

SOUTH AFRICA / JUDGMENT

**Democratic Alliance v Public Protector; Council for
the Advancement of the South African Constitution v
Public Protector (11311/2018; 13394/2018) [2019]
ZAGPPHC 349; [2019] 4 All SA 79 (GP) (15 August 2019)
[2019] ZAGPPHC 349**

COURT

North Gauteng High Court, Pretoria

BEFORE

RG Tolmay

CASE / FILE NUMBER

11311/2018; 13394/2018

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

number: 11311/2018

Date: 15- 8 -2019

In

the matter between:

DEMOCRATIC
ALLIANCE
APPLICANT
vs
THE
PUBLIC
PROTECTOR
RESPONDENT
CASE
NO: 13394/2018
COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH
AFRICAN
CONSTITUTION
APPLICANT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] Judgment on the merits in this matter was handed down on 20 May 2019, the judgment on costs was however reserved pending the Constitutional

Court's (CC) judgment in *The Public Protector vs South African Reserve Bank*,^[1] which dealt *inter alia* with the award of a punitive costs order awarded by the High Court^[2] against the Public Protector in her official and personal capacity. That judgment was delivered on 29 July 2019, as a result this Court is now in a position to deal with the question of costs.

[2] This judgment must be read with the judgment on the merits, as that judgment is inextricably linked to the judgment on costs.^[3]

[3] In the Reserve Bank judgment the CC dealt extensively with the development of the law and the circumstances which may lead to a Court awarding a personal costs order against a public official. This court can't improve on what was said so eloquently there and as a result I quote extensively from that judgment. A reading of that judgment emphasises the tests that must be applied, the importance of holding public officials accountable and the gravity of the decision that the Court must make. It is thus with due deference to all these principles that this Court approached the decision that it came to.

BACKGROUND

[4] The Public Protector opposed the personal costs order in her answering affidavits in these two applications on the following

grounds:

- (i) it has far reaching and serious implications on the administration of justice and the Rule of Law;
- (ii) it is incompetent because she has not been cited in her personal capacity; and
- (iii) such an order against her would be an interference with the functioning of the Public Protector and therefore in contradiction of section 181(4) of the Constitution and the Public Protector Act 23 of 1994 and such interference constitutes a criminal offence.

THE LEGAL PRINCIPLES PERTAINING TO COSTS ORDERS AGAINST PUBLIC OFFICIALS

[5] The general test for the imposition of personal liability for costs was articulated by Innes CJ more than a hundred years ago as: "[the] conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable"^[4].

This test has been applied and developed after the advent of the Constitution. In the judgment on the merits the powers and duties of the Public Protector and her important place in our constitutional democracy was dealt with.[5]

[6] In the Reserve Bank judgment the source and purpose of a Court's power to impose personal costs orders was explained as follows:

"As mentioned, the source of a court's power to impose personal costs orders against public officials is the Constitution itself. The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.

The purpose of a personal costs order against a public official is to vindicate the Constitution. These orders are not inconsistent with the Constitution; they are required for its protection because public officials who flout their constitutional obligations must be held to account. And when their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer. This Court has repeatedly affirmed the principle that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in certain circumstances.[6] [Footnotes omitted]

[7] The CC went further and stated as follows:

"In Black Sash II, this Court held that the common law rules regarding the granting of personal costs orders are well grounded and buttressed by the Constitution. The traditional common law tests of bad faith and gross negligence must be infused by the Constitution. Froneman J said that the question whether the conduct of a public official justifies the imposition of liability for personal costs can be answered by having regard to institutional competence and constitutional obligations. He went on to explain:

"From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will be an overlap."[7]

[Footnotes in judgment deleted]

[8] The Public Protector is enjoined by the Constitution to observe the highest standards of conduct in litigation.[8] It was also held that, the Public Protector, who falls into the category of a public litigant, carries a higher duty as it is expected from "the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights".[9]

[9] The Court stated clearly that there is no merit in the Public Protector's contention that the independence of her office and proper performance of her functions demand the exclusion of the possibility of a personal costs order. It stated:

"On the contrary, personal costs orders constitute an essential, constitutionally infused mechanism to ensure that the Public Protector acts in good faith and in accordance with the law and the Constitution." [10]

[10] It was also held that:

"The imposition of a personal costs order on a public official, like the Public Protector, whose bad faith or grossly negligent conduct falls short of what is required, vindicates the Constitution. The Supreme Court of Appeal in Gauteng Gambling Board opined that public officials who act improperly in "flagrant disregard of constitutional norms" should be personally liable for legal costs incurred by the State. The Supreme Court of Appeal reasoned that the imposition of personal liability might have a "sobering effect on truant public office bearers" and would avoid the taxpayer ultimately having to bear those costs." [11] [Footnotes omitted]

[11] The minority judgment in the Reserve Bank matter penned by the Chief Justice did not exclude the possibility of granting a punitive personal costs order against a public official, but stated "that extraordinary circumstances should be present for such an order to be awarded". [12] [Footnotes omitted]. Thus it was also stated that the Public Protector should not be allowed to abuse her power or office with impunity. [13]

[12] In SASSA [14] the Minister contended that personal costs orders against public officials are unconstitutional, the Court rejected the argument and stated as follows:

"It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation." [15]

[13] An analysis of the Reserve Bank judgment reveals that although there was a difference of view regarding the application of the test for the award of a personal and punitive costs order and whether it should have been granted in that instance, there was agreement that in appropriate circumstances such an order is competent.

[14] The Public Protector in her argument relied on section 5(3) of the Public Protector Act, which she claimed gives her immunity against costs orders. It was held that section 5(3) [16] of the Public Protector Act does not create immunity when the Public Protector acts in bad faith. It was also stated that it is doubtful whether that immunity includes the Public Protector's exercise of her investigative power or the litigation associated with the report. [17]

[15] It is indeed doubtful that this immunity would be limitless and would make her totally untouchable. Her position must be seen against the backdrop of our Constitutional dispensation, where equality of all is central, and accountability to the Rule of Law and the Constitution is not negotiable. It is therefore unthinkable that any one person, irrespective of the importance of their position, will ever be able to claim total immunity when they blatantly transgress their statutory and constitutional duties.[18]

[16] In the light of the aforesaid it must now be trite that *de bonis propriis* costs orders can be granted against public officials in their personal capacities, where their conduct showed a gross disregard for their professional responsibilities[19] and where they acted inappropriately and in an egregious manner.[20]

[17] The Court has a discretion to grant a personal costs order against the Public Protector and must assess the gravity of the conduct complained of. Thus an assessment must be made of the facts and the discretion must be exercised objectively.[21]

[18] In the determination of whether such a punitive and personal costs order is appropriate, the following that was stated in the minority judgment in *Reserve Bank* is of relevance " ... it is only those who knowingly defend the indefensible or oppose in circumstances where they ought reasonably to have known that their defence was hopelessly without merit and were thus abusing Court processes, who should be punished for persistently opposing

applications to the end, it is not every unsuccessful litigant that will be mulcted with costs on an attorney and client scale".[22]

[19] It is obvious from a perusal of the *Reserve Bank* judgment that punitive costs orders will not always be appropriate as was stated:

" It does not follow that a punitive costs order will always be justified in circumstances where a personal order is warranted. An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment, be viewed as 'double punishment'. While the test for awarding a personal costs order or costs in a punitive scale may overlap, an independent, separate enquiry should be carried out by a court in respect of each order. Both personal and punitive costs orders are extraordinary in nature and should not be awarded 'willy nilly', but rather only in exceptional circumstances."[23]

[20] The applicable principles require from the Court to evaluate the relevant public official's conduct in the light of the particular

circumstances of the case before it. It was held that the mechanism of a personal costs order exists "to counteract reprehensible behaviour on the part of the litigant"[24] and will be awarded in circumstances where it would be "unfair to expect a party to bear any costs occasioned by the litigation." [25] What is just and equitable in a particular case, should be determined by the facts of that case.[26]

[21] There should be no fear that Courts will grant personal and/or punitive costs orders without considering all the circumstances of a case, or that public officials who conduct themselves appropriately in terms of their duties, the Constitution and the law, even when they are sometimes mistaken, will be mulcted with personal or punitive costs orders. This is clear from an analysis of all the case law already referred to and specifically from the judgment in the Reserve Bank[27] matter.

THE FACTS OF THIS CASE

[22] The arguments by the Public Protector that a personal costs order against her is incompetent (i) as she had not been cited in her personal capacity, (ii) that it has far reaching implications on the administration of justice, is unconstitutional and against the requirements of the Public Protector Act, have now been dealt with by the CC. All of these arguments were rejected by the CC.

[23] In this matter despite the fact that the Public Protector was not personally cited, she was made aware that a personal and punitive costs order will be sought against her from the inception of the litigation. In this instance the DA sought such an order in its Notice of Motion and CASAC in its amended Notice of Motion. The Public Protector dealt with the issue in her affidavit and the aspect was fully ventilated in Court.

[24] Initially, in this case, the Public Protector filed a Notice to Abide. She however then changed her stance and filed opposing papers. Her answering affidavit was not limited to the costs order, she proceeded to oppose the applications on the merits too. The argument before Court dealt extensively with the merits of the case. It was argued, on her behalf, that it was necessary to deal with the merits in order to explain to the Court why a personal costs order would not be appropriate. However both the answering affidavit and argument went far further than a mere attempt to avoid a personal costs order.

[25] The failures and dereliction of duty by the Public Protector in the Estina matter are manifold. They speak to her failure to execute her duties in terms of the Constitution and the Public Protector Act. In my view her conduct in this matter is far worse, and more lamentable, than that set out in the Reserve Bank matter. At least there her failures impacted on institutions that have the resources to fend for themselves. In this instance her dereliction of her duty impacted on the rights of the poor and vulnerable in society, the very people, for whom her office was essentially created. They were deprived of their one chance to create a better life for themselves. The intended beneficiaries of the Estina project were disenfranchised by the very people who were supposed to uplift them. Yet the Public Protector turned a blind eye, did not consult with them and did not investigate the numerous

irregularities that allegedly occurred properly and objectively. She even completely failed to investigate the third complaint. In the judgment on the merits this Court dealt in detail with the failures of the Public Protector to properly investigate and to propose an appropriate remedial action. What was said there stands and requires no repetition. Her conduct during the entire investigation constitutes gross negligence. She failed completely to execute her constitutional duties in the ways illustrated in the judgment on the merits.[28]

- [26] The Public Protector attempted to justify her limited investigation mainly due to an alleged lack of resources. In the judgment on merits this Court dealt extensively with the lack of merit in this argument.[29] In this instance she indeed tried to defend the indefensible and should have realised that her defences were hopelessly without merit.
- [27] Her inability to comprehend and accept the inappropriateness of her proposed remedial action constitutes ineptitude. As was stated in the Reserve Bank judgment a higher duty is placed on her due to her great importance in our democracy. The Public Protector failed the people of this country in the way she dealt with the investigation of the Estina dairy project.
- [28] The Public Protector has immense power, but with that power comes great responsibility. If she fails, as she did in this case, (to execute her duties), she must take full responsibility.
- [29] What was also of great concern and a factor that this Court took into consideration, when considering the appropriate costs order, is that the Public Protector made use of two different sets of counsel.[30] These appointments must have caused an enormous escalation of legal costs for her office. This must be seen in the light of the fact, that although two applications were brought, by two different entities, they were based on exactly the same facts, and dealt with the same project. Accordingly they also relied on the same legal principles. One set, of any of her very competent legal teams, could easily have dealt with both matters. In argument the decisions to appoint two legal teams was defended on the basis that two applications served before the Court. There is no merit in this argument for the reasons already alluded to. This decision by the Public Protector unfortunately shows a total disregard for the taxpayers, who will have to foot the bill and flies in the face of her complaint about how financial constraints limited her ability to properly investigate the complaints.
- [30] I am satisfied that the requirements for a personal and punitive costs order were met. As a result she should be liable personally for at least a percentage of the costs incurred. I however take into account that the impact on her personally maybe too harsh, as in this instance there are two Applicants involved and therefore the Court adjusted the personal costs to a lower percentage for each Applicant.
- [31] I make the following order:
1. The Public Protector in her official capacity is ordered to pay 85% of the costs of the Democratic Alliance on an attorney and client scale, which costs will include the costs of two counsel.

2. The Public Protector in her official capacity is ordered to pay 85% of the costs of the Council for the Advancement of the South African Constitution on an attorney and client scale, which costs will include the costs of two counsel.
3. The Public Protector in her personal capacity is ordered to pay 7.5% of the costs of the Democratic Alliance on an attorney and clients scale, which costs will include the costs of two counsel.
4. The Public Protector in her personal capacity is ordered to pay 7.5% of the costs of the Council for the Advancement of the South African Constitution on an attorney and clients scale, which costs will include the costs of two counsel.

RG TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING: 23 24 October 2018

DATE OF JUDGMENT: 15 August 2019

CASE NO: 11311/2018

ATT FOR APPLICANT: MINDE, SCHAPIRO & SMITH ATTORNEYS

ADV FOR APPLICANT: J BLEAZARD et C TABATA

ATT FOR RESPONDENT: TSHISEVHE GWINA RATSHIMBILANI INC

ADV FOR RESPONDENT: V NGALWANA (SC) et F KARACHI

et L RAKGWALE

ATT FOR APPLICANT: LEGAL RESOURCES CENTRE

ADV FOR APPLICANT: M LE ROUX et M MBIKIWA

ATT FOR RESPONDENT: TSHISEVE GWINA RATSHIMBILANI INC

ADV FOR RESPONDENT: A PLATT (SC) et C DAUDS

[1] Public Protector v South African Reserve Bank, Case CCT107/18 (Reserve Bank).

[2] Absa Bank Limited v The Public Protector 2018 JDR 0190 (GP).

[3] Democratic Alliance v Public Protector (11311/2018) Democratic CASAC vs Public Protector(13394/18)[2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019(7) BCLR 882 (GP) (20 May 2019) [Estina.]

[4] Vermaak's Executor v Vermaak's Heirs 1909 TS 679, 691 (emphasis added).

[5] Estina, par 18 40.

- [6] Reserve Bank par 152 & 153 and the footnotes referred to in these paragraphs.
- [7] Reserve Bank par 154, See *Black Sash Trust v Minister of Social Development & Others (Freedom under Law NPC Intervening)* 2019 CC (Black Sash 2) par 7 9, including the footnotes contained In these paragraphs of the judgment.
- [8] Reserve Bank par 155, see also *Nyathi v MEG for Department of Health Gauteng* 2008(5) SA 94 CC; *South African Liquor Traders Association v Chairperson Gauteng Liquor Board* 2009(1) SA 565 (CC).
- [9] Reserve Bank, par 155, see also *MEC for Health Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014(3) SA 481 (CC).
- [10] Reserve Bank par 157.
- [11] Reserve Bank par 158, See also *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng Provincial Government* 2013(5) SA 24 SCA (Gauteng Gambling Board) par 54.
- [12] Reserve Bank par 40, see also par 45 & 46.
- [13] Reserve Bank par 45.
- [14] *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus curiae* [2018] ZACC 26 par 37 (SASSA.)
- [15] Sassa par 37.
- [16] Section 5(3) of the Public Protector Act reads as follows: Neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitution.
- [16] Section 5(3) of the Public Protector Act reads as follows:
- Neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitution.
- [17] Reserve Bank par 162.
- [18] Reserve Bank par 157 160.
- [19] *Pheko v Ekurhuteni Metropolitan Municipality (No 2)* 2015, 5 SA 600 CC (Pheko).

- [20] Reserve Bank, Black Sash 2, Gauteng Gambling Board, Pheko, See also Stainbank v SA Apartheidsmuseum at Freedom Park [2011] ZAC 20.
- [21] Reserve Bank par 107 & 146.
- [22] Reserve Bank, par 115
- [23] Reserve Bank, par 220.
- [24] Reserve Bank par 221.
- [25] Reserve Bank par 221.
- [26] Reserve Band par 222
- [27] Reserve Bank par 159 & 160.
- [28] Estina par 60, 61, 64, 65 72, 79 84, 99 95, 110133, 145147 and 150 156.
- [29] Estina par 85 95.
- [30] consisting of senior and junior counsel in one matter and senior and two junior counsel in the other matter. I was during argument
- however assured that the third Junior's costs would not be borne by the Public Protector. I took that assurance into consideration.

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Prepared on 12 October 2026 · Esheria