THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1000/19
and GP Case no: 31514/2018
and 33401/2018

In the matter between:

GOVERNMENT EMPLOYEES MEDICAL SCHEME	**FIRST APPELLANT**
GUNVANT GOOLAB	**SECOND APPELLANT**
MARTHINUS JOHANNES KRUGER	**THIRD APPELLANT**

and

THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA	**FIRST RESPONDENT**
JOEL MOAGL TUMELO BENEDICT NGWATO	**SECOND RESPONDENT**
THE REGISTRAR OF MEDICAL SCHEMES	**THIRD RESPONDENT**
THE COUNCIL FOR MEDICAL SCHEMES	**FOURTH RESPONDENT**

Neutral citation: *Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others* (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111 (29 September 2020)

Bench: PONNAN, MBHA and ZONDI JJA and GOOSEN and MABINDLA-BOQWANA AJJA

Heard: 4 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 29 September 2020.

Summary: Power of Public Protector to investigate complaint – constrained by sections 6(4) or (5) of the Public Protector Act 23 of 1994.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kubushi J sitting as court of first instance):

(a) The appeal is upheld with costs, including those of two counsel.

(b) The order of the court below is set aside and replaced by:

‘(i) The application succeeds.

(ii) It is declared that the first respondent is not empowered by sections 6(4) or (5) of the Public Protector Act 23 of 1994 to investigate the complaint lodged by the second respondent against the first applicant.

(iii) The rule nisi dated 14 May 2018 issued under case number 33401/2018 is confirmed.

(iv) The first respondent is ordered to pay the costs of the application, inclusive of the urgent application under case number 33401/2018. Such costs to include those consequent upon the employment of two counsel.’

JUDGMENT

Ponnan JA (Mbha and Zondi JJA and Goosen and Mabindla-Boqwana AJJA concurring)

[1] To be sure, the office of the Public Protector, which has been described as 'an indispensable constitutional guarantee',[1] is afforded sweeping powers of investigation. But, those powers are not unconstrained. Prof Martin Krygier points out, the rule of law 'requires that there be no privileged groups or institutions exempt from the scope of the law'.[2] Indeed, as Prof Woolman observes, the rule of law doctrine, which is 'juridical, political and foundational', and its twin, 'the principle of accountability, cannot function solely as constitutional values. They must form part of the daily lived experience of most citizens and public officials'. [3]

[2] The rule of law and the principle of accountability require the Public Protector to act in accordance with the law and the Constitution. In terms of s 182(1) of the Constitution, the Public Protector has the power to:

'(a) 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) report on that conduct; and

(c) take appropriate remedial action.'

[1] *The Public Protector v Mail & Guardian Ltd* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) para 6.

[2] Professor Martin Krygier is the Gordon Samuels Professor of Law and Social Theory and Co-Director of the Network for Interdisciplinary Studies of Law at the University of New South Wales. Cited by S Woolman: 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President' (2016) 8 *CCR* 155 at 156.

[3] S Woolman: 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President' (2016) 8 *CCR* 155 at 156.

According to s 182(2) of the Constitution, the Public Protector also has the additional powers and functions prescribed by national legislation. The Public Protector Act 23 of 1994 (the PPA) is the legislation contemplated by s 182(2) of the Constitution. It establishes the jurisdiction of the Public Protector with respect to categories of investigation as well as entities and conduct that may be investigated. The powers of the Public Protector are thus derived from the Constitution and buttressed by the detailed legal framework in the PPA.

[3] In *SABC v DA*,[4] this court emphasised that those who govern must be held as accountable to the law as the governed and that in that regard, the Public Protector plays a critical role in maintaining the rule of law. In *EFF 1*, the Constitutional Court confirmed the correctness of this court's approach in *SABC v DA*, in holding that 'the Public Protector's remedial action might at times have a binding effect'.[5] Since those judgments there have been several challenges to the exercise by the Public Protector of the powers conferred upon her and our courts have found that she has on occasion behaved irrationally, procedurally unfairly or ultra vires.[6]

[4] This is yet another such challenge. It arises for consideration against the following backdrop: The first appellant, is the Government Employees Medical Scheme (GEMS), a medical scheme registered as such under s 24(1) of the Medical Schemes Act 131 of 1998 (the MSA). During her lifetime, Ms Rakgahla

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[4] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; 2016 (2) SA 522 (SCA).
[5] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) para 73.
[6] See inter alia *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* [2020] ZACC 10; *Gordhan v Public Protector and Others* [2019] ZAGPPHC 311; [2019] 3 All SA 743 (GP); *Absa Bank Limited and Others v Public Protector and Others* [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP); *Institute for Accountability in Southern Africa v Public Protector and Others* [2020] ZAGPPHC 64; [2020] 2 All SA 469 (GP) and *President of the Republic of South Africa v Public Protector of the Republic of South Africa and Others* [2019] ZAGPPHC 368.

was a member of GEMS. Upon her death, the second respondent, Mr Ngwato, sought to be recognised as her 'beneficiary'. GEMS took the view that Mr Ngwato did not qualify pursuant to GEMS' Rules, made under Chapter 5 of the MSA (the Rules).

[5] According to GEMS, Mr Ngwato was unable to produce a marriage certificate in proof of his marriage to Ms Rakgahla. Aggrieved by GEMS' refusal to recognise him as a beneficiary, Mr Ngwato lodged a complaint in terms of s 47 of the MSA with the third respondent, the Registrar of Medical Schemes (the Registrar). In the meanwhile, following a policy change by GEMS regarding the status of life partners, the requirement of a marriage certificate had fallen away. Accordingly, on 7 December 2015 Mr Ngwato 'was furnished with a membership certificate which confirmed that [his] benefit date . . . was 1 June 2013'. However, this did not entirely satisfy Mr Ngwato. What remained, so he seems to have contended, was his eligibility to qualify for a Government Pensions Administration Agency (GPAA) subsidy. On 19 January 2016 the Registrar ruled against Mr Ngwato, holding that: 'You are entitled to membership with the scheme however do not qualify for the subsidy from GPAA, hence you will be liable for the full contribution to the scheme'.

[6] Mr Ngwato appealed to the fourth respondent, the Council for Medical Schemes (the Council) in terms of s 48 of the MSA. On 27 October 2016 the Appeal Committee of the Council (per Advocate Ngalwana SC) ruled against Mr Ngwato. The Appeal Committee held:

'3. In his written appeal, the appellant complains about "termination" of his benefits "on the 1st of June 2013" and his "exclusion" from the scheme not "based on the rules of the scheme". This accords neither with the registrar's ruling nor with the scheme's submissions at the hearing of the appeal. Both make it clear that the appellant is, following the passing of his life partner who

was a member of the scheme and pursuant to rule 6.8.1 of the scheme rules, "entitled to continued membership of the scheme without any restrictions, limitations or waiting periods".

4. At the hearing of the appeal, the appellant's case mutated to claiming a subsidy from the Government Pensioners Administration Agency. The scheme says this is not within its province. This was explained to the appellant at the hearing and he seems to have understood it.

5. After these issues had been explained to the appellant, he was asked whether he still requires a formal ruling to be made. He said yes; hence this ruling.

6. What remains for us is to confirm that the appellant is a continuing member of the scheme and is liable for payment of contributions in terms of the scheme rules in the ordinary course. Issues concerning subsidies by the GPAA must be taken up with the GPAA because this committee has no jurisdiction in that regard.'

[7] In terms of s 50 of the MSA, Mr Ngwato had the right of a further appeal to the Appeal Board of the Council. He did not exercise that right. Instead, he lodged a complaint with the Public Protector. In an affidavit deposed to on 19 February 2016 in support of his complaint to the Public Protector, Mr Ngwato stated:

'5. I submit that it is very convenient and suspicious, if not arbitrary, that GEMS have now recently issued a certificate of membership dated 7th of December 2015 stating that my benefits were terminated on the 1st of June 2013. More than two years after the passing of my life partner, it is further a coincidental travesty that when I complain about my cover, GEMS then conveniently issues termination thereof.

6. I further submit that GEMS have not given any form of reasoning for my exclusion based on the rules of the scheme. I thus conclude that the exclusion by GEMS that I was a non-active member as baseless and without merit and proper reasoning. I further conclude that GEMS provided GPAA with misinformation regarding my membership, thus the negative response from GPAA.

7. I implore you to reconsider your advice and re-instate my benefits in terms of the rules of the medical scheme and on the basis of my submission above.'

[8] Some 16 months were to pass before GEMS received an email on 9 June 2017 from Mr Jeno Singh, snd Advocate and senior investigator in the office of the Public Protector. After drawing attention to the jurisdiction of the Public Protector, with reference to s 182 and 181(3) of the Constitution as well ss 7(4)(*a*) and (b) of the PPA, the email stated:

'6. The Public Protector was in receipt of a complaint from Mr Benedict Ngwato (hereinafter referred to as the Complainant). The complainant made various allegations against GEMS and the GPAA. This office had forwarded an enquiry letter to GPAA and had received a response. Based on the GPAA response and evidence that was submitted by the Complainant, this office closed the file and found the complaint unsubstantiated.

7. The Complainant has now applied for a review of the decision by this office to close his matter.

8. In view of the above, this office requires you to attend a meeting at the office of the Public Protector. Some of the issues that we require clarity on are the following:

8.1 The basis for GEMS confirming that he was a member of the fund and later withdrawing the confirmation;

8.2 The process followed by GEMS to cancel/withdraw his confirmation of his membership; and

8.3 The 2012/2013 fund rule relied upon by GEMS to demand that he should have a valid marriage certificate in order to be registered as a dependent.'

[9] On 13 June 2017 the third appellant, Mr Marthinus Kruger, the legal advisor of GEMS responded as follows to Mr Singh:

'3. At this stage, we wish to draw your attention to the following:

i. GEMS is a registered medical scheme in terms of the Medical Schemes Act 131 of 1998 ("the Act");

ii. As such, GEMS is subject and/or regulated by the Act, the Council for Medical Schemes [which is a statutory body established by section 3 of the Act] as well as its own Scheme Rules [which is registered in terms of the Act];

iii. GEMS is neither an organ of state, nor a public entity, nor falling within any sphere of government;

iv. GEMS does not perform a public function nor does it handle any public funds; and

v. Although GEMS' membership consists of government employees, it does not detract from the fact that it is a private body incorporated in terms of and regulated by the Act.

4. As a result of the aforementioned, we are advised that your office does not have the necessary jurisdiction, in terms of sections 6(4) of (5) of the Public Protector Act 23 of 1994, to entertain the current complaint which you are purportedly investigation as set out in your letter. We accordingly hold the view that any investigation into the complaint made to the Public Protector cannot proceed due to the Public Protector not having the necessary jurisdiction to do so.

5. Should you however hold an alternative view; we invite you to engage us on the question of jurisdiction.

6. Notwithstanding the aforesaid, and without any prejudice to GEMS' rights, GEMS wishes to be transparent in its dealing with the Public Protector, in that respect, GEMS is prepared, without any prejudice to its rights, to provide the Public Protector with an overview of the subject matter of the current complaint, provided that should the Public Protector seek such disclosure in the absence of having the necessary jurisdiction as aforesaid, that such disclosures be treated as confidential.

7. We also wish to advise that Mr. Ngwato lodged a complaint stemming from the same facts/conduct with the Registrar for Medical Schemes in terms of section 47 of the Act under case number CMS55375, in which matter the Registrar ruled against Mr. Ngwato. Mr Ngwato subsequently appealed the decision in terms of section 48 of the MSA and the Council for Medical Schemes' Appeal Committee dismissed his appeal and found that the Scheme acted correctly and in accordance with its own (registered) Scheme Rules. GEMS accordingly considers the matter closed, the statutory body with jurisdiction over the Scheme having made a final and binding finding in its favour.'

[10] On 21 June 2017 an informal meeting was held between Mr Singh and Mr Kruger. According to GEMS, the former refused to discuss whether the Public Protector had the requisite jurisdiction to investigate the complaint. Nothing

was heard thereafter for approximately 10 months, until 24 April 2018, when two subpoenas purportedly issued under s 7(4)(*a*) of the PPA were served on Mr Kruger and the second appellant, Dr Gunvant Goolab, the Principal Officer of GEMS.

[11] The subpoenas required Mr Kruger and Dr Goolab to appear in person before the Public Protector on 18 May 2018, as also, to produce a list of specified documents. Each subpoena further stated:

'6.6 On 9 June 2017, an enquiry letter was forwarded to Mr Kruger of GEMS setting out the complaint and requested a response to questions posed. On 13 June 2017, Mr Kruger responded and inter alia stated that the PPSA does not have the necessary jurisdiction to investigate GEMS. Furthermore, GEMS felt that they considered the Complainant's matter closed as the statutory body (CMS) with jurisdiction over the Scheme had made a final and binding finding in its favour. A meeting was thereafter requested with Mr Kruger to discuss the matter.

6.7 A meeting was held with Mr Kruger on 21 June 2017 and the PPSA investigative team. The case was discussed and documents were requested from GEMS. Mr Kruger once again mentioned the no-jurisdiction of the PPSA office to investigate the matter and advised that GEMS will not be handling any documents over to the PPSA investigation team.

6.8 On 10 April 2018, a legal opinion was obtained from Mr Ntsumbedzeni Nemasisi: Senior Manager Legal Services: PPSA which inter alia stated that the PPSA has the necessary jurisdiction to investigate any conduct of GEMS.'

[12] On 9 May 2018 GEMS applied to the Gauteng Division of the High Court, Pretoria for an order in the following terms (the main application):

'1. Declaring that the First Respondent does not have the statutory authority and/or jurisdiction in terms of the Public Protector Act, No. 23 of 1994, or otherwise, to investigate and entertain the Second Respondent's complaint lodged against the First Applicant under file reference number: 7/2-02447/16;

2. In the event of Prayer 1 being granted, setting aside any steps taken by First Respondent in pursuance of the purported investigation of the complaint referred to in paragraph 1 above, including the subpoenas issued by the First Respondent to the Second Applicant and the Third Applicant under file reference no: 7/2-024477/16.'

The Public Protector was cited as the first respondent. Mr Ngwato, the Registrar and Council were cited respectively as the second to fourth respondents. Only the Public Protector opposed the application.

[13] At about the same time as the issuance and service of the main application, the attorney of record for GEMS addressed a letter to the Public Protector requesting an undertaking that the hearings scheduled for 15 May 2018 will be stayed pending finalisation of the main application, and that Mr Kruger and Dr Goolab be excused from attendance as required by the subpoenas. The response on 10 May 2018 from Mr Nemasisi was to assert that they viewed the main application 'as an attempt to frustrate the investigation, in violation of s 181(4) of the Constitution' and that 'the subpoena hearing, scheduled for 15th May 2018, may only be suspended or stayed upon receipt of all the documents subpoenaed'.

[14] The next day, GEMS' attorney recorded in a letter to the Public Protector that: (i) the rejection of GEMS' request that the subpoena hearings be postponed until finalisation of the main application is unreasonable; (ii) the complaint has in any event become moot as Mr Ngwato has since, due to regulatory changes, been recognised as a member, it was thus not clear why the office of the Public Protector persists with the investigation of the complaint; (iii) GEMS is of the view that it has just cause as contemplated in s 11(3) of the PPA, not to comply with the directions issued under ss 7(4)*(a)* and 7(5) until the jurisdiction of the Public Protector to investigate the complaint has been determined by the court in the main application;

and, (iv) GEMS and any person subpoenaed to testify would for obvious reasons be manifestly prejudiced should they be compelled to participate in an investigation, which a court may determine the Public Protector lacks jurisdiction to investigate. It was thus stated that GEMS will not be delivering the documents sought or permitting Mr Kruger or Dr Goolab to attend on the office of the Public Protector for the purposes referred to in the subpoena. The Public Protector was once again requested to reconsider her position and consent to the postponement of the hearings scheduled for 15 May 2018.

[15] That evening, at 6.19 pm, GEMS' attorney received the following response from Mr Nemasisi:

'5. We wish to place on record that the Public Protector has, in accordance with her statutory power (section 7(4)(*a*) of the Public Protector Act), subpoenaed the documents which has a bearing on the matter being investigated, which documents is in possession or under control of Dr Gunvant Golab and Mr Marnus Kruger. In terms of the aforesaid subpoenas, the documents listed therein must be produced to the Public Protector on 15th May 2018. Should Dr Gunvant Goolab and Mr Marnus Kruger refused and/or failed (sic) to comply with the above-mentioned directives (subpoenas), **they shall be guilty of an offense [sic]**, in terms of section 11(3) of the Public Protector Act.

6. We further wish to place on record that production of documents by Dr Gunvant Goolab and Mr Marnus Kruger, which has a bearing on the matter being investigated has nothing to do with the jurisdictional challenge by your client.

7. In fact, Dr Gunvant Goolab and Mr Marnus Kruger are neither the Applicants nor the Respondents in the foresaid court application brought by GEMS. Accordingly, your client (GEMS) has no *locus standi* to challenge the subpoenas. As a result of the above, Dr Gunvant Goolab and Mr Marnus Kruger cannot rely on your client's court application as a just cause to defy the lawful directives of the Public Protector.

8. Lastly, we wish to place on record that bringing an application to court challenging the jurisdiction of the Public Protector to investigate does not automatically suspend the investigation, which is a constitutional mandate of the Public Protector. Accordingly, Dr Gunvant Goolab and

Mr Marnus Kruger have both constitutional and statutory obligations (in terms of section 181(4) of the constitutional and section 7(4)(*a*) of the Public Protector Act respectively), not to interfere with the functioning of the Public Protector and to comply with the Public Protector's directives.

9. It is not clear, from your aforesaid letter, as to how the production of the documents will affect any of your client's rights, as the matter is still under investigation. Instead, the complainant will suffer severe prejudice for undue delay of finalization of his complaint.

10. In light of the above, we wish to place on record that the subpoenas are directed to Dr Gunvant Goolab and Mr Marnus Kruger and therefore, the instruction from your client (GEMS) regarding the refusal to produce the documents is legally misplaced as you have no mandate to act on behalf of Dr Gunvant Goolab and Mr Marnus Kruger.

11. In paragraph 4 of your letter dated 10th May 2018, your requested an undertaking that Dr Gunvant Goolab and Mr Marnus Kruger will no longer be required to appear in person before the Public Protector on 15th May 2018. In our aforesaid letter, we indicated that Dr Gunvant Goolab and Mr Marnus Kruger may not have to appear before the Public Protector on 15th May 2018, only if the documents subpoenaed are delivered to the Public Protector. We therefore reiterate the contents of our letter dated 10th May 2018.

12. Should your client persist with its court interdict, as threatened, we reserve our rights to file an application for contempt of the Public Protector against Dr Gunvant Goolab and Mr Marnus Kruger.'

[16] Mr Kruger and Dr Goolab felt compelled to approach the high court as a matter of urgency at 2pm on 14 May 2018 (the urgent application) for an order in the following terms:

'3. That leave be granted to the Applicants to intervene and be joined as Second and Third Applicants respectively, in the pending application under case number 31514/2018;

4. That the subpoenas issued by the First Respondent to the First and Second Applicants respectively, under file reference no: 7/2-024477/16, be suspended pending finalisation of the application under case number 31514/2018;

5. That the costs of this application be reserved for adjudication by the court in the application under case number: 31514/2018.'

The Public Protector filed a notice of intention to oppose the urgent application. But, by the time the matter came to be heard, failed to file an answering affidavit. The urgent application succeeded before Davis J.

[17] Both the main and urgent applications eventually served before Kubushi J, who, on 27 June 2019: (a) dismissed the main application; (b) set aside the order suspending the subpoenas and (c) ordered the costs of both the main and urgent applications, inclusive of two counsel, to be paid by the appellants jointly and severally. On 3 September 2019, Kubushi J granted leave to GEMS, Dr Goolab and Mr Kruger (collectively referred to as the appellants) to appeal to this court.

[18] In finding for the Public Protector, the high court observed 'I do not think that a dispute exists between the parties as to whether GEMS is an entity that can be investigated by the Public Protector'. It reasoned 'even though it is not a government or an organ of state, GEMS performs a public function in terms of national legislation and its functions are public in nature'. The high court took the view that:

'[56] Although GEMS is a medical scheme, like other medical schemes . . . GEMS is unique. GEMS was established by government for government employees, using public funds and resources to undertake a responsibility of Government, as an employer, to public service employees. Government as employer contributes to the medical scheme. Government has a right to nominate 50% of the members of the Board of Trustees who control the scheme. GEMS, as such, is a public resourced entity and falls to be investigated by the Public Protector to ensure accountability.'

It accordingly concluded:

'[57] . . . evidently, an investigation of the nature of Mr Ngwato's complaint carries with it an element of public interest [and that his] removal equate[d] to the factors stated in section 6(4) and (5) of the [PPA].'

On the view that I take of the matter, the approach of the high court cannot be supported on appeal.

[19] Section 6 of the PPA is headed: 'Reporting matters to and additional powers of Public Protector'. Section 6(4)*(a)* provides that 'the Public Protector shall be competent to investigate on 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 prejudice to any other person.'

[20] GEMS has not been accused of maladministration, the unjustifiable exercise of power in the performance of a public function, improper or dishonest actions or improper or unlawful enrichment. Subsections (i), (iii) and (iv) of s 6(4)*(a)* accordingly need not detain us. The argument on appeal was confined to ss 6(4)*(a)*(ii), 6(4)*(a)*(v) and 6(5)*(b)* of the PPA, which so counsel submitted, empowered the Public Protector to investigate Mr Ngwato's complaint. I shall accordingly restrict myself to the sweep of those provisions.

[21] Common to both ss 6(4)*(a)*(ii) and (v) is the expression 'performing a public function'. The debate thus centred on whether it can be said that GEMS performs a public function. 'Medical scheme' is defined in the MSA to mean any medical scheme registered under s 24(1). A medical scheme is a *sui generis* non-profit entity, which operates for the benefit of its members. According to the MSA, no person shall carry on the business of a medical scheme unless registered as such. The functions and powers of a medical scheme are limited by its registered rules and the MSA.

[22] The business of a medical scheme does not appear to encompass the performance of a public or government function or the exercise of a public power. The relationship between members and the scheme is essentially one of a contractual nature. The rules of a medical scheme and any amendment thereof is binding on the medical scheme concerned, its members, officers and any person who claims any benefit under the rules or whose claim is derived from a person so claiming.[7] GEMS is a restricted medical scheme and only employees qualifying to be registered as members and their dependants may be registered as beneficiaries of the scheme. The Rules are thus not of general application. They only apply to a restricted class of persons. It is so that membership of GEMS is restricted to government employees. But such membership is not compulsory.

[23] GEMS does not itself provide a health service. Like other medical schemes, it operates rather in the nature of a health insurance. As Rule 5.1 makes plain, in exchange for the payment of a premium, GEMS 'undertakes liability in respect of health and health-related expenses in respect of its members and their dependants'.

[7] Section 32 of the Medical Schemes Act.

Failure by a member to pay any amount due may result in the suspension or termination of membership as provided for in the Rules. Accordingly, complaints arising from the Rules do not concern the general public. They remain domestic in nature and cannot be described as the exercise of a public power.

[24] Moreover, Chapter 10 of the MSA creates an array of complaint and appeal procedures for aggrieved members. These include the lodging of a complaint in terms of s 47 and the appeal procedures provided for in ss 48, 49 and 50. In terms of ss 42, 43, 45 and 46, far-reaching powers are given to the Registrar to inter alia conduct inspections into the affairs of medical schemes and to obtain information. GEMS is a medical scheme no different to other medical schemes and governed by the same regulatory framework. Like all other medical schemes, GEMS is subject to the MSA as well as its registered rules and it is regulated by the Council.

[25] According to the high court, unlike other medical schemes, GEMS, may be investigated by the Public Protector. In that it has been singled out by the high court. Thus, solely in respect of GEMS, and not any other medical scheme, aggrieved members may lodge a complaint with the Public Protector, thereby rendering nugatory the complaints procedure prescribed by the MSA. It will be recalled that in this case, Mr Ngwato had yet a further appeal in terms of the MSA. He eschewed that in favour of a complaint to the Public Protector. The high court gave no attention to the fact that Mr Ngwato had failed to exhaust his internal remedies. Nor did it consider when precisely an aggrieved member may have recourse to the office of the Public Protector. It is thus unclear from the high court's judgment, whether, as occurred here, an aggrieved member may in addition to a complaint to the Public Protector also avail him - or her - self of the complaints procedures envisaged in the MSA. Were that to be the case, it could lead to parallel investigation processes,

with the potentiality for conflicting decisions. This clearly could not have been the intention of the legislature in enacting Chapter 10 of the MSA.

[26] Turning to s 6(5)*(b)*. Section 6(5) of the PPA provides:

'In addition to the powers referred to in subsection (4), the Public Protector shall . . . 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 . . .

(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)*

. . . .'

Two issues occupied our attention in debate with counsel: first, whether GEMS conducted itself in a manner contemplated in subsection *(b)*; and, second, whether it is an 'institution in which the State is the majority or controlling shareholder' as contemplated in subsection *(a)*.

As to the first:

[27] In the answering affidavit filed on behalf of the Public Protector in the main application, Mr Singh stated:

'40. The issue which stood-out, was the retention of membership hinged on the registration of customary marriage. It is this issue, amongst others, which attracted the attention of the Public Protector because non-registration of customary marriages has often been used in Public Administration as a basis of numerous decisions, which have since been pronounced by Courts as unlawful.

41. Thus, even upon being advised that the matter had since been partial resolved with [Mr Ngwato], the Public Protector exercised [her] discretion to continue with the investigation with the intention of understanding the decisions and the reasons proffered by GEMS.

42. The complaint . . . may very well be an isolated event, however the facts and information gathered thus far, illustrate a real likelihood that the decision could affect a broader society of the persons disadvantaged by the non-registration of their customary marriages.'

[28] There are several difficulties with the version advanced by Mr Singh. First, as best as one can discern, the Public Protector appears to have understood Mr Ngwato's complaint as one relating to GEMS' failure to recognise his customary marriage. But, that was not the subject of his complaint. His complaint was that GEMS had 'not applied the scheme rules when deliberating on [his] matter'. The dispute between him and GEMS therefore turned on the interpretation of the rules, not any conduct of the kind specified in s 6(5)*(b)*.

[29] Second, Mr Singh states that it was the 'customary marriage' issue, amongst others, that attracted the attention of the Public Protector. But, that is simply not so, because no other issue had been alluded to by the Public Protector in any of the papers filed of record in this matter. And, so the only issue as conceived by the Public Protector that warranted investigation, would appear to have been GEMS' refusal to recognise a customary marriage, which as I have already pointed out was not the complaint raised by Mr Ngwato.

[30] Third, Mr Singh asserts that the 'non-registration of customary marriages has often been used in Public Administration as a basis of numerous decisions, which have since been pronounced by Courts as unlawful'. However, no evidence is adduced in support of that claim. But, even if correct, it is unclear what that has to do with GEMS or why it was thought appropriate that the office of the Public Protector should investigate GEMS in that regard. It is doubtful that Mr Ngwato's complaint could form the springboard for a wider investigation and if

so, the scope and ambit of the envisaged investigation. An industry-wide investigation would surely be out of the question, because the Public Protector has never contended that she had the competence to investigate any other medical scheme, but GEMS. In any event, if our courts have already pronounced on the issue, as Mr Singh asserts, it is unclear what remains for investigation.

[31] Fourth, it is asserted that the matter had been partially resolved. Once again, that is inaccurate. Certainly from the perspective of GEMS, the dispute relating to the interpretation of the scheme rules had been fully resolved. All that remained, related to the GPAA subsidy. That was also the view of the Registrar and Appeal Committee for the Council. Indeed, Advocate Ngalwana stated as much in his ruling on behalf of the Appeal Committee. That, as well, appears to have been the initial view of the Public Protector. When Mr Singh first wrote to Mr Kruger on 9 June 2017, he stated:

'. . . The complainant made various allegations against GEMS and the GPAA. This office had forwarded an inquiry letter to GPAA and had received a response. Based on the GPAA response and evidence that was submitted by the complainant, this office closed the file and found the complaint unsubstantiated.'

[32] Fifth, it is claimed that the Public Protector exercised her discretion to continue with the investigation. To the extent that the Public Protector has a discretion, such discretion only arises to be exercised in circumstances where she has the requisite jurisdiction. She may in the exercise of her discretion decline to investigate a matter which falls within the scope and ambit of her jurisdiction, but she may not in the exercise of her discretion assume to herself a jurisdiction that the PPA does not give to her. Absent jurisdiction, she has no discretion. Jurisdiction is thus a necessary prerequisite for the exercise of any discretion. What is more, from

the correspondence that had been exchanged, the Public Protector already well knew the 'decisions and reasons' proffered by GEMS.

[33] Sixth, if this is indeed 'an isolated incident', as Mr Singh describes it, there would be no continuing public interest in the matter (which had in any event already been resolved between GEMS and Mr Ngwato) or warrant for the Public Protector continuing with the investigation. Mr Ngwato himself had no further interest in the matter. Certainly, as between him and GEMS the complaint had become moot. If, however, there is evidence of a broader societal interest, then such evidence should have been adduced. Had there been 'facts and information' of others having been 'disadvantaged', as Mr Singh claims, that would mean that this was not an isolated incident. In the absence of those facts or information, it is difficult to understand what these matters have to do with GEMS or what remedial action was being contemplated by the Public Protector that would extend beyond GEMS and the immediate complaint. Indeed, if the Public Protector had confined herself to the facts relating to Mr Ngwato's complaint, it would not have had any implication for the general public.

[34] Seventh, generally speaking, a complaint should not be entertained 'unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned' (s 6(9)). The Public Protector does have a discretion, however, where special circumstances exist, to entertain complaints that are older than two years. Here, the incident giving rise to the complaint occurred in June 2013. It was only lodged sometime after February 2016. Despite the point having been

pertinently raised by the appellants, no special circumstances as contemplated in s 6(9) of the PPA were raised by the Public Protector.[8]

[35] Thus, even on the Public Protector's own showing, she simply failed to bring herself within the ambit of s 6(5)*(b)*. It is manifest that the Public Protector's stubborn and irrational insistence on continuing with her investigation could hold no benefit for the public at large, or for that matter even Mr Ngwato himself. In other words, it is not aimed at, nor is there any need to protect the public against the conduct which informed the complaint.

As to the second:

[36] GEMS is a body corporate.[9] It is managed by a board of twelve trustees. It is so that 50% of the trustees are appointed by the Minister. But, the remaining 50% are elected by the members of the scheme. In terms of the rules: (i) 'the Board is responsible for the proper and sound management of the Scheme'; (ii) the trustees are required to 'act with due care, diligence, skill and in good faith and run the Scheme for the benefit of the Beneficiaries'; and, (iii) any trustee 'found not to be a fit and proper person may be removed as such by the Board'. It thus follows that the mere fact that the Minister may appoint 50% of the trustees, does not mean that the government exercises control over the affairs of GEMS. In any event, although the right to appoint 50% of the trustees is given to the Minister by the internal rules of GEMS, those rules may be changed by the Board of Trustees, without reference to the Minister.

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[8] In *Gordhan v The Public Protector and Others* [2019] ZAGPPHC 311; [2019] 3 All SA 743 (GP) paras 14-20, the court found that it is incumbent upon the Public Protector to set out special circumstances why a complaint or matter is entertained by her when it is reported to her more than two years after the occurrence of the incident or matter concerned, as is contemplated in s 6(9) of the Public Protector Act.

[9] *Pennington v Friedgood* 2002 (1) SA 251 (C) para 36.

[37] In *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* [2010] ZASCA 94; 2010 (5) SA 457 (SCA), this court doubted whether a body can be said to exercise public powers or perform a public function only because the public has an interest in the matter. The court held that when procuring services to manage its AIDS programme and 'wellness fund', the respondent Bargaining Council had been performing a 'quintessentially domestic function' rather than exercising a public power. Nugent JA stated (para 42):

' . . . When implementing such a project a bargaining council is not performing a function that is "woven into a system of governmental control" or "integrated into a system of statutory regulation". Government does not "regulate, supervise and inspect the performance of the function", the task is not one for which "the public has assumed responsibility", it is not "linked to the functions and powers of government", it is not "a privatisation of the business of government itself", there is not "potentially a governmental interest in the decision-making power in question", the council is not "taking the place of central government or local authorities", and most important, it involves no public money. It is true that a government might itself undertake a similar project on behalf of the public at large – just as it might provide medical services generally and pensions and training schemes to the public at large – but the council is not substituting for government when it provides such services to employees with whom it is in a special relationship.'

[38] Accordingly, the nature of the complaint as well as the nature of the power exercised by GEMS, has the consequence that the jurisdictional preconditions for an investigation in terms of ss 6(4) and (5) have not been met. The Public Protector accordingly does not have the statutory power to investigate the complaint. It follows that the high court's conclusion that 'an investigation should be undertaken [by the Public Protector] to determine whether or not the exclusion was unlawful or improper prejudice to Mr Ngwato', cannot be endorsed. In the result, GEMS' main application ought to have succeeded before the high court.

[39] The urgent application remains. In that regard, the high court recorded:

'[15] The Public Protector's argument, on the other hand, is that the issue of the subpoenas should depend on the outcome of the main application: if the investigation by the Public Protector is found to be lawful the subpoenas should stand; and, if the Public Protector is not authorised, the subpoenas cannot stand as the substratum shall have fallen off. The subpoenas, it was argued, could only stand as long as the investigation stands.

[16] As regards the issue of cost, the Public Protector's argument is that cost of the interlocutory application should be cost in the cause and the party who succeeds in the main application should be awarded those costs.'

The high court agreed with those submissions. It took the view, wrongly I suggest, that the challenge to the issuance of the subpoena had been subsumed under the main application. It thus did not enter into the substantive merits of the urgent application.

[40] The Public Protector adopted the stance in the main application that GEMS did not have the necessary *locus standi* to seek to set aside the subpoenas. That obliged Dr Goolab and Mr Kruger to bring the urgent application to be joined as applicants in the main application and obtain interim relief for the suspension of the subpoenas pending finalisation of the main application. In support of the urgent application, Dr Goolab stated:

'5.11 Since June 2017, the purported investigation . . . remained dormant and nothing was heard from the [Public Protector] who seemingly took no steps to advance the investigation. The interaction created the impression that [she] had accepted the fact that she does not have the necessary jurisdiction to entertain the complaint and pursue the investigation.

5.12 However, more than [10] months later, the [Public Protector], out of the blue and without any prior warning, caused two subpoenas . . . to be issued . . .

5.13. *Ex facie* . . . both the subpoenas, the [Public Protector], no doubt informed by her own uncertainty regarding her jurisdiction to entertain the complaint and pursue the investigation, obtained a legal opinion from one of her own employees i.e not independently, which employee

concluded, for reasons not divulged . . . that [she] had the necessary jurisdiction to investigate any conduct of [GEMS].

5.14 In other words, having been satisfied that the investigation does not require any urgent attention, the [Public Protector] leisurely dealt with the matter until 10 April 2018, whereafter she inexplicably decided that the complaint has become so urgent that it justified the issuing of subpoenas and the scheduling of hearings as a matter of urgency.

. . .

5.16. Since clarity on the dispute is of material importance not only to the parties, but also to the medical schemes industry and its regulatory authority, [GEMS] issued the main application to settle their dispute.

5.17. A ruling on the main application will also be manifestly in the interest of the [Public Protector] and the public at large. Should [GEMS] be successful in the main application, the public purse will be spared the financial implications of fruitless expenses emanating from an illegal investigation. Likewise, the Applicants will be protected from being subjected to an illegal investigation and the financial and other ramifications, such as applications for contempt of court and possible imprisonment which they are probably already been threatened with.'

[41] The Public Protector did not file an answering affidavit in the urgent application. There was thus nothing to gainsay Dr Goolab's version. In an uncommissioned statement filed on behalf of the Public Protector in the urgent application, Mr Singh stated:

'44 . . . I thus submit that the Public Protector only has to show to jurisdictional facts, which are that:

44.1 There is a pending investigation, (whether or not such investigation is correct or incorrect in law is irrelevant), and

44.2 A particular individual . . . has, in his possession or control, documents relevant to the investigation.

. . .

46. Thus on every manner of interpretation, the Applicants are obliged to comply with Section 7(4) of the Public Protector Act. The case advanced in the Applicant's founding affidavit does not make out an exemption from complying with the obligation.

47. The Public Protector is a constitutional institution required to exercise its powers and perform its functions without fear, favour or prejudice. The Applicants are prohibited, in terms of section 181(4) of the Constitution, from interfering with the functioning of the Public Protector.
48. In the premises and in order to give effect to the constitutional and statutory obligations, the Applicants must comply with the subpoenas without any further delay.'

[42] I have referred to Mr Singh's uncommissioned statement because it demonstrates the fallacy in the Public Protector's approach. This was consistent as well with the view articulated earlier by Mr Nemasisi that the production of the documents sought by the Public Protector had nothing to do with the jurisdictional challenge, the subject of the main application and, that Dr Goolab and Mr Kruger had no choice but to comply with the subpoena. It is difficult to discern precisely what Mr Singh meant by 'a pending investigation (whether or not such investigation is correct or incorrect in law is irrelevant)'. That assertion is alarming. Surely, it is not irrelevant whether or not a pending investigation accords with the law. Equally untenable is the assertion that 'on every manner of interpretation, [they] are obliged to comply with section 7(4) of the Public Protector Act'. It goes without saying that the Public Protector cannot lawfully embark on an investigation which does not fall within her statutory remit. Such an investigation would be unlawful. And, if such an investigation would be unlawful, so too would the purported exercise of her powers of subpoena in pursuance of such an investigation.

[43] The attitude of the officials in the office of the Public Protector appears to have been that their mere say-so that the Public Protector is empowered to investigate the complaint should carry the day. Such an attitude ignored the fact that there was a challenge pending before the high court to settle the jurisdiction of the Public Protector to investigate the complaint in question. Given the lengthy period

of time that had already elapsed, and the fact that the complaint was no longer of any moment to Mr Ngwato, it is unclear why complying with the subpoena could not wait. What else, it must be asked, were the appellants to do? Unlike in the *SABC v DA*,[10] the appellants did not sit idly by, but had moved the court for relief. But, that seemed to matter not to the Public Protector. Insisting on compliance with the subpoenas whilst the question of her jurisdiction remained to be determined by the high court, leaves one with the impression that the subpoenas were intended to cow the appellants into submission. Given the wide powers in her arsenal, including interrogations, contempt [11] and imprisonment,[12] the Public Protector appeared not to appreciate the extent to which the appellants' constitutional rights were being affected. For as long as what may have turned out to have been an unlawful investigation was allowed to continue, the insistence that the documents sought had nothing to do with the jurisdictional challenge and, that Dr Goolab and Mr Kruger could suffer no prejudice in complying with the subpoena, was misconceived. There is much to be said for the appellants' argument that for so long as the jurisdiction of the Public Protector remained to be settled by the court in the main application, the coercive subpoena power was invoked in bad faith or with an ulterior purpose or in a manner that abuses the power to subpoena. But, it is perhaps not necessary to go that far.

[44] Because subpoena powers are extraordinary coercive powers, they 'are generally reserved for courts'.[13] This means that where the power is granted to a body other than a court, the power should be interpreted restrictively. Subpoenas

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[10] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; 2016 (2) SA 522 (SCA).
[11] See ss 7 and 9 of the Public Protector Act 23 of 1994 (the PPA).
[12] Section 11(4) of the PPA.
[13] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CC) 2000 (1) SA 1 (CC) para 176.

should accordingly only be used where 'there is an appreciable risk, to be judged objectively' that the evidence cannot be obtained by following a less invasive route.[14] In *Special Investigating Unit v Nadasen* 2002(1) SA 605 (SCA) para 5, it was stated:

'A unit such as the appellant is similar to a commission of inquiry. It is as well to be reminded, in the words of Corbett JA in *S v Naude* 1975 (1) SA 681 (A) 704 B-E, of the invasive nature of commissions, how they can easily make important inroads upon basic rights of individuals and that it is important that an exercise of powers by a non-judicial tribunal should be strictly in accordance with the statutory or other authority whereby they are created. The introductory part of s 4(1) of the Act emphasises the point. This accords with the approach of the Constitutional Court (*South African Association of Personal Injury Lawyers v Heath and Others* supra par 52). Appellant's reliance upon a "liberal" construction (meaning in the context of the argument "executive-minded") is therefore misplaced. A tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly (cf *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) 613F-J).'

[45] Like the Special Investigating Unit in *Nadasen's case* supra, the Public Protector also has no inherent jurisdiction and must exercise her powers within the confines of the PPA. Section 7(4)*(a)* of the PPA provides:

'For the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person.'

Section 7(4)*(a)* must be read with s 7(5), which provides:

'A direction referred to in subsection (4)(a) shall be by way of a subpoena containing particulars of the matter in connection with which the person subpoenaed is required to appear before the

[14] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (CC) [2008] ZACC 13; 2009 (1) SA 1 (CC) para 125.

Public Protector and shall be signed by the Public Protector and served on the person subpoenaed either by a registered letter sent through the post or by delivery by a person authorised thereto by the Public Protector.'

[46] Counsel for the Public Protector suggested that the PPA confers wide and expansive powers of subpoena on the Public Protector. But, those powers are not unbounded. In terms of s 7 of the PPA, the Public Protector is granted the power, on her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to her knowledge and which points to conduct such as referred to in ss 6(4) or (5) to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with. Having initiated an investigation, the Public Protector may decide that she possesses sufficient evidence to warrant further investigation. To that end, the Public Protector possesses the ability to subpoena any person to provide evidence or submit affidavits. It must be accepted that without this power her ability to conduct meaningful investigations could well be rendered illusory.

[47] However, s 7(1)*(a)* expressly qualifies that the investigation must relate to conduct such as referred to in ss 6(4) or (5) of the PPA. The Public Protector's power of subpoena is thus dependent upon the existence of a complaint, allegation and the like, which points to conduct referred to in ss 6(4) or (5) of the PPA. Until then, no licence exists for the resort to a subpoena. The power of subpoena is thus not an independent, self-standing power as appears to have been supposed on the part of officials in the office of the Public Protector. What is more, based on considerations of principle, Professor De Vos suggests that the provisions of the PPA are reasonably capable of an interpretation that safeguards the rights of those subpoenaed, by

allowing for a subpoena as a last resort and only after a decision has been made by the Public Protector to conduct a full investigation.

[48] In this regard Prof De Vos states:

'. . . During a preliminary investigation no decision has been taken to investigate a matter. The preliminary investigation is exactly aimed at deciding whether there is a case to be answered and whether it should be pursued. During this phase it is not possible for the Public Protector to inform a person with any degree of precision (if at all) what is being investigated (as no decision has been taken to investigate anything). The person may well be left in the dark as to why she has been subpoenaed and this will be potentially extremely disadvantageous to the witness, who may expose herself to criminal prosecution for making false statements.

The witness is also unlikely to be able to establish whether he or she runs the risk of incriminating themselves and whether there is "just cause" to refuse to honour the subpoena. There is a grave danger that subpoenas issued during a preliminary investigation will be over-broad (see *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others* on over-broad subpoenas) as the Public Protector will not be in a position to tell the person subpoenaed what exactly is being investigated and what evidence this investigation is based on, and this will infringe on the rights of the individual protected in the Bill of Rights.

A constitutionally compliant and purposive interpretation of the Act therefore requires us to read the Act contextually and as allowing a subpoena only to be issued as a last resort and only once a decision has been made that an actual investigation is to be conducted. In my view, the purpose of the subpoena power is to allow the Public Protector to force witnesses – especially those implicated in wrongdoing – to answer question once the Public Protector has decided that a full investigation should be conducted.'[15]

[49] It follows that like the main application and, more importantly, irrespective of the merits of the main application, the urgent application should have succeeded with costs in the high court.

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[15] Professor Pierre De Vos in a post on his Constitutionally Speaking Blog on 15 November 2018 entitled: 'Response to the Legal Claims made by the Public Protector's Office'.

[50] Finally, as I have already pointed out, not only did the Public Protector misconceive her powers, but in many respects her approach is regrettable. The Constitutional Court has emphasised that the Public Protector is bound, in terms of s 195(1) of the Constitution, by the basic values and principles governing public administration, including, amongst others: (a) a high standard of professional ethics; (b) the constitutional imperative to use resources efficiently, economically and effectively; (c) accountability; and, (d) the constitutional imperative to foster transparency by providing the public with timely, accessible and accurate information.[16] In that, it seems to me, the Public Protector has failed.

[51] From the outset, GEMS evidently entertained grave concern as to the jurisdiction of the Public Protector to investigate Mr Ngwato's complaint. Instead of seeking to assuage those concerns, the repeated refrain on the part of the officials in the office of the Public Protector was to regurgitate provisions of the PPA and to insist on compliance on pain of criminal sanction. They thus eschewed reason for coercion. That strikes one as the very antithesis of an office designed to resolve conflict between the citizenry of this country and those who control the levers of power. It ill-behoves officials to perceive GEMS' challenge to jurisdiction as undermining the office of the Public Protector or its constitutional powers.[17] Nor, was it fair to suggest that GEMS sought to immunise itself from the scrutiny of the Public Protector. After all a robust democracy must of necessity welcome challenges such as this. More so, one imagines, in respect of an office such as that of the Public Protector, which as the Constitutional Court has made plain, falls into the category of a public litigant, upon whom a higher duty is imposed to respect the law, fulfil procedural requirements and tread respectfully when dealing with rights.[18]

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[16] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 151.
[17] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* [2020] ZACC 10 para 99.
[18] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 155.

[52] The further unfortunate consequence of the approach adopted is that it shifted the focus from the individual complaint to the overall authority of the Public Protector. That however served to enlarge the issues and obfuscate the true nature of the inquiry because, as I have attempted to show, the fact that the Public Protector may have had the necessary jurisdiction to investigate GEMS was not the end of the matter, it still remained to consider whether the particular complaint fell within her remit.

[53] In the result:

(a) The appeal is upheld with costs, including those of two counsel.

(b) The order of the court below is set aside and replaced by:

> ‘(i) The application succeeds.
>
> (ii) It is declared that the first respondent is not empowered by sections 6(4) or (5) of the Public Protector Act 23 of 1994 to investigate the complaint lodged by the second respondent against the first applicant.
>
> (iii) The rule nisi dated 14 May 2018 issued under case number 33401/2018 is confirmed.
>
> (iv) The first respondent is ordered to pay the costs of the application, inclusive of the urgent application under case number 33401/2018. Such costs to include those consequent upon the employment of two counsel.’

V M Ponnan
Judge of Appeal

APPEARANCES:

For Appellants:	A Bava SC (with him J W Schabort) Instructed by: Gildenhuys Malatji Inc, Pretoria Honey Attorneys, Bloemfontein
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