



CONSTITUTIONAL COURT OF SOUTH AFRICA

Public Protector and Others v President of the Republic of South Africa and Others

CCT 62/20

Date of hearing: 26 November 2020

Date of judgment: 1 July 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 26 November 2020 at 10h00, the Constitutional Court heard a direct leave to appeal against the full bench judgment and order of the High Court, Gauteng Division, Pretoria (High Court). On 10 March 2020, the High Court reviewed and set aside the decision by the Public Protector to investigate and report on the CR17 campaign for the African National Congress (ANC) leadership elected in December 2017. It also reviewed and set aside the findings and remedial orders in the Public Protector's report. The Public Protector was also ordered to pay punitive costs in the application.

The litigation stems from 6 November 2018 when a question was posed to President Cyril Ramaphosa in Parliament by the then leader of the Democratic Alliance (DA), Mr Mmusi Maimane relating to the payment of an amount of R500 000 into an account which allegedly belonged to the President's son, Mr Andile Ramaphosa. This payment was allegedly paid from the late Mr Gavin Watson who was Chief Executive Officer of Africa Global Operations (AGO), formerly known as Bosasa. In his response, the President explained that his son was involved in business with AGO, and that the payment was related to work which he had conducted for that company. Roughly a week later, the President wrote a letter to the Speaker to explain that the answer he had given in response to the question which was posed to him was incorrect. He explained that the payment was in fact made on behalf of the late Mr Watson to the CR17 campaign.

This gave rise to two complaints directed to the Public Protector. The first complaint was from Mr Maimane regarding the relationship between the President and AGO. The second

complaint was lodged by Mr Floyd Shivambu, the Deputy President of the Economic Freedom Fighters (EFF) regarding the alleged breach of the Executive Ethics Code (Code) by the President. In light of the above complaints, the Public Protector conducted an investigation, the scope of which was whether the President, in giving an incorrect answer to the question directed to him in Parliament, misled Parliament in breach of the Executive Members' Ethics Act (Members Act) and the Code.

At the conclusion of the investigation, the Public Protector found that the President deliberately misled the National Assembly (NA). Further that the President exposed himself to a situation involving the risk of a conflict between his official duties and his private interests or used his position to enrich himself and his son through businesses owned by AGO. In light of the findings, the Public Protector took remedial action which had a direct effect on the President, and further directing the Speaker and the National Director of Public Prosecutions (NDPP) to comply with the orders therein.

The President launched an application to review and set aside the Public Protector's report in the High Court. AmaBhungane also filed a conditional application to challenge the Code and were granted leave to intervene as a respondent in those proceedings. AmaBhungane did not embroil itself in the main issues in dispute in respect of the Public Protector's Report but instead brought a constitutional challenge to the Code.

The High Court had difficulties with the Public Protector's finding that the President misled Parliament. It noted that the Public Protector failed to understand the law on which this complaint was based and misapplied it. This is the question of whether the President violated the Code by willfully misleading Parliament. The Court pointed out that in her Report the Public Protector replaced the word "willfully" with "deliberately or inadvertently".

In addition, the High Court held that the Public Protector's view that the President breached the Code by failing to disclose donations to the CR17 campaign was irrational and held that the legal precepts upon which the Public Protector drew her conclusion on the issue of money laundering were wrong. With regards to the remedial action, the High Court noted that given its serious implications, the President's right to just administrative action placed an obligation on the Public Protector to forewarn the President, and to be given an opportunity to make representations (*audi alteram partem* rule). The Court held that the Public Protector failed to comply with this obligation. Lastly, with regards to the Public Protector directed remedial action against the Speaker and the NDPP, the High Court held that the Public Protector must give due deference to the expertise within other organs of state. The remedial action and monitoring measures were inappropriate, and in some instances ineffective, and constituted a usurpation of the constitutional discretionary powers of the Speaker and the NDPP.

Unhappy with the outcome in the High Court, the Public Protector filed an application for direct leave to appeal to this Court. The EFF filed a conditional application in this Court only in the event that leave to appeal is granted to the Public Protector. AmaBhungane also

filed a conditional application in this Court for leave to appeal insofar as their application was dismissed. Freedom Under Law (FUL) was admitted as *amicus curiae*.

The majority judgment penned by Jafta J concurred in by (Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ), held that the Public Protector misconceived the Code by holding that the President's acknowledgment that he gave an incorrect answer in Parliament was enough for the conclusion that he had violated the Code. The majority judgment held that the Public Protector changed the wording of the Code from "wilfully" to "inadvertent" by holding that the President's reply breached paragraph 2.3(a) of the Code, the standard of which she claimed included "*deliberate and inadvertent misleading*". Because the Public Protector's report revealed that, on the facts placed before her, the President did not wilfully mislead Parliament, he could not have violated the Code. The majority judgment agreed with the High Court that her finding in this regard constituted a material error of law and fell to be set aside.

On the issue whether the President had personally benefitted from the CR17 campaign donations, the majority judgment held that the Public Protector's conclusion that the President had personally benefitted was not substantiated by her own report, which contained the summary of the evidence she heard during the investigation. The Public Protector's acceptance of the e-mail evidence over conflicting evidence was held to be inconsistent with the principle set out by the Supreme Court of Appeal in *Mail & Guardian*, which held that where evidence is inconclusive or diverges, the Public Protector is obliged to carefully evaluate it to determine the truth. In the circumstances, the majority judgment held that the duty of the President to disclose personal benefits under the Code was not triggered without proof of that he had benefitted. Additionally, the majority judgment held that the Public Protector's finding was fatally defective because she was not authorised to investigate whether the President personally benefitted from donations made to the CR17 campaign. 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 and the complaints received by her did not require her to investigate the President's failure to disclose benefits derived from the CR17 campaign donations. 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.

On the issue of the competence to investigate the affairs of the CR17 campaign, the majority judgment held that neither section 6 of the PPA nor section 4 of the Members Act authorised the Public Protector to investigate the affairs of the CR17 campaign. The judgment also held that section 182(1) of the Constitution is concerned with state affairs and the affairs relating to the CR17 campaign were private affairs and did not fall under the scope of this section. What turns a private entity into an organ of state is the exercise of a public power or the performance of a public function.

The majority judgment further held that the evidence in the Public Protector's report did not support the finding that the President had involved himself in illegal activities sufficient to evoke a suspicion of money laundering. Further, that the Public Protector was not

empowered by the Members Act, nor the PPA, to investigate money laundering allegations. The majority judgment left the issue, whether the Public Protector's remedial action constituted administrative action, open. It however held that the application of the *audi* principle does not depend on whether the exercise of power constitutes administrative action. Therefore, the Public Protector was obliged to afford an affected 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 was anticipated. The majority judgment agreed with the High Court that 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. The majority judgment held further that the Public Protector's remedial action fell to be set aside for additional reasons, including ordering the Speaker of the NA to take steps in respect of which she had no authority in law; issuing supervisory orders against the Speaker, the NDPP and the National Commissioner; and taking remedial action for the violations of the Code, not empowered by the Members Act.

Concerning AmaBhungane's challenge to the Code, the majority judgment held that the High Court erred in concluding that the challenge was not properly before it and that court should have considered the merits of that claim. That issue was remitted back to the High Court for adjudication of the claim.

In a dissenting judgment, Mogoeng CJ concluded that Honourable Mmusi Maimane, MP lodged a formal complaint that allowed the Public Protector to investigate every aspect of the President's CR 17-related conduct that she considered as potentially unethical.

He held that financial assistance from individual donors and even the composite amount from the CR17 Campaign, as an entity, constituted a personal benefit to the President and created a situation that involved a risk of conflict between the President's private interests, his pursuit of the ANC Presidency with the assistance of private donors, and his official responsibilities as Deputy President of the Republic, Member of Parliament, Leader of Government Business in Parliament and even as President of the Republic. The President should, in his view, while still a Member of Parliament and Deputy President, have disclosed the sponsorship to the National Assembly as enjoined by the Constitution, the Members Act and the Code.

He further held that the emails which the President effectively admitted are authentic and true revealed that he deliberately represented a falsehood to the Public Protector. And this together with his failure to disclose the private donations to his campaign ran against the very essence of his obligations laid out in sections 96(2)(b), 83(b) and 181(3) of the Constitution and the values of transparency and accountability on which our democratic State was founded.