[27] *Moller v Erasmus* 1959 (2) SA 465 (T) at 467B-C.

[28] An explanation of costs on an attorney and client scale was provided by Eksteen J in *Loots v Loots* 1974 (1) SA 431 (E) at 433H-A:

> "Generally speaking one may regard party and party costs as being those costs which have been incurred by a party to legal proceedings and which the other party is ordered to pay to him, and attorney and client costs as being those costs which an attorney is entitled to recover from his client for the disbursements made by him on behalf of his client and the professional services rendered by him, and again speaking generally, such latter costs often include items not recoverable on a party and party bill, and the amounts recoverable for certain items may well be considerably higher than those recoverable on similar items in the party and party bill."

category that is much higher than costs on the same scale granted against those litigating in their personal or official capacity and to be borne in those capacities.

[38] This is so because an institution or natural person litigating in its or their own behalf expects to bear costs as a matter of course should they be unsuccessful.[29] Under those circumstances, it would be a reasonably anticipated possibility that costs on an attorney and client scale could then be granted against them as punishment in the true sense. This is not so with representative litigants. They expect the institutions they represent to bear costs, including costs on an attorney and client scale, if they are unsuccessful or where punitive costs are warranted. They would in all likelihood not even budget for ordinary costs.

[39] It bears repetition that the grant of ordinary personal costs ought therefore to be viewed as punishment that equates, in terms of seriousness and effect, to costs on an attorney and client scale unexpectedly visited upon a natural person or institution acting on her or its behalf. They are not on par with ordinary costs to be borne by a party litigating in her or its name. When a representative litigant is ordered to pay not only ordinary costs, but also costs on an attorney and client scale from her own pocket, it amounts to an unmasked double punishment.

[40] It ought therefore to take extraordinary circumstances for such costs to be justifiably awarded.[30] That decision ought to be a product of much more than a mere box-ticking exercise. It requires deeper reflection, tightly guided by an unmistakably

---

[29] The general rule is that the successful party ought to be awarded his or her costs. See *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3; *Abbott v Von Theleman* 1997 (2) SA 848 (C) at 854B; and *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) at 246C-E.

[30] *Nel v Davis SC N.O.* 2016 JDR 1339 (GP) (*Davis*) at para 25:

> "A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation."

See also *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) at para 69 where the court held that "[t]he authorities caution that costs orders *de bonis propriis* [from his or her own pocket] should only be awarded in exceptional circumstances".

strong sense of justice. After all, courts exist not to crush or destroy, but to teach or guide, caution or deter, build and punish constructively. And that ought to be the purpose of the law in our constitutional dispensation, considering our injustice-riddled past. The law ought not to be applied mechanically, regardless of whether the outcome yields justice or inequity. For then it could be the ass that it has occasionally been allowed to be prior to our current constitutional dispensation.

[41] All of the above considered, when any costs order is made, especially of a double punitive nature like ordering a representative litigant to not only pay costs out of her own pocket on an ordinary scale, but also on an attorney and client scale, several factors must be taken into account. They are the economic realities that apply at the time of awarding costs; the capacity or predictable incapacity to pay; and whether that order serves as constructive or corrective punishment, in addition to the inescapable wrapping over the knuckles that accompanies it, or whether it is in effect an instrument of destruction or irreparable damage. That would explain why, using crime as a comparator, removing people's limbs or organs is never an option and the possibility of being released on parole exists even for murderers. To this end, convicts are kept in centres for rehabilitation known as correctional facilities with programmes designed to achieve change or correction, not permanent damnation. No costs order ought ever to be made regardless of its consequences or impracticability or the injustice and inequity it would yield. Courts are all about justice and equity.[31]

[42] In line with the courts' constitutionally entrenched original role, any order they make must be capable of advancing the interests of justice. No wonder the Constitution empowers courts to make "just and equitable" orders.[32] Any archaic consideration or

[31] In *Fripp v Gibbon & Co* 1913 AD 354 at 363, it was held that the award of costs is an issue within the discretion of the court and in exercising this discretion—

> "the law contemplates that [the Judge] should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties."

[32] Section 172(1)(b) of the Constitution.

approach for awarding costs that is inconsistent with justice and equity, however well established, ought to be abandoned.

[43] It cannot be overstated that an order for personal costs against a representative litigant is a very serious matter. That order thus ought to bear a demonstrably clear correlation to the gravity of the wrongdoing that it is said to have occasioned.[33] More importantly, that seriousness must be a reflection of the real harm or prejudice likely or reasonably anticipated to be suffered as a result of the unacceptable conduct sought to be punished.[34] It cannot be seriousness or a mark of displeasure in a vacuum that is not supported by the danger, real or potential, that flows or could flow from the impugned conduct.

[44] And this is what ought to inform the approach we adopt to personal costs against representative litigants – the issue that sits right at the heart of this case. It is about the future management or application of the novelty that personal costs, especially on an attorney and client scale, are against constitutional office-bearers or high-ranking government officials acting or litigating in their official capacities.

The tests for personal costs against representative litigants

[45] It bears emphasis that it took extraordinary circumstances or highly inappropriate or prejudicial conduct over the years to make a personal costs order against a representative litigant.[35] Until *Black Sash II*, those costs were confined to conduct relating to court proceedings.[36] We then extended it to conduct relating to the

[33] See *Black Sash III* above n 20 at paras 10-6.

[34] Id at paras 10, 13 and 15-6.

[35] *Id* above n 19 at paras 5 and 18.

[36] *Black Sash II* above n 8 at paras 6, 8-9, 20 and 24 and Cilliers et al *Herbstein and Van Winsen*: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta & Co Ltd, Cape Town 2009) vol 2 at 982-7.

performance of constitutional duties.[37] And it had indeed been a rarity for a personal costs order to be made against an office-bearer, particularly a State functionary.[38]

[46] All this was and is for good reason. Public office-bearers must be allowed the space to be human. And to err is human. It ought to take much more than ignorance, limited competence in one's area of responsibility, poor judgement or incidental but harmless unfairness to others to order personal costs against an office-bearer litigating in a representative capacity.

[47] A failure to guard against an easy award of costs of this nature could undermine the willpower to deal with everybody as they deserve to be dealt with. The knowledge that certain litigants are or could be unrelenting, and at times vindictive, in their pursuit of personal costs could arrest the zeal to do the right thing when that "special" category litigates. Indeed some of those with very deep or, so to speak, virtually bottomless pockets or those who are connected to the well-resourced could pull all their resources together to send a strong message that they are not to be touched. The knowledge of this possibility could cause office-bearers not to act against those people or institutions for fear of being mulcted with personal costs, even on an attorney and client scale. This is part of the ever-abiding danger that this Court sought to highlight in relation to the Public Protector in *Economic Freedom Fighters I*.[39]

[48] That said, constitutional office-bearers, like the Public Protector, should not be allowed to abuse their power or office with impunity. They should never be left free to mark out for prejudice or mete out unjust and unfair treatment to any person or institution, just as they are not to be driven to the state of near paralysis when some people or institutions need to be investigated. In other words, nobody who deserves the attention of the Public Protector's investigative eye and potentially unpleasant decision

[37] *Black Sash II* above n 8 at paras 7-9 and *Black Sash III* above n 20 at paras 10 and 14-5.

[38] It was noted, for example, in *Black Sash III* above n 20 at para 16 that "[i]t is a novel matter to hold a Cabinet Minister personally responsible for the costs of litigation".

[39] *Economic Freedom Fighters I* above n 1 at para 55.

should enjoy impunity by reason of their popularity, resources or connections. Similarly, the Public Protector must not be left to virtually corrupt the Office.

[49] There should thus be no hesitation in visiting a public office-bearer with costs even on a highly punitive or attorney and client scale in an official or personal capacity when circumstances plainly justify this extreme censure. But when that has been done, the reasons for doing so and the gravity of the underlying conduct should never be difficult to make out or understand.

[50] It is for this reason that gross negligence and bad faith or the plain intention to prejudice anyone being investigated or abuse of power must be strongly guarded against and appropriately sanctioned. These are the tests for awarding personal costs against those litigating in their official capacities.[40] And the onus, as the High Court correctly pointed out, rests on the Reserve Bank.[41] In *Black Sash II*, they were laid down in these terms:

> "Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order."[42]

[51] Non-disclosure was central to the award of personal costs against Minister of Social Development, Ms Bathabile Dlamini (the Minister), in *Black Sash III*.[43] She was required to work with and guide the South African Social Security Agency (SASSA), as its political head, to comply with the deadline set by this Court for ending a contract which this Court had declared to have been irregularly concluded.[44] In his report, from

[40] *Black Sash II* above n 8 at paras 6 and 9.

[41] High Court judgment above n 7 at para 98.

[42] *Black Sash II* above n 8 at para 9.

[43] *Black Sash III* above n 20 at paras 6 and 12.

[44] *Black Sash Trust v Minister of Social Development (Freedom Under Law Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash I*) at paras 2-3 and 14.

which this Court quoted with approval on the exclusion of information on work streams, former Judge President Ngoepe said:

> "I have to, inevitably, consider the Minister's explanation for the non-disclosure of the information in question. Her explanation is unconvincing and therefore falls to be rejected: *The appointment of work streams and their role was central to the whole exercise of meeting the deadline.* Therefore, in dealing with any aspect relating to *the crisis*, it is difficult to understand how the Minister could justifiably leave out the issue of the appointment of work streams, their role, who appointed them, when and to whom they reported; especially when she was the one who had instructed that they be appointed, identified specific individuals to be appointed and ordered that they report to her directly."[45]

[52] The Minister *never* of her own accord disclosed the fact of the existence and role of the work streams. It was the Chief Executive Officer of SASSA and the Director-General of the Department of Social Development, over which the Minister had political oversight, who did.[46] More importantly, those work streams were meant to effectively undermine efforts aimed at meeting the deadline set by this Court to comply with its order. Their unstated purpose was therefore to frustrate compliance with an order of this Court. A disclosure of their existence and mode of operation would, to the knowledge of the Minister, most likely result in personal costs. It can thus be reasonably or fairly inferred that she sought to deceive the Court in order to escape a reasonably foreseeable award of personal costs against her.[47] And that is self-evidently very serious.

[53] The seriousness of the Minister's conduct was explained with reference to the potential impact of the crisis, to whose creation she largely contributed, "especially in the context of the provision of social grants to the most needy in our society".[48] And

[45] *Black Sash III* above n 20 at para 6.

[46] Id at paras 6 and 11.

[47] Id at para 12.

[48] Id at para 13.

that "if it is not to happen again, consequences must follow".[49] This Court went on to say that ordering the Minister to pay personal costs "would account for *her degree of culpability in misleading the Court* – conduct which is deserving of censure by this Court as a mark of displeasure".[50] Noteworthy is that this Court was being misled, not without negative or harmful consequences. But its order, meant to end an irregular contract for public good, would not be complied with. Furthermore, this Court said:

> "The report by Ngoepe JP revealed that *the Minister misled the Court* to protect herself from the consequences of her behaviour. She allowed a parallel process to occur *knowing that she withheld information that would lead to her being held personally liable for the social grants disaster*. The office which she occupied demands a greater commitment to ethical behaviour and requires a high commitment to public service."[51]

[54] The egregiousness of the Minister's conduct was marked out by, among other things, the crisis it contributed to, misleading this Court and her failure to be alive to her obligations in relation to the interests of "the most needy of our society". The gravity of her conduct is, in a sense, also underscored by her obligation to help meet the deadline set by this Court and the following remarks:

> "A last and unedifying matter remains. The Inquiry Report's findings suggest very strongly that some of Minister Dlamini's evidence under oath in the affidavits before this Court and orally before the Inquiry was false. The Registrar of this Court must be directed to forward a copy of the Inquiry Report and this judgment to the National Director of Public Prosecutions, to consider whether Minister Dlamini lied under oath and, if so, whether she should be prosecuted for perjury."[52]

This Court was also concerned about her "personal responsibility, arising from . . . her shielding this truth [concerning a parallel process] from the Court".[53]

---

[49] Id.

[50] Id at para 14.

[51] Id at para 15.

[52] Id at para 17.

[53] Id at para 16.

[55] All of the above prove beyond doubt that this was not conduct without actual prejudice or potentially harmful consequences. It also demonstrates why her conduct necessitated a novelty in the form of ordering a Cabinet Member to pay personal costs while acting in her official capacity. There were potentially disastrous consequences, enabled by the work streams she created which frustrated compliance with an order of this Court. A crisis of monumental proportions was looming in the horizon. And it translated into national anxiety and potential harm to the interests of the most vulnerable in our society, who largely depend on social grants for survival. It is against this backdrop that compliance with the requirements of gross negligence and bad faith must be examined in this matter. But since there is no clarity on the test(s) relied on by the High Court, after quoting a passage from *Herbstein and Van Winsen*, and how the tests' requirements were met, it is necessary to work it out ourselves with reference to the known tests.[54] In doing so, I traverse even issues that do not fall within the scope of the High Court judgment on costs, to demonstrate the failure by the High Court to explain why personal costs were warranted and also on an attorney and client scale.

Gross negligence

[56] A dictionary definition of "gross negligence" is "extreme carelessness that shows wilful or reckless disregard for the consequences to the safety or property of another".[55] To the extent that gross negligence as opposed to ordinary negligence is indeed implied or intended here, and guided by *Black Sash II* and *Black Sash III*, it needs to be said that negligence cannot be "gross" merely because the High Court said so or because that

[54] High Court judgment above n 7 at paras 125-9. Cilliers et al *Herbstein and Van Winsen* above n 34 at 983 state:

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

[55] Collins Dictionaries *Collins English Dictionary Complete and Unabridged* 13 (2018) (*Collins*).

negligence is linked to the cardinal principles that apply to the way the Public Protector is required to execute her constitutional obligations. "Gross" must be tied up or intimately connected to and informed by the actual or potential consequences of a failure to do what was reasonably expected of her. And the conclusion that her negligence was "gross" must be capable of being easily appreciated from the reasoning of the High Court, as is the case with *Black Sash II* and *Black Sash III*.

[57] The Reserve Bank says that it would have explained why the proposed constitutional amendment should not have formed part of the remedial action and why an investigation by the Special Investigating Unit should not be "ordered". So the contention is that there was no disclosure of meetings, when this was reasonably expected to be done, and there was no further consultation with the Banks before the final remedial action was taken. This, the Reserve Bank says, denied it the opportunity to make representations that could possibly have averted a remedial action that could lead to an investigation by the Special Investigating Unit and a constitutional amendment by Parliament. Remember, the then Public Protector, Ms Thulisile Madonsela, had already expressed a preference for an investigation in her provisional report – a judicial commission of inquiry. And her successor, Ms Busisiwe Mkhwebane, says that after her meeting with the Presidency (incorrectly referred to as having been part of what occurred on 25 April 2017 in her answering affidavit), she realised that the commission route might be problematic since its legality was already a subject matter of litigation in relation to another Public Protector's report,[56] hence her switch to the Special Investigating Unit's approach.

[58] Besides, something needs to be put into proper perspective here. In her answering affidavit, the Public Protector alludes to what is in effect the meeting of 7 June 2017 or both April 2017 and June 2017, as the meeting of 25 April 2017. All things put together, part of what she attributes to the meeting of April actually relates

[56] Office of the Public Protector: *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* (Report No. 25 of 2013/14).

to that of 7 June as her notes of the latter meeting show. What matters is the content of the discussions and the acknowledgement that the meeting had a role to play in the final determination of the remedial action taken. It cannot therefore be a consequence of a correct and fair assessment of the Public Protector's version to conclude that she only disclosed the meeting of April 2017, but concealed or was totally secretive about the fact of the one of June 2017 taking place. Doing so could reasonably be misunderstood as being symptomatic of a desperation to find fault.

[59] So what was gross about her negligence, extremely opprobrious, clearly and indubitably vexatious or reprehensible about her conduct, in relation to (i) her interactions with the Presidency and the State Security Agency; (ii) her treatment of the transcript or minutes; and (iii) not affording the Banks the opportunity to be heard for the second time after the provisional report was released to interested parties? What harm, actual or potential, was to flow from the Public Protector's conduct that would explain the "grossness" of the negligent conduct? Put differently, with reference to the Special Investigating Unit investigation, reprehensible as the Public Protector's conduct might be or is, what damage did she occasion or could cause by ordering a different kind of investigation from the one already proposed in the provisional report?

[60] If it was in law wrong or negligent of Ms Mkhwebane to have changed from an investigation by a judicial commission of inquiry, proposed by Ms Madonsela, to an investigation by a specialised prosecutions unit, then negligence cannot be gross for that reason alone. For it would be no more than a change of the vehicle for doing the exact same thing, based on a wrong understanding of the law. And that extends to her understanding that because the Reserve Bank was not being asked to initiate any process, no remedial action was being taken against it and it was therefore not necessary for it to be consulted. The reality is that although the Reserve Bank has a material interest in this lifeboat related process, since its fingerprints are all over it, when it was directed by the Public Protector to offer its inevitable cooperation in the investigation, it was not required to act unless others – the President and the Special Investigating Unit – did. It ought therefore to be understandable how an error, if it be, could be made by

any reasonable person on the basis that, since they had been consulted after the provisional report, a second consultation in relation to the same report was not necessary.

[61] After the provisional report was issued, and after consulting with the Reserve Bank, the Public Protector consulted with the Presidency at the latter's request. This, the Reserve Bank says, she should not have done since the Presidency has nothing to do with her key recommendations or remedial steps, particularly the possible constitutional amendment as it relates to or impacts on economic issues. The Reserve Bank contends that it should have been consulted about economic issues and Parliament consulted about a constitutional amendment instead. But this is an erroneous contention.

[62] First, the President of Republic has a critical role to play in the affairs of this country, including the attainment and safeguarding of good governance or the creation of a corruption-free and truly law-governed environment, especially as regards constitutional institutions. The Reserve Bank must be trusted to "perform its functions independently and without fear, favour or prejudice".[57] There must therefore be no reason to believe that this constitutionally-ordained facilitator of "balanced and sustainable economic growth in the Republic"[58] is favourably disposed to some players in the economy, in disregard for its mandate, or that it could even as much as consider entering into an unlawful contract at a great financial loss and to the prejudice of the interests of the general public. Allegations of corruption, illegality or impropriety, especially those relating to an amount in excess of R1 billion, appear to be sufficiently serious to warrant credible closure via the medium of a thorough investigation, however old the subject matter of investigation might be. And on this both Ms Madonsela and Ms Mkhwebane fundamentally agree.

[57] Section 224(2) of the Constitution.

[58] Section 224(1) of the Constitution.

[63] Second, section 85(2)(d) of the Constitution vests in the Executive, headed by the President, the authority to prepare and initiate any legislation, including a constitutional amendment. It is therefore incorrect of the Reserve Bank to contend, as it does, that the Presidency would have no role to play in a possible amendment of the Constitution meant to address or reconfigure the mandate of the Reserve Bank, and to suggest that the entire process falls under the exclusive domain of Parliament.

[64] The Public Protector got the law completely wrong by acting as if it was open to her to direct Parliament to amend the Constitution and even in a specific way.[59] She, like any other citizen, could of course suggest, but most certainly could not take remedial action, to that effect. How then is the gravity of the negligent conduct to be gauged in this connection? Is it with reference to the radical departure from the norm – the failure to appreciate the vital limits of her constitutional powers – or with special regard to the deleterious effect of the proposed amendment? Is the determination of the seriousness or gross nature of the negligence relating to the amendment not context-specific?

[65] I believe it is context-specific. And that context is that not even this Court, with all its extensive powers, may effectively direct Parliament to amend the Constitution. Therefore, any endeavour to that end may rightly be criticised and dismissed as bereft of seriousness given the nature or intricacies of law-making or constitutional amendment and Parliament's functional independence. The Public Protector's remedial action was a known or predictable non-starter in legal circles. The Reserve Bank has access to the best of the best lawyers who could, as urgently as was considered necessary, have calmed their unnecessarily and unreasonably aroused nerves or jitters, and those of the markets, that there really was nothing to worry about. Sentiments and

[59] As noted in *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) (Urgent High Court judgment) at para 43—

> "the Public Protector is a creature of the Constitution, her remedial powers are derived from the Constitution, and hence she operates under the Constitution and not over it. She has no power to order an amendment of the Constitution. Section 74 of the Constitution prescribes the conditions for its own amendment."

sensationalism aside, an objective, reasoned and calm approach to the Public Protector's ill-advised or over-zealous proposal must inevitably lead to the conclusion that it was inconsequential, never posed any real, but only an imaginary, threat to the well-being of the Reserve Bank, and all other interested parties, including the reasonably informed economic forces or markets. The remedial action was bound to be set aside with ease. Unsurprisingly, the Public Protector did not even oppose its setting aside.

[66] The only compelling conclusion to arrive at is that she sought inputs from those who she rightly or wrongly thought could still be helpful and who were directed by the remedial action to initiate or do something. The Reserve Bank would after all still have had the opportunity to rebut the allegations to be levelled against them or deal just as effectively with a perceptible prejudice arising from not having been given another round of consultation on the provisional report, during the proposed investigation or parliamentary process, were they to eventuate.

[67] As for meeting with the State Security Agency and discussing the Reserve Bank's vulnerability, it must not be forgotten that it was the State Security Agency that virtually initiated the investigation, to recover whatever the Reserve Bank had given away illegally, that culminated in the CIEX report. A meeting with them was most appropriate and we all must be loath to readily infer cynicism from that meeting. Once being held, anything including the Bank's vulnerability could legitimately be discussed. It is astounding that knowing this, the High Court still went on to conclude that "her discussion pertaining to the Reserve Bank cannot be justified in any manner". It is a factual misdirection.[60] And so is the finding that she was overly secretive about their meeting. How can a "secretive" person go so far as to waive the classification of the record of her discussion with the same State Security Agency, of her own volition? Besides, the discussion of the Reserve Bank's vulnerability is not one of the reasons relied on by the High Court to make the unprecedented order that it made. It thus ill-

[60] High Court judgment above n 7 at para 108.

behooves any court to augment the deficient reasoning of the High Court with the vulnerability issue.

[68] A transcript or the minutes of a meeting serve an obvious purpose. It is to confirm, and inform or remind a reader of, what transpired during a meeting. It is an unfortunate misapprehension of the facts – a hair-splitting exercise indeed – to conclude that the Public Protector neither made a transcript nor any minutes of her second meeting with the Presidency available to the Banks. The notes she discovered, albeit somewhat belatedly, capture the essence of what a transcript or the minutes would have been reasonably expected to reflect. They in fact accord with her account in the answering affidavit that her meeting with the Presidency led to a change of approach to the remedial action. More specifically, she candidly discloses in her affidavit that her change from the judicial commission of inquiry to an investigation by the Special Investigating Unit was influenced by her meeting with the Presidency.

[69] It bears emphasis that she was under no legal obligation to record and transcribe her meetings with the President, the State Security Agency or even the Banks. And it is inappropriate to use her departure from her own practice and her failure to explain it as one of the grounds for awarding exceptionally high personal costs against her. For it does appear that a lot is being deduced from the record and conduct of the Public Protector that is not borne out by the facts and the law.

[70] What cannot be denied is that in her somewhat incongruous handling of some of the issues relating to her investigation and reporting, the Public Protector ultimately disclosed all that is foundational to the possibly alleged grossness of her negligence or the non-disclosure relied on by the Reserve Bank. Apart from the High Court's failure to rely on gross negligence and explain how it was proven, the facts do not bear it out.

Bad faith

[71] A proper starting point is in my view to remind ourselves of what the ordinary meaning of bad faith is. A dictionary meaning is "[i]ntent to deceive".[61] The meaning of bad faith or malicious intent is generally accepted as extending to fraudulent, dishonest or perverse conduct; it is also known to extend to gross illegality.[62] Here too the perverse, seriously dishonest or malicious conduct must link up, not merely with the seniority of the person or high office occupied, but also with the seriousness of the actual or reasonably foreseeable consequences of that conduct.

[72] The correct approach to determining the existence of bad faith is therefore one that recognises that bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be reasonably inferred and bad faith presumed.[63] This is so because the mischief sought to be rooted out by rendering bad faith so severely punishable, particularly within the public sector space, is to curb abuse of office which invariably has prejudicial consequences for others. Abuse of office undermines the efficacy of State machinery and denies justice and fairness to all people and institutions.

[73] For, a person who acts in bad faith is one who hopes to get away with a surreptitious connivance to harm the unsuspecting other. Within the context of this case, the High Court would have had to be satisfied that the Public Protector sought to disadvantage the Reserve Bank, acting in cahoots with the Presidency or whoever else. Not only would the prejudice have had to be explained by the High Court, but the conspiracy or connivance insinuated would have had to be kept "classified" by the Public Protector for the devious scheme to succeed.

---

[61] Collins above n 55.

[62] *Commission for Conciliation, Mediation and Arbitration v Inzuzu IT Consulting (Pty) Ltd* [2012] 11 BLLR 1081 (LAC) at para 20 and *Birch v Lombard* 1949 (3) SA 1093 (SR) at 1097.

[63] *Réjean Hinse v Attorney General of Canada* 2015 SCC 35 at paras 48 and 53. The Supreme Court of Canada adds at para 52 that "[a] simple fault such as a mistake or a careless act does not correspond to the concept of bad faith".

[74] Neither the President nor the State Security Agency are competitors with the litigating Banks nor did they initiate the investigation by the Public Protector that culminated in the final remedial action. It is Mr Hoffman who did. The question of favouritism or partiality does not therefore arise. Much more would have had to be said by the High Court in support of the alleged partiality or lack of good faith of the Public Protector, especially because of the prominent role these factors played in awarding personal punitive costs against her.

[75] It requires little effort to determine how much the Public Protector earns and how much the ordinarily astronomical litigation costs would be that she must pay to the Reserve Bank and for own counsel if she loses. It ought to be known that she cannot afford to pay and that the inescapable, albeit unintended, consequence of the High Court order is to "bankrupt" her. Findings of apparent partiality, reasonable apprehension of bias or a failure to appreciate aspects of her work, misplaced as I believe they are, would not, even if they were established, justify this ruination of a career and exhaustion of resources. A decision of the High Court and its confirmation by this Court will predictably end her career and, at best for her, drown her in debt. Ordinarily, that would not be objectionable but understandable where it is at least sought to be explained with reference to her indubitably vexatious or extremely opprobrious conduct.

[76] Turning to a somewhat different subject, the President would have a role to play in the reopening of the investigations into the lifeboat saga by the Special Investigating Unit.[64] Partiality or bad faith cannot therefore flow or be reasonably inferred from the fact that the President was consulted about this matter. The Presidency has a material interest in matters concerning the possible disregard for the law or impropriety of a very important constitutional institution like the Reserve Bank and deserved to be consulted. Nothing sinister or anything that smacks of lack of impartiality or independence ought to flow so effortlessly from that meeting.

[64] Section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996.

[77] And the Dr Tshepo Mokoka issue calls for attention as it relates to or seems to undergird the thinly articulated bad faith requirement. The High Court concluded:

> "The Public Protector failed to make a full disclosure when she pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report. We have already pointed out that Dr Mokoka's report was obtained after the final report had been issued and the applications for review had been served. Section 5(3) of the Public Protector Act provides for an indemnification with regard to conduct performed *'in good faith'*. The Public Protector has demonstrated that she exceeded the bounds of this indemnification. It will therefore be of no assistance to her. It is necessary to show our displeasure with the unacceptable way in which she conducted her investigation as well as her persistence to oppose all three applications to the end."[65]

This is all that is said about bad faith in the judgment.

[78] What is it that flows from the Public Protector's non-disclosure of the lateness of the stage at which Dr Mokoka's report was made available to her to support the conclusion that she "demonstrated that she exceeded the bounds of this [good faith] indemnification"? Again, context is critical if a self-evidently ruinous costs order is to be made against an official based on a particular fact. The relevance, full implications and gravity of the impugned conduct must be properly explained.

[79] The Public Protector said in one breath that she consulted two economists only for it to subsequently emerge from her own account and from Dr Mokoka's report that it was not so. Actually, she consulted one economist Mr Goodson, not two. I hasten to state that the High Court found that Mr Goodson is an economist. It is therefore not open to any other court to seek to discredit his credentials as such. Does her inability to explain this discrepeancy inevitably point to the "[intent] to deceive"? If so, who was sought to be deceived or disadvantaged, how and for what conceivable purpose?

[65] High Court judgment above n 7 at para 128.

In other words, what prejudice does the contradiction about Dr Mokoka's report hold for the Banks or what value does it add to the remedial action for so much weight to be attached to it? Of what significance is the role of Dr Mokoka for the High Court to even rely on it to apparently find bad faith and as one of the grounds for making a personal punitive costs order against the Public Protector?

[80] The conclusion or suggestion that there was a plan or intention to deceive, malice or crass dishonesty is irreconcilable with the Public Protector's disclosure of both the correct and incorrect stage at which Dr Mokoka's views were sought and the production of his report that does not support her initial stance. And whether this confusion was correctly said to constitute bad faith must be determined with reference to the reasons advanced by the High Court itself. A subsequent augmentation is not permissible at appellate level. A malicious, fraudulent, grossly dishonest scheme or intent to deceive is logically irreconcilable with alluding to the fact of Dr Mokoka's report having been had regard to after the final report was issued. The errors or ineptitude of the Public Protector have been blown out of proportion here. That she occupies high office that demands high ethical standards does not mean that her wrongdoing, however inconsequential, must earn her the harshest of punishments.

[81] It is true that the Public Protector failed to give answers that could convincingly put to rest questions around some of these points of criticism. She fumbled around in a way that is somewhat concerning. It baffles me that she was unable to explain herself even with the benefit of legal representation. But her inability to explain this confusion away cannot without more evidence serve as justification for concluding that bad faith was established – to view it otherwise would amount to taking the matter too far, too easily. The need to examine all facts and issues in a detached and fair way cannot be obliterated by her wrongdoing or inability to explain the inconsequential Dr Mokoka confusion properly. The Reserve Bank was in law, required to prove its case rather than be allowed to effortlessly ride on waves of suspicion or unsubstantiated conclusions to its desired destination.

[82] A deceitful or dishonest functionary would not herself have exposed "her lie" or allowed anybody acting on her behalf to do so, especially to those who she knew would or are clearly determined to use it against her. This explains why the Minister did not disclose anything about the work streams. A commonsensical approach to real life issues militates against the adverse inference or conclusion sought to be drawn or reached. This is not a case of being caught or found out. The Public Protector laid it bare herself.

[83] A dishonest conspirator, as the Public Protector is made out to be, would in all probability have shredded or concealed the documentation. Not even a rule 53 application has the necessary force to compel a fraudster to discover what she is intent on concealing in order to deceive successfully. Interestingly, for her to know which documents to disclose, logic dictates that she would have had to read her handwritten notes that expose the "plot" or the "deception" by revealing information about the 7 June 2017 meeting. The notion that she was being partial or acted in bad faith and that it is the only reasonable inference to be drawn from her failure to disclose this information and to not consult with the Banks, lacks substance. And it must be emphasised that the conclusion that she was dishonest or deceitful is belied by her declassification of notes of her meeting with the State Security Agency, her somewhat belated disclosure of all the other information including the dates of the meetings, her contemporaneous notes of what was discussed and the effect of the meeting with the Presidency on the choice of the vehicle for investigation.

[84] Ordinary personal costs, worse still personal costs on an attorney and client scale, cannot be awarded merely because the Public Protector unwisely or in a manner that smacks of poor judgement, initially withheld information that she eventually disclosed. She deserves to be criticised for this. But absent proof or a reasoned explanation of deliberate wrongdoing designed to prejudice others, there can be no justification for any form of personal costs on grounds of bad faith. A court must work with what has been placed before it and in terms of the law. It is not open to it to read a lot more into or out of what is before it to arrive at a conclusion. It also cannot disregard what is favourable

to a litigant because of her errors. Articulating legal or constitutional realities that spring out naturally and forcefully from the issues cannot amount to speculation. An injustice may not be left to survive because a party did not raise an obvious legal or constitutional reality or flaw.

[85] More importantly, incoherent as the Public Protector's explanation of her failures or deliberate omissions are or might be, they are irreconcilable with "gross" negligence and "bad faith". I repeat. Nobody who is deeply involved in or who is a kingpin of a fraudulent, malicious, perverse or intentionally deceptive scheme to the disadvantage of others would reasonably be expected to disclose to them, without duress, that which would expose the fraud, malice or calculated deception, as the Public Protector did disclose.

[86] In sum, the bases for the presumably alleged partiality or bad faith are just too thin and unexplained. Considerations of justice demand much more to conclude that these have been demonstrated.

[87] Besides, there is much to be said for the Public Protector's contention that just as partiality or apprehension of bias in relation to Judicial Officers is not to be lightly inferred,[66] so should it be with the Public Protector. That stems from a presumption of impartiality in their favour which has more to do with the weight of the constitutional obligation imposed on them to act without fear, favour or prejudice. That presumption applies subject to appropriate adjustment to the Public Protector who is similarly required to act in terms of that constitutional injunction.[67] No wonder even a High Court Judge may be appointed to the position of Public Protector.

[88] And it ought not to matter how old a serious alleged wrongdoing is. That the incident or investigation is even 30 years old ought not to clothe the Reserve Bank with

[66] *Stainbank v SA Apartheid Museum at Freedom Park* [2011] ZACC 20; 2011 JDR 0706 (CC); 2011 (10) BCLR 1058 (CC) at paras 35-6.

[67] Section 181(2) of the Constitution.

an exemption or some kind of immunity from an investigation which could possibly help prevent future wrongdoing by any other important institution. The Reserve Bank itself, initiated an investigation into the lifeboat agreement many years after it had been entered into. The pursuit of a related investigation does not establish bad faith.

[89] By the way, the Reserve Bank is in terms of section 239 of the Constitution an organ of State. Like the Public Protector, it is an institution that exercises power and performs functions in terms of the Constitution and legislation. One wonders whether it is consonant with the spirit and principles of cooperative government and intergovernmental relations set out in section 41 of the Constitution for one organ of State to be allowed to insist on punitive costs against another functionary or institution (organ) of State like the Public Protector.

Costs on an attorney and client scale

[90] The High Court said:

> "It is necessary to show our displeasure with the unacceptable way in which she conducted her investigation as well as her persistence to oppose all three applications to the end.
>
> Having regard to all the above considerations, we have to conclude that this is a case where a simple punitive costs order against her in her official capacity will not be appropriate. This is a case where we should go further and order the Public Protector to pay at least a certain percentage of the costs incurred on a punitive scale."[68]

[91] What happened? Having decided to order the Public Protector to pay punitive costs in her official capacity to Absa, the High Court readily made the exact same costs order in favour of the Reserve Bank for identical reasons, except that this time 15% of those costs was to be borne by her in her personal capacity.

[92] But that is not how it is supposed to work in law. Not only should orders with these foreseeably serious consequences be properly explained, but the principles and

[68] High Court judgment above n 7 at paras 128-9.

the reinforcing facts on which they are based must be set out with specific reference and relevance to the kind of order being made. Even where the tests for the award of ordinary personal costs against a representative litigant have been met, that does not without more justify or serve as a sound legal basis for the grant of personal costs on an attorney and client scale. Different legal requirements apply to each. This Court can only make a just and equitable order.[69] And an order for costs on an attorney and client scale that is legally indefensible and therefore unjust cannot be insisted on just because it was not raised as a separate issue from the all-encompassing objection to the grant of personal costs. Every aspect of the impugned personal costs has to be legally sustainable or else the order must be set aside.

[93] Having decided to award personal costs against the Public Protector, the High Court should therefore have embarked on another process. And that is to state the principles it relied on and explain how the legal requirements for costs on an attorney and client scale, authoritatively laid down by this Court, were met. Needless to say, we have affirmed the pre-constitutional position on punitive costs. These costs are to be granted against a litigant whose claim is frivolous, vexatious or manifestly inappropriate.[70]

[94] To justifiably rely on her opposition of the three applications to the end for awarding personal costs on an attorney and client scale, a proper explanation would be necessary. The High Court should have explained just how the Public Protector's opposition helps meet one or more of these requirements. This is so because the Public Protector had the right to defend the three applications to the end. Good reason is required to not only deny her this right but to also rely on her exercise of that right, to mete out such an unprecedentedly harsh punishment to her.

[69] Section 172(1)(b) of the Constitution.

[70] *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at para 36 and *Biowatch Trust* above n 24 at para 18.

[95] This is only the second time in the history of this country that a senior constitutional office-bearer has been ordered to pay personal costs while litigating on behalf of the State.[71] What is more, it is for the first time ever that those personal costs are awarded on an attorney and client scale. The reasons for this high-level novelty are therefore critical not only to facilitate comprehension of the justice and equity behind the order but also because of the huge potential it has of undermining the truly independent and effective functioning of organs of State and of literally destroying an erring State functionary. But the High Court said:

> "Having regard to all the above considerations, we have to conclude that this is a case where a simple punitive costs order against her in her official capacity will not be appropriate. This is a case where we should go further and order the Public Protector to pay at least a certain percentage of the costs incurred on a punitive scale".[72]

[96] That is all that the High Court had to say for awarding personal costs on what is in reality a double punitive scale for a representative litigant. It leaves us none the wiser. And the question is which legal principle did the High Court rely on for venturing into this high-level novelty? Did it rely on all that it says in its judgment under costs or even on "all the above considerations", which would include what precedes the costs section of the judgment? That is how woefully inadequate the High Court judgment is in addressing this all-important subject of personal costs on a punitive scale. Whatever the Court intended, it does not accord with this Court's jurisprudence. More importantly, "all the above considerations" at this stage of the judgment ought really to be confined to punitive costs in a personal capacity. "Having regard to all the above considerations" does not therefore relate to all other matters that may be relevant to costs. This is so because the High Court used this expression while it was dealing exclusively with punitive costs, under the heading "costs". It would be most inappropriate to supplement its otherwise deficient reasoning on costs with what precedes "costs" just because it appears to be relevant. My own reference to what does

[71] *Black Sash III* above n 20 at para 18.

[72] High Court judgment above n 7 at para 129.

not appear under "costs" is merely to demonstrate that even if other parts of the judgment, beyond the discussion on costs, could be relied on, it would still not salvage the High Court costs order.

[97] Courts should not be required to be needlessly elaborate and provide every detail, however minor, in the determination of the issues. But, a fair grasp of the basic and crucial principles and clarity of expression is to be reasonably expected of the High Court and any other court of equivalent or higher status in explaining particularly important aspects of its decision. It bears repetition that the operative principle in determining whether to award punitive costs is, whether a litigant's conduct is frivolous, vexatious or manifestly inappropriate.[73]

[98] And it is not clear which, if any, of these requirements the High Court sought to place reliance on. Its own handling of this matter is really no different from, if it is not worse than, that of the Public Protector. The High Court delivered its judgment on 16 February 2018. At that stage, this Court's much publicised judgment that laid down the tests for awarding personal costs against a representative litigant had already been delivered, on 15 June 2017. Yet the High Court was clearly unaware of the existence of those tests and thus made no attempt to ensure that any of them was applied and met. Reference to "bad faith" in its judgment was nothing more than a passing and unexplained reaction to the Public Protector's reliance on section 5(3) of the Public Protector Act. Yet, the Court was very harsh on the Public Protector because she "does not fully understand her constitutional duty".[74]

[99] The Court does not, for instance, differentiate between a reasonable apprehension of bias and actual bias.[75] It also does not seem to appreciate that the Public Protector was entitled to defend her decision in the three applications to the end and – not to be punished for it. It concluded that the "Public Protector's meeting with the

[73] *Helen Suzman Foundation* above n 71 at para 36 and *Biowatch Trust* above n 24 at para 18.

[74] High Court judgment above n 7 at para 127.

[75] High Court judgment above n 7 at paras 101 and 123.

State Security Agency and the former Minister of State Security on 3 May 2017 and her discussion pertaining to the Reserve Bank cannot be justified in any manner, she should have engaged directly with the Reserve Bank if she was concerned about the security of the Reserve Bank".[76] As stated elsewhere, it is the predecessor of the State Security Agency that initiated the investigation. No automatic and unexplained stigma should thus be attached to meeting the State Security Agency and the Minister responsible for it. Why does the discussion of the security or vulnerability of the Reserve Bank with a national security agency justify punishment by a court of law? Which law, regulation or convention forbids that engagement and why?

[100] Be that as it may, a case was not made out for awarding personal costs against the Public Protector on an attorney and client scale. Awarding costs on that scale cannot be a sheer consequence of seeking to mark displeasure about a party's conduct. Factors that constitute the basis for that displeasure must be made clear and must justify the devastating consequences of that displeasure. For, it is a very serious decision with far-reaching financial, occupational and jurisprudential implications that must therefore be properly substantiated.

[101] Litigants and the public must never be left to guess what legal principle, if any, a court sought to or did rely on. Courts must say. Maybe the High Court premised its decision to award costs on an attorney and client scale on the manifest impropriety of the Public Protector's conduct. But, even assuming that to be so, which of her conduct is being relied on to that end? Is it her conduct during the investigation or an aspect of her persistent opposition of the three applications to the end or both?

[102] It is difficult to have the gravity of the Public Protector's conduct, assuming it is serious, live up to that of the Minister. I say this well aware that they, up to a point, both did not disclose information of varying degrees of significance, and each occupies a high constitutional office which "demands a greater commitment to ethical behaviour

[76] Id at para 108.

and requires high commitment to public service".[77] As stated already, there is no actual or reasonably foreseeable or comparable harm to be suffered by anybody for the negligent conduct of the Public Protector to qualify it as "gross" negligence and "bad faith". There is a lot of nit-picking and exaggeration of what her conduct entails.

[103] It must be reiterated that this Court did not award personal costs on an attorney and client scale against the Minister, whose conduct was with respect incomparably egregious. It was not only effectively designed to achieve non compliance with the order of this Court but also enabled a high degree of prejudice to the State. Additionally, it generated nerve-wracking public anxiety, about whether social grants would be paid, to the overwhelming majority of the most vulnerable of our people. And that award of personal costs against her was the correct decision to take. It is very difficult to understand why a comparatively harsher costs order would be deemed just and equitable in the case of the Public Protector.

[104] The Public Protector was about a noble constitutional and statutory assignment for the good of the public. She was exercising her section 182(1) power "to investigate any conduct in State affairs, or in the public administration . . . that is alleged or suspected to be improper or to result in any impropriety or prejudice".[78] Now, all the High Court lays emphasis on are her failures or apprehension of her partiality or lack of good faith. The brightly highlighted apparent corruption, fraud, illegality or impropriety involving the R1.125 billion bailout of Bankorp by the Reserve Bank has virtually disappeared into thin air. The errors of the Public Protector committed in the course of trying to get to the bottom of the Reserve Bank's apparent wrongdoing enjoy prominence in the High Court judgment. The Public Protector's legitimate, albeit arguably flawed, attempt to unearth and address an apparent illegality or impropriety, which is not an attempt to improperly benefit herself or another or to corrupt the system or prejudice anybody, has been turned upside down to make her look like a dishonest

[77] *Black Sash III* above n 20 at para 15.

[78] Section 182(1) of the Constitution.

constitutional office- bearer who is on a vindictive crusade against the innocent and squeaky-clean Reserve Bank. The good name or notoriety of a litigant ought not to look like it has a decisive role to play in litigation outcomes. Only a detached and justice and equity-driven assessment should inform the outcome.

[105] How the High Court moved from punitive costs against the institution of the Public Protector, as was the case with Absa, past ordinary costs against the Public Protector in her personal capacity, to costs from her own pocket on an attorney and client scale is difficult to understand and woefully unsubstantiated. The well- articulated bases for the trend-setting costs order in the matter of the Minister lays this reality bare and renders this injustice and misdirection clearly indefensible.

[106] The Public Protector was punished for not having kept a transcript or minutes, the equivalent of which she actually kept in the form of contemporaneous notes. She was also censured for the Dr Mokoka discrepancy, whose significance is in the least very suspect. The only perceptible reason for this strong irritation about Dr Mokoka's report is his criticism of the Reserve Bank, like all others who investigated it. In addition, costs on an attorney and client scale were awarded against her. It cannot be overemphasised that this by far exceeds the scale of displeasure visited upon the Minister whose conduct was extremely reprehensible or opprobrious. The question is why this gross inconsistency and how can it be sustained under the garb of justice and equity? More disturbing are the implications of this fast- moving trend for governance and the real risk of State functionaries being disabled to do their work without fear, favour or prejudice when certain personalities or interests are involved. I conclude that no sound explanation and no legal justification exists for personal costs against the Public Protector, particularly costs on an attorney and client scale.

Interference with the costs order

[107] The discretion exercised by the High Court when awarding personal costs on an attorney and client scale against the Public Protector is a "true" or "strong" discretion. It is a discretion that is not to be easily interfered with on appeal. And it would only be

permissible for this Court to interfere with that discretion if it can be shown that the court whose decision is under attack—

> "had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all relevant facts and principles."[79]

[108] What informs this cautious or restrained approach is the need for finality and judicial comity, which renders it permissible for appellate courts to interfere only when it is in the interests of justice to do so. In other words, only where deference by an appellate court to a court of first instance would allow a travesty of justice to linger and live on or where non-interference would help perpetuate an injustice or inequity, would it be permissible for an appellate court to intervene. But, that would be in circumstances set out above or similar circumstances designed to avert an injustice.

[109] Here, the High Court in awarding personal costs on an attorney and client scale was moved by a wrong principle of law and an incorrect appreciation of some of the all-important facts relied on.

[110] The notes of the meeting of 7 June 2017 set out the essence of that meeting, however cryptic they may have been. Objectively viewed, the notes contained the essentials of what a transcript or minutes would have been expected to contain. It matters not whether the Public Protector almost always records meetings electronically but did not do so this time around. For, there is no constitutional or legal requirement that she does so and the notes, containing the essence of the meetings, were kept and were made available to the Banks. It is that essence that enabled the Reserve Bank to criticise the Public Protector for her failure to afford it the opportunity to express its views for the second time before a final report was issued. Because the notes were

[79] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 112.

actually made available to the litigating Banks, it is a material misdirection on the facts, to rely on the absence of a transcript or minutes for awarding those personal punitive costs against a representative litigant, as if the Reserve Bank was kept completely ignorant of what happened. The High Court was thus influenced by a misdirection on the facts.

[111] The weight attached to the Public Protector's apparent reliance on Dr Mokoka's report is another incident of being influenced by a misdirection on the facts. That "pretext" holds no conceivable risk or harm to anybody. It could not have been meant to tilt the scales one way or the other to the advantage or disadvantage of any party or the State or public. After all, the illegality, corruption or impropriety of the lifeboat agreement had already been pronounced upon by at least two Judges and an international asset recovery entity. And the Public Protector opened up about the correct position by not only attaching Dr Mokoka's report but also confirming that she consulted Dr Mokoka after the final remedial action had been taken. An objective and detached examination of these issues does in my view point very far from the High Court's inferential conclusion of the intent to deceive or bad faith. The significance of the conflict or confusion around Dr Mokoka's report is with respect misunderstood or prejudicially exaggerated.

[112] The High Court concluded that the reason advanced by the Public Protector for consulting with the Presidency and the State Security Agency, namely that they were implicated, was disingenuous. In support of this conclusion, the High Court says that she turned down Absa's request to be consulted but granted a similar request by BFLF. The impression created is that two requests were made at more or less the same time and to the same incumbent. But, Absa's request was turned down by Ms Madonsela in 2013, whereas the BFLF request was made and granted by Ms Mkhwebane. The finding that Government and the Reserve Bank improperly failed to recover the R3.2 billion lent to Bankorp or Absa was already made in the provisional report. The only difference between the provisional and final reports is that the former says the allegation was partially proven, whereas the latter says it was substantiated. When the Banks were

consulted on the provisional report, this basis for claiming another round of consultation with them, already existed. This constitutes a misdirection on the facts.

[113] A reasonable apprehension of bias or an apparent failure to fully grasp the dictates of impartiality or independence, which I must add was not proven in this case, cannot be relied on for awarding personal costs against a representative litigant, let alone on an attorney and client scale. A reasonable apprehension of bias has always constituted the basis for recusal. It is not the same thing as evidence of bias or partiality. Unsurprisingly, the High Court never suggested that they constitute either gross negligence or bad faith. They are legal principles but wrong ones to rely on for awarding personal costs and on a double punitive scale against a representative litigant who happens to be a highly- placed constitutional office-bearer.

[114] Actual or perceived lack of good faith in conducting investigations is another wrong principle of law to rely on for personal costs on an attorney and client scale. And, persistent opposition of the three applications to the end cannot without any explanation as to what is legally reprehensible about it, constitute a proper ground in law for awarding personal costs on an attorney and client scale.

[115] Opposing a challenge to one's decision is, as stated already, legally permissible. Even if the Public Protector was wrong in law she was ordinarily entitled to defend her conduct and decisions. After all, it is those who knowingly defend the indefensible or oppose in circumstances where they ought reasonably to have known that their defence was hopelessly without merit and were thus abusing court processes, who should be punished for persistently opposing applications to the end. But, not every unsuccessful litigant is to be mulcted with costs on an attorney and client scale. Why then was it done here? There are no facts set out nor is there a legal principle advanced in support of this position of the High Court. To sanction the Public Protector's opposition with costs on an attorney and client scale requires a proper and sound explanation not merely a conclusion as is the case here. But none was given. And that amounts to being moved by a wrong legal principle.

[116] Both an award of personal costs and on an attorney and client scale against a representative litigant requires that a particular test be met and certain legal principles be shown to apply and its requirements met. The test is gross negligence or bad faith in connection with litigation or the fulfilment of public obligations. And the principles for awarding costs on an attorney and client scale are frivolity, vexation or manifest impropriety. Apart from a passing reference to exceeding the bounds of good faith and to bias or its reasonable apprehension, none was sought to be relied on and no explanation was provided for how they were met. Only general statements of disapproval, conclusions and even wrong legal principles were reflected. One such wrong principle was the elevation of the Public Protector's electronic recordal of the meetings from a practice to a legal requirement whose perceived breach must attract personal costs even on a punitive scale.

[117] It is harsh enough to be ordered to pay costs on an attorney and client scale in a representative capacity and even more so to have to pay normal costs out of one's own pocket as a representative litigant. It is devastatingly punitive to ask of an ordinary salary-earner, acting as a representative litigant, to pay costs, no matter the percentage, out of her own pocket on an attorney and client scale. Considerations of justice and equity dictate that the legal basis for awarding such costs, appreciating their disastrous consequences, must not only be correctly identified, but how they find application in this case must also be properly explained. "Gross" negligence and "bad faith" had to be demonstrated and so should the meeting of the test for imposing personal costs on an attorney and client scale have been explained. That did not happen.

[118] These incidents of being "influenced by wrong principles" and "a misdirection on the facts" allow this Court to interfere with the admittedly true or strong discretion exercised by the High Court. It places the order for personal costs on an attorney and client scale within a range of decisions that may permissibly be interfered with. This

Court's intervention would impose fidelity to the law and advance the interests of justice.[80]

[119] I am satisfied that the High Court "reached a decision which in the result could not reasonably have been made by a court properly directing itself to all relevant facts and principles" for all of the above reasons.[81] I would set aside the order for personal costs on an attorney and client scale and replace it with a normal costs order against the Public Protector, in her official capacity.

Leave to cross appeal

[120] The Reserve Bank launched an application for leave to cross-appeal conditional upon leave being granted to the Public Protector to appeal against the punitive out-of-own-pocket costs order. That relates to its dismissed prayer that a declaratory order be made that the Public Protector abused her office in the manner she conducted the investigation.

[121] Not only did the Reserve Bank seek to make its case for this order in its replying affidavit, but it is also highly unmeritorious. The abuse and the exact form it took is not properly set out to justify the declaration. Why that prayer was not included in its notice of motion, is also not properly explained. A litigant stands or falls by her founding papers. Absent clear and direct assertions to this end that would have allowed the Public Protector to confront the issue squarely, the application falls to be dismissed.

[122] But even assuming that the application complies with all procedural requirements, no case was made out for the order sought. The facts of this case demonstrate that the Public Protector sought not only to satisfy itself about but also to address or cause to be addressed, the wrongdoing which had been found to have been

[80] *Biowatch Trust* above n 24 at paras 45-7.

[81] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 11.

committed by the Reserve Bank. In the course of this exercise, she made minor errors that do not amount to abuse of office.

[123] The Reserve Bank comes across so strongly against the Public Protector, unlike Absa, as to give credence to a belief that it is a vindictive litigant that seems to yearn for untouchability. It comes across as wanting to teach the Public Protector and others an unforgettable lesson. And the message apparently sought to be communicated, through that lesson, is "you hold the Reserve Bank accountable like all others or subject it to public scrutiny at your peril". That seems to be what differentiates its attitude towards the conduct of the Public Protector from that of Absa. Whatever explains this rigorous and merciless pursuit of punishment, it ought to be said that nobody and no institution ought to use courts to entrench a culture of impunity or untouchability for itself or the similarly situated. What also needs to be said is that the Reserve Bank must not be handled as if, unlike all of us, it is supposed to be exempted from scrutiny and accountability regardless of what it might have done – under the ever-lurking subtle threat of potential harm to the economy or the displeasure of market forces. It must not be clothed with the mystified but real and highly undesirable mantle of untouchability or impunity. It too, like all of us, must be held transparently accountable. Otherwise the Constitution may well exclude it from investigation by all and scrutiny by courts. That it too must be investigated is evidenced by its self- initiated investigation by Davis J and others and the markets did not react negatively.

[124] Its assumed commitment to our foundational values of equal treatment before the law, transparency and accountability as well as its critical role in securing the well-being of our economy, demands of it to be transparent and clean. And it is understandable that this kind of investigation or attempt to recoup the money could scratch its institutional ego the wrong way. But the overwhelming public interest for it to clear its name in an investigative process for the preservation of public confidence or confidence of reasonable market forces, should impel it to welcome and make the most of the opportunity. Attempts to investigate the Reserve Bank, in relation the recovery

of the money, after several negative findings, cannot, however imperfect, amount to abuse of office.

[125] Like all others, the Reserve Bank must be openly but fairly held to account for its perceived improprieties or illegalities and should welcome the opportunity to cleanse itself of potentially ill-founded serious allegations or suspicions. That is how to generate genuine public confidence or earn the confidence of well-informed economic or market forces in the independence, accountability and transparency of our constitutional institutions, like the Reserve Bank. Genuine confidence or respect cannot be secured by an appearance of covering up or resistance to an investigation into allegations of impropriety or illegality. The Reserve Bank should in fact be insisting on the opportunity to clear its name publicly and speedily, rather than make itself look like it seeks to almost intimidate constitutional office-bearers out of investigating it as required by the Constitution.

[126] For these reasons, even if leave to cross-appeal were to be granted, the case has not been made out for a declaration that the Public Protector abused her office. The application for leave to cross-appeal would thus be dismissed.

Conclusion

[127] Every case is essentially about the pursuit of justice. Judicial Officers swear or affirm to "administer justice to all persons alike without fear, favour and prejudice, in accordance with the Constitution and the law",[82] before assumption of office. And courts are required by section 172(1)(b) of the Constitution to make orders that are "just and equitable". The order made by the High Court against the Public Protector was, for the reasons outlined above, not only impermissibly made, but it is also not just and equitable.

[82] Item 6(1) of Schedule 2 to the Constitution.

[128] The regard for and protection of the independence of the Office of the Public Protector should never depend on who the incumbent is and whether she is popular or unpopular. It is institutional protection and dignity that must be accorded. The order for personal costs on an attorney and client scale made against the Public Protector has a potentially chilling or weakening effect on that Office and all other high State offices, which exist to strengthen our constitutional democracy.[83] Sadly, altogether thin grounds largely based on misdirection on facts and wrong legal principles in relation to those costs were relied on.

[129] More importantly, it is ironic that the High Court was clearly unaware of elementary and critical legal principles that govern the award of these types of costs. It was obliged to know them. But, because it did not, it failed to apply them and that is fatal to its order. This notwithstanding the fact that they had been authoritatively and bindingly laid down by this Court more than eight months before the High Court delivered its own judgment. Ironically, as stated above, it was very hard on the new Public Protector, for her assumed ignorance of principles that govern her operations and for her comparatively minor and harmless infractions, committed in the course of trying to put to rest conduct of the Reserve Bank that was found three times already, to be corrupt or fraudulent or illegal or improper.

[130] The order for punitive costs against the Public Protector in her personal capacity would thus be set aside. Instead, the institution would, bear all the costs on the ordinary scale.

KHAMPEPE J and THERON J (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Mhlantla J and Petse AJ concurring):

[131] This matter calls for the adjudication of two core issues. First, whether this Court should interfere with the discretion exercised by the Full Court of the High Court of

[83] Section 181(1) of the Constitution.

South Africa, Gauteng Division, Pretoria (High Court) to award punitive costs in favour of the South African Reserve Bank (Reserve Bank) against the incumbent Public Protector, Ms Busisiwe Mkhwebane, in her personal capacity. Second, whether the Reserve Bank is entitled to the declaratory order it seeks to the effect that the Public Protector abused her office in conducting the investigation that gave rise to her impugned report.

[132] We have read the judgment penned by our brother Mogoeng CJ (first judgment). Regrettably, we are unable to agree with the first judgment's reasoning and proposed order.

Context

[133] The first judgment has adequately set out the background of this matter. It is not necessary for us to repeat this and we state the facts only insofar as is necessary.

[134] On 19 June 2017, the Public Protector published a final report in which she made adverse findings against numerous persons including the Reserve Bank.[84] The final report and the Public Protector's investigation had its genesis in a complaint submitted to the Public Protector by Mr Paul Hoffman (Hoffman complaint). The Hoffman complaint was founded on a report produced by CIEX, an asset recovery agency based in the United Kingdom (CIEX report). CIEX had undertaken to advise the South African Government on the recovery of a debt which CIEX alleged was owed by ABSA Bank Limited (Absa) and other entities to the Reserve Bank.[85] The alleged debt arose from financial support that the Reserve Bank had provided ostensibly under its function as a lender of last resort, from 1985 to 1991, to a number of small banking financial institutions that were in financial distress, including Bankorp Limited (Bankorp).[86] This

[84] See n 14.

[85] In terms of an arrangement with the South African National Intelligence Agency, CIEX was paid for its advisory services and further stood to receive a commission in respect of any funds that were recovered. The CIEX report is described by the Reserve Bank as a "bounty hunter's tender".

[86] See High Court judgment above n 7 at paras 22 and 25. In a letter to the Public Protector dated 30 August 2011, the Reserve Bank explained that central banks are deeply involved in systemic risk management because a close relationship exists between monetary and financial stability. In this regard, the Reserve Bank functions as a lender

financial assistance has become known as the so called "lifeboat". A series of lending agreements were concluded between the Reserve Bank and Bankorp, with specific dates for the repayments of several loan amounts extended over many years. In 1992, Absa purchased Bankorp for R1.23 billion.[87] The CIEX report concluded that corruption, fraud and maladministration had been committed in relation to the financial assistance that had been provided by the Reserve Bank.

[135] In 1998, the President issued a proclamation directing the Special Investigating Unit to investigate the financial assistance provided by the Reserve Bank to Bankorp (1998 SIU Proclamation).[88] The Special Investigating Unit was required to investigate "the granting, the terms and conditions and the repayment of the loan or loans and any other special assistance by the Reserve Bank to Bankorp to rescue Bankorp from bankruptcy". In its final report, the Special Investigating Unit concluded that the financial assistance given by the Reserve Bank to Bankorp was a simulated loan transaction which was in fact a donation. The Special Investigating Unit was of the view that any attempt to recover the donation may lead to a serious run on the banking sector in general, as well as specifically on Absa.[89]

[136] Pursuant to the Hoffman complaint, the then Public Protector, Ms Thuli Madonsela, investigated the financial support that was provided by the

---

of last resort when it is required to mitigate a financial crisis by providing assistance to support banks facing liquidity difficulties. This is to ensure that there is enough base money to off-set the public's desire to switch to cash in a time of financial crisis and to restore confidence in the failing bank.

[87] Absa alleged before the High Court that this purchase price constituted "fair value" for Bankorp and included the value of the financial assistance that had been provided by the Reserve Bank to Bankorp. This implies that Absa did not benefit from the financial assistance; it paid for it. The Reserve Bank alleged before the High Court that when Bankorp was acquired by Absa, the loan was extended to Absa on the same basis as it had been provided to Bankorp. Absa then allegedly used the interest differential between the loan and the government bonds which Bankorp had purchased with the loan to "expunge Bankorp's bad book". The Reserve Bank further alleged that Absa repaid the loan to the Reserve Bank in 1995.

[88] Referral of Matter to Existing Special Investigating Unit and Special Tribunal, GN R47 *GG* 18893, 7 May 1998.

[89] A bank run occurs when banking depositors withdraw their assets from the bank for fear that others will do the same, leaving no assets in place for those who do not withdraw. As more people withdraw their funds, the probability of a bank default increases, prompting more people to withdraw their deposits. Without intervention, the bank's reserves may become insufficient to cover the withdrawals, leading to a collapse. See Diamond and Rajan "Liquidity Risk, Liquidity Creation, and Financial Fragility: A Theory of Banking" (2001) 109 *Journal of Political Economy* 287; and Bryant "Model of Reserves, Bank Runs and Deposit Insurance" (1980) 4 *Journal of Banking and Finance* 335.

Reserve Bank to Bankorp and other financial entities. The Public Protector interviewed officials of the Reserve Bank in September 2013. In August 2016, the Reserve Bank received a request from the Public Protector to furnish certain information relating to Bankorp. Another meeting was held between the Reserve Bank and the Public Protector on 8 September 2016 which was also attended by the former Governor of the Reserve Bank, Dr Christian Stals.

[137] On 17 October 2016, the incumbent Public Protector, Ms Mkhwebane, assumed her duties. She alleges that by this time the investigation into the Hoffman complaint was already well under way and that a provisional report had already been drafted.[90]

[138] On 20 December 2016, the Public Protector sent a provisional report to various parties in order to provide them with an opportunity to respond to the findings made in the provisional report, including to the finding that the South African Government and the Reserve Bank had improperly failed to recover funds from Absa.[91] The provisional report also proposed certain recommendations for remedial action, including that—

(a) National Treasury and the Reserve Bank must recover the money still allegedly owed by Absa, being an amount of R1.125 billion;

(b) National Treasury and the Reserve Bank must put in place systems, regulations and policies to prevent "this anomaly in providing loans/lifeboats to banks in future"; and

(c) the President must *consider* whether it is necessary to appoint a commission of inquiry in terms of section 84(2) of the Constitution to investigate alleged apartheid era corruption as outlined in the CIEX report.[92]

[90] According to Ms Busisiwe Mkhwebane's founding affidavit in this application, the investigator who drafted the report left the Office of the Public Protector in December 2016.

[91] These parties included the President, the Reserve Bank and Absa.

[92] Section 84(2)(f) of the Constitution provides that the President is responsible for appointing commissions of inquiry.

[139] The President, the Reserve Bank and Absa responded in writing to the Public Protector's preliminary report. The President stated that the power to appoint a commission of inquiry is vested in the President who is, in any event, not bound to accept the advice of such a commission. Both the Reserve Bank and Absa responded by raising serious concerns about the correctness of the provisional factual findings made by the Public Protector, and cautioned that the remedial action was unlawful in numerous respects. They further submitted that they were severely prejudiced by the provisional report and demanded to be given forewarning of the publication of the final report so that they would be empowered to make further comments or take steps to protect their rights. In this regard, the Reserve Bank warned the Public Protector that:

> "The errors in the report are so serious that if they remain in the final report, they will likely bring instability to the South African financial markets and will require the Reserve Bank to take immediate urgent action in the courts to prevent the implementation of the remedial action pending a review of the final report."

[140] On 19 June 2017, the Public Protector published the final report. The final report found that the South African Government had improperly failed to implement the CIEX report and, together with the Reserve Bank, had failed to recover R3.2 billion from Bankorp or Absa. The Public Protector further concluded that the South African public was prejudiced by the conduct of the South African Government and the Reserve Bank.

[141] The remedial action recommended by the Public Protector in the final report differed substantially from that which had been recommended in the provisional report. The final remedial action consisted of two key aspects. First, it directed the Chairperson of the Parliamentary Portfolio Committee (Parliamentary Committee Chairperson) to take steps to amend section 224 of the Constitution in order to strip the Reserve Bank of its primary object of protecting the value of the currency and to change the Reserve Bank's consulting obligations with the Minister of Finance.[93] Second, the final

[93] Section 224(1) of the Constitution provides that "[t]he primary object of the Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic." Section 224(2) provides that—

report required the Special Investigating Unit to approach the President to re-open and amend the 1998 SIU Proclamation in order to recover misappropriated public funds unlawfully given to Absa in the amount of R1.125 billion.

[142] The release of the final report caused severe harm to the South African economy. This included a significant depreciation in the Rand and a sell off by non-resident investors of R1.3 billion worth of South African government bonds. The Reserve Bank launched an urgent application in the High Court to review and set aside the remedial action insofar as it related to the amendment of section 224 of the Constitution. The urgent application was not opposed by the Public Protector and the High Court reviewed and set aside, among others, this aspect of the remedial action.[94]

[143] The Reserve Bank launched a second review application in the High Court in respect of the second aspect of the remedial action in the final report (second review), namely, the re-opening and amendment of the 1998 SIU Proclamation. In its replying affidavit, the Reserve Bank sought further relief, namely a personal costs order against the Public Protector and a declarator that she had abused her office in conducting the investigation. The High Court upheld the second review, set aside the remaining remedial action report and made the disputed costs order. The High Court refused to grant the declaratory relief.

> "the South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters."

The amended wording of section 224 of the Constitution that is recommended in the final report would alter the primary object of the Reserve Bank and would oblige the Reserve Bank to consult with Parliament to "achieve meaningful socio-economic transformation".

[94] Urgent High Court judgment above n 59 at para 60.2.

Legal principles

[144] An important principle in this appeal is that courts exercise a true discretion in relation to costs orders.[95] A true discretion exists where the lower court has a number of equally permissible options available to it.[96] An appeal court will not lightly interfere with the exercise of a true discretion.[97] Ordinarily, it would be inappropriate for an appeal court to interfere in the exercise of a true discretion, unless it is satisfied that the discretion was not exercised judicially, the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[98] There must have been a material misdirection on the part of the lower court in order for an appeal court to interfere.[99] It is not sufficient, on appeal against a costs order, simply to show that the lower court's order was wrong.[100]

[145] An appeal court should be slow to substitute its own decision simply because it does not agree with the permissible option chosen by the lower court. The reason for this was explained by Moseneke DCJ in *Florence*:

> "Where a court is granted wide decision making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial

[95] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 85 and *Hotz v University of Cape Town* [2017] ZACC 10; 2018 (1) SA 369 (CC); 2017 (7) BCLR 815 (CC) at para 28.

[96] *Trencon* id.

[97] *Hotz* above n 95 at para 28.

[98] *Trencon* above n 95 at para 88; *Florence* above n 79 at para 113 and *National Coalition* above n 81 at para 11.

[99] *Swartbooi v Brink* [2003] ZACC 25; 2006 (1) SA 203 (CC); 2003 (5) BCLR 502 (CC) at para 23 and *Limpopo Legal Solutions v Vhembe District Municipality* [2017] ZACC 14; 2017 (9) BCLR 1216 (CC) (*Limpopo Legal Solutions I*) at para 17.

[100] *Limpopo Legal Solutions I* id.

> comity. It fosters certainty in the application of the law and favours finality in judicial decision making."[101]

[146] This Court has previously granted *de bonis propriis* costs (costs which a party is ordered to pay out of her own pocket as a penalty for improper conduct)[102] against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities,[103] and where they acted inappropriately and in an egregious manner.[104] The assessment of the gravity of the conduct is objective and lies within the discretion of the court.[105]

[147] This Court recently affirmed the test for personal costs orders against public officials. In *SASSA*, it held:

> "It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation."[106]

[148] In *SASSA*, the Minister of Social Development contended that personal costs orders against public officials like her are unconstitutional because they would breach the separation of powers. This Court rejected that argument and held that the Constitution itself is the source of the judicial power to order personal costs against public officials who are guilty of bad faith or gross negligence in conducting litigation and discharging their constitutional obligations.[107] It reasoned that the Constitution endows courts with the responsibility to uphold and enforce the Constitution, and the

---

[101] *Florence* above n 79 at para 113.

[102] *Pheko v Ekurhuleni Metropolitan Municipality (No. 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) at para 51.

[103] *Pheko* id at para 54.

[104] *Stainbank* above n 66 at para 52.

[105] Id at para 54.

[106] *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus Curiae)* [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) (*SASSA*) at para 37.

[107] Id at para 38.

imposition of personal liability for costs on public officials who act contrary to their constitutional obligations is an important tool to be used for this purpose.[108]

Grounds of appeal

[149] We deal with each of the five grounds advanced by the Public Protector as to why this Court should interfere with the High Court's costs order against her, in turn. These are—

(a) the personal costs award interferes with the independence of the Public Protector and will inhibit her from exercising her powers without fear, favour or prejudice;

(b) the Public Protector is immunised by section 5(3) of the Public Protector Act[109] as she acted in good faith;

(c) the Public Protector was not afforded a sufficient opportunity to deal with the personal costs order as the Reserve Bank only prayed for the order in its replying affidavit;

(d) in making the personal costs order, the High Court was influenced by wrong principles of law; and

(e) the High Court misdirected itself on the facts.

Compromising the independence of the Public Protector

[150] The Public Protector submits that if personal costs orders are granted against her, then she will always operate in fear of personal adverse costs orders and will be hampered in the performance of her constitutional obligations. She contends that a

[108] In *SASSA* id it was stated:

> "In her written submissions the Minister contended that to hold her personally liable for costs would constitute an impermissible encroachment on the powers of the other arms of government. She submitted that this Court lacks the authority to hold a Minister to account by ordering her or him to pay costs out of her or his pocket. There is no merit in this argument. As mentioned, *Black Sash 2* affirms the principle that public officials may be ordered to pay costs out of their own pockets if they are guilty of bad faith or gross negligence. The source of that power is the Constitution itself which mandates courts to uphold and enforce the Constitution. It is apparent from *Black Sash 2* that the object of a costs *de bonis propriis* order is to vindicate the Constitution."

[109] 23 of 1994.

personal costs order against her will be an "ever-present threat" to the Public Protector's independence, impartiality and ability to act without fear, favour or prejudice. She says that these orders may open the floodgates for similar applications in other matters where her conduct is reviewed, and may undermine the credibility of the Public Protector in the eyes of the public. The Public Protector submits that the High Court failed to properly consider the restraining effect that the personal costs order would have on the institutions established under Chapter 9 of the Constitution in the performance of their constitutional functions and obligations.

[151] The Office of the Public Protector is one of six Chapter 9 institutions established by section 181(1)(a) of the Constitution. In terms of section 181(2) of the Constitution, Chapter 9 institutions are independent and subject only to the law and the Constitution. This section further provides that the Public Protector must be impartial and exercise her powers and perform her functions without fear, favour or prejudice. Section 41(1)(c) of the Constitution further requires that the Public Protector, as an organ of State, provide effective and accountable government for the Republic as a whole. The Public Protector is also required to perform all her constitutional obligations diligently and without delay.[110] In terms of section 195(1) of the Constitution, the Public Protector is bound by the basic values and principles governing public administration, including, amongst others—

(a) a high standard of professional ethics;[111]

(b) the constitutional imperative to use resources efficiently, economically and effectively;[112]

(c) accountability;[113] and

(d) the constitutional imperative to foster transparency by providing the public with timely, accessible and accurate information.[114]

[110] Section 237 of the Constitution.

[111] Section 195(1)(a) of the Constitution.

[112] Section 195(1)(b) of the Constitution.

[113] Section 195(1)(f) of the Constitution.

[114] Section 195(1)(g) of the Constitution.

[152] As mentioned, the source of a court's power to impose personal costs orders against public officials is the Constitution itself.[115] The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly.[116] They are required to be candid and place a full and fair account of the facts before a court.[117]

[153] The purpose of a personal costs order against a public official is to vindicate the Constitution.[118] These orders are not inconsistent with the Constitution; they are required for its protection because public officials who flout their constitutional obligations must be held to account. And when their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer.[119] This Court has repeatedly affirmed the principle that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in certain circumstances.[120]

[154] In *Black Sash II*, this Court held that the common law rules regarding the granting of personal costs orders are well grounded and buttressed by the Constitution.[121] The traditional common law tests of bad faith and gross negligence

---

[115] *SASSA* above n 106 at para 38.

[116] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 82; *Njongi v MEC, Department of Welfare, Eastern Cape* [2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) at para 79; *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) (*Liquor Traders*) at para 49; *Mohamed v President of the Republic of South Africa* (*Society for the Abolition of the Death Penalty in South Africa and Another Intervening*) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 68; *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 17; and *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* [2001] ZASCA 85; 2001 (4) SA 1184 (SCA) at para 15.

[117] *Matatiele Municipality v President of the RSA* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) para 107 and *Western Cape Government v Ndiki* 2013 JDR 1109 (WCC) at para 77.

[118] *Black Sash II* above n 8 at para 8.

[119] *Gauteng Gambling Board v MEC for Economic Development, Gauteng* [2013] ZASCA 67; 2013 (5) SA 24 (SCA) para 54.

[120] *Black Sash II* above n 8 at paras 5-9; *SASSA* above n 106 at para 38; and *Swartbooi* above n 99 at para 7.

[121] Id *Black Sash II* at para 7.

must be infused by the Constitution.[122] Froneman J said that the question whether the conduct of a public official justifies the imposition of liability for personal costs can be answered by having regard to institutional competence and constitutional obligations. He went on to explain:

> "From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will be an overlap."[123]

[155] The Public Protector falls into the category of a public litigant.[124] A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.[125] The need to hold government to the pain and duty of proper court process is sourced in the Constitution itself.[126] This is because the Constitution regulates all public power and public officials are required to act in accordance with the law and the Constitution.[127]

[156] In a concurring judgment in *Matatiele Municipality*, Sachs J held that the constitutional injunction for our democratic government to be accountable, responsive and open implies that candour is required from government officials when they are before the courts.[128] This is also consistent with section 165(4) of the Constitution which requires organs of State to assist and protect the courts in order to ensure that

[122] Id at para 8.

[123] Id.

[124] *Liquor Traders* above n 116 at para 52 and *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 69.

[125] *Kirland* above n 116 at para 82.

[126] Id at paras 64-5.

[127] Id at para 88.

[128] *Matatiele Municipality* above n 117 at para 107.

they are effective. The Public Protector is therefore enjoined by the Constitution to observe the highest standards of conduct in litigation.

[157] Despite this clear authority that personal costs orders are constitutional and necessary in order to hold public officials to account when they fail, for example, to fulfil their constitutional obligations, the Public Protector argues for an exception in her case. There is no merit in the Public Protector's contention that the independence of her office and proper performance of her functions demand that she should be exempted from the threat of being mulcted with adverse personal costs orders. On the contrary, personal costs orders constitute an essential, constitutionally infused mechanism to ensure that the Public Protector acts in good faith and in accordance with the law and the Constitution.

[158] The imposition of a personal costs order on a public official, like the Public Protector, whose bad faith or grossly negligent conduct falls short of what is required, vindicates the Constitution. The Supreme Court of Appeal in *Gauteng Gambling Board* opined that public officials who act improperly in "flagrant disregard of constitutional norms" should be personally liable for legal costs incurred by the State.[129] The Supreme Court of Appeal reasoned that the imposition of personal liability might have a "sobering effect on truant public office bearers" and would avoid the taxpayer ultimately having to bear those costs.[130]

[159] The fears that the Public Protector has about the impact of a personal costs order on the institution of the Public Protector are unwarranted. Personal costs orders are not granted against public officials who conduct themselves appropriately. They are granted when public officials fall egregiously short of what is required of them. There can be no fear or danger of a personal costs award where a public official acts in

[129] *Gauteng Gambling Board* above n 119 at para 54.

[130] Id.

accordance with the standard of conduct required of them by the law and the Constitution.

[160] Furthermore, granting a personal costs order in a case where it is warranted will not open the floodgates for further personal costs orders because, as this Court has emphasised, whether a personal costs order should be granted must be determined "in the light of the particular circumstances of each and every case".[131] The only relevant question is whether the High Court misdirected itself in concluding that the Public Protector did not act in good faith, and behaved in an unacceptable and secretive manner.

Immunity under section 5(3) of the Public Protector Act

[161] The Public Protector submits that section 5(3) of the Public Protector Act creates an indemnification in her favour which protects her against being held personally liable for the Reserve Bank's costs. Section 5(3) provides:

> "Neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitution."

[162] The immunity which the Public Protector enjoys against personal liability under section 5(3) is only triggered when she acts in good faith. The High Court held that the Public Protector exceeded the bounds of this indemnification in the present matter.[132] To the extent that the Public Protector conducted herself in bad faith, the potential immunity she may otherwise enjoy under section 5(3) is of no assistance to her. The High Court found that the Public Protector acted in bad faith.[133] This Court has no

[131] *Pheko* above n 102 at para 51.

[132] High Court judgment above n 7 at para 128.

[133] The finding of bad faith on the part of the Public Protector is implied by the High Court's conclusion that the Public Protector exceeded the bounds of her potential indemnification under section 5(3) of the Public Protector Act, which the High Court recognised is only available in relation to conduct performed in good faith.

reason to interfere with this finding. Accordingly, this ground of appeal must be rejected. In any event, the ambit of the immunity afforded under section 5(3) is expressly limited to "anything reflected in any report, finding, point of view or recommendation made". It is doubtful whether this includes the Public Protector's exercise of her investigating powers, her conduct during the investigation, or the litigation associated with the final report.

Sufficient opportunity to be heard

[163] The Public Protector submits that the High Court erred in granting a personal costs order against her as the order was only sought by the Reserve Bank in its replying affidavit. According to the Public Protector, the Reserve Bank ought to have prayed for the personal costs order in its notice of motion, and its failure to do so deprived her of sufficient opportunity to deal with the issue in her pleadings.

[164] In *Black Sash II*, this Court held that if there is a possibility of a personal costs order against a State official, they must be made aware of the risk and should be given an opportunity to advance reasons why the order should not be granted.[134] This accords with the fundamental principle in our law that no one should be condemned without a hearing.[135]

[165] It is settled law that it is not necessary that there be formal notice of a request for a special costs order. The absence of a prayer for a personal costs order against a public official does not necessarily preclude the granting of such an order. It is sufficient that the party against whom this order is sought is informed that the order will be asked for and has an opportunity to advance reasons why the order should not be granted.[136]

[134] *Black Sash II* above n 8 at para 4.

[135] *MEC for Health, Gauteng v Lushaba* [2016] ZACC 16; 2017 (1) SA 106 (CC); 2016 (8) BCLR 1069 (CC) (*Lushaba*) at para 18.

[136] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 560B-C (*Shatz*); *African Dawn Property Transfer Finance 3 (Pty) Ltd v Tuscaloosa 37 (Pty) Limited* 2014 JDR 2530 (GP) at para 56; *Naidoo v Matlala N.O.* 2012 (1) SA 143 (GNP) at para 15; *Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 269H-270A; and *Sopher v Sopher* 1957 (1) SA 598 (W) at 600A-F.

[166] In her written submissions in this Court, the Public Protector conceded that all the facts which underpin the High Court's personal costs order against her were set out in detail by the Reserve Bank in its founding papers. There was thus ample opportunity for the Public Protector to deal with these facts in her answering affidavit before the High Court. The Reserve Bank's supplementary founding affidavit in the High Court also specifically called on the Public Protector to explain her conduct in light of the seriousness of the allegations that were made against her. She was alerted to the importance of explaining her impugned conduct. As a public litigant, the Public Protector cannot be permitted to benefit from any decision which she made to forgo this opportunity to fully explain her conduct. She was also expressly notified by the Reserve Bank in its replying affidavit that it would seek a personal costs order against her.

[167] It is clear from the facts of this matter that the Public Protector was given sufficient opportunity to plead to the allegations against her which informed the bases of the personal costs order, and to advance submissions as to why the order should not be granted. The record reflects that this question was fully ventilated during the hearing in the High Court.[137] There is accordingly no merit in the Public Protector's submission that the High Court was precluded from granting the personal costs order against her in the absence of the Reserve Bank praying for that order in its notice of motion.

Wrong principle of law

[168] According to the Public Protector, the High Court conflated the principles of bias and *audi alteram partem* (to hear the other party) in granting the personal costs order against her. The Public Protector submits that the personal costs order is premised on the High Court's finding that she was reasonably suspected of bias in terms of section 6(2)(a)(iii) of the Promotion of Administrative Justice Act[138] (PAJA) as she failed to afford the Reserve Bank or Absa an opportunity to be heard before publishing the final

[137] High Court judgment above n 7 at para 124.

[138] 3 of 2000.

report. According to the Public Protector, this implies that the High Court wrongly "found bias on an *audi* question".

[169] In the second review, both the Reserve Bank and Absa successfully reviewed the final report on the independent grounds that the Public Protector was biased against them and that she had failed to conduct a fair investigation.[139] In finding that the Public Protector was reasonably suspected of bias, the High Court had regard to various considerations, including the circumstances in which she had failed to afford either the Reserve Bank or Absa an opportunity to comment on the new adverse findings that were made against them in the final report.[140] The High Court found that the Public Protector had met with the Presidency and the State Security Agency to provide them with an opportunity to consult with her in this regard.[141] The High Court also found that the Public Protector was perspicuously aware of her obligation under section 7(9) of the Public Protector Act to provide the Reserve Bank and Absa with an opportunity to respond to the adverse findings against them.[142] The High Court also considered these circumstances to be relevant to the question whether the procedure adopted by the Public Protector in concluding the final report was fair.[143]

[170] The fact that the Public Protector did not afford the Reserve Bank or Absa an opportunity to respond to the new adverse findings against them does not in itself justify an inference of bias. This is because procedural unfairness and bias are two independent grounds of review under PAJA. It does not, however, follow that the High Court wrongly conflated these principles when it found that the Public Protector was reasonably suspected of bias in light of factors which are also relevant to procedural unfairness. The High Court was cognisant that it would be wrong "to assume that a fundamental breach of administrative justice necessarily indicates bias on the part of

[139] High Court judgment above n 7 at paras 101 and 103.

[140] Id at paras 100-1.

[141] Id at paras 96 and 100.

[142] Id at para 100.

[143] Id at para 103.

the administrator".[144] The context in which a public official conducts themselves in a procedurally unfair manner may, however, indicate bias on the part of that official. That the High Court used this as evidence of bias does not mean that it conflated the two grounds of review. In our view, the High Court did not conflate the principles of bias and *audi alteram partem*.

Misdirection on the facts

[171] According to the Public Protector, the High Court misdirected itself on the facts in imposing personal liability on her for the Reserve Bank's costs. As mentioned, one of the grounds upon which an appeal court can interfere with the exercise of a discretion in relation to costs is where the discretion was influenced by a misdirection on the facts.[145]

[172] The High Court held that the Public Protector had acted in bad faith; did not fully understand her constitutional duty to be impartial and perform her functions without fear, favour or prejudice; had failed to produce a full and complete record of the proceedings under rule 53 of the Uniform Rules of Court; and had failed to fulfill her obligation to be frank and candid when dealing with the court.[146] These findings are underpinned by various factual findings made by the High Court regarding the conduct of the Public Protector during the second review and in the performance of her constitutional duties.

[173] The Public Protector challenges the facts relied upon by the High Court in reaching these findings. She especially challenges the findings made by the High Court regarding her meetings with the Presidency and the State Security Agency. She also submits that the High Court misdirected itself on the representations which she made in

[144] Id at para 92.

[145] See [144] above.

[146] High Court judgment above n 7 at paras 107 and 127-8.

her pleadings regarding her ostensible reliance on expert economic advice in producing the final report.

Meetings with the Presidency and the State Security Agency

[174] By the end of February 2017, the Public Protector had received written responses to her provisional report from the Reserve Bank, Absa and the Presidency. The Public Protector proceeded to expand the reach of her investigation and held meetings with, among others, the Presidency and the State Security Agency.

[175] Despite the general practice within the Public Protector's office of producing transcripts of all meetings conducted during an investigation, no transcripts of the Public Protector's meetings with the Presidency or the State Security Agency have been furnished by the Public Protector.

[176] The Public Protector was obliged to provide a full and frank account of the impugned conduct. This required her to explain, in particular—

(a) why the final report did not disclose meetings that she had held with the Presidency shortly before it was issued;
(b) why she held meetings with the Presidency and the State Security Agency but not with the parties most affected by her new remedial action;
(c) why she discussed amending the Constitution to take away the central function of the Reserve Bank with the Presidency;
(d) why she discussed the vulnerability of the Reserve Bank with the State Security Agency; and
(e) why she recorded and transcribed other meetings held during the conduct of the investigation, but failed to record or transcribe the meetings with the Presidency and the State Security Agency.

[177] These explanations were called for because, as the Reserve Bank made plain in its papers, the engagements with the Presidency and the State Security Agency gave rise to a serious concern about whether the Public Protector had conducted the

investigation independently and impartially. They also gave rise to a reasonable apprehension on the part of the Reserve Bank that the Public Protector was biased against it.

[178] The record contains handwritten notes of a meeting held between the Public Protector and the State Security Agency on 3 May 2017.[147] These reveal that the vulnerability of the Reserve Bank was discussed. The Reserve Bank contended that this discussion with the State Security Agency about the vulnerability of the Reserve Bank was irregular. It said:

> "It is unclear on what possible basis the vulnerability (and vulnerability to whom) of the Reserve Bank was relevant to the Public Protector's investigation into the CIEX report."

[179] The Reserve Bank expressed its concern that this discussion appeared to be aimed at undermining the Reserve Bank and indicated that by May 2017, the Public Protector's investigation had turned from examining the question whether the government had implemented the CIEX report into an attack on the Reserve Bank.

[180] In her answering affidavit in the High Court, the Public Protector admitted to the meeting with the State Security Agency and confirmed that Minister Mahlobo had also been in attendance. The Public Protector, however, failed to explain why she discussed the vulnerability of the Reserve Bank at this meeting. In light of the serious adverse inferences which can be drawn from these facts, as well as the Public Protector's heightened duty towards the Court as a public litigant, an explanation was clearly called for.

[181] The Public Protector's explanation of the meeting with the State Security Agency is not only woefully late but also unintelligible. In the High Court, the Public Protector

[147] These handwritten notes were originally included by the Public Protector in the confidential section of the record. The claim of confidentiality has, however, been waived.

ignored the serious concern raised by the Reserve Bank that she was discussing its vulnerability with the State Security Agency. In this Court, no explanation was offered in her founding affidavit. In her replying affidavit, for the first time, she purports to explain this discussion, where she denies that the notes of the meeting with the State Security Agency indicate that she had discussed the vulnerability of the Reserve Bank with it. However, she goes on to say:

> "The vulnerability aspect as entailed in the notes related to the meeting with SSA [State Security Agency], wherein Judge Heath's media statement relating to his fear of 'run on the banks' was discussed to mean SARB's [the Reserve Bank's] vulnerability with regard to its mandate."

[182] With due respect to the Public Protector, this makes no sense. This Court, like the High Court, is left with no clarity on why the vulnerability of the Reserve Bank was discussed with the State Security Agency during an investigation into government's failure to implement the CIEX report.

[183] It is disturbing that there is no explanation from the Public Protector as to why none of her meetings with the Presidency were disclosed in the final report. This is especially so as the final report contained a section which listed the meetings that she held during her investigation. Evidence that the Public Protector had met with the Presidency surfaced for the first time in the record which she produced before the High Court under rule 53 of the Uniform Rules of Court. The record contained handwritten notes which indicate that the Public Protector met with the Presidency's legal advisors on 7 June 2017, twelve days prior to the publication of the final report.[148] There are thus hand written notes for the meetings the Public Protector had with the State Security Agency and the Presidency on 3 May 2017 and 7 June 2017 respectively. The Reserve Bank has raised concerns about these meetings.

[148] Similarly, these handwritten notes were originally included by the Public Protector in the confidential section of the record. The claim of confidentiality has, however, also been waived.

[184] The Public Protector confirmed in her answering affidavit in the High Court that she had also held a second, previously undisclosed meeting with the Presidency on 25 April 2017. She annexed correspondence regarding this meeting to her answering affidavit. These documents were not included in the rule 53 record she produced.[149]

[185] The Public Protector was, however, required to produce a full and complete record of the proceedings under review in terms of rule 53 of the Uniform Rules of Court. This included "every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially."[150] An essential purpose of this obligation is to enable a court to perform its constitutionally entrenched review function.[151] This gives effect to the rights of the parties under section 34 of the Constitution to have justiciable disputes decided in fair public hearings with all the issues being ventilated.[152] It also safeguards parties' ability to enforce their rights under section 33 of the Constitution to administrative action that is lawful, reasonable and procedurally fair. The record was essential to enable the reviewing applicants to understand what occurred during the investigation that led to the impugned remedial action and to equip the court to ensure the proper administration of justice in the case.[153]

[186] The record that was produced by the Public Protector was thrown together, with no discernible order or index, and excluded important documents. The Public Protector is wrong when she claims that she "filed the entire record". She did not. She omitted pertinent documents from the record, some of which were only put up for the first time as annexes to her answering affidavit in the High Court, and others, which were disclosed for the first time in this Court.

[149] High Court judgment above n 7 at para 107.

[150] *Johannesburg City Council v The Administrator Transvaal* (1) 1970 (2) SA 89 (T) at 91H.

[151] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 14.

[152] Id.

[153] Id at para 13.

[187] The Public Protector's failure to include these documents in the record, or to account for this failure, stands in stark contrast to her heightened obligation as a public official to assist the reviewing court.

[188] In the High Court, the Public Protector provided the following explanation of the meeting with the Presidency on 25 April 2017:

> "From the discussion during our meeting, I became concerned that my draft remedial action to direct the President to establish a Judicial Commission may face similar difficulties as currently faced in the State of Capture report."

The Public Protector alleged that this concern arose as there was already a "legal determination pending, in the review application of the State of Capture report, concerning whether [her] office can direct the President to establish a Commission of [I]nquiry".

[189] It is, however, noteworthy that the Public Protector's draft remedial action did not direct the President to establish a commission of inquiry. Instead, it only required the President to *consider* whether to establish a commission of inquiry. This demonstrates that the Public Protector had already taken account of the pending litigation regarding the State of Capture report (or at the very least had appreciated the underlying legal issue) when she issued her preliminary report for comment in December 2016. It therefore could not have been "from the discussion during a meeting" with the Presidency on 25 April 2017 that she became concerned about directing the Presidency to appoint a commission of inquiry. By the time she met with the Presidency in April 2017, she had already ensured that her remedial action did not direct the President to appoint a commission of inquiry but rather to *consider* doing so. The meeting of 25 April 2017 remains shrouded in mystery. The Public Protector's explanation of what was discussed is obscure.

[190] The Public Protector's failure to deal pertinently and responsibly with the serious accusations made against her impartiality in light of these meetings meant that the High

Court was left with only the handwritten notes as evidence of what was discussed at the meetings and no countervailing account from the Public Protector. This led the High Court to conclude that "the question remains unanswered as to why [the Public Protector] acted in such a secretive manner and she does not give an explanation for doing so".[154]

[191] In her founding and replying affidavits before this Court, the Public Protector has endeavored to explain the inadequacies of her explanation in the High Court. But this is too little too late. This Court is required to determine whether, on the facts presented to the High Court (and not those that have subsequently been volunteered), the High Court materially misdirected itself in granting personal costs against the Public Protector.[155]

[192] The subsequent explanations ought, therefore, not to have a bearing on this appeal. However, even if this Court were to take them into account, they do not assist the Public Protector. Conversely, they compound the case against her.

[193] In her founding affidavit in this Court, the Public Protector sought to distance herself from the explanation which she provided to the High Court about her meeting with the Presidency on 25 April 2017. In this Court, the Public Protector claims that the meeting was a "meet and greet" with the President's legal advisor. In support of this claim, the Public Protector annexed further correspondence with the Presidency to her founding affidavit. She also claims that she was mistaken to describe the meeting in her pleadings before the High Court in a manner which "created the impression that it was more than an introductory meeting". She explains this mistake as being—

> "occasioned by the hurried manner in which [her] answering affidavit had to be prepared within the very tight timeframes set during the case management process thus

[154] High Court judgement above n 7 at para 116.

[155] *Attorney-General, Free State v Ramokhosi* 1999 (3) SA 588 (SCA); [1999] JOL 4715 (A) at para 8 and *R v Verster* 1952 (2) SA 231 (A); [1952] 2 All SA 380 (A) at 236.

> putting pressure on [Ms Mkhwebane] and [her] legal representatives to study voluminous papers in three consolidated applications within a few days."

[194] The Public Protector had, however, more than two months to answer the Reserve Bank's supplementary founding affidavit in the High Court. Her explanation for the mistake which she made in her answering affidavit also does not account for her failure to be frank and candid with the High Court about her meetings with the Presidency. It follows that the High Court did not misdirect itself in finding that the Public Protector failed to either fully or genuinely disclose her meetings with the Presidency.[156]

[195] The High Court also correctly found that the Public Protector was totally silent in her answering affidavit about her meeting with the Presidency on 7 June 2017.[157] This conduct clearly falls foul of her obligation as a public litigant to be candid with the court and violates the standards expected of a Public Protector in light of her institutional competence. The High Court was correct in holding that the Public Protector—

> "failed to realise the importance of explaining her actions in this regard, more particularly the last meeting she had with the Presidency [on 7 June 2017]. This last meeting is also veiled in obscurity if one takes into account that no transcripts or any minutes thereof have been made available."[158]

[196] Before this Court, the Public Protector attempts to explain her failure to disclose the meeting with the Presidency on 7 June 2017 in the final report on the basis that the meeting was "covered by the Presidency's response to the provisional report". The Public Protector had annexed the response by the Presidency to her answering affidavit before the High Court. According to the Public Protector, the Presidency had requested a meeting with her in order to clarify its response to the provisional report.

---

[156] High Court judgment above n 7 at paras 127-8.

[157] Id at para 94.

[158] Id at para 127.

[197] The Presidency's response to the provisional report, however, neither requests a further meeting with the Public Protector nor makes any mention of the Presidency's wish to clarify its response. It is also noteworthy that the Public Protector states in her founding affidavit before this Court that her meeting with the Presidency on 7 June 2017 concerned the new remedial action which she had proposed in the final report. This contradicts her claim that the meeting concerned a request by the Presidency to clarify its response to the provisional report. The provisional report axiomatically did not contain the new remedial action proposed by the Public Protector. In any event, it is unclear how this meeting request by the Presidency could ever be capable of explaining the Public Protector's failure to disclose in her final report that she had met with the Presidency on 7 June 2017.

[198] In this Court, the Public Protector also endeavoured to overcome the deficiencies in her explanation in the High Court. She says that she confused the two meetings that she had had with the Presidency. The salient features of the Public Protector's new explanation are these. When the Public Protector referred to the 25 April 2017 meeting in her answering affidavit in the High Court, she ostensibly meant to refer to the 7 June 2017 meeting because the meeting on 25 April 2017 was only a meet and greet with the Presidency. According to the Public Protector, the 25 April 2017 had nothing to do with the investigation.

[199] In addition, the Public Protector says in this Court that her 7 June 2017 meeting with the Presidency did relate to the investigation. According to Public Protector, it had been requested in the letter sent on 28 February 2017 by the Presidency to the Public Protector in response to the provisional report that had been received. According to the Public Protector, the request from the Presidency for the 7 June 2017 meeting was in order to clarify the President's response to the provisional report. As, however, mentioned above, the President's response to the provisional report made no request for a meeting.

[200] This prompted the Public Protector to file a replying affidavit in this Court, in order to explain, for a third time, the precise origin and content of the meeting with the Presidency on 7 June 2017. In her replying affidavit, the Public Protector says that there was an error in her founding affidavit in this Court. She concedes that the President's response to the provisional report did not request a meeting. She explains that she mistakenly referred to this document as containing the request by the Presidency for a meeting to clarify its response to the provisional report. She said she had meant to refer to the next document in the High Court papers.

[201] The document that the Public Protector, in her replying affidavit in this Court, contends is the request by the Presidency for the meeting to clarify its response to the provisional report, is the request for the 25 April 2017 meeting. This is the meeting that the Public Protector has already explained to this Court had nothing at all to do with the investigation. Thus, despite three successive explanations for the 7 June 2017 meeting with the Presidency, the Public Protector still has not come clean and frankly explained why the meeting was held.

[202] In this Court, the Public Protector's explanations are contradictory. On the one hand, the Public Protector says that the meetings with the Presidency had "nothing to do with the substance of the content of [her] Report" and that they did not discuss the remedial action recommended in the final report before its publication. On the other hand, she confirms that the handwritten notes of the meeting of 7 June 2017 set out "what was discussed at the meeting". The handwritten notes of the meeting with the Presidency on 7 June 2017 record that—

(a) the Public Protector and the Presidency discussed the 1998 SIU Proclamation, its re-opening through amendment and the inclusion of other matters like those involving Nedbank in the new proclamation. This included the new remedial action recommended in the final report;

(b) extensive details about the investigation into the CIEX report were discussed, including the interview with Dr Stals; and

(c) the Public Protector's engagements with Mr Goodson were discussed. This included remedial action to change the Constitution around the central function of the Reserve Bank.

It is therefore clearly contradictory for the Public Protector to claim that the new remedial action was not discussed with the Presidency.

[203] The Public Protector's dogged insistence that the substance of her remedial action in the final report was not discussed with the Presidency is contradicted by her own confirmation that the handwritten notes of the meeting held on 7 June 2017 reflect what was discussed. The two people from her office who attended the meeting with her have also confirmed under oath that the handwritten notes correctly reflect what was discussed at the meeting.

[204] The Public Protector's explanation of the meeting of 7 June 2017 with the Presidency was, and still is, woefully inadequate. As mentioned, the handwritten notes of that meeting indicated that the Public Protector and the Presidency had discussed amending the Constitution to strip the Reserve Bank of its central function. It also reflected that the Public Protector had discussed her new remedial action of amending the 1998 SIU Proclamation with the Presidency. No other party had been given an opportunity to comment on the new remedial action.

[205] In this Court, the Public Protector has contended that the adverse findings made against her by the High Court were based on innocent errors on her part. The Public Protector's persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes. This is not a credible explanation. The Public Protector has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalised the report. The Public Protector's conduct in the High Court warranted a *de bonis propriis* (personal) costs order against her because she acted in bad faith and in a grossly unreasonable manner.

[206] The Reserve Bank, this Court and the public are entitled to know why the Public Protector discussed the new remedial action to amend the Constitution and the 1998 SIU Proclamation with the Presidency when she discussed it with no other affected party. The Reserve Bank, at the very least, is entitled to know why amending the Constitution's provisions around the powers of the Reserve Bank was only discussed with the Presidency and not with the Reserve Bank. The Reserve Bank is also entitled to an explanation why its vulnerability was discussed with the security arm of the State. In the absence of an explanation from the Public Protector, it is not for this Court to consider various reasons why these discussions may have been held with the Presidency and the State Security Agency. This would entail speculation.

[207] The Public Protector's entire model of investigation was flawed. She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report. This type of conduct falls far short of the high standards required of her office.

Reliance on expert economic advice

[208] The Public Protector submits that the High Court was mistaken in finding that she had "pretended" that she had relied on the advice of an economist, Dr Tshepo Mokoka, when she compiled the final report. In her answering affidavit in the High Court, the Public Protector relied extensively on a report compiled by Dr Mokoka which she annexed to her affidavit.[159] In this affidavit, the Public Protector stated:

> "where I make averments relating to economics I do so on the basis of advice received from economic experts during the course of the investigation of the complaint referred to below, which advice I accept as correct."

[159] The Reserve Bank have identified 23 sections of the Public Protector's answering affidavit in the High Court which directly replicate Dr Mokoka's report.

[209] This is not a statement without significance in the context of the Public Protector's investigation because the economic rationale of the so-called "lifeboat" was an important aspect of the investigation. What this passage sought to convey was that the statements by the Public Protector about economics were based on the advice she received *from economic experts during the investigation*. Dr Mokoka was, however, consulted by the Public Protector only after the second review was launched.

[210] There were numerous sections of the Public Protector's answering affidavit that were directly replicated from Dr Mokoka's report. This led the High Court to conclude that the Public Protector had "failed to make a full disclosure when she pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report".[160]

[211] In her affidavits in this Court, the Public Protector contends that she did not misrepresent her reliance on Dr Mokoka's report in the High Court. She says that she consulted Mr Stephen Mitford Goodson, a well-known author and former non-executive director of the Reserve Bank during the investigation. But Mr Goodson is not an economic expert and the Public Protector never sought to qualify him as one. She could not, therefore, have been referring to Mr Goodson when she said in the High Court that the averments in her affidavit relating to economics were based on the advice of *economic experts* received during her investigation. The only person she qualified as an expert was Dr Mokoka. The statements in the affidavit relating to economics ought not, therefore, to have included the input from Dr Mokoka because he was not consulted *during the investigation.*

[212] In her replying affidavit in this Court, the Public Protector further states that both Dr Mokoka and Mr Goodson's views were taken into account in the preparation of the final report. In argument before this Court, counsel for the Public Protector submitted

[160] High Court judgment above n 7 above at para 128.

that this statement was clearly a good faith factual mistake and is a *non sequitur* (a statement that does not follow logically from, or is not clearly related to, the premises) in light of the rest of the contents of the Public Protector's replying affidavit. If it is a "mistake", it is one more in her basket of "mistakes". In any event, it fails to advance her appeal.

[213] In a third affidavit before this Court, filed with her written submissions, the Public Protector explains that in the High Court she meant to say that she relied on Dr Mokoka's evidence only as "corroborative evidence" for the purposes of responding to the review applications. That distinction was not made in the affidavits before the High Court. There was no careful delineation between the views that the Public Protector formed during her investigation based on the interview she had with Mr Goodson on the one hand, and the economic analysis of the "lifeboat" that she procured from Dr Mokoka after the investigation, on the other.

[214] Without this delineation, the affidavit in the High Court was misleading because it conveyed that the economic analysis that underpinned the report was based on expert economic advice, which it was not. The new explanation in this Court does not assist the Public Protector because her conduct still falls short of the standard expected of public officials in litigation. That standard is for full and frank disclosure. The Public Protector's explanations are neither.

[215] This distinction was not disclosed by the Public Protector in the High Court and her explanation accordingly does not assist her. The Public Protector's ostensible hidden intention, belatedly disclosed in this Court, is in our view incapable of disturbing the High Court's finding that she pretended to have relied on Dr Mokoka's report in investigating the complaint.

[216] The argument that the High Court was mistaken when it found that the Public Protector was not candid with the Court[161] about her reliance on expert economic advice cannot be sustained.

Conclusion on personal costs order

[217] The Public Protector either failed entirely to deal with the allegations that she was irresponsible and lacking in openness and transparency, or, when she did address them, offered contradictory or unclear explanations. She gave no explanation as to why there were no transcripts of the meetings with the Presidency and the State Security Agency and why the vulnerability of the Reserve Bank was discussed with the State Security Agency. No explanation was provided for the meeting with the Presidency on 7 June 2017. Instead, another meeting with the Presidency, held on 25 April 2017, was disclosed for the first time by the Public Protector in her answering affidavit in the High Court.

[218] There is no merit in any of the grounds of appeal advanced by the Public Protector to justify this Court's interference in the High Court's exercise of its true discretion to order that the Public Protector pay 15% of the Reserve Bank's costs in her personal capacity. There was no material misdirection on the part of the High Court in relation to the personal costs order. The personal costs order must stand.

Punitive costs order

[219] The High Court ordered that the Public Protector must pay the Reserve Bank's costs on a punitive attorney and client scale. The High Court reasoned that a punitive costs order was justified by reason of the same circumstances which warranted the imposition of personal costs.[162] These circumstances included: (a) the Public Protector's failure to fully understand her constitutional duty to be impartial and perform her functions without fear, favour or prejudice; (b) the Public Protector's failure

[161] Id.

[162] Id at para 129.

to disclose in the final report that she had meetings with the Presidency on 25 April 2017 and 7 June 2017; (c) the Public Protector's silence in the High Court about her meeting with the Presidency on 7 June 2017; (d) the Public Protector's failure to meet with the reviewing parties; (e) the Public Protector's failure to realise the importance of, and failure to make, full disclosure; and (f) the Public Protector having pretended that she had acted on advice from economic experts in compiling the final report.[163] The High Court's judgment on this aspect reads:

> "Having regard to all the above considerations, we have to conclude that this is a case where a simple punitive costs order against her in her official capacity will not be appropriate. This is a case where we should go further and order the Public Protector to pay at least a certain percentage of the costs incurred on a punitive scale."[164]

[220] It does not follow that a punitive costs order will always be justified in circumstances where a personal costs order is warranted. An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment, be viewed as "double punishment". While the test for awarding a personal costs order or costs on a punitive scale may overlap, an independent, separate enquiry should be carried out by a court in respect of each order. Both personal and punitive costs orders are extraordinary in nature and should not be awarded "willy-nilly", but rather only in exceptional circumstances.[165]

[221] This Court has endorsed the principle that a personal costs order may also be granted on a punitive scale.[166] The punitive costs mechanism exists to counteract

---

[163] Id at paras 127-8.

[164] Id at para 129.

[165] *SS v VV-S* [2018] ZACC 5; 2018 JDR 0275 (CC); 2018 (6) BCLR 671 (CC) at paras 39-41; *Limpopo Legal Solutions v Eskom Holdings Soc Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) (*Eskom*) at para 20; *United Printing and Publishing Co v John Haddon & Co (Africa) Ltd* 1916 AD 474; *Plastic Converters Association of South Africa* above n 6 at para 46; and *Davis* above n 30 paras 25-6.

[166] *Mtuze v Bytes Technology Group South Africa (Pty) Ltd* [2013] ZACC 31; 2013 JDR 1998 (CC); 2013 (12) BCLR 1358 (CC) at paras 4-5 and 9.

reprehensible behaviour on the part of a litigant.[167] As explained by this Court in *Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by them in the litigation.[168] Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation.[169] An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.[170]

[222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case.[171] A court is bound to secure a just and fair outcome.[172]

[223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant.[173] Since then this principle has been endorsed and applied in a long line of cases and remains applicable.[174] Over the years, courts have awarded costs on an

---

[167] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 84.

[168] *Eskom* above n 165 at paras 36-7.

[169] Id.

[170] *President of the Republic of South Africa v Quagliani; President of the Republic of South Africa v Van Rooyen; Goodwin v Director-General, Department of Justice and Constitutional Development* [2009] ZACC 9; 2009 (2) SA 466 (CC); 2009 (8) BCLR 785 (CC) at para 11.

[171] *De Lacy v South African Post Office* [2011] ZACC 17; 2011 JDR 0504 (CC); 2011 (9) BCLR 905 (CC) at paras 116-7 and 123.

[172] *Limpopo Legal Solutions I* above n 99 at para 33 and *Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging* 1946 AD 597 at 607.

[173] *Orr v Solomon* 1907 TS 281. See *Nel* id at 609 where it was held:

> "Now if a trial judge is satisfied that a defendant's conduct in connection with the subject matter of the proceedings was fraudulent that seems to me a ground on which he may be entitled in a particular case to exercise his discretion in favour of an award of attorney and client costs to the successful party."

[174] *Eskom* above n 165 at paras 35 and 37; *Liquor Traders* above n 116 at para 48; and *Swartbooi* above n 99 at para 27.

attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct;[175] vexatious conduct;[176] and conduct that amounts to an abuse of the process of court.[177]

[224] In *Eskom*, this Court emphasised that a costs award falls within a court's discretion and that there are limited grounds for an appellate tribunal to intervene.[178] The punitive costs order in that matter was held to have been justified as the applicant had abused the High Court's processes, misled the Court, and caused severe prejudice to the respondent.[179] In *AB*, the Minister of Social Development challenged a punitive costs order which the High Court had granted against her in her official capacity.[180] This Court held that the High Court decision was justified in light of the Minister's flagrant disregard of her duty to ensure that all relevant evidence was timeously placed before the Court and the dilatory manner in which she conducted the proceedings in almost every step she was required to take.[181] This Court held that "[t]he High Court's exercise of discretion on costs cannot, in these circumstances, be interfered with".[182]

---

[175] *MEC for Economic Affairs, Environment and Tourism v Kruisenga* [2010] ZASCA 58; 2008 (6) SA 264 (SCA) at paras 77–80; *Law Society, Northern Provinces v Mogami* [2009] ZASCA 107; 2010 (1) SA 186 (SCA) at para 31; *Davis* above n 30 at para 28; *Nordbak (Pty) Ltd v Wearcon (Pty) Ltd* 2009 (6) SA 106 (W) at 117H; *Bernert v Swanepoel* 2009 (4) All SA 440 (GSJ) at 443b–d; *Spieth v Nagel* 1997 JDR 0375 (W) at 18; *Friederich Kling GmbH v Continental Jewellery Manufacturers*; *Speidel GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C) at 975I-976E; *BEF* (*Pty*) *Ltd v Cape Town Municipality* 1990 2 SA 337 (C); *Jooste v Minister of Police* 1975 (1) SA 349 (E) at 356–7; *Simmons v Gilbert Hamer & Co Ltd* 1962 (2) SA 487 (D) at 496H-498C; *Van Dyk v Conradie* 1963 (2) SA 413 (C) at 418E; and *Suzman Ltd v Pather and Sons* 1957 (4) SA 690 (D) at 690G-691A.

[176] *Thunder Cats Investments 49 (Pty) Ltd v Fenton* 2009 4 SA 138 (C) at paras 33–4; *Page v ABSA Bank Ltd t/a Volkskas Bank* 2000 (2) SA 661 (E) at 667A-F; *SA Droëvrugtekoöperasie Bpk v SA Raisins* (*Edms*) *Bpk* 1999 3 All SA 245 (NC) at 254-7; *Ernst & Young v Beinash* 1999 (1) SA 1114 (W) at 1148D-G; *Van Deventer v Reichenberg* 1996 (1) SACR 119 (C) at 129B-D; and *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C) at 233B-G.

[177] *Law Society of SA v Road Accident Fund* 2009 (1) SA 206 (C) at paras 21-6; *Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial* 2007 (6) SA 154 (D) at para 40; *Hudson v Wilkins* 2003 (6) SA 234 (T) at para 20; *Rhino Hotel & Resort (Pty) Ltd v Forbes* 2000 (1) SA 1180 (W) at 1184J-1185B; *Lourenco v Ferela* (*Pty*) *Ltd* (*No 1*) 1998 (3) SA 281 (T) 300C-H; *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T) at 692B-693B; and *Hayes v Baldachin* 1980 (2) SA 589 (R) at 595D.

[178] *Eskom* above n 165 at paras 17 and 20.

[179] Id at para 38.

[180] *AB v Minister of Social Development* [2016] ZACC 43; 2017 (3) SA 570 (CC); 2017 (3) BCLR 267 (CC).

[181] Id at paras 325-6.

[182] Id.

[225] In *Plastic Converters Association of South Africa*,[183] cited with approval by this Court in *Limpopo Legal Solutions I*,[184] the Labour Appeal Court held, in the context of non-constitutional matters, that—

> "[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."[185]

[226] A punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke.[186] In *SS*, the "extraordinary" conduct included compromising the best interests of a minor child and this Court's integrity by failing to comply with an order of this Court.[187] Similarly, in *Mtuze*, it was the conduct of the applicant which justified a costs award against him on an attorney and own client scale, *de bonis propriis*.[188] The double punitive award (personal costs on an attorney and client scale) made in this matter by the High Court, while rare and extraordinary, is not unprecedented.

[227] As stated above, the award of costs is a matter in respect of which courts exercise a true discretion.[189] The question is whether the High Court materially misdirected itself in granting the punitive costs order.[190] The Public Protector, while taking issue with the

---

[183] *Plastic Converters Association of South Africa* above n 6.

[184] *Limpopo Legal Solutions I* above n 99 at para 28.

[185] *Plastic Converters Association of South Africa* above n 6 at para 46.

[186] *SS* above n 165 at para 41.

[187] Id.

[188] *Mtuze* above n 166 at para 3 reads:

> "The manner in which the applicant conducted himself in representing Mr Michael in the High Court, in his communications with the attorneys for the first three respondents and when he appeared in person before Potterill J was such that the latter granted a punitive order of costs against him."

This Court dismissed the applicant's application for leave to appeal on the basis that there were no prospects of success.

[189] See [144].

[190] *Limpopo Legal Solutions I* above n 99 at para 17.

"punitive personal costs" order, does not set out any independent grounds why the punitive aspect of the costs order constituted a material misdirection on the part of the High Court.

[228] The burden of proof rests upon the Public Protector to satisfy this Court that the High Court, in awarding costs on a punitive scale, failed to exercise its discretion judicially.[191]

[229] In this Court, the Public Protector seeks among others an order setting aside paragraph 4.3 of the order of the High Court. Paragraph 4.3 of the order reads:

> "The first respondent, in her personal capacity, is ordered to pay 15% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel, *de bonis propriis*."[192]

[230] The Public Protector refers to punitive costs in a number of passages in her founding affidavit in this Court. She says that the High Court's finding that she was biased in conducting the investigation[193] "was a material consideration in [its] decision to award a punitive costs order against" her. She goes on to allege that the High Court erred in finding that a "simple punitive costs order" against the Public Protector in her official capacity, would not be appropriate and she should be directed to pay a percentage of the costs incurred on a punitive scale.

---

[191] *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA) at 831H-J; and *Pillay v Krishna* 1946 AD 946 at 954. See also Schwikkard and Van der Merwe *Principles of Evidence* 4 ed (Juta & Co Ltd, Cape Town 2016) at 618-9.

[192] High Court judgment above n 7 at para 131.

[193] See para 101 of the High Court judgment above n 7 which reads:

> "The Public Protector did not disclose in her report that she had meetings with the Presidency on 25 April 2017 and again on 7 June 2017. It was only in her answering affidavit that she admitted to the meeting of 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017. She gave no explanation in this regard when she had the opportunity to do so. Having regard to all these considerations, we are of the view that a reasonable, objective and informed person, taking into account all these facts, would reasonably have an apprehension that the Public Protector would not have brought an impartial mind to bear on the issues before her. We therefore conclude that it has been proven that the Public Protector is reasonably suspected of bias as contemplated in section 6(2)(a)(iii) of PAJA."

[231] Further arguments about the punitive costs order are made in the written submissions filed on behalf of the Public Protector. It is recorded that the only substantive issue in this matter is whether the costs incurred in the High Court should be borne by her personally and on a punitive scale. The contention is made that the punitive personal costs order against the Public Protector will compromise the independence and effectiveness of her office. It is further alleged that the costs order would have, and has had, the unintended result of attacks against her by powerful and well-resourced persons who may be the subject of an investigation by her office and facing possible remedial action. Such unintended results were cautioned against by this Court in *Economic Freedom Fighters I*:

> "[The Public Protector's] investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw state power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated."[194]

[232] It is also alleged, in the written submissions, that after the Public Protector's investigation in this matter, she took what she believed was appropriate remedial action and in the public interest and despite this, the High Court ordered punitive personal costs against her.[195] It is further denied that she acted in bad faith. It is suggested that the Public Protector may have acted with unbridled zeal but contended that zealousness

[194] *Economic Freedom Fighters I* above n 1 at para 55.

[195] Ms Mkhwebane goes on to state that, buoyed by the High Court's costs order against her, the Democratic Alliance (the main opposition party that she claims have never supported her appointment and ostensibly have been consistently critical of her) and the Council for the Advancement of the South African Constitution (an organisation that she avers have also been unfairly critical of her) have ganged up against her to seek personal costs orders, on a punitive attorney and client scale, in applications for the judicial review and setting aside of her report into the Free State Vrede Dairy Farm Project.

in the recovery of public funds is to be applauded and not met with punitive personal costs orders. The statement is made that the Public Protector may well in the future be required to investigate the Reserve Bank and, with a punitive personal costs order hanging over the head of the Public Protector, it is likely that her independence and impartiality will be questioned.

[233] These are the sum total of the Public Protector's pleadings and submissions made on her behalf, in regard to the punitive costs order.

[234] The purpose of pleadings is to define the issues for the other party and the Court, and for the Court to adjudicate those issues in dispute.[196] In *Mighty Solutions*, this Court held that an application for leave to appeal must be adjudicated on whether and how the court below erred.[197] As mentioned, a party seeking to appeal against a costs order must demonstrate that the discretion was not exercised judicially, influenced by wrong principles or a misdirection on the facts or the decision reached could not have reasonably been made by a court properly directing itself to all the relevant facts and principles.[198] The Public Protector has not pleaded any of these grounds in relation to the punitive element of the costs order.

[235] While the High Court reached the conclusion that a punitive costs order was called for, it is not clear from the judgment whether it conducted an independent enquiry in this regard or whether its conclusion was based on the same facts it relied upon for the imposition of the personal costs order. There are certain instances where the court may, of its own accord, raise a question of law, but this question must fully emerge from the evidence, and be necessary for the court's decision.[199] A court may only adjudicate

[196] *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 28 and *Fischer v Ramahlele* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) at para 13.

[197] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) (*Mighty Solutions*) at para 64.

[198] See [144].

[199] *Molusi* above n 196; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) at paras 109-14; *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2)

an issue of law of its own accord if this involves no unfairness to the party against whom it is directed.[200] This question was neither pleaded nor ventilated at the hearing of this matter. In these circumstances, this Court is not in a position to decide this question.

[236] In this Court, the Public Protector's argument focused on the personal nature of the costs order, rather than its punitive nature. In any event, whether the punitive aspect of the costs order was challenged separately to the personal aspect, or jointly with the personal costs order, the five grounds on which the appeal is based do not hold any water, as set out in detail above.

[237] Regard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the course of the litigation. This conduct included the numerous "misstatements", like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report. The punitive aspect of the costs order therefore stands.

Declaratory relief

[238] In the High Court, the Reserve Bank sought a declaration that the Public Protector had abused her office during the investigation that led to the final report. This relief was only sought at the stage when the Reserve Bank filed its replying affidavit. The High Court was of the view that the declarator sought may well be warranted. It reasoned:

SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68; and *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39.

[200] Id.

> "The Public Protector did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector . . . She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and that a higher standard is expected from her. She failed to explain her actions adequately. There may be a case to be made for a declaratory order."[201]

[239] Nevertheless, the High Court refused to grant the order on the basis that the Reserve Bank had failed to apply for an amendment of its notice of motion and had only requested the order in its replying affidavit.[202] The High Court was particularly concerned with the prejudice which may have been occasioned to the Public Protector by granting such declaratory relief in the absence of a formal amendment.[203] The Reserve Bank has filed a cross-appeal in this Court which is conditional upon leave to appeal being granted to the Public Protector regarding the costs order.

[240] As mentioned, the Reserve Bank indicated for the first time in its replying affidavit that it would be seeking declaratory relief. This request stated that it would be seeking "a declaratory order from [the High Court] that [the Public Protector] has abused her office. The request for the declaratory order should not come as a surprise to the Public Protector."

[241] The replying affidavit concludes by requesting that the final report be set aside and alleging that the Public Protector's conduct deserves serious censure. The censure proposed is that the High Court should indicate "its displeasure at this improper and unreasonable conduct, with an order of *de bonis propriis* costs against Ms Mkhwebane".

[242] While the replying affidavit contained an allegation that the Reserve Bank would be seeking a declarator that the Public Protector had abused her office, this declarator

[201] High Court judgment above n 7 at para 120.

[202] Id at para 122.

[203] Id at para 119.

was not formally included in the relief sought.[204] Instead, the replying affidavit expressed the relief sought by the Reserve Bank as follows: "the Reserve Bank persists in seeking an order in terms of the notice of motion including costs of three counsel on an attorney and client scale, to be paid *de bonis propriis* by Ms Mkhwebane". The relief sought by the Reserve Bank in the High Court in its notice of motion and replying affidavit did not expressly include the declarator.

[243] The Reserve Bank, however, relies on *Economic Freedom Fighters II* where this Court held that its power to grant a just and equitable order in terms of section 172(1)(b) of the Constitution "is so wide and flexible" that Courts are empowered to grant relief that has not been pleaded.[205] In *Economic Freedom Fighters II*, Jafta J, writing for the majority, put the matter thus:

> "The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution."[206]

[244] The Reserve Bank submits that the declarator ought to have been granted by the High Court because formal amendments for declaratory relief under section 172(1)(a) of the Constitution are not required if the relief sought is adequately addressed on the papers before the court.

---

[204] The Reserve bank did not formally amend its notice of motion to include this relief in terms of Rule 28 of the Uniform Rules of Court.

[205] *Economic Freedom Fighters II* above n 2 at para 211. Section 172 of the Constitution provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[206] Id.

[245] In *Merafong*, this Court held that section 172(1)(a) of the Constitution contemplates that a court may decline to decide a matter because the challenge is not warranted in the particular proceedings before it.[207] The Reserve Bank's replying affidavit was the last set of pleadings filed in the High Court. Dissimilarly from the personal costs order, the Public Protector has not conceded that all the facts which underpin the declaratory relief sought by the Reserve Bank were set out in the papers before the High Court. The Public Protector has not been afforded the opportunity to respond and plead facts in answer to the Reserve Bank's case for the declaratory relief.[208] It may be so that the circumstances of this case justify the granting of a declaratory order under section 172(1)(a) of the Constitution, but this order should not be granted in the absence of the Public Protector having had sufficient opportunity to plead to the Reserve Bank's case.

[246] Given that the matter came directly from the High Court, and the High Court chose not to deal with the merits of the declarator, we do not have the benefit of any other courts' judgments on this matter. Our jurisprudence emphasises that this Court functions better when it is assisted by a reasoned judgment (or judgments) on the relevant issues in dispute.[209] This Court has on numerous occasions expressed itself on the undesirability of sitting as a court of first and last instance.[210] In *Fleecytex*, this Court stated:

---

[207] *Merafong City v AngloGold Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*) at para 37.

[208] The right to be heard both recognises the subject's dignity and is inherently conducive to better justice. See *Psychological Society of South Africa v Qwelane* [2016] ZACC 48; 2017 JDR 0062 (CC); 2017 (8) BCLR 1039 (CC) at para 34.

[209] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 JOL 41705 (CC) (*Tiekiedraai*) at para 20; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 39; *Carmichele v Minister of Safety and Security* (*Centre for Applied Legal Studies Intervening*) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 55; and *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

[210] *Tiekiedraai* id at para 19; *MM v MN* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC); *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* [2010] ZACC 3; (2010) 31 ILJ 273 (CC); 2010 (5) BCLR 422 (CC); *Dormehl v Minister of Justice* [2000] ZACC 4; 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC); and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) (*Fleecytex*).

> "It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[211]

[247] The cross-appeal undoubtedly engages the jurisdiction of this Court. Section 172(1)(a) of the Constitution requires courts to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. In *Merafong*, Cameron J described the section as an injunction to courts to vindicate the supremacy of the Constitution.[212] In addition, the findings endorsed and made by this Court appear to inescapably lead to the conclusion that the Public Protector breached her constitutional obligations in terms of section 181(2) of the Constitution to act independently and impartially. But this is not enough.[213] Leave to appeal will be granted only if it is in the interests of justice to do so.

[248] The Public Protector did not have an opportunity to respond to the request for the declarator and place relevant facts before the High Court. In any event, even if this Court were to adjudicate the cross-appeal on the basis of the evidence before us, it would do so without the benefit of a judgment of any other court. For these reasons, it is not in the interests of justice for this Court to hear the Reserve Bank's cross-appeal.

Costs

[249] The dictates of fairness and equity require that no order as to costs in this Court should be made.

---

[211] *Fleecytex* id at para 8.

[212] *Merafong* above n 207 at para 33.

[213] *Paulsen* above n 167 at para 18.

Order

[250] The following order is made:

1. The Public Protector's application for leave to appeal is granted.
2. The appeal is dismissed with no order as to costs in this Court.
3. The Reserve Bank's application for leave to cross-appeal is dismissed with no order as to costs in this Court.

For the Applicants:	V Ngalwana SC and F Karachi instructed by Cheadle Thompson & Haysom INC
For the Respondent:	K Hofmeyr and C Tabata instructed by Werksmans Attorneys