

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, JOHANNESBURG**

(1)	<b>NOT</b> REPORTABLE
(2)	<b>NOT</b> OF INTEREST TO OTHER JUDGES

**CASE NO:** 31083/2020

**DATE:** 26<sup>th</sup> January 2024

In the matter between:

**AIR CHEFS SOC LIMITED**

Applicant

and

**THE PUBLIC PROTECTOR OF**

**THE REPUBLIC OF SOUTH AFRICA**

First Respondent

**MANTELL, SIMON t/a MANTELLI BISCUITS**

Second Respondent

**SOUTH AFRICAN AIRWAYS SOC LIMITED**

Third Respondent

**Neutral Citation:** *Air Chefs v The Public Protector and Other* (31083/2020)

**[2024] ZAGPJHC ---** (26 January 2024)

**Coram:** Adams J

**Heard:** 11 October 2023

**Delivered:** 26 January 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 26 January 2024.

**Summary:** Administrative law – Chapter 9 institutions – Public Protector report – review of – application for review and setting aside – under the doctrine of legality and the principles relating to irrationality – Public Protector's report that followed investigation into allegations of irregularity during public procurement processes – as well as allegations of maladministration, corruption and improper conduct by State entity –

Court finding Public Protector's findings to be justified and rational insofar as they relate to maladministration and improper conduct – no foundation for findings of dishonesty or fraud – report, and the findings therein and the remedial action taken, held to be rational –

Judicial review of Public Protector's remedial action – legality doctrine and the principle of rationality – Public Protector's powers – to take appropriate remedial action – s 182(1)(c) of the Constitution – s 6(4) and (5) of the Public Protector Act – remedial action aimed at curing incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles – relief sought by second respondent – wholly incompetent – in the nature of a judicial review of an administrative decision, in which is sought an exceptional substitution order – Public Protector does not have judicial review powers – investigation by Public Protector not a process to recover contractual or delictual damages – Application and counter-application dismissed –

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## **ORDER**

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- (1) The applicant's judicial review application be and is hereby dismissed.
- (2) The second respondent's judicial review counter-application is dismissed.
- (3) Each party shall bear its/his own costs.

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## JUDGMENT

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### **Adams J:**

[1]. On 7 April 2013 the applicant (Air Chefs), a state-owned company, published 'Request for Bid (RFB)' number GSM 025/2013 ('the RFB'), 'inviting suppliers to Bid for the supply of the following: ... Purchase of various types of dry snacks'. The submissions for the said bid were to close at 11:00 on 29 April 2013. The different products for the dry snacks tender were contained in a document attached to the bid documents, which *inter alia* described one of the products – the savoury crackers – as '*Wheatsworth Crackers (3 in 1)*'. The tender allowed for a manufacturer to submit a bid for one or more products and for this reason specialised manufacturers submitted bids for particular products.

[2]. On 26 April 2013 the second respondent (Mantelli's), a sole proprietorship, submitted its Bid by hand delivering same in accordance with the RFB and by complying, in all other respects, with the tender requirements. Mantelli's tendered for one specific product, that being 'Savoury Crackers (3 in 1)', and it referred to the product tendered as 'Mantelli's Wheat Crackers'. On 21 February 2014 Mantelli's tender was apparently accepted by Air Chefs, which had addressed a letter to Mantelli's dated 17 February 2014, in which Mantelli's was congratulated 'on being awarded the tender for dry snacks'.

[3]. As the saying goes, so far, so good. However, a few days later, on 24 February 2014, Air Chefs seemingly had a complete change of heart and made a 180 degree turn. They advised Mantelli's telephonically that it was in fact not a tender that had been awarded, but instead that, despite the clear and explicit wording of the communiqué dated 17 February 2014, Mantelli's had only been appointed as a 'preferred supplier'. They were also informed that another bidder, Ciro Beverages Solutions (Pty) Limited (Ciro), would continue to supply its *Wheatsworth* brand of crackers to meet all the requirements of South African Airways (SAA), the third respondent, which constituted more than 95% of Air Chef's savoury cracker procurement. Mantelli's nevertheless signed and returned the Letter of Award (LoA) and awaited the supplier agreement from

Air Chefs, which never arrived.

[4]. In a letter to Mantelli's dated 11 March 2014, Air Chefs, after having formally 'withdrawn' the previous LoA and confirming in writing their foregoing stance, congratulated Mantelli's on being selected as one of the panel of suppliers to supply dry snacks to Air Chefs. The intention, as clearly indicated in the covering email from Air Chefs, was to replace the LoA of 17 February 2014 with 'the correct wording' as per the LoA dated 11 March 2014. It later transpired that Mantelli's was the only successful bidder in the various categories of dry snacks to be placed on a panel of suppliers. All the SAA savoury cracker business was to remain with Ciro, which was more than 95% of all Air Chefs savoury cracker procurement, which meant that there was effectively no business for Mantelli's.

[5]. Aggrieved by this stance adopted by Air Chefs and believing its behaviour to have been unreasonable and improper, Mantelli's lodged a formal written complaint with the first respondent (the Public Protector) on 25 March 2014, which complaint was registered by the Public Protector's office on 7 April 2014. Subsequently, and over the next three years, Mantelli's supplied further documentary evidence to the Public Protector to allow her office to reach a comprehensive understanding of what had transpired in what Mantelli's believed was illegal and ultimately fraudulent conduct on the part of many parties associated with this matter.

[6]. On 31 January 2020, the Public Protector finally, and rather belatedly, published her final report in this matter, which incorporated her findings and recommendations relating to certain remedial action to be taken mainly by Air Chefs and the third respondent (SAA). In a nutshell, the Public Protector found that the decision by Air Chefs 'to revise' the LoA dated 17 February 2013 was irregular and thus constituted improper conduct and/or maladministration in terms of section 6(5)(a) of the Public Protector Act<sup>1</sup>. In coming to this conclusion, the Public Protector found that RFB number GSM 025/2013 was a request for a tender to provide services and not an invitation for a bidder to become one of the panellists of service providers. It was also found by the Public Protector that the Acting Chief Executive Officer of Air Chefs, in supposedly 'correcting' the wording of the first LoA by substituting same with the second LoA, acted improperly as envisaged by s 182(1)(a) of the Constitution and had

<sup>1</sup> Public Protector Act, Act 23 of 1994.

made himself guilty of maladministration in terms of section 6(5)(a) of the Public Protector Act.

[7]. A number of other findings of irregular conduct were also made in relation to conduct on the part of SAA subsequent to the aforesaid irregular acts by Air Chefs, notably SAA's non-implementation of and their delay in providing Mantelli's with some of the investigation reports. Lastly, the Public Protector made the finding that the aforesaid unlawful conduct on the part of Air Chefs and SAA resulted in Mantelli's being unlawfully and improperly prejudiced as envisaged in s 6(5)(d) of the Public Protector Act. This prejudice, so it was found by the Public Protector, was in the form of financial loss or expenses incurred in preparing and submitting the bid documents as well as other related expenses.

[8]. As regards the Remedial Action, with a view to remedying the improper conduct and the maladministration referred to in her report, the Public Protector directed the Chairperson of the SAA Board of Directors to apologise to Mantelli's and its proprietor within ten working days of the issue of her report for subjecting them (Mantelli's) to unnecessary litigation attributable to the unlawful conduct on the part of Air Chefs and SAA. The Public Protector furthermore directed the Chairperson to ensure that Mantelli's be reimbursed, within thirty working days from the date of her report, for all proven out-of-pocket expenses relating to meetings, travelling, accommodation, exchange of correspondence with SAA, seeking legal opinion and representation in his longstanding dispute with SAA.

[9]. The Public Protector also directed the CEO's of both Air Chefs and SAA to have regard to the findings in the report by National Treasury (NT) and the report by Indyebo and the procurement shortcomings identified in those reports, and to address those shortcomings and gaps by the introduction of more stringent policies, prescripts and practices in line with s 217 of the Constitution, the Public Finance Management Act (the PFMA)<sup>2</sup> and the National Treasury Regulations. Additionally, the CEO's were also directed to take appropriate disciplinary action against any official of Air Chefs and SAA found to have been responsible for the misconduct and the maladministration referenced in her report. In sum, Air Chefs and SAA were directed to take appropriate disciplinary action against any and all officials found to have been complicit in any acts

<sup>2</sup> Public Finance Management Act, Act 1 of 1999.

of maladministration and improper conduct referred to in the Public Protector's report.

[10]. It is this report by the Public Protector, and the findings and the recommendations made therein, which Air Chefs is aggrieved by and which it requires to have judicially reviewed and set aside in this opposed Special Motion, which came before me on 11 October 2023. The relief sought by Air Chefs is essentially for an order reviewing and setting aside the report, the findings and the remedial action of the Public Protector, as per her report dated 31 January 2020, on the basis of principle of irrationality and on the basis of the legality doctrine.

[11]. For his part, Mantelli's has preferred a counter-application against Air Chefs, and seeks an order reviewing the findings and portions of the remedial action of the Public Protector in her above report dated 31 January 2020. The said report, as already alluded to *supra*, is 'on an investigation into allegations of procurement irregularities and maladministration regarding the irregular termination of Air Chefs tender number GSM 025/2013 by the SAA after its award to Mantelli's'.

[12]. Mantelli's, in particular, seeks an order supplementing the findings of the Public Protector that he was improperly prejudiced by the conduct of Air Chefs and SAA, as envisaged in s 6(5)(b) of the Public Protector Act. In that regard, Mantelli's counter-applies for an order reviewing and setting aside the Public Protector's remedial action relating to the payment by Air Chefs and SAA of his proven out-of-pocket expenses and by substituting that portion of the remedial action with one in terms of which Air Chefs and SAA are directed to pay Mantelli's damages in the amount of R5 298 783,84.

[13]. Furthermore, Mantelli's applies for an order reviewing and setting aside the Public Protector's failure, as he puts it, to act in terms of s 6(4)(c)(i) of the Public Protector Act by referring the matter to the National Prosecuting Authority for the criminal prosecution of individuals implicated in what he perceives to be criminal conduct on the part of such persons.

[14]. The important part of Mantelli's counter-application is however his prayer that this court substitutes a portion of the remedial action by the Public Protector with an order that Air Chefs and SAA pay to him 'damages' in an amount of about R5 million. At first blush, the relief sought by Mantelli's is wholly incompetent for the simple reason that his counter-application is in the nature of a judicial review of an

administrative decision, in which is sought an exceptional substitution order. The Public Protector does not have the power to judicially review administrative decisions. Moreover, Mantelli's, in his counter-application applies for the judicial review of a 'decision' of the Public Protector, who is not a respondent in the counter-application. The notice of counter-application was not even addressed to the office of the Public Protector. I shall revert to these aspects of the matter later on in this judgment.

[15]. Air Chefs contends that the findings by the Public Protector, and the Remedial Action recommended by her, incorporated into her report of 31 January 2020, should be declared unlawful, reviewed and set aside on the basis that it is irrational as the findings cannot be reconciled with the objective material that was placed before her.

[16]. It is the case of Air Chefs that the bid was adjudicated, but due to inherent errors and flaws in the bid specifications (which rendered the bid inconsistent with the applicant's business processes), a fundamentally flawed and impractical decision was issued by it. Whilst Air Chefs accepts that, as per their communiqué dated 17 February 2014, Mantelli's was awarded the bid for savoury snacks 3 in 1, the said award was vitiated by material flaws and errors in the bidding process as well as by the impracticality of the implementation of the 17 February 2014 decision. This, so it is contended by Air Chefs, entitled them to withdraw the lawfully awarded tender and to replace same with a different one, which fits in with their business model.

[17]. These flaws and errors in the tender, according to Air Chefs, were systemic and their existence were confirmed in the report by National Treasury. The said report indicated, so the case on behalf Air Chefs goes, that there were discrepancies in the bid specifications in that they failed to indicate that the bid was for a panel of suppliers, instead of a tender that would be awarded to individual suppliers with a guaranteed number of orders post the award.

[18]. All of the foregoing, so Air Chefs avers, was explained to the Public Protector, who chose to ignore these contentions when she finalised her report. The point made by Air Chefs is that the second letter sought to correct the patent error in the tender processes, which had led to the confusion and misunderstanding of the true intention of the RFB. This letter was, however, not issued to other bidders who were already doing business with them, as these bidders knew how their business process worked. Due to

Mantelli being the only newcomer to the process, the second letter was only sent to him. Other bidders knew that the tender was for a panel who were only going to get orders at the whim of the airlines that are the clients of Air Chefs.

[19]. Air Chefs therefore contends that there is no basis for the finding that they and SAA were guilty of maladministration when the flaw, through no fault of the then CEO, was in the drawing up of the bid specifications. If the bid process was flawed from inception, so the contention on behalf of Air Chefs goes, there is no basis for finding that the corrective measures pursued by them thereafter constitutes maladministration. As a result, there has not been any ongoing prejudice to Mantelli's as the tender was due to the inherent flaws identified.

[20]. Air Chefs accordingly contend that the withdrawal of the letter of 17 February 2014 was not steeped in malfeasance or maladministration. It was a correction of a patent error in the bidding process. It was also not informed by any malice but by a procedural flaw in the specifications of the bid, which was not aligned with the business processes of Air Chefs. What was irregular, so the contention continues, was the entire bid process and Mantelli's, together with other successful bidders, ought not to have derived any benefit from the flawed bidding process.

[21]. Accordingly, so the argument on behalf of Air Chefs is concluded, the Public Protector, in ignoring the foregoing explanation by it, had acted irrationally in that her findings and remedial action were not rationally connected to the information that was before her when she published her report at the end of January 2020.

[22]. Importantly, so Air Chefs contends, the finding by the Public Protector that Mantelli's was prejudiced by the conduct of Air Chefs and SAA in not adequately or timeously providing him with information pertaining to the investigation is equally irrational and unfounded. Consequently, the remedial action ordered by the Public Protector flowing from the irrational findings should suffer the same fate in that it is irrational and baseless as the objective facts demonstrate that the tender process that Mantelli's complains about, was fundamentally flawed and unlawful.

[23]. I disagree with these contentions on behalf of Air Chefs. The salient fact in this matter, as alluded to in more detail *supra*, is that a tender was lawfully awarded to Mantelli's, which ought to have resulted in an agreement being concluded between him



and Air Chefs. The acceptance of the tender was thereafter withdrawn unlawfully. As correctly found by the Public Protector, Air Chefs could not and should not have withdrawn the award of the tender. Such award was an administrative act, and it could not simply have been undone – it stood until set aside by a Court of law. As was held by the Full Court of this division in *SITA (SOC) Limited v Vox Orion (Pty) Ltd*<sup>3</sup>, ‘[i]n law, the relevant organ of state which took the administrative action under consideration, is entitled, and at times obliged, to approach the court with an application to review and set aside its own administrative action’. Importantly, the court also held as follows: -

- ‘3. Once the [state organ or state entity] had awarded the tender, it was not competent for [it] to seek to revoke the award because it was *functus officio*.
- 4. For the same reason, it was not competent for the [state organ / entity] to commission a later evaluation of the bids of [a tenderer], after the award had been made.’

[24]. On the basis of this authority, I am of the view that Air Chefs and its CEO, in withdrawing the award of the tender, had performed an unlawful administrative action. This, I believe, is the very definition of an irregularity and amounts maladministration, as envisaged by s 6 of the Public Protector Act, which provides, in the relevant part, as follows: -

- ‘(4) The Public Protector shall, be competent –
- (a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged –
  - (i) **maladministration** in connection with the affairs of government at any level;
  - (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
  - (iii) ... ..
  - (v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;
  - ... ..
- (c) at a time prior to, during or after an investigation-
  - (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority; and charged with prosecutions; or
  - (ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority; and affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or

<sup>3</sup> *SITA (SOC) Limited v Vox Orion (Pty) Ltd* 2015 JDR 1335 (GP).

authority.

(5) In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged-

(a) **maladministration** in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999);

(b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);

(c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or

(d) **act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.**

... ..’.

[25]. Accordingly, I reject the contention by Air Chefs that the Public Protector's report is unlawful in that it is irrational as offending against the principle of legality as enunciated in our Constitution. On the contrary, there is indeed a rational connection between the objective facts placed before the Public Protector and the findings and the remedial action that she has ordered. The simple point is this: withdrawal of the award of the tender = unlawful administrative action = maladministration.

[26]. Having said that, I accept the explanation proffered by Air Chefs that after the first LoA was sent to Mantelli's, it dawned on Air Chefs that the award of the tender was problematic in that its implementation would result, from a practical point of view, in difficulties. They then realised that the tender processes were flawed and that they would be ill-advised to implement the award of the bid. This did, however, not entitle them to simply withdraw the award of the tender – that conduct, as I have already indicated, was unlawful and such conduct cannot be countenanced, especially not from a government institution. What Air Chefs ought to have done was to apply to Court for a review and the setting aside of the award – the so-called ‘self-review’.

[27]. I do not agree with the submissions on behalf of Mantelli's that Air Chefs and its management acted dishonestly. There is no evidence in support of such a finding.

[28]. I reiterate that the conduct of Air Chefs amounted to maladministration and, as a

result of such maladministration ‘unlawful or improper prejudice to’ Mantelli’s resulted. It was therefore appropriate for the Public Protector to order the remedial action that she did, notably that Air Chefs was to reimburse Mantelli’s direct out of pocket losses.

[29]. For all of these reasons, the judicial review application of Air Chefs falls to be dismissed.

### **Second Respondent’s Counter-Application**

[30]. The counter-application for the judicial review of portions of the Public Protector’s report is brought in terms of the common law under the principle of legality and not in terms of Promotion of Administrative Justice Act (PAJA)<sup>4</sup>.

[31]. First, Mantelli’s seeks the review of the Public Protector’s failure to find that the improper conduct and maladministration by SAA improperly prejudiced Mantelli’s, as contemplated in section 6(5)(d) of the Public Protector Act. Having found improper conduct and maladministration on the part of both Air Chefs and SAA and having found that Air Chefs’ improper conduct and maladministration improperly prejudiced Mantelli’s, so the contention on behalf of Mantelli’s goes, the Public Protector’s decision not to make this finding in respect of SAA is so unreasonable that no reasonable person in her position would have failed to make it.

[32]. I give short shrift to this part of the review application as there is no merit in same. When adjudicating the bids pursuant to RFB 025/2013, SAA was acting, as its ‘Holding Company’, on behalf of Air Chefs. Any contractual arrangement following on the award of the tender, would have been with Air Chefs. The simple point is therefore that any possible prejudice to Mantelli’s would have resulted from a collapse of such a contractual arrangement and therefore as a result of the unlawful conduct on the part of Air Chefs and not SAA. The Public Protector was therefore correct in not finding that SAA’s maladministration improperly and unlawfully prejudiced Mantelli’s.

[33]. Second, Mantelli’s seeks the review of the Public Protector’s failure to act in terms of section 6(4)(c)(i) of the Public Protector Act, which relates to bringing the matter to the notice of the relevant authority charged with prosecutions if the Public Protector is of the opinion that the facts disclose the commission of any offence by any

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<sup>4</sup> Promotion of Administrative Justice Act, Act 3 of 2000.

person.

[34]. In that regard, I am of the view that there was no credible evidence before the Public Protector suggesting criminality on the part of any individual. As already indicated *supra*, I have no reason to reject the explanation by Air Chefs in relation to why they retracted the first LoA. Such explanation is eminently plausible. Mantelli's suggestions of malfeasance and dishonesty on the part of Air Chefs and SAA are speculative at best. Accordingly, the review in respect of this aspect should therefore also fail.

[35]. Thirdly and importantly, Mantelli's seeks the review and setting aside of the Public Protector's decision directing SAA to pay Mantelli's proven out-of-pocket expenses. In that regard, it is the case of Mantelli's that there was clear evidence of fraud and dishonesty on the part of Air Chefs and SAA officials, and that the Public Protector failed to direct remedial action in the form of damages.

[36]. In support of the foregoing relief sought by him, Mantelli's relies heavily on the decision in *South African Post Office v De Lacy and Another*<sup>5</sup>, in which it was held that irregularities falling short of dishonesty, incompetence on the part of those who evaluated the tenders, and even conduct that amounted to negligence, would not found a claim for damages at the hands of an unsuccessful tenderer. A claim would lie only if it were established that the award of the contract to the rival was brought about by dishonest or fraudulent conduct on the part of one or more of the officials for whose conduct the public entity was vicariously liable, but for which the contract would have been awarded to the complainant. The onus rests upon a tenderer to establish, as a matter of probability, that the award of the contract was brought about by conduct of that kind, and, if that onus were not discharged, the claim would have to fail.

[37]. In that case, which had commenced as an action by the tenderer against the Post Office, it was furthermore held that there might well have been irregularities, incompetence and negligence on the part of the Post Office and the complainant might even have been more worthy of being awarded the contract, but none of that was enough.

[38]. *In casu*, as I have alluded to *supra*, there is no such credible evidence of

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<sup>5</sup> *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA).

dishonest or fraudulent conduct on the part of Air Chefs and SAA officials. Mantelli's contends that the backdating of the tender register by SAA officials, the withdrawal of the letter of award of the tender to Mantelli's by Mr Kemp, the then CEO of Air Chefs, and its replacement by Mr Kemp with a panel letter, the conduct of SAA Legal officials in suppressing and then misrepresenting the findings and recommendations of the Indyebo report and the subsequent business supply arrangements reached between Air Chefs, CIRO and a supplier disqualified in the tender for the purposes of circumventing the tender process, all amount to fraud and dishonesty, which caused Mantelli's financial loss. I reject these contentions as misguided. As I have already indicated, I cannot reject without more the explanation given by Air Chefs for the retraction of the first LoA. As for the other accusations, they are based at best on flimsy and speculative assertions and assumptions.

[39]. For the foregoing reason alone, the counter-application should fail.

[40]. There is however another reason why the application should fail even if my estimation of the evidence that was before the Public Protector is wrong. And that relates to the nature of the proceedings which are the subject of the judicial review application.

[41]. Mantelli's seeks the substitution of the decision that SAA pay its out-of-pocket expenses with one directing Air Chefs and SAA to pay it damages in the amount of R5 298 783.84 jointly and severally. In other words, Mantelli's case is that the Public Protector, in giving directions in relation to her remedial action, should have directed Air Chefs and SAA to pay to him 'contractual damages' or 'delictual damages' of about R5 million based on the alleged dishonest and fraudulent conduct on the part of officials of Air Chefs and SAA. This, in effect, amounts to an application for the judicial review and the setting aside of the decision by Air Chefs to withdraw the first LoA, with and exceptional substitution remedy.

[42]. The Public Protector does not have judicial review powers. As can be seen from the extract from the Public Protector Act, quoted *supra*, read with s 128(1) and 128(2) of the Constitution, the Public Protector's main function is to investigate and to report on maladministration, and then to take appropriate remedial action, in connection with the affairs of any State institution or on the abuse of power or unfair, capricious,

discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by such State institutions. Similarly, the Public Protector's powers are limited to her investigating and reporting on maladministration or such other misconduct by a person in the employ of a State institution, 'which results in unlawful or improper prejudice to any other person'<sup>6</sup>, and then to take 'appropriate remedial action'.

[43]. As was held by the Constitutional Court in *Economic Freedom Fighters v Speaker, National Assembly and Others*<sup>7</sup>, s 182(1)(c) of the Constitution provides that the 'Public Protector has the power, as regulated by national legislation ... to take appropriate remedial action'. The court went on to hold as follows: -

'The power to take remedial action is primarily sourced from the supreme law itself. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the "(e)fficient, economic and effective use of resources [is] promoted", that accountability finds expression, but also that high standards of professional ethics are promoted and maintained. To achieve this requires a difference-making and responsive remedial action. Besides, one cannot really talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.'

[44]. The point of these extracts is that the remedial action taken by the Public Protector, which must be suitable and effective, is binding and aimed primarily at helping to uproot prejudice, impropriety, abuse of power and corruption in state affairs, all spheres of government and state-controlled institutions. It is not intended as a means or a procedure to recover damages of possible damages suffered by an aggrieved complainant.

[45]. The directions which Mantelli's contends should have been issued by the Public Protector could not and should not have been made by her. Had the Public Protector granted such directions she would in effect have judicially reviewed and set aside an administrative decision, which is a process which falls squarely and exclusively in the province of a Court of Law. I reiterate that it would have been incompetent for the Public Protector to have issued such orders. Those are the type of orders that can be granted only by a Court hearing a judicial review application or seized with a damages

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<sup>6</sup> S 6(5)(d) of the Public Protector Act.

<sup>7</sup> *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC).

claim based on contract or delict.

[46]. That, in my view, spells the end of Mantelli's counter-application.

[47]. I am bolstered in my foregoing conclusion by the fact that any and all of the case authorities relied on by Mr Elliot SC, Counsel for Mantelli's, in support of his argument that this court should substitute the Public Protector's remedial action with what is in effect a damages award, relates to judicial review applications. Those cases include *Vox Orion* referred to supra, *Gauteng Gambling Board v Silverstar Development Ltd and Others*<sup>8</sup> and *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*<sup>9</sup>.

[48]. I therefore conclude that the counter-application of Mantelli's should be dismissed. And in view of such finding it is not necessary for me to deal with any of the other issues which arose in this matter, including Mantelli's application for condonation of the late filing of his answering affidavit, which application, in my view, should be granted.

[49]. In sum, I intend to dismiss both the applicant's judicial review application and the second respondent's counter-application.

### **Costs**

[50]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[51]. In this matter the second respondent has been successful in its opposition to the applicant's judicial review application. Conversely, the applicant has successfully opposed the second respondent's counter-application. In the end, it can therefore be said that the applicant and the second respondent were both successful in this matter and neither of them are entitled to a costs order. The other parties – the Public Protector and SAA – played no part in these proceedings and I assume that their intention is to abide the judgment of this court.

[52]. I am of the view that each party should, in the circumstances, bear his/its own

<sup>8</sup> *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA).

<sup>9</sup> *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC).

costs.

**Order**

[53]. In the result, I make the following order:

- (1) The applicant's judicial review application be and is hereby dismissed.
- (2) The second respondent's judicial review counter-application is dismissed.
- (3) Each party shall bear its/his own costs.

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**L R ADAMS**  
*Judge of the High Court*  
*Gauteng Division, Johannesburg*

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HEARD ON:	11 <sup>th</sup> October 2023
JUDGMENT DATE:	26 <sup>th</sup> January 2024 – Judgment handed down electronically
FOR THE APPLICANT:	Advocate M Majozi, together with Advocate Sihawu
INSTRUCTED BY:	Motalane Incorporated, Waterkloof Ridge, Pretoria
FOR THE FIRST RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE SECOND RESPONDENT:	Advocate Guy Elliot SC
INSTRUCTED BY:	Francis Thompson & Aspden, Cape Town
FOR THE THIRD RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance