

**IN THE HIGH COURT OF SOUTH AFRICA**

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**NORTH GAUTENG, PRETORIA**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

08/08/2019  
DATE

*[Signature]*  
SIGNATURE

CASE NO: 41636/19

In the matter between:

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

**Applicant**

And

**THE PUBLIC PROTECTOR OF THE REPUBLIC  
OF SOUTH AFRICA**

**PRAVIN JAMNADAS GORDHAN  
ECONOMIC FREEDOM FIGHTERS**

**1<sup>ST</sup> Respondent**

**2<sup>ND</sup> Respondent**

**3<sup>RD</sup> Respondent**

**JUDGEMENT**

**MOLOPA-SETHOSA J**

[1] The applicant, the President of the Republic of South Africa (the President) has launched an application on an urgent basis for an order in the following terms:

*"2. It is declared that the President of the Republic of South Africa has complied with the remedial action of the Public Protector of South Africa (Public Protector) arising out of the investigation and report into allegations of maladministration and impropriety in the approval of Mr Ivan Pillay's early retirement with full pension benefits and subsequent retention by the South African Revenue Services bearing reference number 2019/20 (the Report) in that the President has:*

*2.1 in compliance with paragraph 7.1.1 of the Report noted the adverse findings made in the Report against the second respondent (the Minister;) and*

*2.2 within 30 days of the issuing of the report and in compliance with paragraph 8.1 of the Report submitted an implementation plan to the Public Protector indicating how the remedial action in paragraph 7.1.1 of the*

*Report will be implemented (the implementation plan).*

- 3. The President is directed in accordance with the implementation plan and subject to the decision of this court in the review application under case number 36099/2019 (the Minister's review application), to take appropriate disciplinary action against the Minister within thirty (30) days from the date of the final determination of the Minister's review application, including the final determination of any subsequent appeals.*
- 4. Alternatively to paragraph 2 and 3 above, it is directed that the President's obligation to implement the remedial action of the Public Protector in paragraphs 7.1.1 and 8.1 of the Report is stayed pending the final determination of the Minister's review application, including the final determination of any subsequent appeals.*
- 5. That costs of this application shall be paid by any such respondent who opposes the*

*application on an attorney and own client  
scale including costs of two counsel."*

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**The parties:**

[2] The applicant is the President of Republic of South Africa (hereinafter referred to as "the President"). The first respondent is the Public Protector of South Africa (hereinafter referred to as "the Public Protector"). The second respondent is Pravin Jamnadas Gordhan ("Minister Gordhan"). The Economic Freedom Fighters hereinafter referred to as "the EFF") brought an application to intervene in these proceedings. Both the President and the Public Protector are not opposing the EFF's application for intervention. Accordingly, the EFF is joined in these proceedings as the third respondent.

[3] Minister Gordhan is not opposing the application and he supports the application by the President. Both the Public Protector and the EFF are opposing the application.

[4] As already indicated this matter come on an urgent basis. Urgency is not in issue; all the parties are agreeing that it is in the best interest and in the protection of our democracy that this application be dispensed with as quickly as possible.

**Points in limine:**

[5] The Public Protector had raised some points in *limine* primarily relating to the **jurisdiction** of this court to deal with this matter on the issue of the declaratory order sought by the President on the basis that the President has failed to fulfil his Constitutional obligations which arise from Section 83 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”); as well as **non-joinder** of Messrs Ivan Pillay (“Pillay”) and Edward Kieswetter (“Kieswetter”), the erstwhile and current commissioners of the South African Revenue Services (“SARS”) respectively, in these proceedings.

[6] It was agreed that I should not deal with the points in *limine* at the beginning of the case as it is usually done, but that I should rather hear the whole argument on both the points in *limine* and the merits of the application and then decide on this at the end of the case. I will thus deal with the points in *limine* below.

**Background facts**

The following is a summary background to the issues leading to this application:

[7] On 24 May 2019 the Public Protector published a report bearing reference number 24/2019/20 (“the report”) containing findings made and the remedial action to be taken against Minister Gordhan. The remedial action arises out of the Public Protector’s

report on investigation into allegations of maladministration and impropriety in the approval of Pillay's early retirement with full pension benefits and subsequent retention by SARS.

[8] The remedial action includes that the President must take disciplinary action against Minister Gordhan. The remedial action that is relevant to this application states the following:

***“7.1: The President of the Republic of South Africa***

*7.1.1 to take note of the findings in this report insofar as they related to the erstwhile Minister of Finance, Mr Gordhan and to take appropriate disciplinary action against him for failing to uphold the values and principles of public administration entrenched in Section 195 of the Constitution, and the duty conferred on Members of the Cabinet in terms of Section 92(3)(a) of the Constitution, to act in accordance with the Constitution.*

**8 MONITORING**

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

[9] On 28 May 2019 Minister Gordhan launched a review application in this court under case number 36099/2019, amongst others, for the Public Protector's report [No. 24/2019/20] to be reviewed and set aside, declared unconstitutional, unlawful, irrational, and invalid; including the remedial action in paragraph 7 of the report aforesaid.

[10] The President submitted an implementation plan wherein he sets out his plan of action on the terms set out in a letter dated 19 June 2019 addressed to the Public Protector, wherein he states the following, and I read from paragraph 5 of the said letter:

*"5. My letter is in accordance with my obligation in paragraph 8.1 of your report.*

*6. In relation to your direction to submit my Implementation Plan I reply as follows:*

*6.1 I have noted the findings against Minister Gordhan in your report.*

*6.2 I have noted, too, the assertions made by Minister Gordhan in his review application that your report falls to be reviewed and set aside because it is allegedly ultra vires Section 6(9) of the Public Protector Act, issued by means of*

*an unfair procedure and tainted by misdirections of law and fact.*

*6.3 One of the legal complaints raised by Minister Gordhan is that the direction that I take appropriate disciplinary action against him is 'vague and impossible to implement in the absence of an employment relationship between the President and myself.'*

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

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

*6.4.2 my alleged power to exercise such disciplinary action is itself legally*

*contested by Minister Gordhan in that dispute pending before the High Court.*

*7 In the circumstances my implementation plan in respect of the remedial action set out in paragraphs 7.1 of your report is the following:*

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

*7.2. I have concluded that the process of taking appropriate disciplinary action against Minister Gordhan would best be served by waiting until the legal processes of his review proceedings have clarified*

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

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

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

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

[11] As can be seen from the letter from the President, just read above, the President explained the President's reasoning for the implementation plan adopted; especially at paragraphs 6.3 and 6.4 above.

[12] The Public Protector replied to the President's letter aforesaid as follows in a letter dated 26 June 2019:

"2. *It is trite that the remedial actions from of the Public Protector are binding unless set aside by a court order as was stated by Mogoeng Mogoeng CJ in the*

*matter between Economic Freedom Fighters v Speaker of National Assembly [2016] ZACC 11. Whilst it is established law that a report of the Public Protector can be reviewed and set aside through a judicial review application, the institution or intention to institute such proceedings does not automatically pend the implementation or enforcement of the remedial action.*

3. *As the law currently stands a review application does not suspend the enforceability of a decision administrative act, or a judicial edict. This principle was settled by the Supreme Court of Appeal in the matter of the SABC v DA 2016(2) SA 522 SCA where the court reaffirmed the position as laid in Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) that that 'is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked'. It is clear from the above that any advice to the effect that a review application stays the implementation of the remedial action is incorrect and is a sheer display of*

*cluelessness on the person giving such advice.*

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

5 *The President's refusal to act on my remedial action is a failure on the President's part to uphold the Constitution. Absent of an order directing otherwise, my remedial action are (sic) binding and compliance thereto is not optional. Contrary to the President's advice that I should approach a court for compelling compliance, it is the President who must approach the court to interdict my remedial action. This is also another indication that the President relies on incorrect advice legal or otherwise. I can deduce from the President's letter that the decision not to implement was a foregone conclusion as it is merely based on Gordhan's assertions, and nothing else.*

6 *In an attempt to dispel the myth that a mere review application automatically suspends an impugned decision, I copy Mr Gordhan's legal representatives on this correspondence.*

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

[13] On the 3<sup>rd</sup> July 2019 the President responded to the letter of the Public Protector aforesaid, stating that he fears that the Public Protector has misunderstood his letter of 19 June 2019 in that he has not refused to act on the Public Protector's remedial action. He/the President, *inter alia* also states as follows:

*"The relevant paragraphs of your report directs me to take note of the findings in this report insofar as they related to the erstwhile Minister of Finance, Mr Gordhan and 'To take appropriate disciplinary action against him for failing to uphold the values and principles of public administration entrenched in Section 195 of the Constitution, and the duty conferred on Members*

*of the Cabinet in terms of Section 92(3)(a) of the Constitution, to act in accordance with the Constitution' and you further direct me to submit within thirty (30) days an implementation plan indicating how I will implement the remedial action..*

*I have complied with your direction by:*

- *firstly, taking note of the findings in your report insofar as they relate to Minister Gordhan, and*
- *secondly, sending you an implementation plan indicating how I will implement the remedial action you have directed me to take within the 30 days' deadline that you directed I do so in paragraph 8.1 of your report.*

*You appear to have concluded that I am refusing to act on your direction 'to take appropriate disciplinary action against Minister Gordhan'. This is not the case. In terms of your direction it is for me to determine what is 'appropriate' disciplinary action to take. As pointed out in paragraph*

5.4 (sic) of my letter of 19 June 2019 I have concluded that at this stage (for the reasons stated in my letter) there is yet no action that would be appropriate to take. I am advised that this a legally sound conclusion to reach on the basis of the judgment of the Supreme Court of Appeal in *Soutwerk (Pty) Ltd v Minister of Mineral Resources and Another* [2017] ZASCA 56 (19<sup>th</sup> May 2017). In this case, the Department of Mineral Resources decided not to take steps to finalize a mining right while two private parties litigated over the validity of that right in proceedings to which the Department was a non-disputing party. At paragraph 66 of the judgment, the Supreme Court of Appeal stated the following:

*'The policy of the Department was not to finalize a mining right whilst litigation was pending regarding the validity of that right. It was in my view in keeping with public and legal policy not to undermine the legal process by determining that which the courts were called upon to decide.'*

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

*As proceedings in the review application unfold the state of affairs in relation to appropriate action may well change should this happen I will promptly notify you of any result and changes to my implementation plan."*

[14] In a further letter dated **9 July 2019** the Public Protector responds to the letter of the President aforesaid and states amongst others the following and I quote from paragraph 9:

"9. I fear that the Honourable President's persistence on wilful non-compliance with my remedial action which is based on the Honourable President's incorrect interpretation of the law is not only ostensibly contemptuous of my office but also borders on a breach of the Honourable

President's Constitutional duties as spelled out in the Constitution."

12 I therefore plead with the honourable President to avert the Constitutional crisis alluded to above by taking heed of my advice and implementing the remedial action as set out in the report or obtaining a court interdict to stay the implementation pending the outcome of the review proceedings or even causing the implicated and/or affected public officials to do so. Such orders are sought and obtained daily in our courts in respect of review applications targeted at ordinary administrative action let alone the remedial action of the Public Protector which almost ranks as a court order in its binding effect.

At paragraph 14 of this letter the Public Protector states the following:

14 To the extent that it could possibly be argued that there was any ambiguity as to what the Public Protector meant or intended in taking the remedial action specified in the relevant report, which is disputed, this letter

must serve to remove any such alleged ambiguity and, given that the timeframes originally determined have now already expired, to demand such implementation as a matter of urgency and preferably by no later than Friday 12 July 2019." [My underlining]

### **The issues**

[15] From the reading of the papers and the correspondence between the President and the Public Protector aforesaid the main issue between the parties can be defined as follows:

-Whether the President has complied with the Public Protector's remedial action contained in the Public Protector's report of 24 May 2019 this is what the declarator seeks to achieve through prayers 1, 2, and 3 of the Notice of Motion.

-Alternatively, whether the President has made out a case for the stay of the President's obligation to implement the remedial action of the Public Protector in paragraphs 7.1.1 and 8.1 of the report, pending finalization of Minister Gordhan's review application.

[16] The President's case is that he has complied with the remedial action of the Public Protector contained in the report aforesaid.

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[17] In the alternative, and in the event the Court finds that the President has not complied with the remedial action of the Public Protector, the President contends it is in the best interests of justice that the President's obligation to implement the remedial action of the Public Protector be stayed pending the final determination of Minister Gordhan's review application.

[18] Minister Gordhan is not opposing the President's application. He supports the President's application on the basis that there is no compelling reason to immediately implement the remedial action imposed by the Public Protector in the report.

[19] Both the Public Protector and the EFF are opposing the application and contend that the President has not complied with the Public Protector's remedial action and has not made out a case for the stay of the implementation of the remedial action.

[20] The Public Protector further contends that the President refuses to implement the remedial action of the Public Protector and that that undermines the office of the Public Protector. Further that the President seeks an order against himself to suspend the powers of the President to act expeditiously against members of the

National Executive against whom there are adverse findings. She contends that in granting the order sought by the President the Constitution work of the Public Protector would be undermined, stifled and incapacitated. The Public Protector furthermore contends that “*the court is being asked to provide legal advice to the parties*”, i.e. that the President has launched this application to seek legal advice from the Court.

[21] The EFF contends that the President has not complied with remedial action of the Public Protector as he has up to now not taken any disciplinary action against Minister Gordhan. The EFF further contends that the President has not met the requirements for an interim relief as set out in *Setlogelo v Setlogelo*. That the President must immediately take disciplinary action against Minister Gordhan, irrespective of the pending review application.

[22] As correctly contended and submitted on behalf of Minister Gordhan, the Public Protector accepts that the fact that there is a review application does not stay the implementation of the remedial action, in the absence of a court order. This application thus is not seeking legal advice from the court. The application is seeking a declaratory relief or a stay as is usually granted in such matters pending the final determination of the review application.

[23] From the correspondence referred to hereabove between the President and the Public Protector it is clear that the Public Protector has no regard whatsoever to the implementation plan proffered by the President; and in fact insists on immediate disciplinary action by the President on Minister Gordhan; so does the EFF.

[24] Clearly here the President is seeking the Court's assistance because of the opposition he encountered from the Public Protector to his implementation plan. This is the only avenue to the President in the face of the Public Protector's ultimatum to him, as postulated in the Public Protector's letter dated 9 July 2019, challenging the President as well, to bring this application, to do precisely what the President is doing now seeking a temporary suspension of the implementation of the disciplinary action/remedial action pending the outcome of the review launched by Minister Gordhan who challenges the report and its remedial action.

[25] In essence the President, as stated above, the President contends that he has complied with the remedial action, however, he seeks the suspension of the implementation of the disciplinary action against Minister Gordhan.

[26] It is clear that the parties are in disagreement as to what is required of the President flowing from the Public Protector's report and thus the President has approached this court to provide clarity on these issues.

[27] There is no cogent reason proffered by the Public Protector, and the EFF for that matter, as to why the disciplinary action should be implemented immediately prior to the final determination of the pending review of the report and the remedial action of the Public Protector launched by Minister Gordhan. It was submitted on behalf of Minister Gordhan that this is so particularly given the vague and confusing formulation of the remedial action itself.

[28] As stated above, the remedial action in the report required that the President take note of the findings in the report insofar as they relate to Minister Gordhan. It is not in dispute that the President has indeed taken note of the findings of the report and informed the Public Protector in writing. The Public Protector self accepts that the President has taken note of the findings of her report insofar as they relate to Minister Gordhan.

[29] The remedial action set out in the report does not stipulate **when** the President is to take appropriate disciplinary action. The President contends, and it was so submitted on his behalf, that the Public Protector has left the issue pertaining to **the time when to**

take the **appropriate** disciplinary action [and the **how**] to the discretion of the President.

[30] At paragraph 14 of her letter of 9 July 2019 the Public Protector gave the President an ultimatum to comply with the remedial action, more specifically to take disciplinary action against Minister Gordhan by the 12<sup>th</sup> August 2019, and this in essence prompted the President to bring this urgent application [which was launched on 16 July 2019]. The aforesaid ultimatum is basically a variation and/or alteration of the Public Protector's remedial action since, in the report there is no time stipulation within which the President must take appropriate disciplinary action. The thirty (30) days postulated in paragraph 8.1 of the report refers to the time within which the President must 'submit an implementation plan to the Public Protector indicating **how** the remedial action referred to in paragraph 7.1 of the report will be implemented'; and in his letter to the Public Protector, dated 19 June 2019, the President outlined his implementation plan.

[31] Of course it is incumbent on the President to act within a reasonable time, however, the President having adopted a sensible approach states that he will await the finalization of the review application launched by Minister Gordhan, and his reasons are fully set out in paragraph 6.4 of the said letter. The President's approach allows the review Court to pronounce on the merits of

Minister Gordhan's review, vindicating Minister Gordhan's right to access to justice and upholding the rule of law.

[32] The EFF contends that since the President has not taken the Public Protector's report on review he has clearly accepted the factual findings of the report and that therefore he must take disciplinary action against Minister Gordhan immediately.

[33] I may state that the President at no stage in his affidavits- both the founding affidavit and the replying affidavit does he attack the factual basis of the report; nor does he deny that the remedial action is binding on him and also he acknowledges that a review application does not necessarily suspend the implementation of a remedial action unless such remedial action is suspended and/or stayed by a court of law.

[34] The suspension and/or stay of the Public Protector's remedial action, by a court of law has been ordered and/or obtained many times, even with the consent as well of the Public Protector; for example, there is a matter which came before this court on Tuesday 30 July 2019, in Phumelela v The Public Protector, The President and Others, Case No.51631/19 wherein the applicant, Phumelela brought an application on an urgent basis interdicting the immediate implementation of the remedial action contained in paragraph 8 of the Public Protector's report 2019/20 imposed by the

Public Protector pending finalization of Phumelela's review application. The Public Protector did not oppose that application and in fact consented to the order staying the implementation of the remedial action pending the final determination of Phumelela's review application to have the report of the Public Protector reviewed and set aside.

[35] Also, on 01 August 2019, in another matter involving the President and the Public Protector, in a letter provided to this Court, the Public Protector basically consented to a suspension and/or staying of the implementation of her remedial action, pending finalization of the President's pending review application. The legal principles in the above cases are similar to the matter at hand here. The suspension or stay of the remedial action in the aforesaid cases has the same effect and same legal principle as in this matter.

[36] Both the President and Minister Gordhan question why in this case the Public Protector is not being consistent in agreeing to the suspension of the implementation of the disciplinary action and/or her remedial action. I may state that there are two cases in this Division which lay precedence for this Court to grant this application as I cannot and do not find fault in any of the judgements alluded to. The one is the matter of Pravin Gordhan v The Public Protector and Others, case no. 48521/19, which was

heard on 23 July 2019 before my sister Potterill where the effect of the order granted interdicting the implementation of the remedial action temporarily pending finalization of the review. The legal principle in that case basically has the same effect as in this one. The other case from this Division [though Gauteng South] by my brother Makume J in *Democratic Alliance v Jacob Gedleyihlekisa Zuma* [the erstwhile President of the Republic of South Africa] and another, case no. 21029/2017 where the erstwhile President Zuma had launched an application for the stay of the implementation of the remedial action of the Public Protector pending finalization of his review application; which order was granted by Makume J suspending the operation of the remedial action issued by the Public Protector. The effect of the orders, and the legal principles in the above mentioned cases have the same effect as in this case; i.e. having the implementation of the remedial action suspended, in this President's case, more specifically pertaining to the disciplinary action which the President is implored to take against Minister Gordhan. With regards the doctrine of precedence the Supreme Court of Appeal held *as follows in Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* 2018 (4) SA 107 (SCA) at paras [3]-[4].

“[3] . . . The basic principle is *stare decisis*, that is, the court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have

*been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. The need for palpable error is illustrated by cases in which the court has overruled its earlier decisions. Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.*

*[4] The doctrine of stare decisis is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. It serves to lend certainty to the law."*

[37] Besides the principles relating to precedence, the matter basically also relates to **consistency**. The President and Minister Gordhan are correct in stating that there is no consistency in the manner of approach and conduct of the Public Protector, and further that there are two cases which I have already mentioned the one by my sister Potterill J the other by my brother Makume J which have the same legal principles which have the same effect to the matter at hand; and it is mind boggling basically why in this matter the

Public Protector did not even consent to at least if she does not want to consent to the declaratory order to have the remedial action stayed pending finalization of the review application launched by Minister Gordhan. Of importance is that immediately after the judgement of Potterill J under Case No. 48521/19 on 29 July 2019 in the aforesaid case between Minister Gordhan and amongst others the Public Protector, which case is in issue herein, the Public Protector sent a letter dated 29 July 2019 consenting to the relief sought in the Phumelela case mentioned above which order was granted on 30 July 2019; and in essence as I have indicated hereabove is similar in principle to this case

[38] The Public Protector contends that there is a close relationship between the President and Minister Gordhan i.e. that they are friends and that the President basically is protecting Minister Gordhan. The President disputes this, correctly stating that the allegation in this regard is spurious, in fact, he even did not want to give that assertion any dignity and he correctly states this has to do with legal issues that the Court has to determine; it has nothing to do with any friendship between the President and Minister Gordhan. I am not even going to consider that, I am of a view that that merely clouds the issues.

[39] The issue here is whether the President has complied with the remedial action or not; if he has not he is seeking an alternative relief to have the implementation of the remedial action more specifically implementation of the disciplinary action against

Minister Gordhan stayed until finalization of Minister Gordhan review.

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[40] Looking at the facts and the correspondence between the parties and on a proper reading of the letter by the President to the Public Protector the first letter, the letter of 19 June 2019 the President has complied with the remedial action. The Public Protector herself states that she required the President to take three actions:

[40.1] To take note of the findings against the Minister-the  
President has taken note of the findings.

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[40.2] To take appropriate disciplinary action against the  
Minister-the President has submitted an  
implementation plan detailing that he intends  
deferring his decision on what disciplinary action to  
take pending finalization of the review application.

[40.3] To provide the Public Protector with an  
implementation plan for the Public Protector's  
approval indicating how the remedial action will be  
implemented- the President has timeously submitted  
his implementation plan to the Public Protector.

[41] Clearly the Public Protector does not approve of the implementation plan which the President submitted to her. This, however, does not negate the fact that the President, has, in compliance with the remedial action, submitted the implantation plan within the stipulated thirty (30) days from date of the report, setting how he intended dealing with the disciplinary action.

[42] What does one do if the Public Protector does not approve of one's implementation plan? One would do what the President has done, one would approach the court. The Public Protector herself has indicated in the letters that I have read, i.e. in the correspondence that I have read into the record, it appears many times from what the Public Protector says to the President that the review does not suspend the operation of the remedial action unless a party approaches the court for a stay or suspension of such remedial action. I have already stated that the Public Protector has consented, in this week only she has consented to about two, no, it is not this week, it is last week, on the 30<sup>th</sup> July and the 1<sup>st</sup> August 2019, she consented to two suspensions of her remedial actions pending finalisation of the review applications in the respective applications.

[43] Counsel for the President as well of the second respondent, Minister Gordhan, suggest that the Public Protector is taking this matter personally and when one sees the language she uses in her

address to the President that is now in the correspondence that she has sent to the President to tell the President that the people who are advising the President basically she is saying that they do not know the law they are incompetent, in her words they '*display cluelessness on the person giving such advice*', basically insulting the President's legal adviser(s), yet she herself complains basically in her affidavit, and submissions were made on her behalf in that regard, that Minister Gordhan is insulting her in his founding affidavit in the review application and she even goes further to state that the President by not taking disciplinary action and by stating that he does not regard the Minister Gordhan's application as frivolous in fact is endorsing the insults that Minister Gordhan is allegedly hurling at her in his affidavits. The President has set the record straight and in his replying affidavit he states categorically that he does not in any way associate himself with whatever the Public Protector calls insults to her by Minister Gordhan.

[44] Looking at the report itself, and as conceded, properly so, by the Public Protector, the remedial action is silent on when and how the disciplinary action should be taken. Counsel for the President submitted that the remedial action gives the President discretion of the time and form of the disciplinary action to be imposed on Minister Gordhan. And on a proper reading of the remedial action, taking into account that there are no time frames within which to act, of course justice dictates that it must be within a reasonable time,

the President presented his implementation plan in terms whereof he stated what his plan of action.

[45] All the President was required to do in order to satisfy the test of compliance was to determine the appropriate disciplinary action which flows from the Report as it stands. The President in his letter to the Public Protector outlining his implementation plan specifically states that the outcome of Minister Gordhan's application will inform what appropriate action if any to take. On the facts, the President has complied with the remedial action; in terms of the timing and the form of the disciplinary action, the President was left with the discretion and he has duly exercised his discretion; he has taken a sensible approach to say that he will defer his decision on what disciplinary action to take pending finalization of Minister Gordhan's review application. The President is not saying that he will not take disciplinary action against Minister Gordhan; he is saying he will defer the implementation of the disciplinary action pending finalization of Minister Gordhan's review application.

[46] It is incumbent on the President to act reasonably and rationally and in my view this is a reasonable and rational decision which he has taken. The outcome of the review will necessarily and materially inform the content of any disciplinary action the President might have to take depending on the outcome of the review application whatever disciplinary action will impact on Minister Gordhan. Now that there is a review application pending

launched by Minister Gordhan, it will be absurd for the President to now take disciplinary action against Minister Gordhan while the review application is pending.

[47] It was argued both on behalf of the Public Protector and the EFF that the President in this case is not the victim and that he was not supposed to have taken, to have brought this application to stay the implementation of the remedial action that it should have been Minister Gordhan who should have asked for the relief sought more specifically pertaining to prayer 4 of the Notice of Motion, the alternative relief. That argument loses sight of the fact that the President is the one who is obligated to take remedial action, it is not like any man in the street who just comes and say I want to bring this application on behalf of someone. The President is the one who is enjoined by the remedial action of the Public Protector to take disciplinary action against Minister Gordhan; and he has a right to approach this court.

[48] In the correspondence from which I have alluded to above, more specifically in the letter to the President dated **9 July 2019**, the Public Protector herself states that either the implicated or affected party or the President may approach a court for a suspension or stay of remedial action pending finalization of the review application; she states:

*"I plead with the honourable President to avert the Constitutional crisis alluded to above by taking heed of my advice and implementing the remedial action as set out in the report or obtaining a court interdict to stay the implementation pending the outcome of the review proceedings or even causing the implicated and/or affected public officials to do so. Such orders are sought and obtained daily in our courts in respect of review applications targeted at ordinary administrative action let alone the remedial action of the Public Protector..." [my underlining]*

and as I stated, it is mind boggling that the Public Protector is now not consenting or she has not consented to at least the stay of her remedial action pending finalization of Mr Gordhan's application.

[49] It was suggested by both the Public Protector and the EFF's counsel, even in the answering affidavits that the President can take remedial action by way of, for example, reprimanding Minister Gordhan or by way of suspending him or by way of stating that he should forfeit maybe one (1) month's salary. This argument loses sight of the fact that whatever action could be taken impacts on Minister Gordhan and that that would be irreversible in the event Minister Gordhan were to be successful in his review application. Both the Public Protector and the EFF contend that the President has not complied with the remedial action because he will only take disciplinary action against Minister Gordhan in future. The President contends, correctly so in my considered view, that this is precisely what the remedial action envisaged; i.e. that disciplinary action would

be taken in future in accordance with the implementation plan. Accordingly, the President cannot be said to have breached the remedial action. The Public Protector correctly left the timing and the form of the implementation plan to the President. In terms of section 91(2) of the Constitution it is only the president who appoints and dismisses Ministers.

[50] I am deliberately not going to express my *prima facie* view on the review application; I leave it to the court that will be dealing with that review application to decide; I do not want to intrude onto the court that will be hearing the review application. However, Minister Gordhan like everyone else has rights, and that is entrenched in the Constitution; why subject him now to disciplinary action when there is a review application pending, the result of which is not known.

[51] It is important and I will reiterate that the President is not saying that he is refusing to implement the remedial action, the President accepts that the remedial action is binding further that the review does not suspend it unless he approaches the court as he has done and he is not challenging in the affidavit he is not in any way challenging the factual findings of the Public Protector in the report. All he is saying is let me await the final determination of the review and to me that is rational and reasonable and as the President of all in the country not a friend, as the President of all in the country including Minister Gordhan he has to as obliged by

the Constitution act rationally and reasonably. The President's approach accords with the requirement of rationality. In *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 98, the Constitutional Court affirmed that “[t]he principle of legality requires that every exercise of public power, including every executive act, be rational.” In *SA Predator Breeders Association v Minister of Environmental Affairs* [2010] ZASCA 151 at para 28, the Supreme Court of Appeal explained a rationality review as follows:

*“Rationality, as a necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given, and to ensure the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such action.”*

[52] It will be clear from what I have stated above that on the facts before this Court, the Court is satisfied that the President has made out a case for the declarator sought and once the declaratory order is granted prayers two and three follow.

[53] However, I want to state that even in the event that the President would not have even succeeded on the declarator, even if one were to decide the matter on the alternative relief sought by the President in prayer 4 of the Notice of Motion, besides complying with all the requirements set out in *Setlogelo v Setlogelo* 1914 AD 221, as stated by Makume J in the DA matter *supra*, it would be in the best interests of justice to stay implementation of the disciplinary action pending the finalisation of Minister Gordhan's review application. The President has an obligation to protect the integrity of all the citizens and institutions of our country South Africa. If one weighs the odds, there will be no prejudice to the Public Protector and the EFF should the relief sought by the President be granted. On the other hand, Minister Gordhan, stands to be seriously prejudiced should the President take disciplinary action now, as contended by the Public Protector and the EFF. If he is subjected to disciplinary proceedings, but later vindicated by the review court, that relief will be nugatory as the remedial action would already have been implemented against him.

[54] But as stated in paragraph [50] hereabove my judgment and order will be based mainly on the issue of the declarator sought in prayer 1 of the Notice of Motion, together with ancillary relief sought.

[55] It was submitted on behalf of the Public Protector that since the Public Protector has not approved the President's implementation plan, there cannot be any talk of any compliance with the remedial action; further that the President is in

contempt of the remedial action since he still has not taken disciplinary action against Minister Gordhan.

[56] What does one do when the Public Protector does not approve of one's implementation plan!! In *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2017(3) SA 580 CC-The Nkandla matter- the Constitutional Court concluded that remedial actions by the Public Protector are binding and should be implemented. The President does not deny that the remedial action of the Public Protector is binding. He has taken cognisance of the review application lodged by Minister Gordhan; he has approached the Court for a declarator the effect of which will be a stay of the implementation of the disciplinary action pending finalization of Minister Gordhan" review application; a step which is recognised by the Public Protector as the correct step, both in correspondence with the President and in written submissions that, as informed by counsel for the President and not disputed by counsel for the Public Protector, served before my sister Potterill J on 23 July 2019. I reiterate that this was not disputed at all by counsel for the Public Protector, both in the argument in chief and in reply by counsel for the President. The relevant paragraphs of the written submissions aforesaid state as follows:

*"23. In order to appreciate the approach of the Public Protector in this application, it is necessary to identify the functionaries that are directed to implement the remedial action. It is the President, who is the head of the national executive with the constitutional power to appoint the applicant and dismiss him. The remedial action against the*

*President is that he should, having regards to the findings in the report, take disciplinary action. The President does not say that such a remedial action is impossible to implement. He does not say that it is practically and constitutionally impossible to give effect. His position is that the timeframe within which to give effect to the remedial action must depend on the merits of the review application and the lawfulness of such action. He appears uncertain about the power to discipline members of the executive given that they do not fall within the classical definition of employees. They serve as his pleasure.*

24. *The reservation[s] are well founded but cannot be cured by an interdict against the remedial action. In other words, if the President's attitude is that he needs the outcome of the review application to perform his duty to hold a member of the executive to account, he could simply include that in his implementation plan. He could inform the applicant that he has received and considered the report which makes numerous adverse findings against the member of the executive. He could then ask for representations from the member concerned. In this case it is clear that the applicant would inform the President that he is taking the findings and remedial action to court on review on the basis of legality, irrationality and other grounds. The President could then*

submit an implementation plan to the Public Protector that takes into account the applicant's representations. Such plan would include timeframes that accommodate the conclusion of the review application. The Public Protector could then consider the implementation plan and endorse it. That way the President has complied with the remedial action of the Public Protector – affirming the constitutional importance of the remedial action on the one hand and on the other ensuring that the member of the executive is held to account. The position adopted by the President in this application to support the applicant neither meets the constitutional obligation to support the Public Protector nor holds the applicant to account for the findings made by the Public Protector.” [My emphasis]

The approach of the President is substantially at all fours with what was submitted on behalf of the Public Protector in the written submissions set out above. I repeat it is mind boggling why the Public Protector is not acceding to what she in the first place suggested.

[57] At paragraph [71] of the Nkandla matter, the Constitutional Court further stated as follows:

*"In sum, the Public Protector's Powers to take appropriate remedial action is wide but certainly not unfettered. Moreover, the remedial*

action is always open to judicial scrutiny". It is also not inflexible in its application but situational. [My emphasis]

[58] The Constitutional Court stressed at paragraph [74] of the Nkandla decision, that decisions, although binding, are not immune from judicial scrutiny, and said the following:

*"This is so because our Constitutional order hinges also on the rule of law. No decision provided in the Constitution or law may be disregarded without recourse to a court of law. To do so would amount to a licence to self-help."*

[59] The President has taken the correct step in approaching the Court, and this cannot be said to be the President's way to seek legal advice from the Court. Issues are contentious between the parties and in the absence of consent from the Public Protector, required adjudication.

[60] So the fact that the Public Protector has not approved the President's implementation plan does not mean that there has not been compliance by the President. I have already stated that on a conspectus of all the facts looking at the conduct the engagement of the President and at more specifically at the letter dated 19 June 2019 the President read with the remedial action imposed on him the President has complied with the remedial action. There are no time frames set out by the Public Protector nor the form of implementation of the appropriate disciplinary action; and the President has submitted his implementation plan to the Public

Protector stating that he is deferring his decision to take disciplinary action pending finalization of Minister Gordhan's review application.

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[61] On the issue then of a declarator, I am satisfied that the President has made out a case for the relief sought in the Notice of Motion

**Points in limine**

[62] As stated above, the Public Protector has raised some points *in limine* relating to the **jurisdiction** of this Court to deal with this matter on the issue of the declaratory order sought by the President, as well as **non-joinder** of Pillay and Kieswetter to the proceedings.

[63] On the issue of **jurisdiction**, the Public Protector contends that, the matter before this court falls within the exclusive jurisdiction of the Constitutional Court in that, so contends the Public Protector, the President has not complied with his Constitutional obligation in terms of Section 83 of the Constitution. And to this the President correctly states that this is just a simple issue where the President and the Public Protector and the EFF now as they have intervened as the third respondents do not see things in the same way and hence coming to the court for a declarator. It has nothing to do with the President not having fulfilled his Constitutional

obligations in terms of the Constitution. The issue according to the Notice of Motion is whether the President has complied with the Public Protector's remedial action contained in the Public Protector's report of 24 May 2019. The declarator sought in this regard.

[64] On the issue of **non-joinder** of Pillay and Kieswetter, the relief sought in this application concerns only the Minister Gordhan; it does not in any way affect Pillay and Kieswetter. This much was conceded by Counsel for the Public Protector, i.e. that the relief sought concerns only Minister Gordhan. It was not necessary for the President to join Pillay and Kieswetter in these proceedings; unlike Minister Gordhan, they have no interest whatsoever in the outcome of these proceedings. This matter purely has an impact on Minister Gordhan only. The submission on behalf of the President that the Public Protector is just being exceedingly technical is correct. The points in *limine*, have no merit and therefore cannot hold.

### Costs

[65] Insofar as the issue of **costs** are concerned it was argued on behalf of the Public Protector as well as the EFF that the President is intimidating the Public Protector by stating that he would ask for costs on a punitive scale i.e. special cost order. In a letter dated 29 July 2019 from the State Attorney to the President's legal representative imploring the Public Protector to consent to the order sought in the notice of motion in this matter, this is after my sister Potterill J had given

judgment in the matter between Minister Gordhan and the Public Protector on the same date, 29 July 2019, favourably so for Minister Gordhan, the Public Protector is informed at paragraph 2 thereof as follows:

*“2. We request the Public Protector to consent to the orders sought in paragraphs 1 to 3 of the Notice of Motion in our application, alternatively paragraph 4 of the notice of motion and an order for costs. Should the Public Protector persist with her opposition to the relief sought in the urgent application, and decline to consent to any of the orders sought, we will obtain instructions to pursue a special costs order.”*

[My underlining]

[66] On a proper reading of the letter, it is clear that when the attorneys wrote that letter, the President had not at that stage given them instructions to threaten or intimidate the Public Protector with a punitive cost order; this clearly implies that the State President had not instructed the State Attorney to pursue a special cost order; the Public Protector was merely being cautioned by the President’s legal representatives that if the Public Protector did not consent to the relief sought herein, they would advise their client, the President, to pursue a special cost order. Mr Mpofu for the Public Protector said in this court during argument that I should pronounce on this issue of costs, and that is specifically why I am mentioning this. It cannot be said from the reading of that letter that the President was trying to intimidate or was intimidating the Public

Protector because the letter is clear, at the time the President's attorneys wrote that letter they stated that they would advise their client to seek a special cost order. It is important to note that counsel for the President did not pursue the issue of costs at all. It is so that in the notice of motion the relief sought in prayer 5 is that any party that would be opposing this application would be required to pay costs on an attorney and own client, this is what is stated in the notice of motion. However, counsel for the President, as mentioned, did not pursue that during argument and he correctly left the issue of costs to the court.

[67] It is trite that the issue of costs is within the discretion of the court and counsel for the President specifically stated that he was leaving the issue of costs to the Court; he did not persist with an order for costs on an attorney and client scale. He left the issue to, of costs to the court. It is trite that the question of costs is a discretion of the court, which must be exercised judicially. The award of costs is to be decided on the basis of fairness and equity. It is a general rule that costs follow the results; the successful party is entitled to costs unless there are good reasons to depart from such rule. There is no reason why this rule cannot apply here.

[68] Both the Public Protector and the EFF's counsel submitted that in the event the application were to be successful in this, the Biowatch principle must apply. I have already stated insofar as the

Public Protector is concerned that it is not understandable really why she was opposing a stay of the remedial action pending the finalization of Minister Gordhan's review application and wanting the President to implement disciplinary action against Minister Gordhan immediately. The EFF as well was basically being unreasonable to also want to demand that the President must take disciplinary action immediately.

[69] The Public Protector and the EFF were unreasonable to oppose the application launched by the President, seeking that the disciplinary action must be immediately implemented by the President, irrespective of the review application pending before the Court. More especially where the Public Protector has recently, as already mentioned above, consented to suspension of the Public Protector's remedial action in some matters, some of which are mentioned hereabove [e.g. The Phumelela matter, the President's matter mentioned above]. All persons are equal before the law. Our Constitution is clear in this regard. There is no reason to treat Minister Gordhan differently by seeking that the President implement the remedial action now while the review application is pending, whereas the Public Protector consented to the suspension of her remedial action in the aforesaid matters pending the review applications of other parties.

[70] I do not see that the justice would be served if the successful parties were not to be granted an order for costs; and I have already indicated that I am satisfied on the papers, and having considered the submissions made on behalf of all the parties before this court

that the President has made out a case for the order sought in prayer one (1) and prayers two (2) and three (3) basically have to follow.

[71] To sum up, the President has complied with the remedial action and as indicated above, he has acknowledged and unequivocally accepts, correctly so, that the remedial action is binding on him. This is not a case which can be compared to the EFF case where the EFF sued the Speaker of the National Assembly; that is now the Nkandla matter *supra* involving the erstwhile President Zuma who wanted to run a parallel process in Parliament instead of implementing the remedial action of the Public Protector. In fact, he did not see himself bound by the remedial action until the court in that matter held that the remedial action is binding; so the Nkandla case cannot in any way be compared to this matter where the current President correctly accepts that he is bound by the remedial action, and he is not refusing to implement it. He is just deferring implementing the disciplinary action, pending finalization of Minister Gordhan's review application.

[72] In my considered view the President is acting rationally and reasonably as I have already indicated pending the finalization of the review application by Minister Gordhan. And having said that and on a consideration of all the facts I come to the conclusion that the President has made out a case for the relief sought. In so far as

the points in *limine* are concerned, there is no substance in the points in *limine*, they ought to be dismissed.

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## **ORDER**

In the result the following order is made:

1. The points in *limine* are dismissed.
2. It is declared that the President of the Republic of South Africa has complied with the remedial action of the Public Protector of South Africa arising out of the investigation and report into allegations of maladministration and impropriety in the approval of Mr Ivan Pillay's early retirement with full pension benefits and subsequent retention by the South African Revenue Services bearing reference number 24/2019/20 in that the President:
  - 2.1 In compliance with paragraph 7.1.1 of the Report, noted the adverse findings made in the report against the second respondent (Minister Gordhan); and
  - 2.2 Within 30 days of the issuing of the report and in compliance with paragraph 8.1 of the report submitted and implementation plan to the Public Protector

indicating how the remedial action in paragraph 7.1.1 of the report will implemented (this is now the implementation plan).

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3. The President is directed in accordance with the implementation plan and subject to the decision of this court in the review application under case number 36099/2019 (Minister Gordhan's review application), to take appropriate disciplinary action against the Minister Gordhan within thirty (30) days from the date of the final determination of the Minister's review application.

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4. The Public Protector (the first respondent) and the Economic Freedom Fighters (third respondent) are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved such costs to include the costs consequent upon the employment of two counsel in respect of the President and Minister Gordhan.



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**L M MOLOPA-SETHOSA**  
**JUDGE OF THE HIGH COURT**

HEARD ON: 01 August 2019

DATE OF JUDGMENT: 08 August 2019

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FOR THE APPLICANT: ADV: H Maenetja S C.

ADV: R Tshetlo

INSTRUCTED BY: STATE ATTORNEY PRETORIA

FOR THE 1<sup>st</sup> RESPONDENTS: ADV: D C Mpofu S C

ADV: T Masuku S C

ADV: T Motloenyane

INSTRUCTED BY: SEANEGO ATTORNEY

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FOR THE 2<sup>nd</sup> RESPONDENT: ADV: M Le Roux

ADV: O Mohlasedi

INSTRUCTED BY: MALATJI & KANYANE INC

FOR THE 3<sup>rd</sup> RESPONDENT: ADV: V Maleka S C

ADV: J Mitchell

ADV: K Premhid

INSTRUCTED BY: IAN LEVITT ATTORNEYS &  
CONVEYANCERS