



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 62/20

In the matter between:

PUBLIC PROTECTOR First Applicant

ECONOMIC FREEDOM FIGHTERS Second Applicant

**AMABHUNGANE CENTRE FOR
INVESTIGATIVE JOURNALISM NPC** Third Applicant

and

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA** First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS** Third Respondent

NATIONAL COMMISSIONER OF POLICE Fourth Respondent

FINANCIAL INTELLIGENCE CENTRE Fifth Respondent

and

FREEDOM UNDER LAW Amicus Curiae

Neutral citation: *Public Protector and Others v President of the Republic of South Africa and Others* [2021] ZACC [19]

Coram: Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ.

Judgment: Jafta J (majority): [1] to [149]
Mogoeng CJ (minority): [150] to [204]

Heard on: 26 November 2020

Decided on: 1 July 2021

Summary: Executive Members’ Ethics Act 82 of 1998 — direct appeal — Public Protector Act 23 of 1994 — CR17 donations — complaints under the Code — personal benefit

ORDER

On application for direct appeal to the Constitutional Court:

1. Leave to appeal is granted.
2. Save to the extent mentioned below, the appeal is dismissed.
3. The dismissal of AmaBhungane Centre for Investigative Journalism NPC’s claim for constitutional invalidity of the Executive Ethics Code is set aside.
4. The matter is remitted to the High Court for determination of that claim.
5. The President of the Republic of South Africa is ordered to pay costs of AmaBhungane Centre for Investigative Journalism NPC in this Court, including costs of two counsel.
6. No order as to costs is made in respect of the parties, including Freedom Under Law.

JUDGMENT

JAFTA J (Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This matter concerns enforcement of the Executive Members' Ethics Act¹ (Members Act) and the Executive Ethics Code² (Code) published in terms of that Act. Powers of the Public Protector to investigate breaches of these instruments also arise for consideration.

[2] The determination of these issues requires a proper interpretation of the relevant legislation and its application to the present facts. These issues arise in the context of the review of findings and remedial actions taken by the Public Protector in a report she rendered against the President of the Republic. In terms of the remedial actions the Public Protector had ordered certain organs of state, including the Speaker of the National Assembly (Speaker), to undertake steps prescribed by her and report back on steps taken by each organ of state.

[3] The President was aggrieved by the findings made against him and the remedial action ordered. He instituted a review application in the High Court impugning the validity of the Public Protector's decisions, mainly on the grounds of

¹ 82 of 1998.

² Paragraph 2.1 of the Code, Proc R41 GG 21399 of 28 July 2000, provides:

“Members of the Executive must, to the satisfaction of the President or the Premier, as the case may be—

- (a) perform their duties and exercise their powers diligently and honestly;
- (b) fulfill all the obligations imposed upon them by the Constitution and law; and
- (c) act in good faith and in the best interest of good governance, and
- (d) act in all respects in a manner that is consistent with the integrity of their office or the government.”

unlawfulness and irrationality. He was joined by the Speaker and the National Director of Public Prosecutions (NDPP) in the review application. These parties sought to have the remedial actions taken against them set aside on the ground that those actions were not competent in law.

[4] The Public Protector and the Economic Freedom Fighters (EFF) opposed the relief sought in the review application. Meanwhile AmaBhungane Centre for Investigative Journalism NPC (AmaBhungane) was granted leave to intervene. AmaBhungane asked the High Court to construe the Code as requiring disclosure of monetary donations made to campaigns for the leadership of political parties, alternatively it mounted a constitutional challenge against the Code. This challenge was contingent upon the rejection of AmaBhungane's interpretation by the High Court.

[5] Before the High Court, the review application was successful and the Public Protector's report was set aside, together with its findings and remedial orders. The Public Protector was ordered to pay the President's costs on a punitive scale of attorney and client, and the costs of the Speaker and the NDPP on a party and party scale.

[6] Unusually, no order was made with regards to the relief sought by AmaBhungane. But in its judgment, the High Court addressed AmaBhungane's case and acknowledged that a compelling case was made out with regard to the constitutional challenge. However, the High Court concluded that the challenge was not properly raised and as a result that Court was of the view that the challenge against the validity of the Code should be dismissed.

[7] The Public Protector, the EFF and AmaBhungane were unhappy with the outcome and sought to appeal to this Court. Before outlining the facts on which these parties rely for leave to appeal, it is necessary for a proper appreciation of the issues, to set out a summary of the relevant legal instruments.

Members Act

[8] The Members Act came into force on 28 October 1998. It is a short piece of legislation comprising seven sections. Its purpose is to provide for a code of ethics governing the conduct of members of Cabinet, Deputy Ministers and Members of Executive Councils (MECs) at a provincial level. Evidently, the scope of this Act is limited to regulating ethical conduct of members of the Executive at both national and provincial spheres.

[9] Section 1 defines meanings to be attached to certain words wherever they appear in the Members Act. These words carry the defined meanings unless the context indicates otherwise. Section 2 empowers the President of the Republic to draw up a code of ethics “prescribing standards and rules aimed at promoting open, democratic and accountable government”. Members of Cabinet, Deputy Ministers and MECs (collectively referred to as Members of the Executive) must comply with this Code when performing their official functions. After consultation with Parliament, the President must publish the Code in the Gazette.

[10] Section 2 also prescribes what the code should contain.³ Apart from requiring that Members of the Executive should at all times act in good faith and in the best interests of government, the code must forbid them from undertaking: (a) paid work; (b) using their positions to enrich themselves and others; (c) acting in a way that is inconsistent with their office; and (d) exposing themselves to a conflict of interest between their official responsibilities and private interests. In addition, the code must require these Members to make formal disclosure of their financial interests to an official designated by the President or the Premier, as the case may be.

³ Section 2(2) of the Members Act provides:

- “(2) The code of ethics must—
- MECs-
- (a) include provisions requiring Cabinet members, Deputy Ministers and
 - (i) at all times to act in good faith and in the best interest of good governance; and
 - (ii) to meet all the obligations imposed on them by law; and
 - (b) include provisions prohibiting Cabinet members, Deputy Ministers and MECs from—
 - (i) undertaking any other paid work;
 - (ii) acting in a way that is inconsistent with their office;
 - (iii) exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
 - (iv) using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; and
 - (v) acting in a way that may compromise the credibility or integrity of their office or of the government.
 - (c) require Cabinet members and Deputy Ministers to disclose to an official in the office of the President designated for this purpose, and MECs to disclose to an official in the office of the Premier concerned designated for this purpose—
 - (i) all their financial interests when assuming office; and
 - (ii) any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationship with them as may be determined in the code of ethics; and
 - (d) prescribe that the financial interests to be disclosed in terms of paragraph (c) must at least include the information, and be under the same conditions of public access thereto, as is required by members of the National Assembly as determined by that House from time to time, but may prescribe the disclosure of additional information.”

[11] Section 3 empowers the Public Protector to investigate any breach of the code. The scheme that emerges from the reading of this provision is that the Public Protector's power to investigate is subject to a formal complaint. This suggests that the scope of an investigation is determined by the breach of the code contained in the complaint. It is important to note that section 3 does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code.

[12] The section does not explicitly prescribe the procedure to be followed during an investigation. However, it mandates the Public Protector to follow processes outlined in the Public Protector Act,⁴ and exercise investigative powers afforded to her by that Act.⁵ The section contemplates a swift investigation which must ordinarily be concluded and a report be submitted to the President if the complaint was against a Member of Cabinet or a Deputy Minister, or to the Premier if the complaint was against an MEC.

[13] Within 14 days from the date of receiving the report, the President must submit to the National Assembly the Public Protector's report, together with the President's report on action taken or to be taken against the culprit. If the investigation was against an MEC, the Premier must submit the Public Protector's report, together with her own report on the action taken or to be taken against the MEC, to the relevant Provincial Legislature.

[14] Implicit in this scheme is that the action to be taken against the culprit is left to the discretion of the President or the Premier, as the case may be.⁶ However, once a

⁴ 23 of 1994.

⁵ Section 3(4) of the Members Act reads:

“When conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act, 1994.”

⁶ Section 3(5) and (6) of the Members Act provides:

“(5) (a) The President must within a reasonable time, but not later than 14 days after receiving a report on a Cabinet member or Deputy Minister referred to in subsection (2)(a), submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to

decision on a penalty is taken, the National Assembly or a Provincial Legislature must be informed about the penalty. If the investigation was against a Premier, the Public Protector must submit her report to the President who must forward it with his own comments to the National Council of Provinces (NCOP). But the scheme does not reveal to whom the Public Protector must submit her report if the President was the subject of an investigation and whether such report is to be placed before Parliament.

[15] Section 4 stipulates that complaints must be investigated in accordance with section 3. If a complaint is against a Cabinet Member or Deputy Minister, the complainant may be the President, a Member of the National Assembly or a permanent delegate to the NCOP. If the complaint is against an MEC, the complainant may be the Premier or a member of the relevant Provincial Legislature.

[16] The form prescribed for the complaint is that it must be in writing and must contain the name and address of the complainant. It should also set out full particulars of the alleged breach of the code and the identity of the person against whom the complaint is lodged.⁷

[17] A member of the public cannot be a complainant in relation to a complaint submitted in terms of section 4 of the Members Act. However, this does not mean

the National Assembly.

- (b) The President must within a reasonable time, but not later than 14 days after receiving a report on a Premier referred to in subsection (2)(a), submit a copy of the report and any comments thereon to the National Council of Provinces.
- (6) The Premier must within a reasonable time, but not later than 14 days after receiving a report referred to in subsection (2)(b), submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.”

⁷ Section 4(2) of the Members Act provides:

- “(2) The complaint must be in writing and must contain—
 - (a) the name and address of the complainant;
 - (b) full particulars of the alleged conduct of the Cabinet member, Deputy Minister or MEC; and
 - (c) such other information as may be required by the Public Protector or prescribed in the code of ethics.”

that a member of the public can never complain about a breach of the code. Where this occurs, the Public Protector must investigate the complaint in accordance with the Public Protector Act and not in terms of section 3 of the Members Act.⁸

[18] The remaining sections of the Members Act are not material to the present issues and need not be considered.

The Code

[19] On 20 July 2000, and after consulting Parliament, the President of that time published the Code in the Gazette, acting in terms of section 2 of the Members Act. Like the Act, the Code is brief and consists of eight paragraphs. Its perusal reveals some tension between the Code and section 2 of the Members Act. For example, section 2 directs that the Code should require all members of the Executive, including the President and Premier, to act in good faith and in the best interests of good governance and to meet all obligations imposed on them by law.

[20] The Code, on its face, exempts the President and Premiers from these obligations and requires other members to discharge these obligations to the satisfaction of the President or the relevant Premier. The Code provides:

- “2.1 Members of the Executive must, to the satisfaction of the President or the Premier, as the case may be—
- (a) perform their duties and exercise their powers diligently and honestly;
 - (b) fulfill all the obligations imposed upon them by the Constitution and law; and
 - (c) act in good faith and in the best interest of good governance, and
 - (d) act in all respects in a manner that is consistent with the integrity of their office or the government.

⁸ Section 4(3) of the Members Act provides:

“Nothing in this section may prevent the Public Protector from investigating any complaint by a member of the public in accordance with the Public Protector Act, 1994 (Act 23 of 1994).”

- 2.2 In deciding whether members of the Executive complied with the Provisions of clause 2.1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.
- 2.3 Members of the Executive may not—
- (a) wilfully mislead the legislature to which they are accountable;
 - (b) wilfully mislead the President or Premier, as the case may be;
 - (c) act in a way that is inconsistent with their position;
 - (d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;
 - (e) use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;
 - (f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
 - (g) receive remuneration for any work or service other than for the performance of their functions as members of the Executive; or
 - (h) make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowances or payments.”

[21] Paragraphs 2.1 and 2.2 of the Code suggest that it is the President or Premier who determines whether the relevant obligations have been properly discharged and, for them to make that determination, they should take into account “the promotion of an open, democratic and accountable government”. But it is not clear whether in relation to obligations under paragraph 2.3 of the Code, the President and Premier play the role given to them by paragraph 2.1. However, this ambiguity has no bearing on the issues that arise because the entire case, here and before the High Court, was prosecuted on the footing that paragraph 2.3 of the Code applies to the President. Consequently, it is not necessary for present purposes to decide definitively whether it applies. The matter must be approached on the same understanding.

[22] Again, the provision of the Code dealing with conflict of interest appears not to be in line with the Members Act. Section 2(1)(b) of the Act prescribes that the Code should prohibit members of the Executive from exposing themselves to a risk of conflict between their official responsibilities and their private interests. One way of

avoiding this is for the member to recuse himself or herself from any matter where the member has a personal or private interest.

[23] But the Code permits such a member to participate in deciding the matter with the permission of the President or the Premier, as the case may be.⁹ The language of the Members Act on this issue is plain and does not qualify the prohibition which the Code must reflect. Paragraph 3.4 of the Code implicitly allows members of the Executive to expose themselves to conflict of interest, provided they declare their interest when making representations to another member of the Executive.¹⁰ This is the legal framework against which the present matter must be adjudicated.

Factual background

[24] The President is elected by the National Assembly from among its members.¹¹ Once elected President, the person ceases to be a member of the National Assembly.¹² This has a bearing on the remedial action ordered by the Public Protector against the National Assembly in this matter. Upon his election, the President becomes the Head of State and the National Executive. When the National Assembly elects the President, it represents the people and ensures “government by the people under the

⁹ Paragraphs 3.2 and 3.3 of the Code above n 2 provide:

“3.2A member must withdraw from the proceedings of any committee of the Cabinet or an Executive Council considering a matter in which the member has any personal or private financial or business interest, unless the President or the Premier, as the case may be, decides that the member’s interest is trivial or not relevant.

3.3 If a member is required to adjudicate upon or decide a matter in which the member has a personal or private financial or business interest the member must declare that interest to the President or the Premier, as the case may be, and seek the permission of the President or Premier to adjudicate upon or decide the matter.”

¹⁰ Paragraph 3.4 of the Code above n 2 provides:

“If a member makes representations to another member of the Executive with regard to a matter in which the member has a personal or private financial or business interest, the member must declare that interest to the other member.”

¹¹ Section 86(1) of the Constitution provides:

“At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.”

¹² Section 87 of the Constitution provides:

“When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.”

Constitution”.¹³ Section 42(3) also imposes a duty to scrutinise and oversee executive action. It is on the basis of this duty that Parliament holds the Executive to account for the exercise and performance of executive functions.¹⁴

[25] One of the ways in which the Executive is held to account is requiring its members including the President, to appear before Parliament and answer questions from members of Parliament. The procedure followed under this process is to have questions reduced to writing and submitted to the relevant member of the Executive, ahead of the date on which she would be required to provide answers. This enables a member of the Executive concerned to investigate the matter for purposes of answering the questions posed. The investigation becomes necessary, especially where the relevant information is not within the personal knowledge of the member of the Executive in question. This procedure facilitates accurate answers to questions from members of Parliament.

[26] On the appointed day, the member of the Executive concerned is required to appear before Parliament and questions are put to the member who would give answers. The member of Parliament whose question is answered, is permitted to ask follow up questions related to the issues covered by the written question.

[27] On 6 November 2018, the President appeared before the National Assembly to answer questions. Having answered a question from the leader of the official opposition party at the time, Mr Mmusi Maimane, the President faced an oral question from that leader. The latter question did not constitute a follow up question to the one that had just been answered by the President. It dealt with a totally different issue. As it appears on the Assembly’s records, the new question was framed in these words:

¹³ Section 42(3) of the Constitution provides:

“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.”

¹⁴ *Mazibuko N.O. v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 43.

“Mr President, here I hold a proof of payment that was transferred to say that R500 000 had to be transferred to a trust account called EFG2 on 18 October 2017. This was allegedly put for your son, Andile Ramaphosa. [Interjections]. Following on that, I have a sworn affidavit from Piet Venter, stating that he was asked by the chief executive officer of Bosasa to make this transfer for Andile Ramaphosa. Mr President, we can’t have family members benefiting. [Interjections]. I would want to ask you, right here today, that you bring our nation into confidence and please set the record straight on this matter. Thank you very much.”

[28] The question clearly was about a payment of R500 000 that was deposited into a “trust account called EFG 2” for Mr Andile Ramaphosa, the President’s son, on 18 October 2017. The leader of the official opposition claimed to have proof of that payment. He also said he had a sworn affidavit from the person who made the payment. Then he asked the President to set the record straight after alleging “we can’t have family members benefiting”.

[29] The President did not insist that the normal procedure of reducing the question to writing and submitting it to him in advance be followed. Instead, he answered the question as follows:

“I proceeded to ask my son what this was all about. He runs a financial consultancy business, and he consults for a number of companies, and one of those companies is Bosasa where he provides services on entrepreneurship, particularly on the procurement process. He advises both local and international companies. Regarding this payment, I can assure you, Mr Maimane that I asked him at close range whether this was money obtained illegally, unlawfully – and he said this was a service that was provided. To this end, he actually even showed me a contract that he signed with Bosasa. The contract also deals with issues of integrity, issues of anti-corruption, and all that.”

[30] Shortly after the President’s appearance before Parliament, one of his advisors pointed out that the payment of R500 000 into the EFG 2 account was not for his son but a donation made to the CR17 campaign by Mr Gavin Watson. Realising that the answer he gave instantly in Parliament was inaccurate, the President addressed a letter

to the Speaker.¹⁵ In it, the President pointed out that the payment over which he was asked by the leader of the official opposition was in fact a donation by Mr Watson to the CR17 campaign. The President explained that he learnt about this fact after he had answered the question in the Assembly.

[31] The management of the CR17 campaign also issued a public statement to the media which sought to clarify the matter. The statement revealed that the CR17 campaign was established to promote, among other goals, the candidature of Mr Cyril Ramaphosa to the position of President of the African National Congress (ANC), one of the political parties represented in Parliament. The other objectives of the campaign were to restore the integrity and cohesion of the ANC, as well as putting South Africa back on the growth path. Plainly these were the activities of the ANC, as a political party.

[32] The same media statement stated that the President, who then was the Deputy President of both the Republic and the ANC, had no close contact with the campaign.

¹⁵ That letter reads:

“I wish to draw your attention to the fact that during my appearance in the National Assembly when I was answering questions on 6 November 2018. I inadvertently provided incorrect information in reply to a supplementary question.

Following my response to Question 19 on VBS Mutual Bank, the Leader of the Opposition asked me about a payment that had been made on behalf of a Mr Gavin Watson to my son, Mr Andile Ramaphosa.

My reply to the question was based on the information that was at my disposal at the time, regarding a business relationship that my son’s company has with the company Africa Global Operations.

It is true that my son’s company does indeed have a contract with Africa Global Operations for the provision of consultancy services.

The said consultancy services are provided by my son’s company to Africa Global Operations in a number of African countries other than South Africa. He informed me that South Africa was specifically excluded to avoid a potential conflict of interest.

Since my reply in the National Assembly, I have sought to get more information regarding this matter.

I have been subsequently informed that the payment referred to in the supplementary question by the Leader of the Opposition does not relate to that contract.

I have been told that the payment to which the Leader of the Opposition referred was made on behalf of Mr Gavin Watson into a trust account that was used to raise funds for a campaign established to support my candidature for the Presidency of the African National Congress.

The donation was made without my knowledge. I was not aware of the existence of the donation at the time that I answered the question in the National Assembly.”

By design, those who established the campaign wanted to avoid conflict of interest. Although the President was invited to some fundraising dinners with potential donors, he was not exposed to information about donations and who had made them. When he answered the question on 6 November 2018, concluded the media statement, the President had no knowledge of the donation by Mr Watson to the campaign.

[33] Surprisingly the leader of the official opposition, who had claimed in Parliament to have had in his possession proof of payment to the President's son, did not seek to refute the correctness of the allegations in the President's letter to the Speaker and repeated in the campaign's media statement. Instead, he lodged a complaint with the Public Protector on 26 November 2018. In his complaint, he reaffirmed that he had documentary proof of the payment to the President's son and a sworn statement which alleged that the money was for the President's son.¹⁶

[34] Having referred to the President's letter that was addressed to the Speaker, the complaint asserted that the facts revealed that "there is possibly an improper relationship existing between the President and his family on the one side and the company African Global Operations (formerly Bosasa) on the other side". The complaint proceeded to allege "that the President may have lied to the National Assembly in his reply to my question on 6 November 2018". No details

¹⁶ The complaint reads as follows:

"On 6 November 2018, during a question session in the National Assembly, I presented President Ramaphosa with the documentary proof of the payment and the sworn statement that alleges the money was intended for his son Andile. The President confirmed that he was aware of the payment but had been satisfied that it was a lawful payment for services rendered by a consultancy firm owned or operated by Andile Ramaphosa

Subsequently, and on or about 16 November 2018, the President sent a letter to the Speaker of the National Assembly purporting to 'correct' the answer he gave in the National Assembly ten days earlier In this letter of correction the President reveals that the payment was actually a donation toward his campaign to be elected ANC President in December 2017.

It is my concern that the set of facts related above reveal that there is possibly an improper relationship existing between the President and his family on the one side, and the company African Global Operations (formerly Bosasa) on the other side. The nature of the payment, passing through several intermediaries, does not accord with a straight forward donation and raises the suspicion of money laundering. The alleged donor is further widely reported to have received billions of Rands in state tenders often in irregular fashion.

It is further my concern that the President may have lied to the National Assembly in his reply to my question on 6 November 2018"

were provided on how or on what basis the President was suspected to have lied in his answer in Parliament.

[35] But what is confusing with regard to this suspicion is that the leader of the official opposition persisted in contending that the payment in question was made to the President's son. And he attached the proof of payment he claimed to have had together with a sworn statement from the person who made it. It will be recalled that in the view of the complainant, the payment was for the President's son and he had "proof" of that fact. It will also be remembered that the answer given by the President accorded with the facts in respect of a payment to his son.

[36] Evidently the complaint by the leader of the official opposition was lodged in terms of section 4 of the Members Act. On 25 January 2019, the Deputy President of the EFF also submitted a complaint against the President to the Public Protector. With reference to sections 3(1) and 4(1) of the Members Act, the EFF's Deputy President asked the Public Protector to investigate—

- "1. Whether the statement made by President Ramaphosa in [the National Assembly] on 6 November 2018 that he saw a contract between his son's company and African Global Operations is true, and that a contract indeed does exist;
2. Whether President Ramaphosa deliberately misled Parliament in violation of the Executive Ethics Code."

[37] Meanwhile, the President received notice from the Public Protector in December 2018, inviting him to submit a written response to the complaint by the leader of the official opposition together with any relevant information. The notice also indicated that should the President wish to engage, the Public Protector would meet him.

[38] The President submitted a written response and met with the Public Protector on 29 January 2019. The Public Protector in that meeting, which was convened to

discuss the complaint by the leader of the official opposition, raised the alleged failure by the President to declare donations to the CR17 campaign “as personal sponsorships” in terms of the Code. On 11 March 2019, the President filed a supplementary response addressing the non-disclosure issue. In this response, the President disputed that he had a duty to disclose donations to the CR17 campaign on the ground that they were not donations to him. He set out the requirements of the Code as he understood it and concluded that he did not fail to make a disclosure because in the first place he had no obligation to disclose donations to a structure within a political party.

[39] During her investigations, the Public Protector also interviewed managers of the CR17 campaign. She demanded disclosure of information on all donations to the CR17 campaign but those managers declined on the ground that, barring the donation by Mr Watson, those donations were not relevant to the complaints she was investigating.

[40] In May 2019, the Public Protector invited the President to a meeting. At that meeting, the Public Protector gave the President a copy of her preliminary report which outlined findings she intended to make against him. She afforded him 10 days within which to respond to the preliminary report. Upon perusing the report, the President realised that he needed more time as the report addressed wide ranging issues and he had other demands to attend to from his office. He asked for an extension of three weeks but the Public Protector gave him two weeks. He also asked for an opportunity to interview Mr Watson which was granted but later withdrawn. Instead, the President was informed that he could submit his questions to the Public Protector who would do the interview. The President submitted the questions but he did not receive Mr Watson’s answers until he submitted his response to the preliminary report.

[41] The final report was released and published on 19 July 2019. In this report, the Public Protector rejected the President’s representations made in response to the

preliminary report. Instead, she concluded that the President had violated paragraph 2.3(a) of the Code. The report also revealed that the Public Protector investigated the affairs of the CR17 campaign and that during the course of that investigation, she reached a conclusion that there was a failure by the President to disclose donations made to him, in his capacity as the Deputy President of the Republic. In addition, she formed an opinion that some of the payments made raised a reasonable suspicion of money laundering.

[42] But in a somewhat confusing manner, and relying on the same findings that support the conclusion that the President failed to disclose the CR17 campaign donations, the Public Protector's report records that the allegation that the President exposed himself to a risk of a conflict between his official responsibilities and private interests is substantiated.

[43] Having found that the President violated the Code and section 96(1) of the Constitution, the Public Protector directed the Speaker to refer the President's breach of the Code to a Joint Committee on Ethics and Members' Interests and that the Speaker should demand publication of all donations received by the President. Her remedial action also required the NDPP to take note of certain "observations" and directed the NDPP to "conduct further investigation into prima facie evidence of money laundering as uncovered during [her] investigation". Lastly, the remedial action directed the National Commissioner of Police to investigate criminal conduct described as lying under oath, against Mr Watson.

[44] The Public Protector added to her remedial action, supervisory orders which required the Speaker, the NDPP and the National Commissioner to submit to the Public Protector implementation plans, indicating how they were going to give effect to the remedial actions. They were instructed to submit these plans within 30 days from the date on which the report was issued. The need for the supervisory orders was not explained in the report.

[45] This is the background against which this matter must be considered. It will be recalled that it comes before this Court as an application for leave to appeal directly to it.

Leave to appeal

[46] Section 167(6) of the Constitution gives litigants a right to appeal directly subject to leave of this Court which may be granted only if allowing a direct appeal is in the interests of justice.¹⁷ The Public Protector, the EFF and AmaBhungane sought leave to appeal the decision of the High Court directly to this Court. The EFF and AmaBhungane have also applied to other courts for leave. They approached this Court upon learning that the Public Protector had sought leave from it and that her application was set down for hearing. As a result, the success of their applications depended on the granting of leave to the Public Protector. Their approach was simply that in the event of the Public Protector obtaining the necessary leave, it would be convenient for this Court to entertain their cases as well because they raise issues similar to those advanced by the Public Protector.

[47] Therefore, whether it is in the interests of justice to permit a direct appeal will be evaluated with reference to the Public Protector's case only. Factors which support a direct appeal here include important constitutional issues raised which have a bearing on the exercise of public powers by the Public Protector; the saving of time and costs; the prospects of success; and urgency. The question whether the Public Protector is obliged to afford a hearing to a party against whom she contemplates remedial action, must be determined as a matter of urgency. This issue has a bearing on the fairness of investigations undertaken daily by the Public Protector.

¹⁷ Section 167(6) of the Constitution provides—

“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.”

[48] These factors must be weighed against bypassing the Supreme Court of Appeal and the disadvantages to the management of this Court's roll. Guidance in determining where the interests of justice lie was provided in *Democratic Party*.¹⁸ In that matter this Court stated:

“In deciding what is in the interests of justice, each case has to be considered in the light of its own facts. A factor will always be that direct appeals deny to this Court the advantage of having before it judgments of the [Supreme Court of Appeal] on the matters in issue. Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court. But where the only issues on appeal are constitutional issues the position is different. Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the [Supreme Court of Appeal] is bypassed.”¹⁹

[49] Here, there are no common law issues that arise. The matter concerns constitutional issues only. Disadvantages to the management of this Court's roll also do not occur. The only factor against permitting a direct appeal is that the Supreme Court of Appeal would be bypassed. Some of the issues arising have been before that Court. In *Democratic Alliance*,²⁰ the Supreme Court of Appeal decided to leave open the question whether the Public Protector's remedial action constituted administrative action. Meanwhile, the High Court has held that remedial action amounts to administrative action.²¹

¹⁸ *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC).

¹⁹ *Id* at para 32.

²⁰ *South African Broadcasting Corporation SOC Ltd v Democratic Alliance* [2015] ZASCA 156; 2016 (2) SA 522 (SCA).

²¹ *Minister of Home Affairs v Public Protector* 2017 (2) SA 597 (GP) and *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) (SARB).

[50] Recently in *Minister of Home Affairs*, the Supreme Court of Appeal has concluded that the decisions taken by the Public Protector, including the remedial action, do not constitute administrative action.²² This decision appears to be at variance with one taken by this Court in *South African Reserve Bank*.²³ This Court implicitly endorsed the application of the Promotion of Administrative Justice Act²⁴ (PAJA) in the decision making process followed by the Public Protector when she takes remedial action.

[51] It is in the interests of justice for this Court to definitely determine whether a person against whom remedial action is taken by the Public Protector is entitled to a hearing. There must be certainty in the procedure followed by the Public Protector in taking decisions which adversely affect the rights of those who become the subject of her remedial actions.

[52] When all the factors outlined here are weighed against bypassing the Supreme Court of Appeal, the scale tilts in favour of granting the applicants permission to bring the appeal directly to this Court. Affording parties a hearing before remedial action is taken by the Public Protector is a matter of constitutional import in which the public has interest. Consequently, leave to appeal should be granted.

[53] Freedom Under Law (FUL) was admitted as *amicus curiae* (friend of the court). FUL was established in 2009 as a not-for-profit organisation whose objectives are the promotion of democracy under law and respect for the rule of law in Southern Africa. It has participated as a friend of the court in a number of matters in various courts, including this Court.

²² *Minister of Home Affairs v Public Protector* [2018] ZASCA 15; 2018 (3) SA 380 (SCA).

²³ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC).

²⁴ 3 of 2000.

Issues

[54] Since the applicants seek to appeal against the decision of the High Court, the present issues arise from that decision:

1. Whether the Public Protector correctly found that the President had misled Parliament in breach of the Code;
2. Whether the President had a duty to disclose donations made to the CR17 campaign;
3. The Public Protector's competence to investigate the affairs of the CR17 campaign;
4. Whether the audi principle applies to the process preceding a decision on appropriate remedial action;
5. Whether the remedial actions taken here are lawful; and
6. Whether the High Court rightly declined to adjudicate AmaBhungane's constitutional attack in relation to the Code.

Misleading Parliament

[55] When the former President drafted the Code, he did not lose sight of the fact that members of the Executive are usually called upon to give answers to questions raised in Parliament, in respect of matters over which they have no personal knowledge. He cautiously and deliberately framed the Code in these words:

“Members of the Executive may not:

- (a) wilfully mislead the Legislature to which they are accountable.”²⁵

[56] Plainly, this prohibition is narrow. Members of the Executive are forbidden from wilfully misleading the Legislature to which they are accountable. In other words, for a member of the Executive to breach the Code, she or he must have given incorrect information with the intention to mislead the Legislature. Incorrect

²⁵ Paragraph 2.3(a) of the Code above n 2.

information alone is not sufficient to constitute a violation of the Code. Such information must be accompanied by the member's intention to mislead.

[57] A perusal of the Public Protector's report reveals that she seriously misconstrued the Code. In paragraphs 5.1.33-5.1.34 she states:

“5.1.33 As indicated above, the statement made by President Ramaphosa on 06 November 2018 in his reply to Mr Maimane's question albeit defective in terms of the Rules of the National Assembly, was misleading, as he also conceded in his correspondence to my office on 01 February 2019, and even in his subsequent letter to the Speaker of the National Assembly on 14 November 2018 where he sought to correct the incorrect information he had provided in the National Assembly.

5.1.34 Consequently, *President Ramaphosa's reply was in breach of the provisions of paragraph 2.3(a) of the Executive Ethics Code, the standard of which includes deliberate and inadvertent misleading of the Legislature. He inadvertently and/or deliberately misled Parliament, in that he should have allowed himself sufficient time to consider the question and make a well informed response.*”

[58] Quite clearly, this statement shows that she thought that the Code prohibited members of the Executive from furnishing any and every piece of incorrect information, regardless of their state of mind and the objective they wished to achieve. To her, the acknowledgment by the President that he gave an incorrect answer was enough for the conclusion that he had violated the Code. If the President, according to the Public Protector, wished to avoid giving an incorrect answer, he should have insisted that the rules of the Assembly be followed which would have afforded him sufficient time “to answer the question and make a well informed answer”. This reasoning is not only devoid of a legal foundation but also reveals ignorance as to how information furnished to Parliament is gathered.

[59] But what is more concerning with the report is that the Public Protector changed the wording of the Code by adding “deliberate and inadvertent misleading of the Legislature”. That this is an addition is apparent from the statement quoted above. She states that the President’s reply breached paragraph 2.3(a) of the Code, “the standard of which includes *deliberate and inadvertent misleading*”. It is inconceivable that the sole word used in the Code “wilfully” could be read to mean “inadvertent”. These words carry meanings that are mutually exclusive. Wilfully cannot include inadvertent. What was done by the Public Protector here exceeded the parameters of interpretation.

[60] The Public Protector’s report reveals that, on the facts placed before her, she accepted that the President did not wilfully mislead Parliament. This meant that he could not have violated the Code. The Public Protector then changed the wording of the Code to include “deliberate and inadvertent misleading” so as to match with the facts. Having effected the change in the Code, the Public Protector proceeded to conclude that the President had violated the Code. It is unacceptable that the Public Protector did what no law had authorised her to do.

[61] It was the wrong approach adopted by the Public Protector here which led her astray. Instead of evaluating the President’s conduct against paragraph 2.3(a) of the Code, she measured it against a standard she had created. This is plain from her findings as recorded in the report. On the question whether the President wilfully misled Parliament, the findings read:

“7.1. Regarding whether on 06 November 2018 during question session in Parliament, President Ramaphosa deliberately misled the National Assembly and thereby acted in violation of the provisions of the Executive Ethics Code and Code of Ethical Conduct and Disclosure of Members Interests for Assembly and Permanent Council Members.

7.1.1 The allegation that on 06 November 2018 during question session in Parliament, President Ramaphosa deliberately misled the National Assembly, is substantiated.

- 7.1.2 President Ramaphosa’s statement on 06 November 2018 in his reply to Mr Maimane’s question albeit defective in terms of the Rules of the National Assembly, was misleading, as he also conceded in his correspondence to my office on 01 February 2019, and even in his subsequent letter to the Speaker of the National Assembly on 14 November 2018 where he sought to correct the incorrect information he had provided in the National Assembly.
- 7.1.3 Consequently, President Ramaphosa’s reply was in breach of the provisions of paragraph 2.3(a) of the Executive Ethics Code, the standard of which includes deliberate and inadvertent misleading of the Legislature. He deliberately misled Parliament, in that he should have allowed himself sufficient time to research on a well-informed response.
- 7.1.4 I therefore find President Ramaphosa’s conduct as referred to above although ostensibly in good faith, to be inconsistent with his office as a member of Cabinet and therefore in violation of section 96(1) of the Constitution, as referred to above.”

[62] It was this wrong approach which drove the High Court to concluding that her finding on the issue whether the President misled Parliament was flawed “due to a material error of law”. That Court stated:

“In her treatment of this issue the Public Protector demonstrated a fundamentally flawed approach to the principles underpinning the question of whether the President violated the Executive Code by wilfully misleading Parliament. It is to be expected of the Public Protector to proceed from the premise of the correct formulation of paragraph 2.3(a); to understand what the test is that must be applied to determine whether there has been a violation; and finally, to pronounce a conclusion that can be clearly understood and is in line with that test. Unfortunately, the Public Protector’s approach to the issue, in this case, falls far short of this.

In this regard, the Public Protector’s finding on the misleading of Parliament issue is fatally flawed due to a material error of law. For this reason alone, the finding

warrants review and setting aside. However, there are further reasons for reaching the same conclusion.”²⁶

[63] The High Court’s conclusion that the Public Protector’s findings should be set aside on the material error of the law point alone, cannot be faulted.

Duty to disclose donations to CR17 campaign

[64] The Public Protector’s findings under this heading are framed in confusing terms. The heading suggests that the report is dealing with the question whether the President “exposed himself to any situation involving the risk of a conflict between his official duties and his private interest or used his position to enrich himself and his son through business owned by African Global Operations”. This heading is typed in bold letters as is done with each heading under the section of the report setting out the findings.

[65] Surprisingly, this heading includes the issue whether the President used his position to enrich himself and his son through businesses owned by African Global Operations. It will be recalled that the written complaint merely stated that there was a probability of an improper relationship between the President and his family on one side and African Global Operations, on the other. The issue of the President having enriched himself and his son was added by the Public Protector. On a reading of section 4 of the Members Act, it is doubtful that the Public Protector may expand the scope of a complaint submitted to her with “full particulars of the alleged conduct” as prescribed by the section.

[66] Moreover, under the Code, the prohibition against self-enrichment or improperly benefitting others is a self-standing prohibition that is separate from the one of exposing oneself to a conflict between official responsibilities and private interests. The essential elements of the latter prohibition are: (a) official

²⁶ *President of the Republic of South Africa v Public Protector* 2018 (2) SA 100 (GP) (High Court judgment) at paras 54-5.

responsibilities; (b) private interests; (c) the risk of a conflict between (a) and (b); and (d) a member's conduct that exposes him to that risk.

[67] The Public Protector makes sweeping findings which do not show how the President exposed himself to a situation involving the risk of a conflict between his official duties and private interests. It is difficult to appreciate how the breach of this prohibition was established without identifying the President's private business and his official responsibilities, in respect of which he had exposed himself to a risk of a conflict.

[68] The relevant findings by the Public Protector read:

“7.2 Regarding whether President Ramaphosa improperly and in violation of the provisions of the Executive Ethics Code and Disclosure of Members' Interests for the National Assembly and Permanent Council Members exposed himself to any situation involving the risk of a conflict between his official duties and his private interest or used his position to enrich himself and his son through businesses owned by African Global Operations.

7.2.1 The allegation that President Ramaphosa improperly and in violation of the provisions of the Executive Ethics Code and Disclosure of Members' Interests for the National Assembly and Permanent Council Members exposed himself to any situation involving the risk of a conflict between his official responsibilities and his private interests or used his position to enrich himself and his son through businesses owned by AGO, is substantiated.

7.2.2 In light of the evidence before me, it can be safely concluded that the campaign pledges towards the CR17 campaign were some form of sponsorship, and that they were direct financial sponsorship or assistance from non-party sources other than a family member or permanent companion, and were therefore benefits of a material nature to President Ramaphosa.

7.2.3 President Ramaphosa as a presidential candidate for the ANC political party, received campaign contributions which benefitted him in his personal capacity. He was therefore duty bound to declare

such financial benefit accruing to him from the campaign pledges. Failure to disclose the said material benefits, including a donation from AGO constitutes a breach of the Code.

7.2.4 I have evidence which indicates that some of the money collected through the CR17 campaign trust account was also transferred into the Cyril Ramaphosa Foundation account from where it was also transferred to other beneficiaries.

7.2.5 President Ramaphosa at the time of receipt of the donations, was the Deputy President of the Republic of South Africa and a Member of Parliament. He was therefore bound by the Code of Ethical Conduct and Disclosure of Members' Interest for Assembly and Permanent Council Members, to declare such financial interest.

7.2.6 I therefore find President Ramaphosa's failure to disclose financial interest which accrued to him, as a result of the donations received towards the CR17 campaign to be in violation of paragraph 2 of the Executive Ethics Code, and accordingly amounts to conduct that is inconsistent with his office as member of Cabinet, as contemplated by section 96 of the Constitution."

[69] First, the issue whether the President exposed himself to a situation involving the risk of a conflict is mentioned in the first subparagraph following the heading. The point made there is that the allegation that the President violated the Code and the Members Act by exposing himself to the risk of a conflict or used his position to enrich himself and his son, is substantiated. It will be recalled that here the Public Protector is recording her findings, following her evaluation of the evidence. The form in which subparagraph 7.2.1 is framed suggests that the Public Protector was not sure upon which of the two grounds the allegation rested and was established. Otherwise it makes no sense to say an allegation based on one or the other ground was substantiated. If both grounds were proved, the report would say so or if only one was established it would expressly say so. Instead of saying one or the other.

[70] Notably all the remaining subparagraphs are dedicated to the conclusion that the President breached the Code by his failure to disclose donations made to the

CR17 campaign. All of this has nothing to do with the heading that the President exposed himself to the risk of conflict or used his position to enrich himself and his son. Instead these subparagraphs address the President's failure to disclose donations made to the CR17 campaign. It is not clear why this issue which was raised separately in the complaints is treated as part of the issues contained in the relevant heading.

[71] But what is most concerning is the quality of the reasoning leading up to the various findings. For example, in subparagraph 7.2.2 the Public Protector reasoned that it can be safely concluded that the campaign pledges towards the CR17 campaign were some form of sponsorship. And she proceeds to state that "there were direct financial sponsorship or assistance from non-party sources other than a family member or permanent companion". And then she deduces from these facts that the donations to the CR17 campaign were benefits of a material nature to President Ramaphosa.

[72] The Public Protector reached the conclusion that the President, as then Deputy President of the country, had personally benefitted from donations made to the CR17 campaign. But her own report which contains the summary of the evidence she heard during the investigation, does not support this conclusion. Nowhere in the report has the Public Protector recorded evidence that shows that the President had personally benefitted. From paragraphs 5.3.9 up to 5.3.10.67, the report sets out a comprehensive summary of all the evidence the Public Protector had as a result of her investigation.

[73] Having identified witnesses who were interviewed, the report sets out in summary form the evidence of each witness. These included the managers of the CR17 campaign. With regard to Ms Donne Nicol, one of the managers, the report states:

“She also confirmed virtually all what the other two (2) members of the fundraising campaign had mentioned. For instance the pre-condition made to the donors that they should not expect any favours for having contributed to the campaign, as well as their identities and amounts pledged being deliberately concealed from President Ramaphosa.”

[74] Despite acknowledging that the campaign managers corroborated one another in their oral testimony, the report reveals that the Public Protector preferred evidence in the form of e-mails which indicated that the President had played an active role in the affairs of the CR17 campaign. On this issue, the report reads:

“5.3.10.25 Notwithstanding the unanimous statements by the CR17 campaign managers to me that it had been agreed that the identities of the donors and the amount donated by them should not be disclosed to President Ramaphosa, evidence adduced has revealed the contrary.

5.3.10.26 Evidence adduced in a form of e-mails, invitations and instructions confirm that President Ramaphosa was constantly informed of the activities of the CR17 campaign by the campaign managers whereupon his advice and approval on specific matters, would from time to time be sought.

5.3.10.27 I have therefore established that in addition to having met with the potential donors during the banquet functions, where he delivered key note addresses, evidence further confirms that President Ramaphosa had had further and broader interactions with the donors, some of whom he knew very well.”

[75] Apart from those e-mails which suggested that the President was more involved in the affairs of the campaign than the managers had testified, there is no other evidence that links the President with the campaign.

[76] The question which the Public Protector’s report does not address is how the divergence between the managers and the e-mails was resolved. It appears that the Public Protector simply chose the e-mails over the managers’ oral testimony which she disregarded. This was inconsistent with the principles laid down by the

Supreme Court of Appeal in *Mail & Guardian*,²⁷ a decision to which the report refers. That decision affirms that the objective of investigations by the Public Protector is to discover the truth. Where the investigation yields disparate pieces of evidence which do not fit into place, the Public Protector must continue digging until the true picture emerges. As Nugent JA observed in that case:

“The Public Protector has no place summarily dismissing any information. His or her function is to weigh the importance or otherwise of the information and if appropriate to take steps that are necessary to determine its truth.”²⁸

[77] *Mail & Guardian* makes plain that the duty of the Public Protector is not only to discover the truth but is also to inspire public confidence that in each investigation, the truth has been discovered.²⁹ Where the evidence is inconclusive or diverges, the Public Protector is obliged to carefully evaluate it to determine the truth. At the end, she must be in a position to say that the truth has been revealed.

[78] Here, the truth which the Public Protector was seeking was whether the President had personally benefitted from the CR17 campaign donations. She has failed to discover this. The manager’s testimony was to the effect that he did not benefit personally. But even if this evidence was to be rejected, there is just no evidence that established a personal benefit. The e-mails on which the Public Protector relied simply showed that the President was more involved in the affairs of the campaign. This is not the same as receiving personal benefits.

[79] Moreover, the Public Protector could not disregard the evidence of the campaign managers solely on account of the e-mails that diverged with that evidence on the involvement of the President in the campaign’s affairs. Instead, she was required to evaluate those witnesses’ credibility and reliability of their testimony on the one hand and the authenticity and reliability of the e-mails, on the other. And she

²⁷ *Public Protector v Mail & Guardian* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) (*Mail & Guardian*).

²⁸ *Id* at para 17.

²⁹ *Id* at para 19.

should have also tested each version against the probabilities. When the versions placed before the Public Protector diverged on some of the relevant issues, she could not without more prefer one version over the other.³⁰ The truth is established by facts and not one's preference.

[80] In these circumstances, the duty of the President to disclose under the Code was not triggered. On the basis of the uncontroverted facts, he did not personally benefit from the donations made to the CR17 campaign. Under the Code, the duty to disclose is activated once a benefit is given to a member of Cabinet in his or her personal capacity.

[81] However, in argument the EFF submitted that the President could not avoid disclosure by wilfully remaining ignorant of donations made to the CR17 campaign. This submission misses the point. The issue is not whether the President deliberately kept himself ignorant of matters he was required to disclose. Instead, the question is whether there was proof that he personally benefited from the CR17 campaign donations. The EFF did not point to any evidence on record which established that the President benefitted in his personal capacity because such evidence was not placed on record. It does not exist.

[82] Without proof of that kind, it cannot be said that the President failed to disclose benefits he was under a duty to disclose. It bears emphasis that there must first be a benefit to a member of Cabinet for him or her to be obliged to make a disclosure in terms of the Code. In the absence of proof of a personal benefit to the President, the High Court concluded that he did not fail to make a disclosure.

[83] In the entire report the Public Protector has not even once referred to any evidence that indicates that the President benefitted personally from the CR17 campaign donations. The absence of such evidence was expressly raised in the

³⁰ *Stellenbosch Farmers' Winery Group Ltd v Martell Et Cie* [2002] ZASCA 98; 2003 (1) SA 11 (SCA).

representations made by the President in response to the interim report. As recorded in the final report, the President had submitted:

“The Executive Ethics Code only requires members to disclose their own financial interests. The President never had any financial interest in the donations made to CR17. The money was donated to CR17. The President did not have any claim to the money or any say over it, with the exception of amounts he himself loaned to the campaign. He never received any of it. It thus remained CR17’s money alone.”

[84] In rejecting this argument, the Public Protector did not refer to a single piece of evidence which showed that the President had in fact received money or a personal benefit from the CR17 campaign. Instead she stated:

“I have also established that some of the donors to the CR17 campaign could have been doing business with the state, and just like AGO (Bosasa) with several long-standing government contracts, stood to benefit substantial financial returns from such big government contracts. However, the risk in these circumstances is the potential that we would be having a President that would be beholden to such donors, thereby causing the manifestation of capture of the state.

It is therefore against such potential capture, that all South African state functionaries, including the Executive, should guard against exposing themselves to a situation involving the risk of a conflict between their official responsibilities and private interests in violation of section 96 of the Constitution.

President Ramaphosa at the time of receipt of the donations, was the Deputy President of the Republic of South Africa and a Member of Parliament. He was therefore bound by the Code of Ethical Conduct and Disclosure of Members’ Interest for Assembly and Permanent Council Members, to declare such financial interest.”³¹

[85] This reasoning fails to address the point raised by the President, namely, that he received no donations and that he had no claim or say over money donated to the CR17 campaign. Instead, in a confusing manner, the Public Protector addressed the issue of members of Cabinet exposing themselves to a potential risk of conflict of

³¹ Report No 37 of 2019/2020 of the Public Protector of RSA at paras 5.4.33–5.4.35.

interest between their official responsibilities and private interests. This had no bearing whatsoever on the issue whether the President received donations.

[86] What the Public Protector was required to do in order to address the President's argument, was to refer to facts which established that the President received donations and that he failed to declare them. If such facts existed, the Public Protector would have referred to them in dealing with the President's argument. The omission of those facts from her report is not an oversight. They simply do not exist.

[87] In the final paragraph of the Public Protector's reasoning quoted above, she suggests that the President received donations which he was obliged to disclose under the Code and the Members Act. This is a finding made without a shred of evidence supporting it. On the contrary, the evidence placed before the Public Protector which is also reflected in the report, establishes that the President did not receive donations. Therefore, the argument advanced by the President was in line with the evidence on record. On the basis of the undisputed evidence, it was the CR17 campaign that received donations and not the President.

[88] It is a leap in logic to hold that the President personally benefitted from the donations made to the CR17 campaign. That campaign, on the undisputed evidence, existed separately from the President. And there was no evidence that it was appointed to act as his agent. There is therefore no basis in law to regard donations to the CR17 campaign as personal benefits to the President.

[89] In relation to the relevant findings, the High Court said:

“The Public Protector's finding that the President received direct financial sponsorship through the CR17 campaign was based on her conflation of that campaign with the President. What she had before her was a full explanation as to how the CR17 campaign spent the money that it raised. This showed that it funded the entire broad-based CR17 campaign. There was no evidence that it was used to pay the President's expenses. On the contrary, the President himself contributed to

the CR17 campaign, as did many other ANC members. The Public Protector has not identified any evidence nor facts to substantiate her conclusion that he received direct personal sponsorship through the campaign.

The same goes for her finding that he received campaign contributions through the CR17 campaign that benefitted him in his personal capacity. This conclusion again emanated from her conflation between the CR17 campaign and the President. There was simply no evidence that the President received personal financial benefit from any campaign contributions. From her Report it appears that the Public Protector was concerned about transfers from the CR17 campaign accounts to the Cyril Ramaphosa Foundation (the CRF). However, the facts before her clearly established that neither the President nor his family were beneficiaries of the CRF, neither did they receive funds from it. The Public Protector had no contrary evidence at her disposal.”³²

[90] The contention that the President personally benefitted from donations made to the CR17 campaign because one of the campaign’s objectives was to promote his candidacy to becoming President of the ANC, a step towards becoming President of the country, is at a first blush attractive. But it cannot withstand scrutiny. The contention rests on a number of assumptions that are without factual and legal foundation.

[91] In the first place, the Code does not apply to matters which are not state affairs like internal party elections. According to section 2 of the Members Act, the objective of the Code is the promotion of an open, democratic and accountable government. And members of Cabinet are obliged to comply with the Code when performing their official responsibilities. In an attempt to overcome this obstacle, the argument seeks to link the election of the President of the ANC to being President of the country. But this falters at the starting line. In our multi-party system, being President of a political party is not a guarantee to being President of the country. Under our Constitution, there can be only one President at any given time. This means that a number of party Presidents cannot be President of the country. Moreover, the Constitution tells us that the President of the country is elected by the National Assembly.³³

³² High Court judgment above n 26 at paras 120-1.

³³ Section 86 of the Constitution provides:

[92] The National Assembly consists of women and men elected by voters in terms of an electoral system. But it is the political parties themselves which contest elections and they alone decide who, among their members, would become members of the National Assembly. Representation of each party in the National Assembly depends on votes received by them. Therefore, even though a President of a political party may wish to be President of the country and his or her party makes him or her a member of the National Assembly, he or she may not succeed if the party failed to get majority votes at the elections. Even if it did get a majority of votes, it would still depend on whether members of the party wish to vote for their party President. There are many variables that occur before one is elected President of the country. The contention overlooks all of this.

[93] But even if it were to be said that there was proof of a personal benefit, the Public Protector's finding was fatally defective. She was plainly not authorised to investigate the issue whether the President personally benefitted from donations made to the CR17 campaign. The condition precedent for undertaking such investigation did not exist. Section 4 of the Members Act mandates the Public Protector to investigate violations of the Code only if there is a complaint by one of the persons listed in the section. Here, the complaints received by her did not require her to investigate the President's failure to disclose benefits derived from the CR17 campaign donations.

[94] As appears from footnote 16, the complaint by the leader of the official opposition required the Public Protector to investigate three issues. These were an improper relationship between the President and his family on one side, and African

“(1)At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.

(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after the vacancy occurs.”

Global Operations on the other side; the suspicion of money laundering; and whether the President lied to the National Assembly. As appears from paragraph 36, the complaint by the Deputy President of the EFF asked the Public Protector to investigate two issues. These were whether the statement made by the President in the National Assembly, to the effect that he saw a contract between African Global Operations and his son, was true; and whether the President had deliberately misled Parliament in violation of the Code.

[95] None of these complainants had asked the Public Protector to investigate the President's failure to disclose benefits he derived from the CR17 campaign. The only reference made to donations in the complaint by the leader of the official opposition was in relation to the issue of money laundering. Evidently, the complaint was not that the President is suspected of having laundered money. The complaint was that the donation made by African Global Operations passed through several intermediaries and that gave rise to the suspicion of money laundering. But the evidence by the donor and the person who made the payment quashed the suspicion.

[96] In our law, where the exercise of public power depends on the existence of certain conditions, such power cannot be validly exercised in the absence of those conditions.³⁴ This simply means that here the Public Protector purported to investigate the President's failure to disclose benefits without the existence of a complaint. Consequently, her purported investigation of this issue and the remedial action she took were invalid because the investigation was unlawfully undertaken.

[97] I am not persuaded that any of the conclusions reached by the High Court should be overturned.

³⁴ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38-40 (*SARFU*); *Paola v Jeeva N.O.* [2003] ZASCA 100; 2004 (1) SA 396 (SCA) at para 16; and *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34H.

Competence to investigate the affairs of the CR17 campaign

[98] The President succeeded in having the Public Protector’s decision to investigate the CR17 campaign set aside. He had argued that the affairs of the campaign fell outside the jurisdiction of the Public Protector. The Public Protector and the EFF seek to overturn this decision of the High Court.

[99] This is a legal question which must be answered with reference to the empowering provisions of the Constitution and relevant legislation. Section 182(2) of the Constitution provides that in addition to powers listed in section 182(1), the Public Protector has additional powers prescribed by legislation.³⁵ The Public Protector Act and the Members Act constitute legislation contemplated in the Constitution.

[100] The Public Protector Act lists additional powers of the Public Protector in section 6. Section 6(4) empowers the Public Protector to investigate maladministration in connection with the affairs of government; abuse of public powers and improper or unlawful enrichment by a person as a result of an act or omission in the public administration.³⁶ Whereas section 6(5) confers similar powers

³⁵ Section 182(2) of the Constitution provides:

“The Public Protector has the additional powers and functions prescribed by national legislation.”

³⁶ Section 6(4)(a) of the Public Protector Act provides:

“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) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;
 - (iv) 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 the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
 - (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

on the Public Protector in respect of state-owned entities.³⁷ Evidently, none of the powers flowing from section 6 of the Public Protector Act cover the affairs of the CR17 campaign.

[101] For its part, the Members Act authorises the Public Protector to investigate alleged breaches of the Code only. Even so, the Public Protector may undertake an investigation only after receipt of a complaint envisaged in section 4 of the Members' Act. Although there have been alleged breaches of the Code, none related to the general affairs of the CR17 campaign. In fact, there is no mention of the CR17 campaign in the complaints received by the Public Protector. Accordingly, the Members Act too did not empower the Public Protector to investigate the affairs of the CR17 campaign.

[102] This leaves section 182(1) of the Constitution as the only possible source of the Public Protector's power. It provides:

“The Public Protector has the power, as regulated by national legislation—

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- (b) to report on that conduct; and
- (c) to take appropriate remedial action.”

prejudice to any other person.”

³⁷ Section 6(5) of the Public Protector Act reads:

“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.”

[103] This provision empowers the Public Protector to investigate any conduct in state affairs or in the public administration. This means the scope of the power is limited to state affairs and affairs of the public administration. There can be no doubt that the CR17 campaign was engaged in the affairs of the ANC, which is a political party. The fact that it was the ruling party at the relevant time did not make it a part of the public administration. But in this Court the EFF argued that as a ruling political party, the ANC “undoubtedly influences the direction of the State”. While this is true, it does not mean that the ruling party and the state become one entity. Ordinarily, political parties win elections on the basis of their policies and manifestos. This occurs worldwide. And once they assume power, they promote the policies that won them the elections. But the bright line separating the party from the state remains intact. This is clear from the provisions of the Constitution which establishes three branches of the state. In our system, political parties are represented in the legislative and executive arms of the state. It is a multi-party system. That is why various parties have members representing them in Parliament. And sometimes the President does appoint members of opposition parties into Cabinet. Representation in a particular body does not mean that the represented entity becomes part of the body where the representation occurs.

[104] With reference to decisions dealing with elections to various legislative bodies, the EFF argued that internal elections in a political party must be taken as amounting to a state affair. It contended that those party elections are a step towards membership of the state legislative bodies. This argument is flawed. First, the elections to legislative bodies are contested by political parties in their own right. Internal party elections are contested by individual members of the party in question. Second, elections to state legislatures are regulated by law and conducted by a public body, exercising public power. No public power applies to private and internal party elections. Third, in terms of the law, it is the political party that determines the list of candidates who would represent it in each legislative body. There is no law that

obliges a party to put its office-bearers on that list. Consequently, being elected to a position within the party does not guarantee those elected a place in state legislatures.

[105] The question remains whether the ruling political party in our system is an integral part of the state and whether its affairs are state affairs, as contemplated in section 182(1) of the Constitution. The Constitution does not define “the state”. Nor does it define “state affairs”. The term “state affairs” used in section 182 must mean affairs of the state. Clearly this section draws a line between affairs of the public administration and those of the state, and it empowers the Public Protector to investigate affairs of both entities. Both the Public Protector and the EFF did not argue that the CR17 campaign donations constituted conduct in the public administration. Their contention was that “state affairs” must be given a wider meaning and that when it is read this way, the phrase includes political parties which play a crucial role in our democratic government.

[106] Although the Constitution does not define “state”, it does define “organ of state” as any department of state or administration in all spheres of government, or any functionary or institution exercising a public power or performing a public function in terms of the Constitution or legislation.³⁸ It is explicit from the definition that organ of state is a concept that extends beyond what the state as an institution means. An organ of state can be a private company or an individual exercising public powers or performing public functions in terms of the Constitution or legislation. What is crucial is that the entity must exercise a public power or perform a public function.

³⁸ Section 239 of the Constitution states:

“‘organ of state’ means—

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution—
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

[107] What turns an otherwise private entity into an organ of state is the exercise of a public power or the performance of a public function. This is vital in determining whether a particular conduct amounts to a state affair. There can be no state affair without the exercise of public power or the performance of a public function. This is the dividing line between state affairs and private affairs. When a political party holds internal elections, it does not exercise a public power. Nor does it perform a public function in terms of the Constitution or legislation. Instead, it acts in terms of its constitution which constitutes a contract between it and its members. Therefore, its affairs do not fall within the scope of matters to be investigated by the Public Protector under section 182(1) of the Constitution.

[108] In its written submissions, the EFF conceded that the High Court may have been correct in its interpretation of section 182(1) of the Constitution. But it argued that the jurisdiction of the Public Protector to investigate the affairs of the CR17 campaign was sourced from section 96(2)(b) of the Constitution.³⁹ There is no merit in this submission. This section prohibits members of Cabinet from acting in a way that is inconsistent with their office or exposing themselves to the risk of a conflict between their official responsibilities and private interests. For this prohibition to be breached, there must have been a forbidden conduct by the member of Cabinet.

[109] But more importantly, the Public Protector's powers to investigate violations of section 96 is limited by sections 3 and 4 of the Members Act. There must be a written complaint about a breach of the Code. None of the complaints submitted to the

³⁹ Section 96 of the Constitution provides:

- “(1)Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Cabinet and Deputy Ministers may not—
- (a) undertake any other paid work;
 - (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
 - (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”

Public Protector referred to the affairs of the CR17 campaign, let alone that those affairs were in breach of the Code. The High Court was correct in concluding that the Public Protector had no authority to investigate the affairs of the CR17 campaign.

Improper relationship between the President and African Global Operations, raising the suspicion of money laundering

[110] The Public Protector held in her report that the allegation made in the complaint of the leader of the official opposition had merit. The complaint had stated that facts set out in it revealed a possibility of an improper relationship between the President and his family on the one side, and African Global Operations on the other, due to how the payment of R500 000 was made, which gave rise to a suspicion of money laundering. According to this allegation, what raised suspicion was the manner in which the donation to the CR17 campaign was made. The evidence summarised in the Public Protector's own report indicates that neither the President nor his family participated in the transfer of that amount. The transfer was made by an employee of African Global Operations, on the instructions of its CEO, Mr Watson. The R500 000 was part of the sum of R3 million which was transferred from Mr Watson's personal account into the account of a company called Miotto Trading which belonged to the employee who was instructed to transfer R500 000 to a trust account held on behalf of the CR17 campaign. It is puzzling that despite the evidence placed before her, the Public Protector would conclude that the allegation has merit.

[111] It appears that she disregarded all that evidence and reached a conclusion that was devoid of any factual foundation. The Constitution and relevant legislation require that the Public Protector must conduct proper investigations, rightly evaluate the evidence placed before her and make findings which are supported by established facts.⁴⁰ Here the Public Protector's approach falls short of this standard. I agree with the following observation by the High Court:

⁴⁰ *Mail & Guardian* above n 27 at para 19.

“Clearly the Public Protector had no foundation in fact and in law to arrive at her finding that the President had involved himself in illegal activities sufficient to evoke a suspicion of money laundering. In addition the Public Protector based her finding on legislation that has nothing to do with the offence of money laundering. The conclusion is inescapable that in dealing with this issue the Public Protector completely failed to properly analyse and understand the facts and evidence at her disposal. She also showed a complete lack of basic knowledge of the law and its application. She clearly did not acquaint herself with the relevant law that actually defines and establishes the offence of money laundering before making serious unsubstantiated findings of money laundering against a duly elected head of state. Had she been diligent she would not have arrived at the conclusion she did.”⁴¹

[112] But the absence of facts is not the only defect. The Public Protector once again misconstrued the empowering legislation. The complaints to her were made in terms of section 4 of the Members Act which stipulates that the complaints should relate to an alleged breach of the Code. The Code does not refer to money laundering and yet the Public Protector treated the allegation as separate and dedicated a large portion of the report to addressing it and making a finding specifically on it. It appears that the Public Protector was aware that the Members Act did not empower her to investigate the money laundering allegation and she invoked the Prevention and Combating of Corrupt Activities Act⁴² (PCCA), whose specific provisions were cited and interpreted in her report.

[113] The Public Protector’s report concludes its analysis of the PCCA by stating:

“My investigation into the issue pertaining to possible money laundering is premised on the above legislation dealing with corruption and applies not only to private individuals who offer bribes, but also to private individuals who accept bribes.

It would therefore have been remiss of me not to deal with this aspect of the complaint so as to be able to confirm or dispel with any such suspicion as referred to in the allegations brought before me by the complainants.”

⁴¹ High Court judgment above n 26 at para 146.

⁴² 12 of 2004.

[114] Having interpreted the PCCA, the Public Protector concluded that it criminalises corrupt activities and other forms of organised and financial crimes including money laundering.⁴³ But as the High Court rightly pointed out, the PCCA does not create the crime of money laundering. Before us, counsel for the Public Protector attempted to explain this as the innocent reference to the incorrect Act. There is no merit in this submission. The report quotes extensively from the provisions of the PCCA which the Public Protector interpreted to be criminalising financial crimes including money laundering. This illustrates plainly that she misconstrued the PCCA. In fact, a reading of the report shows that she equated money laundering to corruption and bribery.

[115] Having investigated the money laundering allegations, the Public Protector decided to dispose of them in terms of section 6(4)(c)(i) of the Public Protector Act.⁴⁴ Once more the Public Protector overlooked the fact that this provision is triggered where the facts disclose the commission of an offence during the course of dealing with a matter that properly falls within her competence. This disclosure must occur at any time, before, during or after an investigation of an issue listed in section 6(4). Money laundering is not one of the matters listed in section 6(4) as falling within the competence of the Public Protector. And apart from specified offences under the PCCA, crime is not reported to the Public Protector for investigation. The Constitution empowers the police service to investigate crime.⁴⁵ Yet here the Public

⁴³ Para 5.3.10.70 of the report of the Public Protector stated:

“[PCCA] also criminalises specific corrupt activities relating to, amongst others, public officers, contracts and the procurement of tenders. It also recognises the link between corrupt activities and other forms of crime such as organised crime and financial crimes including money laundering.”

⁴⁴ Section 6(4)(c)(i) of the Public Protector Act provides:

“The Public Protector shall, be competent—

...

(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.”

⁴⁵ Section 205(3) of the Constitution provides:

Protector undertook to investigate an allegation on money laundering made by the leader of the official opposition. This differs from stumbling upon money laundering facts during an investigation.

[116] With regard to the allegation that the President and his family were involved in illegal activities that gave rise to the suspicion of money laundering, the High Court held that the finding lacked legal and factual foundation. This conclusion is unassailable.

Audi principle

[117] There has been uncertainty in court decisions on whether the Public Protector's remedial action constitutes administrative action. In a number of matters, the High Court has held that it does.⁴⁶ The implication of this was that PAJA applies to the decision making leading up to the remedial action in question. PAJA proclaims procedural fairness which is inclusive of the audi principle.

[118] But the Supreme Court of Appeal came to the opposite view in *Minister of Home Affairs*.⁴⁷ Relying on certain factors that Court concluded that decisions of the Public Protector are not administrative in nature. Those factors included that the Public Protector is not part of the Executive and that she exercises "constitutional powers and other statutory powers of a public nature". I am not convinced that the factors on which the Supreme Court of Appeal relied support the view that those decisions do not constitute administrative action. The fact that a power is derived directly from the Constitution does not mean that its exercise cannot be administrative. Indeed the Supreme Court of Appeal characterised that power as being of a public nature. It will be recalled that administrative action comes into existence from the exercise of public power.

"The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

⁴⁶ *Minister of Home Affairs* above n 21; *SARB* above n 21 and *ABSA Bank Limited v Public Protector* 2018 JDR 0190 (GP).

⁴⁷ *Minister of Home Affairs* above n 22 at paras 36-7.

[119] Evidently, the Supreme Court of Appeal, contrary to the jurisprudence of this Court, laid more emphasis on the identity of the functionary that exercised the power than the nature and impact of the power on those against whom it was exercised. This Court has ruled that the focus of the enquiry into whether the exercise of power amounts to administrative action should be on the nature of the power itself rather than the functionary who exercises it.⁴⁸

[120] Since the application of the audi principle does not depend on whether the exercise of power constitutes administrative action, a definitive conclusion by this Court on whether the Public Protector's remedial action is administrative action, is not essential. I prefer to leave this question open for now.

[121] There can be no doubt that findings made by the Public Protector may be damaging to those who are the subject of investigations. Those findings may condemn those who are investigated or ruin their reputations and careers. The Public Protector's report may expose those investigated by her to unwelcome criminal or civil proceedings. These are serious consequences for the investigated persons.

[122] The duty for the Public Protector to act fairly is entrenched in section 7(9) of the Public Protector Act. It reads:

- “(a) If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.
- (b) (i) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of

⁴⁸ *SARFU* above n 34 at para 141 and *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at paras 81 and 203.

subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.

- (ii) Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.”

[123] Whenever an individual is implicated during the course of an investigation, the Public Protector is obliged to afford such person an opportunity to respond to the implicating evidence, if the implication may be detrimental to that person or if a finding adverse to him or her is anticipated. The form or manner of the response depends on the circumstances of each case. For example, if the implication was made in a sworn statement, a response in a sworn statement would suffice.

[124] Where that implication was made in oral testimony, the implicated person would be entitled to adduce controverting evidence before the Public Protector. In addition, that person has a right to question witnesses who gave the relevant testimony. This questioning must be done through the Public Protector. Implicit in this process is that the affected person would be afforded an opportunity to make representations on the relevant evidence. Ordinarily the questions should be put to witnesses in the presence of the affected person or her legal representative.

[125] It cannot be gainsaid that the Public Protector’s investigation may implicate the rights in the Bill of Rights. Consequently, the Public Protector Act in terms of which those investigations are undertaken must be interpreted in a manner, where reasonably possible, that promotes the objects of the Bill of Rights.⁴⁹ Section 7(9) declares that if it appears to the Public Protector at any time during the course of an investigation that an adverse finding or a detrimental implication may result, the Public Protector must afford the affected person a hearing. Implicit in the language of section 7(9) is that where it appears that a particular remedial action adverse to the affected person may

⁴⁹ *Democratic Alliance v Speaker, National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at para 19 and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

be taken, the Public Protector should afford that person an opportunity to make representations on the contemplated remedial action. If the section were to be read otherwise, the procedural fairness it guarantees would be seriously undermined. There is no reason in principle or logic that fairness envisaged in the provision should be restricted to findings or implication by evidence. The bigger risk to the affected person's rights is posed by the remedial action. And section 7(9) should not be given a meaning that is antithetical to the rule of law.

[126] For all these reasons, I conclude that when the Public Protector contemplates taking remedial action against the subject of an investigation, that subject is entitled to an opportunity to make representations on the envisaged remedial action. For a proper opportunity to be given, the Public Protector must sufficiently describe the remedial action in question to enable the affected person to make meaningful representations.

[127] The High Court here held that the Public Protector's remedial action had serious implications for the President, including being a suspect in a criminal charge that carries a punishment of up to 30 years' imprisonment. The High Court concluded that the failure to afford the President a hearing before the decision on the remedial action was taken was fatal to the validity of that remedial action. This conclusion too is beyond reproach.

[128] In addition, the President has complained that the e-mails on which the Public Protector relied were not disclosed to him and that he was denied the opportunity to make representations on those e-mails. In his supplementary affidavit, the President stated:

“Furthermore, these e-mails were not raised in the Notice, and first made an appearance in the Report without affording me an opportunity to address them before the Public Protector concluded her investigation.

The mere fact that what could be improperly obtained evidence has been used in the investigation is enough to vitiate the Report.”

[129] In her answering affidavit, the Public Protector does not dispute that the e-mails were not disclosed and that the President was not afforded a hearing on them. She responded in these terms to the relevant allegations:

“It is telling that Instead of denying the contents of the e-mail, the President complains about how I obtained the e-mails to which I refer. I receive many documents from anonymous whistle blowers. These e-mails were provided to my Office anonymously and in hard copies. It is for that reason that I have no metadata in respect thereof.

However, even if I knew the identities of whistle blowers, I have an obligation to protect them. What the President has to do is to take this Honourable Court and the country at large into his confidence and explain the contents of these e-mails. I deny that I obtained the e-mails unlawfully.”

[130] While it may be true that the Public Protector had lawfully obtained the e-mails and was entitled to have regard to them during the investigation, she was under a legal duty to disclose them to the President and afford him the opportunity to counter them if he was able to do so or that he makes whatever representations he may have wished to make on the e-mails.⁵⁰ It is a basic principle of our law that if a decision-maker is in possession of information that is adverse to the person against whom a decision is imminent, that such information be disclosed to the person concerned and that he or she be given the opportunity to deal with that information. Our jurisprudence shows that a decision based on adverse information which was not disclosed to the affected person and in respect of which that person was not heard, is fatally defective and ought to be set aside.⁵¹

⁵⁰ *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) at paras 56-69; *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (TkH) at para 26; and *Huisman v Minister of Local Government, Housing and Works (House of Assembly)* 1996 (1) SA 836 (A) at 845F-G.

⁵¹ *AOL v Minister of Home Affairs* 2006 (2) SA 8 (D) at 13I-14E; *Foulds v Minister of Home Affairs* 1996 (4) SA 137 (W) at 149I-J ; *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T) at 178E-F; and *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646E-G.

[131] Here the Public Protector based her crucial findings on the e-mails which were delivered by anonymous persons at her offices, without disclosing them to the President and affording him the opportunity to make representations. Notably, the authenticity of those e-mails was not established. In relying on them in the circumstances of this case, the Public Protector violated the audi principle and her findings, based on the e-mails, must be set aside.

Remedial action

[132] Apart from the fact that the remedial actions taken here were vitiated by the failure to afford the President a hearing, there are additional reasons which render them invalid. The first is that the Public Protector ordered the Speaker of the National Assembly to take steps in respect of which she had no authority in law. She ordered her to refer the President's "breach" of the Code to the Joint Committee on Ethics and Members' Interests for consideration. As the President is not a member of Parliament, the Speaker has no power to make the referral in question and the Joint Committee too has no authority over non-members. The Public Protector does not have authority, by the stroke of a pen, to empower both the Speaker and the Joint Committee to take steps that exceed their mandate.

[133] This applies with equal force to the remedial action directing the Speaker to "demand publication of all donations received by President Ramaphosa because as he was the then Deputy President", he was obliged to disclose such financial interests on the register of financial interests.⁵² To begin with, this part of the remedial action is vague. It requires a demand for publication of all donations received by the President whilst he was Deputy President, regardless of whether the donations had been disclosed. It does not state where this publication must be made. Nor does it state the source of the Speaker's power to demand publication. It will be recalled that the Code

⁵² The relevant part of the remedial action reads:

"Within 30 working days of receipt of this Report, demand publication of all donations received by President Ramaphosa because as he was the then Deputy President, he is bound to declare such financial interests into the Members' registerable interests register in the spirit of accountability and transparency."

requires disclosure in the register. And on established facts the relevant donations were not made to the President but to the CR17 campaign.

[134] Having proper regard to the scheme of the Members Act, it is doubtful that the Public Protector can herself take remedial action for the violations of the Code. In terms of section 3 of that Act, it is the President who may take action if the culprit was a member of Cabinet or a Deputy Minister. With regard to MECs, the power vests in the Premier. But if the Premier herself had violated the Code, action may be taken by the NCOP. The Members Act is silent on violations by the President. It may well be that breaches by the President should be referred to the National Assembly for it to decide on action to be taken within its powers.⁵³

[135] The difficulty here with regard to action which ought to be taken for the failure to disclose is that the alleged breach occurred whilst the President held the position of Deputy President. If the breach of the Code was established before the Public Protector, then she could have competently referred the matter to the then President in terms of section 3. But since the complaint was lodged after the President had assumed office, the Members Act does not cater for action to be taken against the President where he or she is responsible for violating the Code.

[136] Furthermore, the Public Protector issued supervisory orders against the Speaker, the NDPP and the National Commissioner. Ordinarily, orders of this nature are necessary where there has been non-compliance with previous orders and there have been systemic violations of the law. Here, the circumstances are different. It is also not clear that the Public Protector has the power to order the relevant entities to report to her. For example, the Speaker presides over the National Assembly to which the Public Protector is accountable. All Chapter 9 institutions are accountable to the National Assembly.⁵⁴ The Public Protector must report on her activities and

⁵³ For example, section 102 of the Constitution empowers the National Assembly to remove the President from office by a motion of no confidence.

⁵⁴ Section 181(5) of the Constitution provides:

“These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.”

performance of her functions to the Assembly. It would be remarkable for her to have the competence of ordering the Speaker to account to her.

Errors in the Public Protector's report

[137] The Public Protector, like all of us, is fallible and mistakes are to be expected in the course of the exercise of her powers. But what is troubling in this matter is the series of weighty errors, some of which defy any characterisation of an innocent mistake. For example, giving the phrase “wilfully misleading” the meaning of “inadvertently misleading” for it to fit established facts. She disregarded uncontroverted evidence to the effect that the President did not personally benefit from the CR17 donations and stated that on the evidence placed before her, he benefitted personally. This finding was made when there was simply no evidence to the contrary. These are some of the disconcerting features of the impugned report.

[138] The nature and number of errors committed by the Public Protector here call into question her capacity to appreciate what the law requires of her when she investigates complaints, arising from the violation of the Code. This is surprising because the Public Protector is, by definition, a highly qualified and experienced lawyer. As required by law, she has no less than 10 years' experience in the relevant field of law.⁵⁵

⁵⁵ Section 1A(3) of the Public Protector Act provides:

“The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who-

- (a) is a Judge of a High Court; or
- (b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or
- (c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or
- (d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or
- (e) has, for a cumulative period of at least 10 years, been a member of Parliament; or
- (f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.”

[139] While the Public Protector has the leeway to determine the form to be followed in a particular investigation, her investigation must meet the basic benchmark of a proper investigation that is conducted with “an open and enquiring mind”. In *Mail & Guardian* the Supreme Court of Appeal defined this standard in these words:

“I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring.”⁵⁶

[140] Here, the questions asked by the Public Protector led to the undisputed fact that the President had no knowledge of the donations to the CR17 campaign and that he did not personally benefit from those donations. An open and enquiring mind would have accepted those facts and would not have proceeded to hold, without any evidence, that the President had personally benefitted from those donations. An open mind suggests that the Public Protector must be open to being persuaded to reach whatever conclusion justified by the facts. She may not approach any investigation with predetermined outcomes. An open and enquiring mind was not displayed here despite the reference to *Mail & Guardian* in the Public Protector’s report, as one of decisions she followed. On the contrary, she made findings that were not supported by the facts and it appears that she was “unduly suspicious” of the person she was investigating. Consequently, the investigation was improperly conducted.

⁵⁶ *Mail & Guardian* above n 27 at para 22.

AmaBhungane's case

[141] Although the High Court had found AmaBhungane's case to have been compelling, it held for a number of reasons that the constitutional challenge mounted against the Code was not properly before it.⁵⁷ It is necessary to scrutinise each of these reasons to determine their cogency. First, the High Court held that the principle of constitutional subsidiarity stands in the way of the challenge by AmaBhungane. It is not clear how constitutional subsidiarity applies here. AmaBhungane challenges the validity of the Code made under the Members Act for not being consistent with the Constitution. And this challenge is not based on a right guaranteed by the Bill of Rights and in respect of which legislation was passed to give effect to it. The High Court itself records that AmaBhungane relies on section 96 of the Constitution to impugn the Code. The High Court's reliance on the decision of this Court in *My Vote Counts*⁵⁸ was therefore misplaced.

[142] Second, the High Court held that because the Code required disclosure of information, the Promotion of Access to Information Act⁵⁹ (PAIA) was applicable and that AmaBhungane may use it to obtain information on donations to internal political party campaigns. This misses the point. The issue is not whether there are other pathways leading to such information. Nor is it about access to information. The issue raised in the challenge is the invalidity of the Code which AmaBhungane contended is inconsistent with the Constitution.

[143] Third, the High Court held that if the claim of invalidity by AmaBhungane were to succeed, this would mean that the duty to disclose would be restricted to members of the Executive only. This would not provide the full transparency necessary for the exercise of the right to vote by the voters. Again, this is immaterial. By design, the scope of the Code is limited to members of Cabinet and Deputy Ministers.

⁵⁷ High Court judgment above n 26 at para 194.

⁵⁸ *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC).

⁵⁹ 2 of 2000.

[144] Fourth, the High Court held that in essence the relief sought by AmaBhungane was to amend the Code so as to require members of the Executive to disclose “donations made to campaigns for positions within political parties”. That Court concluded that this would undermine the principle of separation of powers. This is also incorrect. The consequential remedy of amending the Code is not a requirement for enquiring into the validity of the Code. The High Court could still determine the Code’s validity and declare it invalid, without amending it, if the amendment would not be a just and equitable remedy.

[145] If the High Court were to find that the Code is inconsistent with the Constitution, that Court would have no choice but to declare the Code invalid.⁶⁰ A court is obliged to declare any law or conduct that is inconsistent with the Constitution to be invalid. It follows that the High Court erred in concluding that the challenge by AmaBhungane was impermissible. The High Court should have considered the merits of that claim. I consider it appropriate to remit the matter to the High Court for adjudication of the claim.

Costs

[146] Ordinarily, the dismissal of the appeal would result in the applicants, except AmaBhungane, being liable for costs. But the *Biowatch* principle has altered this rule in constitutional litigation.⁶¹ According to this rule, if a private party is unsuccessful against the state, it should not be ordered to pay the costs of the state. However, here this applies to the EFF only. The rule does not apply to the Public Protector.

⁶⁰ Section 172(1) of the Constitution provides:

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

⁶¹ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[147] The position between the Public Protector on the one hand and the President, Speaker and the NDPP, on the other hand is different. Usually the parties that are successful on appeal would be entitled to their costs and the *Biowatch* principle would not apply between organs of state. However, all these parties used public funds to fund this litigation. If one of them is ordered to pay costs, effectively it will be the public which will bear that liability. In the circumstances, I consider it fair not to make a costs order.

[148] AmaBhungane's case is however different. It has succeeded on appeal and it is entitled to its costs in this Court. But it was only the President who opposed AmaBhungane's appeal. Consequently, it is fair to order that the President alone should be liable for AmaBhungane's costs.

Order

[149] In the result, the following order is made:

1. Leave to appeal is granted.
2. Save to the extent mentioned below, the appeal is dismissed.
3. The dismissal of AmaBhungane Centre for Investigative Journalism NPC's claim for constitutional invalidity of the Executive Ethics Code is set aside.
4. The matter is remitted to the High Court for determination of that claim.
5. The President of the Republic of South Africa is ordered to pay costs of AmaBhungane Centre for Investigative Journalism NPC in this Court, including costs of two counsel.
6. No order as to costs is made in respect of the parties, including Freedom Under Law.

MOGOENG CJ:

Introduction

[150] I read the main judgment written by my Brother Jafta J with great interest and thankfully ride on the facts set out in it, subject to contextual modulation. Sadly, we part ways on the approach, the reasoning and the outcome save where the contents otherwise indicate.

[151] This case is fundamentally about at least two of the foundational values of our democratic State – transparency or openness and accountability – as well as our national quest for ethical leadership and the institutionalisation of good governance. It is also about how dangerous to good governance apparently philanthropic gestures or sponsorships could be, if the teeth of our integrity, transparency and accountability enforcement mechanisms are not allowed to checkmatingly bite these potentially insidious practices.

Background

[152] What happened is that President Cyril Ramaphosa, in order to correct his previous response to Honourable Mmusi Maimane, MP's question in Parliament, informed the Speaker in writing that an amount of R500 000 that was donated by Mr Gavin Watson of African Global Operations, formerly Bosasa, was not paid to his son, but to what we now know as the CR17 campaign. The contribution was made in support of his quest, as Deputy President, to ascend to the Presidency of the African National Congress. This is part of what the President said in his letter to the Speaker:

“I have been told that the payment to which the Leader of the Opposition referred was made on behalf of Mr Gavin Watson into a trust account that was used to raise funds for a campaign established to support my candidature for the Presidency of the African National Congress.

The donation was made without my knowledge. I was not aware of the existence of the donation at the time that I answered the question in the National Assembly”.

[153] It is this response that triggered a formal complaint by Honourable Maimane to the Public Protector to investigate certain concerns he had. Part of what Honourable Maimane stated in his complaint was:

“In this letter of correction the President reveals that the payment was actually a donation towards *his campaign to be elected ANC President in December 2017*.

It is my concern that the set of facts related above reveal that there is possibly an improper relationship existing between the President and his family on the one side, and the company African Global Operations (formerly Bosasa) on the other side. The nature of the payment passing through several intermediaries does not accord with a straight forward donation and *raises the suspicion of money laundering. The alleged donor is further widely reported to have received billions of Rands in State tenders often in irregular fashion.*”

[154] In sum, the President himself said that what we now know as the CR17 campaign received a significant donation from someone, whose commitment to ethics, particularly in securing State tenders is, according to Honourable Maimane, most concerning. In his complaint he:

- (a) highlighted the fact that the money was a donation to the President’s campaign to become ANC President in 2017;
- (b) expressed a concern about the propriety of the President and his family’s relationship with African Global Operations;
- (c) specifically mentioned the billions of Rands received by the alleged donor in “State tenders often in irregular fashion”; and
- (d) expressed a suspicion that money laundering could be involved regard being had to the many intermediaries that payment had to pass through to get to its intended destination.

[155] Central to the complaint was therefore money that was paid to the CR17 campaign undeniably intended to strengthen the President’s prospects of

becoming what he eventually became. How the Public Protector got to investigate the CR17 campaign does not seem to be a consequence of some inexplicable fishing expedition or of being unduly or overly suspicious of the President. Honourable Maimane asked her to look into a potentially compromising donation to the President which, as stated, we now know was to the CR17 campaign and alluded, albeit not in so many words, to a possible conflict between the President’s official responsibilities and his private interests by mentioning the billions of Rands received by African Global Operations in *irregular State tenders*. I turn now to the legal framework that regulates the ethical conduct required of members of the Executive.

[156] Section 96 of the Constitution provides in relevant part:

- “(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Cabinet and Deputy Ministers may not–
 - ...
 - (b) act in a way that is inconsistent with their office, or expose themselves to any situation involving *the risk* of a conflict between their official responsibilities and private interests.”⁶²

Quite apart from what the Code proscribes, the supreme law itself forbids members of the Executive from exposing themselves to the risk of conflict between “official responsibilities and private interests”.

[157] Section 2(2)(b)(iii) of the Members Act⁶³ reiterates the above provisions. And section 2(2)(c)(ii) requires a disclosure of “other benefits of a material nature received” by them or their relations. Paragraph 2.3(f) of the Code also forbids that Members of the Executive “expose themselves to *any situation involving a risk* of a conflict between their official responsibilities and their private interests”. Paragraph 6.2(a) and (b) of the Code insists on a disclosure of:

⁶² Section 96 of the Constitution.

⁶³ The Members Act is the national legislation alluded to in section 96(1) of the Constitution.

- “(a) The source and description of *direct financial sponsorship or assistance from any source other than the member’s party which benefits the member in his or her personal and private capacity*; and
- (b) the amount or value of the sponsorship or assistance.”⁶⁴

[158] When a vacancy in the Presidency of the governing party and, by extension, the Presidency of the Republic loomed large, the then Deputy President, His Excellency Cyril Ramaphosa, decided to raise his hand. Apparently, a successful campaign for the attainment of that personal ambition or private interest required financial resources in abundance. And a funding mechanism for that race to the top was developed with his blessings. I say with his blessings advisedly because he too contributed his own money to the kitty, he reportedly addressed fundraising meetings attended by sponsors and interacted with some of the sponsors. He does not seem to have been oblivious to the existence and purpose of the CR17 campaign.

[159] It is in this context that a determination must be made whether the President’s private interests were advanced by, and whether he personally benefitted from the money that was paid into the CR17 campaign account and was thus obliged to disclose that financial support. Additionally, whether the operations of the mode of transport, known as the CR17 campaign, to the destination known as President of the ANC gave rise to a situation involving a risk of conflict between official responsibilities and private interests, must be similarly considered.

The purpose and nature of the prohibition

[160] The question is whether the findings of the Public Protector are on all fours with the requirements or conditions to be met for wrongdoing to be established or at least reasonably explain why she arrived at her findings and recommendations or the remedial action under consideration. Were the Public Protector’s findings a consequence of a legitimate pursuit of the whole truth and a genuine and reasonable desire to seek to know more about the CR17 campaign-related matters and the President’s possible breach of his constitutional, statutory and ethical obligations or

⁶⁴ Paragraph 6.2(a) and (b) of the Code above n 2.

was she on some vindictive, personal or sectional or political frolic? Is there anything improper, ludicrous or overly suspicious about the Public Protector's investigation and findings?

[161] Lest we forget, the overall thrust of the Public Protector's democracy-entrenching mandate is to rid our State of all forms of impropriety and unethical conduct, particularly at the level of the Executive. How inappropriate could it then have been for the Public Protector, whose constitutional duty it is to strengthen our constitutional democracy, to have, so to speak, left no stone unturned in investigating other potentially compromising donations to the CR17 campaign, using Honourable Maimane's complaint as a launching pad? Shouldn't transparency and accountability, in matters of this kind, trump legal technicalities, to ensure that substance is put over form? This should arguably be so, because the President and his team had the opportunity to address the CR17 campaign issues during the Public Protector's investigations. He also deals with the emails with a measure of thoroughness.

[162] When people or entities other than the then Deputy President's party gave him sponsorship or financial assistance for the purpose of realising his ultimate political dream, he was, by accepting help or allowing others to accept help on his behalf, exposing himself to a situation involving the risk of conflict. For, that sponsorship or financial assistance to help him rise to the highest political office is most likely to induce a favourable disposition towards those who stood by him when help was sorely needed. "Do I, as Deputy President of the Republic, Leader of Government Business in Parliament and later as President of the Republic, do my work with due regard to or without any regard for those who helped advance my personal ambition to occupy the supreme office in the party or in the land?" These kind of issues must inescapably exercise the targeted beneficiary's mind. And that is what the risk of conflict sought to be averted through these legal instruments or the duty to disclose entails. In *My*

*Vote Counts*⁶⁵ this Court addressed this risk and the need to disclose, albeit in a slightly different context, in these terms:

“The reality is that private funders do not just thoughtlessly throw their resources around. They do so for a reason and quite strategically. Some pour in their resources because the policies of a particular party or independent candidate resonate with their world outlook or ideology. Others do so hoping to influence the policy direction of those they support to advance personal or sectional interests. *Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally.*

Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation’s strategic objectives, sovereignty and ability to secure a ‘rightful place’ in the family of nations. Our freely elected representatives must thus be so free that they would be able to focus and deliver on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivity.

The commitment to build ‘a united and democratic South Africa’ and to ‘improve the quality of life of all citizens’ can only be honoured by public office bearers whose character or willpower is unencumbered. *Only when there is a risk of being exposed for receiving funding from dubious characters or entities that could influence them negatively, for the advancement of personal or sectoral interests, would all political parties and independent candidates be constrained to steer clear of such funders and be free to honour their declared priorities and constitutional obligations. And that risk would be enabled by a regime that compels a disclosure of information on the private funding of political players.”*⁶⁶

The true beneficiary and duty to disclose

[163] Cabinet Members are prohibited from *exposing* themselves “to any situation involving the risk of a conflict”. And that potential conflict is between their official responsibilities and private interests. When the then Deputy President urged and

⁶⁵ *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC).

⁶⁶ *Id* at paras 40-2.

allowed potential donors to sponsor his own ambition to become President of his party, he was thereby exposing himself to a situation that is an incubator of a risk of conflict. Donors knew who they were helping and if the unethical ones, assuming there are any among them, were ever to desire help or favours from the State they would know who to go to – the Deputy President and soon to be, President. There is an ever-abiding risk of conflict between being financed to become President of a party (private interest) and one's position as the Deputy President and Leader of Government Business in Parliament or President of the Republic (official responsibility). It is necessary to emphasise, that there is nothing to suggest that sponsors were somehow interdicted or legally forbidden from informing the real beneficiary of the extent of their individual contributions and even producing proof.

[164] President Ramaphosa became a direct and primary beneficiary of the money sourced by the CR17 campaign. It was not for the benefit of the party or official party structure, party-political campaign, or any other person, but for his own upward mobility – his personal benefit. The CR17 campaign was all about him. It was not meant to fund the party to run its day-to-day operations or win elections. It was about him fulfilling his dream to become President of the party and by extension of the Republic. After all, the party neither asked for those donations nor were they paid to the party coffers. He did and they were paid to his chosen or endorsed recipient.

[165] It is the Deputy President who, as a matter of private interest, not only wanted to become President of the ANC but self-evidently also desired and planned to be President of the Republic. It requires a hair-splitting exercise to seek to draw a line between the pursuit of the Presidency of the ANC and the desire to rise to the highest office of President of our country. Similarly, it would require unprecedented linguistic gymnastics to seek to draw a line between channelling funds through the CR17 campaign to fund the race/campaign to the top and the personal benefit to be derived by the one desirous of the resultant elevation.

[166] When any constitutional office-bearer needs financial assistance or sponsorship to ascend to the commanding heights of party structures, that is a pursuit of a personal benefit, regardless of whatever vehicle he or she might settle for as a conveyor belt for the sponsorship or financial assistance to its intended and desired destination. Excusing disclosure as a result of the juristic veneer of the likes of the CR17 campaign or its trust account is a sure way of enabling wrongdoing, corruption or even the so-called State capture. Ascension to raw power or the supreme office enabled by funding sourced by the CR17 campaign, was a quintessential personal benefit and a personal achievement or success.

[167] That trust or entity was in reality a proverbial “middle-man” between the financial sponsorship or assistance and Deputy President Cyril Ramaphosa. It also falls within the ambit of “from any source” in paragraph 6.2(a) of the Code. It was founded, and money was sourced and spent for his personal or private benefit, for him to occupy a particular office. In circumstances where ethical leadership, transparency and accountability are key to the survival and well-being of our democratic order, a State functionary may not permissibly choose a way to obscure an otherwise disclosable benefit by creating or allowing a structure to be created, as a repository of a known benefit under the garb of a distinct juristic personality, so as to escape or immunise himself or herself from a constitutionally-prescribed obligation to be open, accountable and to disclose.

[168] For this reason, whatever legal personality the President and his campaign managers may have chosen to clothe the repository of his campaign sponsorship or financial assistance with, cannot detract from the naked truth that (i) he pleaded with potential sponsors to give money in and for his name – CR17 campaign (Cyril Ramaphosa’s Campaign for the ANC Presidency in 2017); (ii) he knew that the money that was being given and spent on his own ambitious campaign came from an agreed structure known as the CR17 campaign to which he also contributed; and (iii) he personally benefitted from the sponsorship that propelled his campaign to its logical conclusion – the Presidency of the ANC. Election or elevation to a position

you desire is a benefit. And the benefit is personal because the targeted beneficiary gets to occupy and enjoy the position and all its accompaniments. It is perhaps necessary to state the obvious, the position is not occupied by a group but by an individual. When the sponsored one attains the desired position, people congratulate him or her because they see him or her as the winner – the successful one.

[169] The foundational values of openness and accountability demand that we pierce through the trust veil that is capable of inadvertently or by design frustrating the all-important disclosure in this corruption-infested country. Why would anybody not want to know who is helping them and how reasonably practicable is that anyway? And why would they want to have their benefactors unknown to Parliament or the public? It bears emphasis that the “refusal to know” in circumstances where one is under the “duty to know” and the consequential failure to disclose is a sure, albeit unintended, recipe for corruption under the cover or facilitation of a well-structured mechanism or legal stratagem, again not intended to, but having the inescapable effect of evading accountability, openness or disclosure.

[170] Our laws must be interpreted with due regard to the foundational values of our democratic State and with a keen commitment to strengthening our constitutional democracy and furthering the constitutional project of ensuring that constitutional obligations are honoured but not undermined or frustrated. The Constitution, the Members Act, and the Code exist for the purpose of enhancing or enabling the attainment of justice, giving substance to our founding values and ensuring compliance with high ethical standards and constitutional obligations. They are not to be interpreted in a way that impedes the realisation of these critical objectives. Courts should not therefore inadvertently enable schemes designed to or that could unintentionally frustrate the fulfilment of ethical imperatives and constitutional obligations by allowing legal sophistry or technicalities to obscure commonsensical realities.

[171] For this reason, any proposition that the Public Protector should not have investigated possible ethical breaches concerning all other CR17 campaign donations, either because Honourable Maimane, MP did not explicitly mention the CR17 campaign or seems to have confined his complaint, based on the donation, to the relationship between African Global Operations or Mr Watson and the President and his family, would be missing the point. The President himself said that Mr Watson's donation was made to "a *campaign* established to support *my candidature* for the Presidency of the African National Congress". It was *his* campaign and it was known as the CR17 campaign. It is such an embodiment of his aspirations that it even bore his initials. This was the one and only campaign structure to which donations for his Presidential campaign were made. African Global Operations is a donor like all other donors to the CR17 campaign. The pursuit of the whole truth alluded to in *Mail & Guardian* demanded of the Public Protector, in obedience to the constitutional mandate of her Office to strengthen our democracy, to investigate and satisfy herself, on behalf of the public, that none of the other CR17 campaign-related donations were on the wrong side of the constitutionally-prescribed and set ethical standards.

[172] The President therefore had the duty to know, if he did not know already, who was funding his campaign (CR17 campaign) and to disclose that personal benefit compositely as a benefit from the CR17 campaign as an entity and/or more appropriately from each donor with a specified amount. Why? So that Parliament and the public could know who was helping or had helped him to perform better than his competitors and enabled him to become ANC President and a few months later, President of the Republic. The possibility of an unhealthy relationship with donors and the risk of conflict between the Deputy President's official responsibilities, as he then was, and his private interests, as the enabled most senior political party functionary, could then be closely watched to check whether the financial support had induced him or repositioned his disposition or heart to the point where his commitment to his constitutional obligations was in anyway compromised or his government's treatment of funders was more favourable than of those who did not fund him or gave less. This is what *My Vote Counts* is cautioning us about and what

foundational values of openness and accountability as well as the regulatory framework, properly understood, seek to address.

[173] The President's duty to disclose was triggered the moment he agreed to establish or became aware of the existence of the CR17 campaign, asked sponsors to support his campaign and became aware that money was being spent by the CR17 campaign to advance his presidential bid. The emails in the possession of the Public Protector, which are by the way merely additional but not essential material for the purpose of establishing a case against the President, that are not denied, and the briefings to the President about the state and activities of the CR17 campaign make the situation even worse for the President. The contents of any genuine email generated by a specific person should ordinarily be as good as the oral evidence given by that person. As a matter of practice and law, the contents of an email or a document by X and Y may, assuming its authenticity is not disputed, be used to contradict and discredit their own oral evidence and vice versa. This extends to the evidence of the recipient of those emails who might have asserted a contrary view. He or she may be similarly discredited. For this reason, the Public Protector ought to be understood to be saying that the oral evidence of the President and the CR17 campaign managers regarding the happenings in the campaign with regard to the donors and their donations was effectively belied by their own exchange of emails that revealed that the President knew what they claimed, in their oral evidence, that he did not know.

[174] Besides, even in the absence of the proof (emails) uncovered by the Public Protector regarding the President's knowledge of who the donors were and what the CR17 campaign was doing, just how realistic or in keeping with lived experience is it to assume that he would not want to know about the progression of his own destiny-defining project or that donors would not want him to know that they were his enablers to the much-coveted position or throne. He should, with respect, not be allowed to hide behind a structure that bears his name and that was established for the

primary purpose of advancing his private interests and that actually advanced his personal mission to be President.

[175] Whichever way you look at it, the President received a disclosable benefit, disclosable precisely because it has a potentially compromising short- and long-term effect. That money could have and should have come directly to the President because he is the one who needed it for his own personal benefit. He was required to and should therefore have disclosed it. That he and others chose to set up a structure that had the presumably unintended, but effective result of undermining or frustrating the imperative to be transparent, accountable and to disclose to Parliament - to be ethical - cannot help him. It cannot help the President that he might have chosen not to know who his benefactors were. He knew and should have disclosed that the people or entities he addressed asking them to fund his desire to become President heeded his plea or call and gave money to the CR17 campaign and that CR17 in turn released money for his personal election to the much sought-after office of President of the ANC.

[176] On the need to disclose, again I say, the President knew of the CR17 campaign which existed primarily for the purpose of advancing his political career. The veil sought to be erected between him and that project should not be allowed to obscure that truth or reality. He was most unlikely to have been ignorant of a matter so destiny defining and all-important. He was therefore under the obligation to disclose, in the very least, his private interest in the form of the sum-total of the money paid to and used by the CR17 campaign and how this entity benefitted him financially in his journey towards the Presidency of the party.

[177] More importantly, as the Public Protector correctly found, when he received or caused others to receive the sponsorship or financial benefit, he was still the Deputy President of the Republic and a Member of Parliament. The Code applied to him fully. He cannot be exempted from the consequences of what he did then by reason

only of the fact that the “personal benefit” has worked so well that he now occupies the position of President in line with his and the sponsors’ set objective.

Audi alteram–specific reflections

[178] It is necessary to address the concerns raised by the President regarding the failure of the Public Protector to afford him the opportunity to be heard before an adverse decision was made against him. Whichever way one looks at it, substantive justice within the context of the audi alteram partem rule is about ensuring that no adverse decision prevails against anyone whose side of the story has not been heard on the issue(s) central to that decision. It would therefore be a travesty of justice to make or confirm any adverse determination against anybody in circumstances where his or her version is unknown to the decision-maker. And it would similarly be a travesty of justice to ignore the truth that has since been placed squarely before the subsequent decision-maker at the time of entertaining either a review or an appeal grounded on the initial failure to observe the audi principle. In sum, when a possibility looms large that a prejudicial outcome may flow from reliance on certain evidential materials, the audi-inspired dictates of justice requires that a party likely to be adversely affected thereby be heard. Accordingly, in the course of making their representations to the Public Protector the parties would thus be expected, in line with normal civil litigation practice, to express themselves on the possible remedial action as well. This relates to the remedial action and the emails.

[179] The audi alteram partem rule is an integral part of a fair trial process and a fundamental element of justice. How it applies to the Public Protector must be guided by how it ordinarily applies to court proceedings – civil and criminal.

[180] I disagree with views to the effect that the audi principle obliges the Public Protector to inform a party, likely to be adversely affected by the remedial action, of the remedial action she is minded to take. In civil litigation, Judges and Magistrates are never under any audi-induced obligation to inform the parties of the remedy they are most likely to give. Sometimes they do make their preliminary views on remedy

known to the parties and solicit their views. But this is never done as a result of some legal obligation whose failure to fulfil could result in an injustice or unfairness which could or would then give rise to the need to vitiate the decision or order of the court. Not even in a criminal case is a court required by the audi principle to indicate in advance what sentence it is likely to impose. Justice would be sufficiently served by affording all parties the opportunity to deal with the sentence that may be imposed regard being had to the facts of the case and what the accused person would have been convicted of.

[181] The test cannot be any higher when it comes to the Public Protector who does not even have the authority to impose terms of imprisonment on those she investigates. She is therefore only required to have the parties deal with what they consider to be a possible, but not necessarily a pre-announced, remedial action in the event of the complaint(s) under investigation being established. Although not precluded to give a hint at her preliminary views on the remedial action, she is not legally obligated to do so. And section 7(9) of the Public Protectors Act, which really is a codification of the audi principle, must thus be understood in this context.

[182] Had it not been for the whistle-blower who shared the emails with the Public Protector, it would most likely have never been known that the President and his campaign team presented facts known to be incorrect, to the Public Protector. And with regard to these emails, which enjoyed some attention in the preceding paragraphs, it is necessary to do a recap on the relevant background. The President and the CR17 team chose to and represented to the Public Protector that he deliberately kept himself and was intentionally and strategically kept ignorant of the donors and the extent of their contributions to the campaign as well as the operations of the campaign in relation to those financial contributions. The Public Protector subsequently got hold of and relied on emails that belie the President and the CR17 campaign managers' shared version of the President's professed ignorance. What follows is what the President and the Public Protector said in their affidavits. The President says:

“13.11 Copies of various emails containing my personal communications to various persons and individuals during 2017 and 2018 and communications between the members of the CR17 campaign. I have been made aware that the said information may have been illegally obtained as the provenance of the emails cannot be ascertained and the members of the CR17 campaign including myself and the FIC, did not provide these emails to the Public Protector.

13.12 It is my belief that these emails were stolen from the CR17 campaign computers. I call on the Public Protector to explain how and from whom she received these emails.

...

38. *The Public Protector unlawfully failed to give me an opportunity to respond to the FIC report and the other batch of emails. She was obliged to do so by section 7 (9) of the Public Protector Act, 1994.*

39. According to the Public Protector, I was implicated in the alleged CR17 donations. The Public Protector bases this accusation on the FIC report. but she kept the report up her sleeve and never gave me an opportunity to respond to it. It was only when my legal representatives received and studied the Record that this came to light.

40. *The Public Protector could not possibly arrive at rational conclusions in relation to the CR17 payments without affording me an opportunity to respond to the FIC report and the batch of emails upon which she based her findings against me.*

...

87. *I call on the Public Protector to explain how and from whom she received the abovementioned emails.*

88. The emails are in any event irrelevant to the Public Protector’s findings, and it is therefore not clear why they have been included in the Record in the first place. The Public Protector is not entitled to rely on unlawfully obtained evidence. The emails were leaked to the media before even the Record was out. I refer in this regard to the News24 article of 3 August 2019 and the Daily Maverick article of 8 August 2019 marked ‘11SMCR5’ and ‘SMCRG’ respectively.

89. Furthermore, these emails were not raised in the Notice, and first made an appearance in the Report *without affording me an opportunity to address them before the Public Protector concluded her investigation.*
90. *The mere fact that what could be improperly obtained evidence has been used in the investigation is enough to vitiate the Report.*”

[183] In response the Public Protector says:

“2.10.1 It is telling that instead of denying the contents of the email, the President complains about how I obtained the emails to which I refer. I receive many documents from anonymous whistle blowers. These emails were provided to my Office anonymously and in hard copies. It is for that reason that I have no metadata in respect thereof.

2.10.2 However, even if I knew the identities of whistle blowers, I have an obligation to protect them. *What the President has to do is to take this Honourable Court and the country at large into his confidence and explain the contents of these emails.* I deny that I obtained the emails unlawfully.”

[184] The application of the audi principle is not to be equated to some self-driven and mechanical instrument or some inflexible mathematical formula or calculation. It is a purpose-driven legal instrument or principle designed to yield substantive justice and equity with due regard to the specific facts and context of each case. Ordinarily, that part of the Public Protector’s findings that stands or falls by the emails should be set aside by reason only of her non-observance of the audi alteram partem principle. But now, we know and may not therefore act as if we do not have the benefit of the response to the emails that the President would have given to the Public Protector had she afforded him the opportunity to do so. All the information necessary to finally do justice to this matter is on record. The President’s response is in substance as set out immediately below.

[185] The Public Protector should have afforded the President the opportunity to confront the contents of the emails that vitiate the version of the President and his campaign managers. It is concerning that she too, like the President, chose not to address the central feature of the concern raised – why she did not hear the President’s side of the story before she finally relied on the emails. That is what the audi principle demanded of her. But, the President has taken us into his confidence and shared with us the views he would have expressed to the Public Protector regarding the emails, had he been afforded the opportunity to do so.

[186] He has allowed us the opportunity to know as we decide this matter whether the contents of the emails are true or false and what apart from contesting their admissibility or the fact that they may, in his view, have been improperly obtained, disqualifies them from being factored into our decision-making process? It is worth noting that irregularly- or illegally-obtained evidence may be admissible even in criminal matters.⁶⁷ And here, it is a whistle-blower who exposed the falsehood. As we grapple with the application of the audi principle with regard to the emails we therefore have this advantage of being able to ensure that substantive justice obtains, based on the totality of the truth that stares us in the face. The fairness the President did not enjoy before the Public Protector, who did not have the benefit of his response, he can now experience before us since we have the benefit of his side of the story.

[187] The President says repeatedly that he was not afforded the opportunity to be heard before the emails were finally relied on, that they were stolen or irregularly-obtained from the CR17 campaign computers and because they constitute improperly-obtained evidence, that irregularity alone is sufficient to vitiate the entire Report. The President effectively acknowledges the existence and admits the authenticity of the emails. He confirms that they are indeed communications between him and, among others, the CR17 campaign team contained in the computers of the CR17 campaign. He demands more than once that the Public Protector should explain to him how and from whom she obtained this admittedly truthful but reputationally

⁶⁷ See *Key v Attorney General, Cape of Good Hope Provincial Division* [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at para 13.

damaging emails. Not once does he explain why he and his team chose not to tell the truth but to rather mislead the Public Protector as they did. Instead he says that the emails are, in any event, irrelevant to the Public Protector's findings. But, that cannot be correct. For, not only are the emails relevant, but they also expose the falsehood of the version that the President and the CR17 campaign managers chose to present to the Public Protector.

[188] And it bears repetition that that false version is that there was a deliberate plan to ensure that the President does not get to know who the donors were, how much they donated and how the financial assistance received for his campaign was being used. The emails squarely belie this assertion. The question that we should then be asking ourselves is: why did the President and his team deliberately convey a falsehood on an issue so crucial and inextricably connected to the constitutional imperative to promote and observe high ethical standards in obedience to the demands of our democratic State's founding values – openness and accountability. He must have known that if the truth evidenced by the emails were to be told the obligation to disclose the names of the funders and the size of their contributions to the National Assembly and by extension to the public would automatically and plainly be triggered. And in terms of the essence of *My Vote Counts*, the public would then have the opportunity to curiously and vigilantly monitor the outward manifestation of his relationship with the sponsors in line with the concerns raised by Honourable Maimane, MP regarding Mr Watson and the State tenders.

[189] Because of the gravity of these reflections, it behoves us to be more specific and frontal about the relevant constitutional demands upon the Presidency. Section 83(b) of the Constitution imposes a singular responsibility on the President to “uphold, defend and respect the Constitution as the supreme law of the Republic”. The President as a State functionary is, in terms of section 239 of the Constitution, an organ of State. And section 181(3) of the Constitution demands of him, as an organ of State, to uphold and respect the Constitution by “assisting” the Public Protector and “ensuring” the “effectiveness” of that Office. And that Office cannot be assisted and

its effectiveness ensured when those who are under a constitutional duty to help it, choose to mislead it and to fight it to the end for exposing their untruths. What the President self-evidently did was to undermine and frustrate the efforts of that Office to fulfil its constitutional obligations by not just withholding the truth but deliberately asserting the opposite of it. Furthermore, the President is obliged by section 96(2)(b) of the Constitution to not “act in any way that is inconsistent with [his] Office”. This section is the constitutional source of the high ethical standards by which the President is supposed to lead this nation. Strategically and intentionally giving a false version to the Public Protector while she is investigating a possible ethical breach falls squarely within the catchment area of this section.

[190] Truth or integrity is after all at the heart of the Office of President of the Republic particularly in relation to his or her constitutional obligations. Deciding to present a version known to be untrue to an organ of State whose constitutional duty it is to strengthen our democracy is conduct that is inconsistent with that high office and the obligations that the incumbent has – to uphold, defend and respect the Constitution. And so is the failure to report the sponsorship or financial assistance from the donors he has addressed and asked to donate to the CR17 campaign. This violation would still be established even if this obligation to tell the truth and disclose is confined only to the money from this campaign which is after all neither his political party nor an official structure of his party. This second leg of section 96(2) (b) has already been dealt with at some length and I will thus say no more.

[191] Lest we forget, we are not dealing here with an average citizen but with the bearer of specific and frighteningly weighty constitutional responsibilities, who is expected and required to lead by example and be above reproach. His Office demands of him to be the lighthouse, the pathfinder, the embodiment of and vessel for the enforcement of high ethical standards particularly the foundational values of our democratic State, in this instance transparency, accountability and the supremacy of the Constitution. Like all of us, he has rights. But unlike all of us, he does have special obligations, not imposed by courts, but by the Constitution and legislation. It

is the President, the number one or first citizen of the Republic, which we are talking about here. His, is a distinctive and supreme Office in the land that does not permit the employment of extraordinary technicalities when issues of ethics, transparency, accountability, upholding and respecting the Constitution have to be considered and pronounced upon. It is in this context that one is constrained to keep on saying that technicalities must not be allowed to easily frustrate the fulfilment of core constitutional obligations and the attainment of substantive justice.

[192] It also bears repetition that the President carefully and intentionally gave a false version of what he knew to be the case, to the Public Protector. What he did is highly unethical and a resounding rejection or dereliction of his key constitutional obligations. This is therefore not a question of the President and his team mistakenly putting forward a version, such as he did in the National Assembly with regard to the alleged Bosasa donation to his son, which he subsequently corrected. It is rather a case of a calculated misrepresentation of the facts by someone who is confident that the truth would never be uncovered. No wonder the President and his team have made no attempt at reconciling their version with the emails. The two versions are mutually exclusive or destructive and obviously incapable of reconciliation. And all the President could do and did was to keep on asking the Public Protector, and I paraphrase, how did you manage to access this well-kept or closely-guarded secret? Who gave this painful truth to you?

[193] It is against these realities that the point taken with regard to the audi principle has to be understood. And with the benefit of all the information at our disposal, I am satisfied that a somewhat simplistic and mechanical application of the audi principle could only be at the expense of substantive justice and equity.

The Public Protector's power to investigate and refer an offence

[194] The Public Protector relied on an incorrect legislation in dealing with the offence of money laundering in her report. But, that does not really matter. She was not going to prefer criminal charges against the President. It is the Police, in

particular the National Prosecuting Authority – the drafters of the charge sheet or indictment if charges were to be preferred – who had to ensure that the correct legislation was relied on. Hers, was to alert them and ask them to investigate.

[195] It appears that she acted in terms of section 6(4)(c)(i) of the Public Protector Act to recommend to the Police and the Prosecuting Authority to pursue possible charges of money laundering against the President. The subsection reads:

- “(4) The Public Protector shall, be competent–
- ...
- (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 charged with prosecutions.’⁶⁸

And this is what she did in relation to the money laundering charge. I hasten to add that she was wrong to have been somewhat prescriptive by couching her referral of the offence in the form of a supervisory order. Hers was simply to refer. Not to monitor. And not to enforce.

[196] If the Public Protector “is of the opinion that facts disclose the commission of *an offence*” she is empowered to notify the prosecuting authority of what in her opinion, rightly or wrongly, constitutes a commission of *an offence*. Nothing in section 6(4)(c)(i) limits her to the type or class of offences that she is permitted to notify the NPA about. Even murder or robbery may be brought to their attention. The fact that she does not bear the primary responsibility to investigate criminal offences or is not expressly empowered to do so does not mean that she may not look into and subsequently refer to the relevant authority, any offence that is intertwined with allegations of unethical conduct that she is otherwise entitled to investigate. On the contrary, it follows that she had the legal authority to make preliminary investigations

⁶⁸ Id, see section 64(c)(i) of the Public Protector Act.

into money laundering and to refer what she thought could be an offence to the prosecuting authority in terms of section 6(4)(c)(i). The question regarding which legislation deals with money laundering is, as stated, for the prosecuting authority to resolve.

[197] The allegation of money laundering and the CR17 campaign are not divorced from the donation that the Public Protector was asked to investigate. It is an integral part of that investigation. This is so because the source - the donation – is the same. They are virtually identical in nature or character. Honourable Maimane’s concern in this regard was about how the donated money moved through several intermediaries. It was therefore *during* or *after* the investigation of the donation to the CR17 campaign that she formed an opinion that the President might have committed money laundering. And this falls squarely within her section 6(4)(c)(i) powers.

Magnification of the Public Protector’s errors

[198] The following wisdom-laden words of caution by Madlanga J encapsulate the concern I have about the treatment of matters involving the Public Protector, Advocate Busisiwe Mkhwebane, particularly her findings and recommendations or remedial steps. Although the context was different, the message or principle is just as apposite and telling in all other cases. There Madlanga J said:

“There appears to be a developing trend of seeking personal costs orders in most if not all matters involving the Public Protector.⁶⁹ [C]ourts must be wary not to fall into the trap of thinking that the Public Protector is fair game for automatic personal costs awards. Whether inadvertently or otherwise, the High Court judgments in the *EFF v Gordhan* matter and in the instant matter are instances where the High Court fell into that trap.⁷⁰

. . .

⁶⁹ See for example, *Gordhan v Public Protector* [2020] JOL 49105 (GP); *Institute for Accountability in Southern Africa v Public Protector* 2020 (5) SA 179 (GP); *Democratic Alliance v Public Protector*; *Council for the Advancement of the South African Constitution v Public Protector* 2019 (7) BCLR (GP); and *Absa Bank Limited* above n 45.

⁷⁰ *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28; 2020 JDR 2735 (CC) (SARS) at para 43.

I voice these words of caution because of the disturbing frequency and regularity of applications for, and awards of, personal cost orders against the Public Protector. What is particularly disturbing is that it is clear that the applications and awards are not always justified.”⁷¹

[199] There is indeed a disturbing tendency by some of us to, presumably without intending undue harm or injustice, unduly magnify virtually every error of the Public Protector, real or mistakenly perceived. This is quite surprising because Judges, with more experience as practitioners before their elevation to the Bench, and with more years of service as Judges than the ten years’ minimum requirement as an Advocate or the mere fact of being a Judge regardless of how long to be appointable as a Public Protector, have committed similar or more serious errors. And we are not as harsh on them, or should I say on ourselves, and rightly so.

[200] By way of example, I presided in a matter in which my wife was appearing on behalf of the State. And that was in *S v Dube*.⁷² The Supreme Court of Appeal correctly and most courteously held that I should have granted the recusal application necessitated by the very appearance of my wife before me. Harms JA’s son appeared before a Supreme Court of Appeal panel of which he (the father) was a member⁷³ and so did Chaskalson P’s son in this Court.⁷⁴ With the benefit of hindsight, I have realised that a reasonable apprehension of bias would most likely be entertained in matters of this kind. Each of us, should therefore have recused himself without the need for an application to that effect. As Judges, we should therefore always be alive to the reality that elevation to high judicial office does not have the inherent consequence of clothing any of us with a mantle of infallibility. For this reason, when we criticise others we would do well to be alive to our own fallibility. But, more examples are necessary to drive the point home.

⁷¹ Id at paras 42-3 and 45.

⁷² *S v Dube* [2009] ZASCA 28; 2009 (2) SACR 99 (SCA) at para 20.

⁷³ *Vari-Deals 101 (Pty) Limited v Sunsmart Products (Pty) Limited* [2007] ZASCA 123; 2008 (3) 447 (SCA) and *Nestle (South Africa) Pty Ltd v Mars Inc* [2001] ZASCA 76; 2001 (4) SA 542 (SCA).

⁷⁴ *SARFU* above n 34 at paras 18.8 and 84.

[201] Without any basis in fact or law Mabuse J concluded in *Commissioner, South African Revenue Service v Public Protector*⁷⁵ that the Public Protector had a “proclivity . . . to operate out of the bounds of the law” and a “deep rooted recalcitrance to accepting advice from senior and junior counsel”,⁷⁶ and this was cited as proof of her unreasonable, arbitrary and mala fide conduct. He went on to order punitive costs against her, in her personal capacity – a shocking and most unjust decision under the circumstances. Similarly, in *Nkabinde*,⁷⁷ this Court held that two of its members had erred. What all of this means, is that the manner and extent to which Judges and Magistrates criticise litigants, legal practitioners, and witnesses should be a mirror image of the same measure of criticism they would find acceptable, under comparable circumstances, were it to be meted out to them by their colleagues, the practitioners or the public. We must therefore do to others as we would have them or have others do to us.

[202] There can be no doubt that the Public Protector was wrong in certain respects. For that, she deserves to be dealt with appropriately. And it is for this reason that I have to reiterate my support for Jafta J’s assertion that she went overboard in making the supervisory order against the Police, the National Prosecuting Authority and Parliament. It was wrong of her to conclude that the President deliberately misled Parliament, and to use “wilful” and “inadvertent” interchangeably when the two are mutually exclusive. The same applies to aspects of her remedial action, alluded to above, that manifest some overzealousness.

[203] That said, I am also concerned about any notion that she somehow amended the Code without authority. I think hers was more of giving a wrong meaning to a legal instrument than amending it. But, returning to the thrust of my concern, it cannot be correct to brand virtually everything she did in line with her constitutional and statutory obligations to expose and help root out unethical conduct, as shockingly

⁷⁵ *Commissioner, South African Revenue Service v Public Protector* 2020 (4) SA 133 (GP).

⁷⁶ *Id* at para 24.

⁷⁷ *Nkabinde v Judicial Service Commission* [2016] ZACC 25; 2017 (3) SA 119 (CC); 2016 (11) BCLR 1429 (CC) at paras 19, 24 and 27.

wrong and worthy of strong criticism and outright rejection. That, in my view, constitutes the magnification of her errors that courts should, as a way of distinguishing themselves from the media, commentators or analysts, the general public or the so-called court of public opinion, be deliberate and intentional about steering clear of. After all, that is what fidelity to our oath of office demands of us, all the time. It bears repetition that all litigants, practitioners and witnesses deserve only the measure of criticism that we, as Judges and Magistrates, would be happy to be recipients of under similar circumstances. And that applies with equal force to the Public Protector.

Conclusion

[204] I therefore support the main judgment only to the extent that it is reconcilable with these reasons. In sum, I would uphold the appeal, make no order as to costs but remit the AmaBhungane application to the High Court and order the President to pay the costs of two counsel to AmaBhungane.

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