REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 91139/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

13 December 2017 ....
DATE SIGNATURE

In the matter between -

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	APPLICANT
and	
THE OFFICE OF THE PUBLIC PROTECTOR	1ST RESPONDENT
THE PUBLIC PROTECTOR	2ND RESPONDENT
ECONOMIC FREEDOM FIGHTERS	3RD RESPONDENT
THE UNITED DEMOCRATIC MOVEMENT	4TH RESPONDENT
THE CONGRESS OF THE PEOPLE	5TH RESPONDENT
THE DEMOCRATIC ALLIANCE	6TH RESPONDENT
MABEL PETRONELLA MENTOR	7TH RESPONDENT
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	8TH RESPONDENT

JUDGMENT

THE COURT

INTRODUCTION

[1] The President of the Republic of South Africa seeks to review the remedial action in the Public Protector's Report No 6 of 2016/17, which was released on 2 November 2016, and entitled "*State of Capture*" (the Report).

[2] The Report concerns an investigation conducted by the Public Protector into complaints of alleged improper and unethical conduct by the President, certain State functionaries and the Gupta family, relating to the appointment of Cabinet Ministers and Directors of State-owned entities (SOEs), which possibly resulted in the improper and corrupt award of state contracts and other benefits to businesses of the Gupta family. The remedial action directed the President to appoint a commission of inquiry to investigate the matters identified in the Report.

[3] The President seeks to review and set aside paragraphs 8.4, 8.7 and 8.8 of the remedial action, which read:[1]

> "8.4 *The President to appoint, within 30 days, a commission of inquiry headed by a judge solely selected by the Chief Justice shall provide one name to the President.*
>
> ...
>
> 8.7 *The commission of inquiry to be given powers of evidence collection no less than that of the Public Protector.*

[1] Amended Notice of Motion para 1.1.

8.8 *The commission of inquiry to complete its task and to present the report and findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his/her intentions regarding the implementation to Parliament within 14 days of releasing the report.*"

[4] The application is opposed by the current Public Protector (the second respondent), as well as the following political parties: Economic Freedom Fighters (EFF), the United Democratic Movement (UDM), Congress of the People (COPE) and the Democratic Alliance (DA), (third, fourth, fifth and sixth respondents). The application is also opposed by Ms Vytjie Mentor (Ms Mentor), the seventh respondent, and a public benefit organisation, Council for the Advancement of the South African Constitution (CASAC), the eighth respondent.

[5] In the notice of motion[2], the President sought an order that the matter be remitted to the Public Protector for further investigation. This relief was based on the President's contention that the Public Protector did not have the power to delegate or "outsource" her functions to a commission of inquiry. The prayer for remittal prompted the Public Protector to deliver a conditional counter-application in which an order was sought directing the President to ensure that the Public Protector was provided with sufficient funding to conduct the further investigation.

[6] During argument, the President's counsel abandoned the prayer for remittal. Consequently, there is no longer any need for the Public Protector to proceed with the conditional counter-application, and the only issue that remains for consideration is the review of the specified parts of the remedial action.

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[2] Amended Notice of Motion para 1.2.

THE REPORT

[7] The Report was issued by the Public Protector in terms of s 182(1)(b) [3] of the Constitution, s 3(1) of the Executive Members' Ethics Act, 82 of 1998 (the Ethics Act) [4] and s 8(1) of the Public Protector Act, 23 of 1994 (the Act).[5]

[8] In March and April 2016, the Public Protector received three complaints in connection with alleged improper and unethical conduct in relation to the appointment of Cabinet Ministers and directors of SOEs and the award of state contracts and other benefits to the Gupta-linked companies.

[9] The complaints followed media reports alleging that the Deputy Minister of Finance, Mr Mcebisi Jonas, was offered the post of Minister of Finance by the Gupta family in exchange for a R600 million bribe. The offer allegedly took place at the Gupta residence in Saxonwold, Johannesburg, in the presence of Mr Duduzane Zuma, the President's son. According to the Report, the offer was allegedly made before his then colleague, Minister Nhlanhla Nene, who was abruptly removed as Minister of Finance by the President on 9 December 2015. It also appears from the Report that the Gupta family had a long-standing relationship with the President's family and a business partnership with his son.

[10] The Report further refers to media reports that Ms Mentor (the seventh respondent), was offered the post of Minister of Public Enterprises, in exchange for cancelling the South African Airways route to India and that the President was at the Gupta residence when the offer was made. The Cabinet positions were reportedly offered to Mr Jonas and Ms Mentor in exchange for furthering the interests of the Gupta family.

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3 The full text of s 182 of the Constitution is set out in para [72] below.

4 Section 3(1) of the Ethics Act provides, in relevant part, as follows:
"The Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4."

5 Section 8(1) of the Public Protector Act reads:
"The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her."

[11] It further appears from the Report, referring to the media, that the relationship between the President and the Gupta family had evolved into *"State Capture"*, underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and directors in boards of SOEs and leveraging those relationships to get preferential treatment in state contracts, access to state-provided finance and award of business licences.

[12] The first complainant, Father S Mayebe, on behalf of the Dominican Order, a group of Catholic priests, requested an investigation into the veracity of allegations that Mr Jonas and Ms Mentor, were offered Cabinet positions by the Gupta family as well as an investigation into all business dealings of the Gupta family with government departments and SOEs to determine whether there were irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licences, government advertising in the *New Age* newspaper, and other governmental services.

[13] The second complainant, Mr Mmusi Maimane, the leader of the DA, also relying on the same media reports, requested an investigation into the President's role in the alleged offer of Cabinet positions to Mr Jonas, and Ms Mentor, and that the investigation should look into the President's conduct in relation to the alleged corrupt offers and Gupta family involvement in the employment of Cabinet Ministers and directors of SOE boards. In his complaint, Mr Maimane stated, among other things, that the President may have acted improperly and in violation of the Executive Ethics Code (the Ethics Code) provided for in the Ethics Act.

[14] The third complaint by a person, whose name has been withheld, was based on media reports alleging that the Cabinet had become involved in holding banks accountable for withdrawing banking facilities for Gupta-owned companies. The complainant wanted to know whether it was appropriate for Cabinet to assist private business and on which grounds that was happening. He asked, if corruption was not involved, and specifically if such matter should not be dealt with by the National Consumer Commissioning ombudsman.

[15] Based on an analysis of these complaints, the Public Protector identified the following issues as relevant for investigation: whether the President had breached the Ethics Act and had acted improperly and in violation of the Ethics Code; whether the President had allowed members of the Gupta family and his son to be involved in the process of removal and appointment of the Minister of Finance in December 2015; whether the President had allowed members of the Gupta family and his son to engage or be involved in the process of removal and the appointment of various members of Cabinet; whether the President had allowed members of the Gupta family and his son to be involved in the process of appointing members of boards of directors of SOEs; whether the President had enabled or turned a blind eye in violation of the Ethics Code to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointments to *quid pro quo* conditions; whether the President had improperly and in violation of the Ethics Code exposed himself to any situation involving the risk of conflict between his official duties and his private interests, or used his position or information entrusted to him to enrich himself and businesses owned by the Gupta family and his son to be given preferential treatment in the award of state contracts, business financing and trading licences; whether the President had prejudiced anyone by his conduct; and whether other Cabinet Ministers had improperly interfered with the relationship between banks and Gupta-owned companies and thus giving preferential treatment to such companies on matters that should have been handled by independent regulatory bodies.

[16] The Public Protector also identified the following further issues for investigation: (1) whether any state functionary in any organ of state or other person had acted unlawfully, improperly or corruptly in connection with the appointment or removal of Ministers and directors or boards of directors of SOEs; (2) whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the awarding of state contracts or tenders to Gupta-linked companies or persons; any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state-provided business

financing facilities to Gupta-linked companies or persons; any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta-linked companies or persons; and whether any person/entity was prejudiced due to the conduct of the SOE.

THE INVESTIGATION

[17] Because of the statutory obligation under the Ethics Act to submit a report within thirty days, the Public Protector immediately commenced to interact with the President.[6] It is relevant to refer, in some detail, to the exchanges between the Public Protector and the President.

[18] On 22 March 2016, the Public Protector wrote to the President advising him that she had received a request from the DA to conduct an investigation into an alleged breach of the Ethics Code arising from the President's alleged role in the offering of Ministerial positions, by members of the Gupta family. She asked the President: *"If you have any comments on the allegations levelled against you, I would appreciate a letter indicating such comments from you."* This letter, apparently, did not reach the President.

[19] On 22 April 2016, the Public Protector again sent the letter to the President, in which she also advised him that the investigation had not been completed due to inadequate resources. This letter was received by the President. The Public Protector received no response from the President and by early September 2016, had not received additional funds in order to proceed with the investigation.

[20] On 13 September 2016, the Public Protector sent another letter to the President requesting a meeting with him, in order to brief him on the

[6] Sections 3(1) of the Ethics Act, 1998, obliges the Public Protector to investigate and submit a report on the alleged breach to the President within thirty days of the receipt of a complaint.

investigation and affording him a further opportunity to comment on the allegations to the effect that the President, ought to have known and/or allowed his son to exercise undue influence in strategic ministerial appointments, as well as board appointments at SOEs.

[21] On 1 October 2016, the Public Protector sent the President a notice in terms of s 7(9) of the Public Protector Act[7], informing him that the complaints, including the third complaint, had been received and that an investigation was now being conducted, in terms of s 182 of the Constitution, read with sections 6 and 7 of the Act. In the notice, the Public Protector provided a full description of the issues being investigated and how the President was implicated therein. The Public Protector records in the Report that she ended off the notice by advising the President that if she did not get his version, concerning the matters under investigation, there was a possibility of her finding that there was merit in the complaints.

[22] On 6 October 2016, the Public Protector states that she met with the President. The following is a recordal of what transpired at that meeting:

"*3.20* *On 6 October 2016 I met with the President, whose legal team raised various legal objections and refused to discuss the merits of the investigation or the allegations against the President. The Presidency requested that the meeting be postponed to allow the President to study the documents provided and obtain legal advice. The Presidency raised an objection that they had not been provided with the relevant documents and records, and argued that they should be allowed to question witnesses who had already testified before me. I disagreed with this request and instead offered to*

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7 Sections 7(9)(a) provides:
"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

provide the President with written questions to which the President would be required to respond by affidavit.

3.21 *The President's legal advisor argued emphatically that the matter should be deferred to the incoming Public Protector for conclusion. There was a lengthy discussion with the President and his advisor on this matter, after which the President expressed his willingness to answer the questions posted by the Public Protector, at a future date, after having had an opportunity to scrutinize the documents and consult with his legal advisor. I advised the President that as head of state he is accountable to the people of the Republic, and that it is in his interest that he do so. In an attempt to demonstrate to the President that my questions to him were questions of fact, not requiring legal assistance, I posed said questions to him. This discussion is captured in the transcript of this meeting, which is attached hereto as Annexure 1. The President undertook to meet with me again on 10 October 2016 and provide me with an affidavit in response to the questions posed."*

[23] A full transcript of the discussions held with the President and his legal advisors is attached to the Report and accords with what is stated in paragraphs referred to above.[8]

[24] The subsequent interactions between the President and the Public Protector are detailed in the following paragraphs of the Report.

"3.22 *On 10 October 2016 I received a letter from the Presidency, in which he took exception to having been given two days before the meeting of 6 October 2016 to prepare and give evidence on a range of matters which exceed the ambit of the stated request for the meeting. This was as a result of the Notice in terms of Section 7(9) having only been received on 2 October 2016.*

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[8] Report, pp 356-444.

3.23 *The letter continued to raise issues of objection. Firstly, the President advised that Section 7(9) required that he or his legal representative should be entitled to question other witnesses, determined by me, who have appeared before me.*

3.24 *Secondly, the audi alteram partem rule required that, as an implicated person, the President is entitled to the documents and records gathered in the course of the investigation, to enable him to prepare his evidence.*

3.25 *Thirdly, the Presidency required a full opportunity to be heard in order to avoid remedial actions – that would be binding on him – based on evidence not tested by the President as an implicated person.*

3.26 *After providing the written questions to the Presidency, he made somewhat of an about-turn by deciding that in fact before deposing to an affidavit, he still required a list of witnesses, statements, affidavits and transcripts of any oral testimony and wanted to question witnesses.*

3.27 *The Presidency accordingly declined to provide answers to my written questions and cancelled the meeting for 10 October 2016.*

3.28 *The Presidency concluded by objecting to my statement at the 6 October 2016 meeting that I was in a hurry to complete the investigation, which was not 'part heard'. The Presidency suggested that the investigation could just as well be completed after my term as the current Public Protector expired, as with other pending investigations. The President's diary was determined well in advance and did not allow him to attend to the matter within the truncated period.*

3.29 *The Presidency requested an undertaking by the following day, 11 October 2016, that I would not conclude the investigation and issue any report until he had received the aforesaid.*

3.30 On 11 October 2016 I wrote a letter to the President in response. I reassured him that I had, to date, not concluded my investigations into this matter and had made no adverse finding against the President.

3.31 I undertook that this office would comply with its duties under the Constitution, the Public Protector Act, Executive Members' Ethics Act and all other relevant laws in conducting this investigation and submitting the report.

3.32 I noted that I had, since my first letter to him dated 22 March 2016, gone to great lengths to provide him with sufficient detail (regarding him implicating him) and the response required from him.

3.33 I had, in compliance with the Public Protector Act and the law on administrative justice, provided him with ample opportunity to respond in connection therewith.

3.34 The Notice in terms of section 7(9) of the Public Protector Act was merely one in a succession of letters to him canvassing substantially similar issues regarding this matter.

3.35 I noted my concern that he had, on two occasions, undertaken to provide a response to questions put to him in writing; when the time arose, he changed his mind and refused to provide responses.

3.36 I advised that it was incumbent upon him to provide response within a period that I decide is both convenient and practical to me, given that firstly the Constitution requires him to assist and protect this office. Secondly the Constitution prohibited him from interfering with the function of this office. Thirdly, the Public Protector Act vests in me the discretion to require him to provide me with an expedited response. Finally, the spirit of the Constitution and the Public Protector Act requires him to cooperate fully in the investigation process; conversely, recalcitrant witnesses, particularly high-ranking members of the Executive such as him, should be regarded as

violating both the letter and spirit of the Constitution and the Public Protector Act.

3.37 *I advised that I had provided him with the evidence of the witnesses implicating him. He was not entitled to the full record of investigations as a condition precedent to answering the questions I had put to him.*

3.38 *I requested the questions he wished to pose to witness who had appeared before me. I undertook to make a determination on such questions in accordance with the Public Protector Act.*

3.39 *I advised that he was not entitled to refuse to answer the questions I had put to him prior to questioning other witnesses who had appeared before me. His right to question was not a sine qua non for his response to my questions.*

3.40 *I concluded by stating that it was in the President's interests, and that of the people of South Africa, to account fully and honestly regarding the allegations against him.*

3.41 *I afford the President a further extension to answer the questions put to him by no later than 11 am, Thursday, 13 October 2016 to enable this office to conclude the investigation and issue its report on the outcome thereof as soon as possible."*

[25] In the founding affidavit the President deals in very broad terms with his interactions with the Public Protector. He does not place in issue or offer any direct challenge to what is stated in the paragraphs referred to above; nor does he dispute any aspect of the typed transcript of the meeting on 6 October 2016, which is annexed to the Report.

[26] The President explains[9] that he was given an extension from 10 October to 13 October 2016, a mere three days, to provide the necessary answers to

9 Paras 14 and 14.19 of the Founding Affidavit.

the s 7(9) notice and the memorandum of questions. He states that he could not provide answers to such wide-ranging issues within such a short period, especially since he was on international duties until the evening of 12 October 2016. He asserts that the Report was finalised by the Public Protector on 14 October 2016, without any input from him.

[27] The Public Protector elected to combine the three complaints and divided the investigation into two phases. She explains that the investigation was divided into two phases "*in order to accommodate the time and resource limitations by addressing the pressing questions threatening to erode public trust in the Executive and SOEs while mapping the process for the second and final phase of the investigation*".

[28] The investigation process included correspondence with key parties implicated by the allegations and potential witnesses. Interviews were conducted with key witnesses, commencing with Mr Jonas and Ms Mentor, who confirmed their status as whistle-blowers. The investigation team also interviewed a Mr Maseko, who was identified by the media as a whistle-blower. Interviews were also conducted with several other Ministers and selected witnesses. Documents were requested from appropriate persons and institutions; these were analysed and evaluated together with the oral evidence to establish if any of the allegations could be corroborated.

[29] Towards the conclusion of the investigation, persons who appeared to be implicated by the evidence collected were served with notices in terms of s 7(9) of the Act, to apprise them of such evidence, the potential of adverse findings being made, and to afford them the opportunity to respond. In that regard, the following people were issued with notices in terms of s 7(9) of the Public Protector Act: Mr Ben Ngubane and the Board of Eskom; Mr Duduzane Zuma; Mr Ajay Gupta; Tegeta Exploration and Resources (Pty) Limited (Tegeta); Minister Lynne Brown; Minister Douglas Van Rooyen, and Minister Mosebenzi Zwane.

[30] The following witnesses were interviewed in regard to the issue whether President Zuma had improperly and in violation of the Code of Ethics, allowed members of the Gupta family and his son, to engage or be involved in the process of removal and appointment of various members of cabinet: Mr Jonas; Ms Mentor; Mr Maseko, Mr Themba Maseko, the former CEO of Government Communication Information Systems; Ms Barbara Hogan, the former Minister of the Department of Public Enterprises; the former Minister of Finance, Mr Nhlanhla Nene; the then Minister of Finance, Mr Pravin Gordhan; the Minister of the Department of Trade and Industry, Mr Rob Davies; the leader of the Economic Freedom Fighters, Mr Julius Malema; two former security guards at the Gupta family residence; a member of the Gupta family, Mr Ajay Gupta; a businessman, Mr Fana Hlongwane; and the then Minister of Sports, Mr Fikile Mbalula.[10]

[31] In his interview, Mr Jonas confirmed all that had been stated in the media report concerning the offer to be appointed as Minister of Finance. In particular, he confirmed that Mr Ajay Gupta informed him that they were going to make him Minister of Finance and offered to deposit a sum of R600 million in an account of his choice. He mentioned that Mr Ajay Gupta even asked whether Mr Jonas had a bag which he could use to receive and carry the money in cash, immediately.

[32] In her interview, Ms Mentor confirmed the media reports and informed the Public Protector that she was offered the position of Minister of Public Enterprises by members of the Gupta family. The offer was made at their Saxonwold home in Johannesburg, and that President Zuma was present in the house.

[33] The Public Protector also issued subpoenas and procured documentation concerning the issues raised in this part of the investigation. These are detailed in paragraph 4.32 of the Report. In regard to the complaints made by Mr Jonas and Ms Mentor, the Public Protector obtained

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10 Minister Mbalula was subsequently appointed as the Minister of Police.

and analysed the cell-phone records of persons who had been implicated; these included Mr Duduzane Zuma and Mr Hlongwane. She also secured, by means of a subpoena, the cell-phone numbers of Minister Van Rooyen. The Public Protector sets out in detail the telephone discussions and text messages that passed between these persons. She points out that these communications appear to confirm Mr Jonas' version of events.

[34] The Public Protector interviewed Mr Themba Maseko, the former CEO of Government Communications and Information System. She states in the Report that he allegedly received a telephone call from the President telling him to *"help"* the Gupta family. The Gupta family instructed him to direct Government Departments to send advertising to the newspaper, the *New Age*, in contravention of procurement guidelines. He was thereafter removed from this position.

[35] A large part of the Report centres around alleged irregularities in the awarding of contracts by Eskom to Tegeta and Optimum Coal Mine (Pty) Limited (In Business Rescue) (Optimum). In addition, the Public Protector also investigated the sale of all shares held by Optimum Coal Holdings (Pty) Limited (In Business Rescue) (Optimum Holdings). In order to properly conduct this aspect of the investigation, the Public Protector was afforded access to numerous documents relating to Eskom/ Tegeta/ Optimum/ Optimum Holdings. The Public Protector also conducted interviews with the former business rescue practitioners of Optimum and Optimum Holdings, Standard Bank Limited, Glencore International AG, Exxaro Limited and a Loan Consortium, consisting collectively of Nedbank Limited, Rand Merchant Bank Limited and Investec Bank Limited. The details relating to these investigations are fully set out in the Report.

[36] The Public Protector's investigations revealed that the Gupta-owned company, Tegeta, acquired ownership of Optimum Holdings – a company which supplied coal to Eskom. Eskom began awarding Tegeta contracts and made payments to it of over R1.2 billion. At some stage, the Eskom board resolved to pay an amount of R659 558. 079, as a *"pre-payment"*, to Tegeta.

The Public Protector found that the sole purpose of the pre-payment was to enable Tegeta to purchase all the shares in Optimum Holdings.

[37] She further observed that in the days leading up to the Eskom board resolution to pay the pre-payment, Mr Brian Molefe, the Eskom group chief executive, was in the Saxonwold area on numerous occasions and in communication with the Gupta family members.

[38] The Public Protector obtained the cell-phone numbers of Mr Brian Molefe, as well as those of Mr Ajay Gupta, and Mr Nazeem Howa, the chief executive officer of Oakbay Investments (Pty) Limited (Oakbay), a Gupta-owned company. She observed that between the period 2 August 2015 and 22 March 2016, Mr Molefe called Mr Ajay Gupta forty-four times, and Mr Ajay Gupta called Mr Molefe fourteen times. And, during the period 5 August 2015 to 17 November 2015, Mr Molefe can be placed in the Saxonwold area on nineteen occasions. The diagrams presented in the Report, show a distinct line of communication between Mr Molefe of Eskom, the Gupta family and directors of their companies.

[39] The Public Protector also conducted an extensive and careful analysis, in order to establish whether there was a conflict of interest, in relation to Eskom and other SOEs. In that regard, the Public Protector established that the board of Eskom appointed in December 2014, consisted predominantly of individuals having direct or indirect business or personal relations with Mr Duduzane Zuma, the Gupta family and related associates, including a Mr Essa. Mr Essa was the sole director of Elgasolve (Pty) Limited that holds 21.5% of the shares in Tegeta. The majority of the shares in Tegeta are held and owned by Oakbay and Mabengela Investments (Pty) Limited (Mabengela). Mr Duduzane Zuma is the holder of 45% of the shares in Mabengela.

[40] In her investigations, as to whether there was a conflict of interest, the Public Protector performed extensive due diligence searches on individuals within Eskom, as well as individuals who were party to transactions with it.

The Public Protector has identified the following members of the board of Eskom as at 1 April 2016, as having a conflict of interest: Mr Mark Pamensky and Dr Baldwin Ngubane.

[41] The Public Protector established that Mr Pamensky is or was a director of the following entities: (a) ORE - in which Mr Atul Gupta is the holder of 64% of the shares; (b) Shiva Uranium (Pty) Limited – in which Tegeta has a 19.6% shareholding and ORE, a 74% shareholding; (c) Yellow Star Trading 1099 (Pty) Limited, in which Mr Essa was also a director; (d) BIT Information Technology (Pty) Limited (BIT). Mr Pamensky was a director of BIT, together with Mr Kubentheran Moodley. Mr Moodley is a special advisor to the Minister Zwane, the Minister of Mineral Resources. Mr Moodley acted as such advisor during the Tegeta purchase of OCH. He is also married to Ms Viroshini Naidoo, who was a former Eskom board member.

[42] The Public Protector says the following of Mr Pamensky.

> *"Public records confirm that Mr Pamensky has direct business interests in ORE and Shiva Uranium for which he received economic benefit. Mr Pamensky is also a member of Eskom's Board. By virtue of officio function and role in Eskom he would have or could have access to privileged or sensitive information regarding OCH and various Eskom contracts. Such information coupled with a personal economic interest would give Tegeta an unfair advantage over other interested buyers. It would be very important to understand the role of this individual in this transaction in light of a high degree of irregularities that appears to have occurred in Eskom."*

[43] She also established that Dr Baldwin Ngubane is the director or Gade Oil and Gas (Pty) Limited, an entity in which the aforementioned Mr Essa, was a previous director.

[44] The Public Protector also investigated the possibility of there being a conflict of interest by the Minister of Mineral Resources, Mr Zwane. He is responsible for ensuring policy-making and policy implementation of service

delivery for Eskom. In the Report, the Public Protector states that she received information from an independent source that Minister Zwane met with Mr Glasenberg of Glencore in Switzerland, around the period 30 November 2015 to 5 December 2015. Mr Glasenberg, is the holder of the shares in OCH, which were acquired by Tegeta. The other individuals present during the meeting/s were Mr Rajesh (Tony) Gupta as well as Mr Essa. The Public Protector obtained access to travel records obtained from Emirates Airlines, which confirm that Minister Zwane travelled to Zurich on 30 November 2015. She states, that if Minister Zwane did in fact travel officially to meet Mr Glasenberg, it would imply that his travel and reason for travel would have been authorised by the President.

[45] The Public Protector states that the first phase of her investigation did not touch on the award of licences to the Gupta family and superficially touched on state financing of the Gupta-Zuma business, while only selecting a few state contracts. She also states that the issues that are reserved for the next phase of the investigation are the following: whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the exchange of gifts in relation to Gupta-linked companies or persons. In this regard, the Public Protector has decided to investigate contracts awarded by Transnet to Regiments Capital and Trillion Capital Partners (Pty) Limited. Also part of the investigation, are contracts concluded between Denel and VR Laser Services, as well as a contract awarded by SAA to the *New Age* newspaper for circulation to its customers. Also to be investigated are the contracts awarded to the *New Age* newspaper and/or TNA Media, by the SABC. Also reserved for investigation, in the second phase, is the conduct of the Bank of Baroda in relation to the purchase of all the shares in Optimum Holdings by Tegeta. Finally, the investigation will consider whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta-linked companies or persons.

[46] The Public Protector states that it was not possible for her to investigate all the issues before her, due to a lack of resources:

"The investigation has proven that the extent of issues it needs to traverse and resources necessary to execute it is incapable of being executed fully by the Public Protector. This was foreshadowed at the commencement of the investigation when the Public Protector wrote to Government requesting more resources for a special investigation similar to a commission of inquiry overseen by the Public Protector. This investigation has been hamstrung by the late release which caused the investigation to commence later than planned. The situation was compounded by the inadequacy of the allocated funds (R1.5 million)."

OBSERVATIONS

[47] In paragraph 7 of the Report, the Public Protector states *"having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following observations".*

[48] In regard to the question whether the President, improperly and in violation of the Ethics Code, allowed members of the Gupta family and his son to be involved in the process of removal and appointment of the Minister of Finance in December 2015, the Public Protector says the following:

"7.1.1 President Zuma was required to select and appoint ministers and in compliance with the Executive Ethics Code.

7.1.2 It is worrying that the Gupta family was aware or may have been aware that Minister Nene was removed five weeks after Deputy Minister Jonas advised him that he had been allegedly offered the job by the Gupta family in exchange for extending favours to their family business.

7.1.3 Equally worrying is that Minister Van Rooyen, who replaced Minister Nene, can be placed at the Saxonwold area on at least seven occasions, including on the day before he was announced as

Minister. This looks anomalous given that at the time he was a Member of Parliament based in Cape Town.

7.1.4 Another worrying coincidence is that Minister Nene was removed after Mr Jonas advised him that he was going to be removed.

7.1.5 If the Gupta family knew about the intended appointment, it would appear that information was shared then, in violation of s 2.3(e) of the Executive Ethics Code, which prohibits members of the Executive from the use of information received in confidence in the course of their duties or otherwise than in connection with the discharge of their duties.

7.1.6 The provision of s 2.3(c), which prohibits a member of the Executive from acting in a way that is inconsistent with their position. There may even be a violation of s 2.3(e) of the Executive Ethics Code which prohibits a member of the Executive from using information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties.

7.1.7 In view of the fact that the information that was made public included Mr Jonas alleging that the offer for a position was linked to him being required to extend favours to the Gupta family. Failure to verify such allegation may infringe the provisions of s 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004, which places a duty on persons in positions of authority who know or ought reasonably to have known or suspected that any other person has committed an offence under the Act must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official."

[49] As to the question whether the President had improperly and in violation of the Ethics Code, allowed members of the Gupta family and his son to engage or to be involved in the process of removal and appointing of various members of Cabinet, the Public Protector points out that there is no evidence of action taken to verify either Mr Jonas' or Ms Mentor's allegations. If this is

the case, the President may have violated s 2.3(c) of the Ethics Code, which prohibits a member of the Executive from acting in a way that is inconsistent with their position. There may even have been a violation of s 2.3(e) of the Code, which prohibits a member of the Executive from using information received in confidence, in the course of their duties, otherwise than in connection with the discharge of their duties.

[50] The Public Protector expresses the view that if Mr Jonas' allegation, that he was offered the position of Minister for him being required to extend favours to the Gupta family is correct, this may constitute an infringement of the provisions of s 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004, which places a duty on persons in positions of authority, who know or ought reasonably to have known or suspected, that any other person has committed an offence under the Act, to report such knowledge or suspicion to a police official. A similar duty is imposed and possibly violated in relation to the allegations that were made by Mr Maseko.

[51] The Public Protector further states that the allegations raised by Messrs Jonas and Maseko are relevant to the question whether the President, improperly and in violation of the Ethics Code, exposed himself to a situation involving the risk of conflict between his official duties and his private interests.

[52] The Public Protector is of the view that the allegations made by Ms Hogan, also deserve a closer look to the extent that they suggest Executive and party interference in the management of SOEs and appointments thereto.

[53] Another aspect that the Public Protector gave consideration to was whether the President and other Cabinet Ministers had improperly interfered in the relation between banks and Gupta-owned companies, thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies. She points out that the Cabinet appears to have taken an extraordinary and unprecedented step regarding

intervention into what appears to be a dispute between a private company co-owned by the President's friends and his son. This, the Public Protector says, needs to be looked at in relation to a possible conflict of interest between the President, as head of State, and his private interest as a friend and father as envisaged under s 2.3(c) of the Ethics Code and s 195 of the Constitution, which requires a high level of professional ethics. Sections 96(2)(b) and (c) of the Constitution are also relevant.

[54] In relation to the question whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the appointment or removal of Ministers and boards of directors of SOEs the Public Protector states that it appears that the board at Eskom was improperly appointed and not in line with the spirit of the King III report on Good Corporate Governance. It appears that the board of Eskom did not act in the best interests of the Republic of South Africa at all times and that no action was taken on the part of the Minister of Public Enterprises, Ms Barbara Hogan, to prevent the conflicts of interest that existed.

[55] The Public Protector points to the pre-payment, by Eskom, of R659 558 079 as an example of the way in which a state-owned entity acted unlawfully, improperly or corruptly in connection with the award of state contracts or tenders to Gupta-linked companies or persons. In regard to this payment, the Public Protector makes the following observations:

55.1 Tegeta's conduct and misrepresentations made to the public with regard to the pre-payment and the actual reason for the pre-payment could amount to fraud.

55.2 The payment to Tegeta may not have been in line with the Public Finance Management Act, 1 of 1999 (PFMA). It was ostensibly for the payment for coal but was in fact used by Tegeta to purchase the shares of Optimum Holdings. Her investigations reveal that on 11 April 2016, Tegeta informed the Business Rescue Practitioners of OCH, who in turn, informed the Loan Consortium that they were

short of R600 million. On the very same day, Eskom held an urgent Board Tender Committee meeting at 21h00, to approve the payment.

55.3 The Eskom board does not appear to have exercised a duty of care and their actions may constitute a violation of s 50 of the Public Finance Management Act.

[56] The Public Protector is also critical of the conduct of Minister Zwane, the Minister of Mineral Resources. She points out that his conduct, with regard to his flight itinerary to Switzerland, appears to be irregular and not in line with the PFMA or in line with s 96(2) of the Constitution and s 2 of the Ethics Act.

[57] These are some of the more important observations made by the Public Protector.

THE REMEDIAL ACTION

[58] The remedial action proposed by the Public Protector reads as follows:

"8.1 The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, while addressing systemic procurement management deficiencies in the Department, is the following:

To the President:

8.2 Investigation has proven that the extent of issues it needs to traverse and resources necessary to execute it is incapable of being executed fully by the Public Protector. This was foreshadowed at the commencement of the investigation when the Public Protector wrote to Government requesting for resources for a special investigation similar to a commission of inquiry overseen by the Public Protector. This investigation has been hamstrung by the late release which caused the

investigation to commence later than planned. The situation was compounded by the adequacy of the allocated funds (R1.5 million).

8.3 *The President has the power under section 84(2)(f) of the Constitution to appoint commissions of enquiry. However, in the EFF v Speaker of Parliament the President said that 'I could not have carried out the evaluation myself lest I be accused of being judge and jury in my own case'.*

8.4 *The President to appoint within thirty days a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President.*

8.5 *The National Treasury to ensure that the commission is adequately resourced.*

8.6 *The judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.*

8.7 *The commission of inquiry to be given powers of evidence collection that are no less than that of the Public Protector.*

8.8 *The commission of inquiry to complete its task and to present the report with findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his/her intentions regarding the implementation to Parliament within 14 days of releasing the report.*

8.9 *Parliament to review, within 180 days, the Executive Members' Ethics Act to provide better guidance regarding integrity, including avoidance and management of conflict of interest. This should clearly define responsibilities of those in authority regarding a proper response to whistleblowing and whistleblowers. Consideration also be given to a transversal code of conduct for all employees of the State.*

8.10 The President to ensure that the Executive Ethics code is updated in line with the review of the Executive Members' Ethics Act.

8.11 The Public Protector, in terms of section 6(4)(i) of the Public Protector Act, brings to the notice of the National Prosecuting Authority and the DPCI those matters identified in this report where it appears crimes have been committed.

9 Monitoring

9.1 The Public Protector will monitor the implementation of the remedial action.

9.2 The Secretary of Parliament and the Director-General in the Presidency are to provide periodic implementation reports to the Public Protector."

GROUNDS OF REVIEW

[59] The review is essentially directed at the lawfulness and rationality of the remedial action. Broadly stated, the grounds of review are the following.

59.1 The Constitution vests the power to appoint the commission of inquiry in the President. Only he can exercise that power and it is unconstitutional for the Public Protector to instruct him to do so. The President asserts that if he complied with the remedial action, his decision would be reviewable because it would have been taken under the dictate of another, and would be an abdication of his power under s 84 of the Constitution.[11]

59.2 The direction that the Chief Justice appoint the Judge to head the commission of inquiry is unlawful as the Constitution does not assign this power to the Chief Justice. The direction is also

[11] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) paras [39] and [40].

irrational as there is no reason to suggest that a judge selected by the President would not be independent and impartial.

59.3 It is beyond the powers of the Public Protector to give directions as to the manner in which the commission of inquiry is to be implemented. It is the President's prerogative to select the officer to preside over the commission and it is also the President alone who can decide upon the issues that the commission is to investigate, its powers and when the commission is to complete its investigation.

59.4 The remedial action constitutes an unlawful delegation of the Public Protector's investigatory powers to a commission of inquiry. It is inconsistent with the Ethics Act and the Public Protector Act because those statutes require the Public Protector herself to undertake the investigation of the complaints. The remedial action improperly outsources the investigation which is contrary to these statutes.

59.5 The remedial action is inconsistent with the Ethics Act, which requires that the Public Protector investigate a breach of the code of ethics. Section 3 of the Ethics Act requires that the Public Protector must investigate a complaint lodged in terms of the Act; it does not permit the Public Protector to require another body such as a commission of inquiry to complete the investigation into a complaint. The Public Protector has impermissibly delegated or outsourced her function under the Ethics Act to a commission of inquiry. Furthermore, a commission of inquiry does not have the same powers as the Public Protector and cannot take remedial action. This would run counter to the powers and purpose of the Public Protector under the Ethics Act.

59.6 The Public Protector only has the power to take remedial action where an investigation has been completed and findings of impropriety or prejudice have been made. The remedial action

taken is not appropriate, as required by the Constitution, as the investigatory process has not been completed and the Public Protector has not made any findings of impropriety or prejudice. It is also impermissible for the Public Protector to order the President to exercise an executive power as this offends against the separation of powers doctrine.

59.7 The remedial action was irrational, as the Public Protector decided to outsource the investigation to a commission of inquiry, based on an alleged lack of adequate resources. If this were true, the rational decision to have made was to approach Parliament for funds. The remedial action was also irrational as it was based on the pending end of Advocate Madonsela's term and the limited qualifications of her successor, Advocate Mkhwebane.

[60] The primary question, that is pertinently raised in this case, is whether the President's constitutional power to appoint a commission of inquiry can permissibly be limited by remedial action taken by the Public Protector.

THE PRESIDENT'S POWER TO APPOINT A COMMISSION OF INQUIRY

[61] Section 84(2)(f) confers upon the President the power to appoint a commission of inquiry.[12] It is an original constitutional power that vests in the President as Head of State. Section 84 reads, in material part, as follows:

"(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for -

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[12] Section 84(2)(f) of the Constitution must be read together with the Commissions Act, 8 of 1947, which provides for the conferring of certain powers on commissions appointed by the Governor-General [the President] for the purpose of investigating matters of public concern.

(a) - (e) …

(f) appointing commissions of inquiry;

(g) – (k) …"

[62] The power to appoint a commission of inquiry vests in the President alone and only he can exercise that power. Does it not follow, therefore, as the President asserts, that there are no constraints upon the exercise of the s 84(2)(f) power? We demonstrate, in the discussion that follows, that there are constraints to the exercise of this power.

[63] Under our constitutional order, the exercise of all public power is subject to the provisions of the Constitution which is the supreme law. The powers accorded to the President in s 84(2) of the Constitution cannot be viewed in isolation. Account must be paid to the structure and design of the Constitution, the role that different organs of government play and the value system articulated in s 1 of the Constitution and the Bill of Rights. Supremacy of the Constitution, accountability and the rule of law are foundational values that lie at the heart of the Constitution.[13]

[64] In terms of s 83(b) of the Constitution, an obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the supreme law of the Republic. And, s 7(2) of the Bill of Rights binds the

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[13] Section 1 of the Constitution reads as follows:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regulating elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 2 of the Constitution provides:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

President as an organ of state to respect, protect, promote and fulfil the rights contained in the Bill of Rights.

[65] In *President of the Republic of South Africa and others v South African Rugby Football Union and Others*[14] (*SARFU III*), the Constitutional Court observed that –

> *"[148] The constraints upon the President when exercising powers under s 84(2) are clear:... the exercise of the powers does not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers."*

In *SARFU III*, the Court outlined the constitutional framework and manner in which the exercise of public power is regulated:

> *"[132] The exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the Legislature, the Executive and the Judiciary which determines who may exercise power in particular spheres. An overarching Bill of Rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers.*
>
> *[133] Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental*

[14] 2000 (1) SA 1 CC para [148].

rights or accountability. The new Constitution envisages the role and obligations if government quite differently.

[134] The constitutional goal is supported by a range of provisions in the Constitution. First, in the Bill of Rights there is the right of access to information and the right to just administrative action. Both these provisions require national legislation to be enacted by 3 February 2000 to give effect to these rights. Pending the enactment of that legislation, the provisions of the interim Constitution apply. Secondly, all the provisions of the Bill of Rights are binding upon the Executive and all organs of State. The Bill of Rights, therefore, imposes considerable substantive obligations upon the administration. Thirdly, chap 10 of the Constitution, entitled 'Public Administration', sets out the values and principles that must govern public administration and states that these principles apply to administration in every sphere of government, organs of State and public enterprises. This chapter also establishes a Public Service Commission to promote the values of public administration. Fourthly, chap 9 of the Constitution establishes the office of the Public Protector, whose primary task is to investigate and report on conduct in the public administration which is alleged to be improper. Fifthly, the Constitution establishes the office of the Auditor-General whose responsibility is to audit and report on the financial affairs of national and provincial State departments and administrations as well as municipalities."

[66] The principle of legality, being an incident of the rule of law, dictates that those who exercise public power, including the President, must comply with the law.[15] The role of the rule of law as a form of constitutional control on the exercise of public power was given expression in *Affordable Medicines Trust and another v Minister of Health and another*,[16] where Ncgobo CJ stated:

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15 *Masethlha v The President of the Republic of South Africa and Another* 2008 (1) SA 566 CC paras [172] to [173]; *Fedsure Life Assurance and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 CC paras [58] and [59]; *The Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para [20].

16 2006 (3) SA 247 (CC) para [49].

> *"[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundations for the control of public power."*

[67] The constitutional role of the President was aptly described by Kriegler J, in *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) at paragraph [65]:

> *"[65] ... Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of State, the President is obliged to obey each and every one of its commands."*

[68] That the President does not enjoy untrammelled powers is to be inferred from the wording of s 84 of the Constitution. The section is cast in obligatory language. Section 84(1) provides that the President has the powers "*entrusted by the Constitution*" and, in subsection (2), it is provided that the President is "*responsible for ...*" appointing commissions of enquiry. According to the *Oxford Dictionary* one of the meanings of "*entrust*" is "*to give responsibility to*". The ordinary meaning of the word "*responsible*" is "*answerable; accountable; liable to account*". The use of these words implies that the power to appoint a commission of inquiry is a power coupled with a duty.

[69] Counsel for the President submitted that s 84(2)(f), which confers on the President the power to establish a commission of inquiry, does not impose a duty but merely a power which the President may exercise at his discretion.

Reliance was placed on the following dictum in *Daniels v The President of the Republic of South Africa and Another*:[17]

> *"[12] Drawing from Doctors for Life International, this Court, in Von Abo v President of the Republic of South Africa, held that 'obligation' in section 167(4)(e) means a duty specifically imposed on the President to perform specified conduct. Examined in this context, section 84(2)(f) does not impose a duty on the President but a power which may be exercised at his discretion. Accordingly, the President's failure to appoint a Commission of Inquiry does not amount to a failure to fulfil a constitutional obligation."* [Our emphasis]

[70] The reliance on *Daniels* is misplaced. *Daniels* was concerned with the question whether the Constitutional Court – as opposed to the Supreme Court of Appeal and the High Court – had jurisdiction in terms of s 167(4)(e) of the Constitution to decide whether the President had failed to fulfil a constitutional obligation. Section 167(4)(e) provides that only the Constitutional Court can decide whether the President has failed to fulfil a constitutional obligation. The enquiry in *Daniels* was whether the President's power in terms of section 84(2) (f) of the Constitution in an obligation within the meaning of section 167 (4) (e). As appears from the aforesaid *dictum*, it was held in *Daniels* that, that the "obligation" in s 167(4)(e) means a duty that is specifically imposed on the President to perform specified conduct. The President's power to appoint a commission of inquiry in terms of s 84(2)(f) is not a duty specifically imposed upon him by the Constitution and is therefore not justiciable under s 167(4)(e). But such power is justiciable under s 172(2)(a) of the Constitution, which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of any conduct of the President. See *Von Abo v President of the Republic of South Africa*[18] and *President of the Republic of South Africa v South African Rugby Football Union*.[19] *Daniels* is thus not supportive of the President's contention.

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17 2013 (11) BCLR 1241 (CC) at para [12].
18 2009 (5) SA 345 paras [35]-[37].
19 1999 (2) SA 14 (CC) para [25].

[71] To sum up, even though the Constitution vests in the President the power to appoint a commission of inquiry, this power is not an untrammelled one; it must be exercised within the constraints that the Constitution imposes. The President's power to appoint a commission of inquiry will necessarily be curtailed where his ability to conduct himself without constraint brings him into conflict with his obligations under the Constitution.

POWERS OF THE PUBLIC PROTECTOR

[72] We now turn to the President's challenge to the powers of the Public Protector. The Public Protector is one of the institutions created under Chapter 9 of the Constitution to strengthen constitutional democracy.[20] The constitutional mandate and duty of the Public Protector is embodied in s 182 of the Constitution, which reads:

> "(1) *The Public Protector has the power, as regulated by national legislation –*
>
> > (a) *to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
> >
> > (b) *to report on that conduct; and*
> >
> > (c) *to take appropriate remedial action.*
>
> (2) *The Public Protector has the additional powers and functions prescribed by national legislation."*

[20] Section 181(1) of the Constitution.

[73] The Public Protector is required to be independent and subject only to the Constitution and the law, to be impartial and exercise her powers and functions, without fear, favour or prejudice.[21]

[74] In *Economic Freedom Fighters v Speaker, National Assembly and Others*[22] at paragraphs [51] and [56] (*EFF*), the Constitutional Court held that the mandate of the Public Protector is to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice, unlawful enrichment and corruption, to report on its investigations and take appropriate remedial action.[23]

[75] The national legislation that is referred to in s 182(2) is the Public Protector Act, 23 of 1994. This confers additional powers and functions on the Public Protector.[24]

[76] The investigative powers conferred on the Public Protector are of the widest ambit.[25] Section 6(4)(a) of the Act deals with the matters in respect of which the Public Protector is competent to investigate. It provides:

> *"The Public Protector shall, be competent –*
>
> *(a) to investigate, on his or her own initiative or on receipt of a complaint any alleged –*
>
> *(i) maladministration in connection with the affairs of government at any level;*
>
> *(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;*

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21 Section 181(2) of the Constitution.
22 2016 (3) SA 580 (CC).
23 EFF, at paras [51], [56] and [58].
24 See *EFF*, at para [61].
25 See *EFF*, at para [53].

(iii) *improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (insofar 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 at public functions; 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;*

(b) *to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by –*

(i) *mediation, conciliation or negotiation;*

(ii) *advising, where necessary, any complainant regarding appropriate remedies; or*

(iii) *any other means that may be expedient in the circumstances;*

(c) *at a time prior to, during or after an investigation -*

(i) *if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecution; or*

(ii) *if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make*

any other appropriate recommendation he or she deems expedient to the affected public body or authority; and

(d) on his or her own initiative, on receipt of a complaint or on request relating to the operation or administration of the Promotion of Access to Information Act, 2000, endeavour, in his or her sole discretion, to resolve any dispute by -

(i) mediation, conciliation or negotiation;

(ii) advising where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances.

(5) In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged –

(a) maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999);

(b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);

(c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or

(d) act or omission by a person in the employ of an institution or entity contemplated in paragraph (a) which results in unlawful or improper prejudice to any other person."

[77] In a footnote,[26] the Court in *EFF* said the following concerning the powers of the Public Protector set out in s 6 of the Act:

> *"All the powers set out in section 6 accord and are harmoniously co-existent with section 182. Powers or functions have thus either been added or regulated. Mediation, conciliation, negotiation and giving advice to a complainant regarding how best to secure an appropriate remedy; bringing what appears to be an offence to the attention of the prosecuting authority; referring a matter to an appropriate body or authority or making suitable recommendations to remedy the complaint; and resolving any complaint by 'any other means that may be expedient in the circumstances', are all regulatory and additional powers. And they are consistent with and flow from the constitutional power 'to take appropriate remedial action' and provision for 'additional powers and functions."*

[78] In s 7 the Act gives the Public Protector extensive investigatory powers. On receipt of a complaint the Public Protector has the power to conduct a preliminary investigation for the purposes of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.[27] The Public Protector has the power to determine the format and procedure to be followed in conducting any investigation.[28] The Public Protector is entitled to subpoena persons and require them to give evidence.

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26 Footnote 61.

27 Section 7 (1)(a) of the Act:
"*Investigation by Public Protector*
(1) (a) The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6 (4) or (5) of this Act, 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."

28 Section 7 (1)(b) of the Act:
"(b)(i) The format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.
(ii) The Public Protector may direct that any category of persons or all persons whose presence is not desirable, shall not be present at any proceedings pertaining to any investigation or part thereof."

[79] Section 182(1)(c) of the Constitution provides that the "*Public Protector has the power, as regulated by national legislation ... to take appropriate remedial action*".

[80] The phrase "*take appropriate remedial action*" is of importance. It connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate.[29] What remedial action is taken in a particular case depends on the nature of the issues under investigation and the type of findings made.

[81] In *EFF*, the Court stated the following concerning the exercise and legal effect of the remedial power.[30]

> *"[71] ...*
>
> *(a) The primary source of the power to take appropriate remedial action is the supreme law itself, whereas the Public Protector Act is but a secondary source;*
>
> *(b) It is exercisable only against those that she is constitutionally and statutorily empowered to investigate;*
>
> *(c) Implicit in the words 'take action' is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And 'action' presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of a power to take remedial action to other institutions or that it is power that is by its nature of no consequent;*
>
> *(d) She has the power to determine the appropriate remedy and prescribe the manner of its implementation;*[31]

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[29] EFF, para [71]; Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para [69].
[30] EFF para [71].

(e) *'Appropriate' means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case;*

(f) *Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken;*

(g) *Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would be a non-binding recommendation be made or measure be taken;*

(h) *Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is binding or not or what its legal effect is, would be a matter of interpretation aided by context, nature and language."*

[82] As is evident from the aforegoing, the Public Protector's investigative powers are of the widest character. Section 182(1)(c) of the Constitution requires that the Public Protector provide an effective remedy for state misconduct. The Public Protector's role is to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice. In order to fulfil this role, the Public Protector is empowered to take binding remedial action that is capable of remedying the wrong in the particular circumstances. This must include directing or instructing members of the Executive, including the President, to exercise powers entrusted to them under the Constitution where that is required to remedy the harm in question.[32]

[83] It ought to be borne in mind that the Public Protector regularly instructs members of the Executive, including high-ranking government officials, to

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[31] South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others (2015) ZASCA 156 and The Public Protector v Mail & Guardian Limited and Others 2011 (4) SA 420 (SCA) at para [5].

[32] *EFF* para [68].

exercise discretionary powers assigned by law to them. In its answering affidavit the sixth respondent refers to some twenty examples, where the Public Protector, has instructed organs of state to perform functions that are ordinarily left to their discretion.

[84] In *EFF*, the Constitutional Court emphasized that although the Public Protector's power to take appropriate remedial action is wide, it is certainly not unfettered. The remedial action is always open to judicial scrutiny. It is also not "*inflexible in its application, but situational*". What remedial action is appropriate in a particular case depends on the nature of the issues under investigation and the findings made. Remedial action is therefore context-specific.

[85] Adopting a purposive interpretation of the relevant statutory framework, it is plain that the Public Protector must, if she is to properly fulfil her constitutional mandate, have the power, in appropriate circumstances, to direct the President to appoint a commission of inquiry and to direct the manner of its implementation. Any contrary interpretation would be inconsistent with the Constitution as aptly pronounced by the Constitutional Court in *EFF*, and would render the Public Protector's power to take remedial action largely meaningless or ineffectual.

[86] For these reasons, it follows that the primary ground of review, *in example,* that it is unlawful for the Public Protector to instruct the President to appoint a commission of inquiry no matter how compelling the circumstances may be, is without merit and must be rejected.

UNLAWFUL DELEGATION

[87] The President advances the argument that the remedial action constitutes an unlawful delegation of the Public Protector's powers under the Constitution and s 7(3) of the Act to a commission of inquiry.

[88] This argument misconceives the manner in which the Public Protector has exercised her powers. The Public Protector has not delegated her investigatory powers to a commission of inquiry. She did what she is empowered and mandated to do in terms of s 182(1) of the Constitution: she investigated the three complaints of "*State Capture*" laid before her to the extent that this was possible; made *prima facie* findings on the basis of her investigation and took remedial action, directing the President to establish a commission of inquiry to complete the second phase of the investigation.

[89] The language, history and purpose of s 182(c) makes it clear that the Constitution intends that the Public Protector have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation.[33]

[90] An investigation may take many forms and it is for the Public Protector to decide what is appropriate to in each case.[34] Because of the financial and other constraints mentioned in the Report, the Public Protector considered it appropriate that the second phase of the investigation into allegations of "*State Capture*" be undertaken by a commission of inquiry.

[91] There is nothing in either the Public Protector Act or the Ethics Act that prohibits the Public Protector from instructing another organ of state to conduct a further investigation.

[92] The Public Protector Act expressly empowers the Public Protector to obtain assistance in her investigations. Under s 6(4)(c)(ii), the Public Protector may at any time prior to, during or after an investigation "*if he or she deems it advisable to refer any matter which has a bearing on an*

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[33] South African Broadcasting Corporation SOC Limited and Others v Democratic Alliance and Others 2016 (2) SA 522 (SCA) para [31]. This case was referred to with approval in *EFF* at para [68].

[34] The Public Protector v Mail & Guardian Limited and Others 2011 (4) SA 420 (SCA) para [20].

investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority".

[93] Section 7(3) of the Public Protector Act allows the Public Protector, prior to or during an investigation, to (a)(iii) request any person in government or performing a public function to assist her "*with regard to a particular investigation or investigations in general*"; and (b)(i) "*designate any person to conduct an investigation or any part thereof on his or her behalf and to report to him or her and for that purpose such a person shall have such powers that the Public Protector may delegate to him or her*".

[94] The Act envisages that the Public Protector will exercise her powers with the assistance of other relevant entities. It expressly allows her to require other parties to "*make appropriate recommendations*" after she has concluded an investigation.

[95] Consequently, this ground of review cannot be sustained.

INCONSISTENCY WITH THE ETHICS ACT

[96] The President argues that the remedial action is inconsistent with the Ethics Act because a commission of inquiry is unable to investigate a breach of the Ethics Code. This can only be done by the Public Protector. Reliance is place on s 3 of the Ethics Act which provides that the Public Protector is to investigate breaches of the code of the Ethics Code.

[97] This argument is misconceived. Section 3(4) of the Ethics Act provides that "*[W]hen conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act*". The Public Protector has in fact investigated the complaints and performed her duty under the Ethics Act. As empowered to do, she has taken binding remedial action on the basis of her investigation

and the *prima facie* findings of wrongdoing that she has made. The Public Protector has considered appropriate that a commission of inquiry complete the second phase of the investigation, which will also give consideration to the question whether the President has breached the Ethics Code.

[98] It is further argued that the remedial action is inconsistent with the Ethics Act because a commission of inquiry would be unable to take remedial action. This argument is also misconceived. The Public Protector's power to take remedial action stems from the Constitution and not the Ethics Act. Acting in terms of her constitutional power, the Public Protector took binding remedial action on the basis of her investigation and the *prima facie* findings made.

FINDINGS OF IMPROPRIETY OR PREJUDICE

[99] Counsel for the President argued that the remedial action is unlawful because the Public Protector did not make findings of impropriety or prejudice. It was submitted that such a finding is a jurisdictional fact necessary for the Public Protector to take remedial action. It was also argued that there must be an appropriate *nexus* between the finding of impropriety or prejudice and a remedy to correct the improper conduct found to have been committed.

[100] On a proper interpretation of s 182(1) of the Constitution, read together with the relevant provisions of the Public Protector Act, the taking of remedial action by the Public Protector is not contingent upon a finding of impropriety or prejudice. The Public Protector's powers are clearly set out in s 182(1) of the Constitution.

[101] There is nothing in the wording of the section that links the remedial action to a finding of improper conduct. It is clear from the wording of the section that the Public Protector is afforded three separate powers: (1) to investigate conduct that is alleged or suspected to be improper; (2) to report on that conduct, and (3) to take appropriate remedial action.

[102] Section 7(1)(a) of the Act provides as follows:

> *"The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in sections 6(4) or (5) of this Act, 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."*

[103] Section 8(1) of the said Act reads:

> *"The Public Protector may ... in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her."*

[104] Thus, under these provisions, the Public Protector is expressly empowered to make "*findings ... or recommendation[s]*". Read together with the Public Protector's constitutional powers to take binding remedial action, the Public Protector is constitutionally and statutorily empowered to take such action on the basis of preliminary or *prima facie* findings.[35]

[105] The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the Court.[36]

[106] It is common cause that the Report does not reach any firm findings on whether the evidence collected established wrongdoing by the President, the

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[35] As to the meaning of "*prima facie*" evidence see the *dictum* of Stratford JA, in Ex parte The Minister of Justice: In re Rex v VV Jacobson and Levy 1931 AD 466 at 478-479. Also see Gericke v Sack 1978 (1) SA 821 (A) at 827E-F.

[36] The Public Protector v Mail & Guardian Limited and Others 2011 (4) SA 420 (SCA) paras [9] to [11] and [17].

Gupta family and others. But that does not preclude the Public Protector from taking appropriate remedial action.

[107] The Public Protector's observations set out in paragraph 7 of the Report constitute *prima facie* findings that point to serious misconduct or impropriety on the part of the President, the Gupta family and the persons, functionaries and entities referred to in the Report. These observations are supported by a considerable body of corroborative evidence.

[108] What considerably strengthens the *prima facie* case of misconduct and impropriety is the failure of the President to address the complaints when requested by the Public Protector to do so.

[109] As appears from the Report, letters were sent by the Public Protector to the President on 22 March and 22 April 2016 advising him that she had received complaints and a request from one of the complainants, the DA, to conduct an investigation of an alleged breach of the Ethics Code, arising from the President's alleged role in the offering of Ministerial positions by members of the Gupta family. She invited him to comment on the allegations levelled against him. We know that the President received the Public Protector's letter sent in April and we also know that no response was forthcoming from him.

[110] On 13 September 2016, another letter was sent to the President in which he was again afforded an opportunity to comment on allegations that he had allowed his son, Mr Duduzane Zuma, to exercise undue influence in strategic Ministerial appointments and board members of SOEs. We are similarly unaware of any response to this letter from the President.

[111] A notice in terms of s 7(9) of the Public Protector Act was given to the President on 1 October 2016, in which he was again told that if he did not provide the Public Protector with his version there was a possibility of her finding that the allegations against him could be sustained. This was followed by meetings held on 6 and 10 October 2016, at which questions relating to the complaints, were put to the President. Instead of answering those questions,

various technical objections were raised by the President and his legal advisors. These included a request for more time to consider and offer a response.

[112] The *prima facie* evidence which points to serious state misconduct is a sufficient and appropriate basis for the Public Protector to have taken the remedial action.

[113] The President's argument that the remedial action is unlawful because the Public Protector did not make findings of misconduct and impropriety is groundless and must also be rejected.

WHETHER THE REMEDIAL ACTION IS APPROPRIATE

[114] Section 182(1)(c) of the Constitution enjoins the Public Protector to "*take appropriate remedial action*".

[115] Relying on what was stated in *Fose v Minister of Safety & Security*[37] at para [69], the Constitutional Court, in *EFF*,[38] emphasized that the taking of appropriate remedial action connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate. The Public Protector is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint.

[116] The allegations of "*State Capture*" detailed in the Report are extremely serious. They amount to allegations that the President and members of the Executive have exercised their powers, at least on occasion, not in the public interest as they are required to do under the Constitution, but rather at the behest of a private family and to further its financial interests.

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37 1997 (3) SA 786 (CC).
38 Para [68].

[117] The Public Protector has made a number of damning allegations against the President.

[118] Mr Jonas' allegation that he was offered money and a ministerial post by members of the Gupta family in exchange for favours has never been investigated by the President or any other member of the Executive, notwithstanding a legal obligation to do so.

[119] The offer of a ministerial appointment to Mr Jonas was allegedly made some six weeks before the removal and appointment of the Minister of Finance in December 2015. If the Gupta family knew of the pending removal and the appointment of a new Minister of Finance, as is suggested by Mr Jonas, this information could only have been imparted to them by the President. The sharing of such information constitutes a violation of s 2.3(e) of the Executive Ethics Code. It may also have constituted a violation of s 2.3(e), which prohibits a member of the Executive from using information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties. The failure to verify Mr Jonas' allegations may also have infringed the provisions of s 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004.

[120] Ms Mentor, the seventh respondent, was allegedly offered the position of Minister for Public Enterprises in exchange for favours of cancelling the South African Airways route, to India. This offer was made by a member of the Gupta family at the Gupta family residence in Saxonwold, while the President was there. If Ms Mentor's evidence is true, the offer of a Cabinet position could only have been made with the knowledge and approval of the President. Again, the Public Protector notes that there may have been a violation by the President of ss 2.3(c) and 2.3(e) of the Executive Ethics Code. The Public Protector notes that there is no evidence of action taken by anyone to verify Ms Mentor's allegations. If that is true, the provisions of s 195 of the Constitution may not have been complied with. The failure to verify these allegations may have infringed the provisions of s 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004.

[121] The Public Protector notes that a similar duty may possibly have been violated by the President in relation to the allegations made by Mr Themba Maseko, the former CEO of Government Communications and Information Systems. He allegedly received a telephone-call from the President telling him to "*help*" the Gupta family. The Gupta family allegedly instructed him to direct government departments to send advertising to their newspaper, "*The New Age*" in contravention of procurement guidelines. He was also removed from his position and no action to investigate these allegations has been taken.

[122] It reads, in relevant part, -

> *"195(1) Public administration must be governed by the democratic values and principles enshrine in the Constitution, including the following principles:*
>
> *(a) A high standard of professional ethics must be promoted and maintained.*
>
> *..."*

In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal,*[39] the Constitutional Court said the following concerning the duty of a functionary to investigate and, if need be, to correct any unlawfulness in public administration.

> *"[35] Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a*

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[39] 2014 (3) *BCLR* 333 (CC) paras [35] & [36].

> *high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.*
>
> *[36] Public functionaries, as the arms of the State, are further vested with the responsibility, in terms of section 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights. As bearers of this duty and in performing their functions in the public interest public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public section as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration."*

[123] There is evidence that the President and other Cabinet members improperly interfered in the relationship between banks and Gupta-owned companies. The Cabinet appears to have taken the extraordinary and unprecedented step regarding intervention into what appears to be a dispute between a private company co-owned by "*the President's friends and his son*". She observes that this needs to be looked at in relation to a possible conflict of interest between the President as Head of State and his private interests as a friend and father, as envisaged under s 2.3(c) of the Executive Ethics Code, which regulates conflict of interest and s 195 of the Constitution, which requires a high level of professional ethics.

[124] The Public Protector makes the observation that Eskom and other state-owned entities may have acted unlawfully, improperly or corruptly in connection with the award of state contracts or tenders to Gupta-linked companies or persons. There is irrefutable evidence that the board of Eskom in December 2014, consisted predominantly of individuals with direct and

indirect business or personal relations with the President's son, Duduzane Zuma, the Gupta family and their related associates.

[125] The Public Protector conducted a detailed investigation of irregularities, employment of board members, the award of certain contracts by Eskom to Optimum Coal Mine, and the sale of shares held by it to Tegeta. The Report highlights how the Gupta family used its influence to obtain business contracts with Eskom. Eskom awarded Tegeta contracts and made payments to it of over R1.2 billion. Of particular concern to the Public Protector was the pre-payment to Tegeta in the amount of R659 558 079. As mentioned above, the Public Protector found that the sole purpose of the pre-payment was to enable Tegeta to purchase the shares in OCH. This payment amounted to a possible contravention of ss 38 and 51 of the Public Finance Management Act.

[126] The Public Protector is particularly critical of the conduct of Mr Brian Molefe, the CEO of Eskom. As previously mentioned, in the days leading up to the Eskom board resolution to pay the pre-payment to Tegeta, Mr Molefe was placed in the Saxonwold area on numerous occasions and in communication with Gupta family members and she also noted that the President's son, Duduzane Zuma, is a shareholder in Tegeta.

[127] On the basis of the extensive evidence placed before her, the Public Protector makes the observation that Tegeta's conduct and misrepresentations made to the public with regard to the pre-payment and the actual reason for the payment could amount to fraud.

[128] There is thus compelling *prima facie* evidence that the relationship between the President and the Gupta family had evolved into "*State Capture*", underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and directors in boards of SOEs and leveraging these relationships to get preferential treatment in state contracts, access to state-provided business finance and the award of business licences.[40]

[40] Report p 6 para VIII.

[129] The issue of "*State Capture*" is a matter of great public concern. The outcome of her investigation is that there is deeply concerning evidence of serious malfeasance and corruption, but she does not have the resources to complete the investigation. She has reasoned that a commission of inquiry is the appropriate remedial action in light of her findings and constraints.

[130] In order to determine whether the Public Protector's remedial action was lawful and rational, it is necessary to understand what role a commission plays, how it performs that role and why it is better suited at accomplishing certain ends than the Public Protector.

[131] In *Minister of Police & Others v Premier of the Western Cape & Others*,[41] the Constitutional Court confirmed the role of commissions of enquiry as follows:

> *"[45] In addition to advising the Executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent. In the words of Cory J of the Canadian Supreme Court in Phillips v Nova Scotia:*
>
> > *'One of the primary functions of public enquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover the truth ... In times of public question, stress and concern they provide the means for Canadians to be appraised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public."*

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[41] 2014 (1) SA 1 (CC) para [45].

[132] In *Magidiwana and Others v President of the Republic of South Africa and others*,[42] the Constitutional Court emphasized that the rationale for a commission is to serve as a "*truth-finding*" device. The Court stated that:

> *"[15]… It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for the truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those affected need to know the truth, the country at large does, too."*

[133] See also in this regard what was stated in *SARFU III;*[43] and *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa.*[44] In *SARFU III*, the Constitutional Court summarised the role of commissions as being "*to determine facts and to advise the President through the making of recommendations. It is a mechanism whereby he or she can obtain information and advice.*" In AZAPO, the Constitutional Court described the role of commissions as also encompassing a national catharsis and accountability element.

[134] In order to achieve the goals of truth-finding and restoring confidence, it is necessary that those who head the commission be perceived as independent and that the proceedings be conducted in public. Sitting and retired judges are often used as commissioners as they have both institutional and financial independence. Moreover, they have the forensic skills necessary to gather and evaluate large quantities of evidence.

[135] Commissions of enquiry are by their nature open and transparent. Their sittings occur in public. In terms of s 4 of the Commissions Act, 8 of 1947-

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42 [2013] ZACC 7 para [15].
43 SARFU III at paras [146] to [147].
44 1996 (4) SA 672 (SCA).

> "[A]ll the evidence and addresses heard by a commission shall be heard in public: Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion, not necessary or desirable."

[136] Professor Salter, in an article entitled "*The Two Contradictions in Public Enquiries*"[45], explains that a commission of inquiry is "*an exceptionally public process*". It can have the effect of promoting or enabling "*new kinds of public participation in public life and to debate issues in greater detail than is possible in Parliament, within government or in the normal course of media coverage*".

[137] A commission of inquiry has a number of important advantages. A commissioner would be able to subpoena witnesses and documentation. The documents produced at a commission of inquiry are generally publicly available. Commissions are generally provided with adequate financial resources and often appoint specialists in the subject areas under investigation; the reports they produce are publicly available and they are expected to justify their findings and recommendations. The commissioner is permitted to obtain submissions from any interested party.

[138] The matters reserved by the Public Protector for the second phase of the investigation are extensive. In her answering affidavit the Public Protector states that it is not possible for the office of the Public Protector to finalise the investigation due to a lack of resources. The Good Governance and Integrity Unit (GGI) is a unit within the office of the Public Protector which specifically deals with matters involving conduct failure, maladministration and corruption in State affairs. Currently, GGI is composed of eight senior investigators, who are investigating more than 288 complex cases involving conduct failure, maladministration and corruption. On average, each investigator carries

[45] 1990 (12 Dalhousie Law Journal 173).

thirty-six cases for investigation. As a result, it takes an average of between two to four years for an investigator to finalise an investigation of a complaint. There is simply no capacity to conduct an investigation of the scale that would be required.

[139] The Public Protector estimates that she will need a total of sixteen additional investigators, the salary cost of which would amount to R21 152 944. In addition, the Public Protector would require additional funding for specialised expert services such as forensic and audit investigations which she estimates the funding required for this service would amount to R10 million. In all, the total financial resources required to conduct the investigation would amount to R31 152 944.

[140] All of the aforementioned considerations lead ineluctably to the conclusion that a judicial commission of inquiry is by its nature pre-eminently suited to carry out the task of investigating the allegations of *"State Capture"* contained in the Report.

THE DIRECTION THAT THE CHIEF JUSTICE IS TO SELECT THE JUDGE WHO IS TO PRESIDE OVER THE COMMISSION OF INQUIRY

[141] The rationale that underpins the Public Protector's direction that the judge who is to head the commission be appointed by the Chief Justice is clear. The Public Protector foresaw that the credibility of the process may be compromised were the President to select the judge who is to lead the commission. She would undoubtedly have been aware that public perception is important too and is linked to encouraging public faith in the process.

[142] The President has a clear personal interest in the outcome of the commission. The President is implicated in the "*State Capture*" Report and is at the centre of the allegations regarding the Gupta family's involvement in the appointment of Cabinet Ministers. Moreover, his son's business interests are heavily implicated by the allegations regarding the award of contracts by SOEs to Gupta-owned businesses.

[143] Any person chosen by the President to head the commission would therefore not be perceived as independent. There is much force in the argument that the President should recuse himself from appointing a Judge in order to exclude any perception of bias and to protect the integrity of the commission in the eyes of the public.

[144] The President's insistence that he alone select a Judge to head the commission of inquiry is at odds with the legal principle of recusal. The principle of recusal is primarily applicable to Judges who have a conflict of interest in matters over which they preside. Judges recuse themselves from matters in which they are personally conflicted in order to exclude the possibility or the perception of bias affecting the outcome and in order to protect the integrity of the legal process in the eyes of the public.

[145] The principle of recusal is not only concerned with actual bias, but with the existence of a reasonable apprehension of bias. The apprehension of bias principle reflects the fundamental principle of our Constitution that Courts must be independent and impartial. In *President of the Republic of South Africa and Others v South African Rugby Football Union & Others*,[46] it was emphasized that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution.[47]

[146] There is no reason why the recusal principle should not apply to the President. The principle of recusal applies here because the President has an official duty to select a Judge to lead the commission, but he is conflicted, as he himself has been personally implicated, whether directly or indirectly, through his family and associates in allegations of "*State Capture*".

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46 1999 (4) SA 147 (CC) (SARFU II) para [30].

47 See also: Bernert v ABSA Bank Limited 2011 (3) SA 92 (CC) para [28]; South African Commercial Catering & Allied Workers' Union v Irvin & Johnson Limited (Seafood's Division Fish Processing) 2000 (3) SA 705 (CC).

[147] In these exceptional circumstances it was not only appropriate, but necessary for the Public Protector to ensure that someone other than the President select the head of the commission. The Chief Justice was a perfectly sensible and rational choice.

[148] What remains to be considered is the President's contention that it is unlawful for the Chief Justice to appoint the Judge to head the commission of inquiry as the Constitution does not assign this power to the Chief Justice.

[149] There is no constitutional prohibition on the President seeking and adopting the advice of the Chief Justice. The President could of his own accord ask the Chief Justice to select the Judge to head a commission, whether for reasons of availability or, as here, the clear apprehension of bias.

[150] In the circumstances of this case, the Public Protector's direction that the Chief Justice select the Judge who is to preside over the commission of inquiry is both necessary and appropriate in order to render the remedial action taken suitable and effective. The President's contrary argument must be rejected.

THE PRESIDENT'S REMAINING GROUNDS OF REVIEW

[151] The President contends that it is beyond the powers of the Public Protector to give directions as to the manner in which the commission of inquiry is to be implemented. It is the President's prerogative to select the officer to preside over the commission and it is also the President alone who can decide upon the issues that the commission is to investigate, its powers and when the commission is to complete its investigation.

[152] That argument can immediately be disposed of. For the same reason that the Public Protector has the power, in appropriate circumstances, to direct the President to establish a judicial commission of inquiry, so too does she have the power to give directions as to the manner of its implementation.

[153] The Public Protector has directed that the commission of inquiry is to investigate "*all issues using the record of this investigation and the Report as the starting point*".[48]

[154] There can be no question that this aspect of the remedial action is both necessary and appropriate. Since the release of the Report, further allegations of "*State Capture*" have become public in the form of the so-called "*Gupta-leaked emails*". The Public Protector's remedial relief is broad enough to encompass the investigation of these issues. As was emphasized in *EFF*, appropriate remedial action means nothing less than the provision of an effective, suitable, proper or fitting remedy to redress the prejudice, impropriety, unlawful enrichment or corruption that may have occurred in a particular case.[49]

[155] The Public Protector has also directed that the commission of inquiry to have powers of evidence collection, which are no less than those of the Public Protector.[50]

[156] In terms of s 3(1) of the Commissions Act, 8 of 1947, a commission has the powers which the High Court has to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them and to call for the production of books, documents and objects. But a commission does not have the power to enter premises in order to search and seize evidence.[51] It is evident that without such powers the commission of inquiry would be unable to conduct an effective investigation.

[157] Section 7A of the Public Protector Act, confers upon the Public Protector, the power to enter premises in order to search and seize evidence, and the power to direct any person to give evidence or to hand over evidence

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48 Report, para 8.6.
49 EFF, para [71].
50 Report, para 8.7.
51 Section 7A of the Public Protector Act.

under his or her control. It follows, therefore, that the direction in paragraph 8.7 of the remedial action will enable the commission to conduct an effective investigation.

[158] Paragraph 8.8 of the remedial action directs that the commission of inquiry is to complete its task and to present the report with findings and recommendations to the President within 180 days. It also provides that the President shall submit a copy with an indication of his/her intentions regarding the implementation, to Parliament within fourteen days of releasing the report.

[159] The allegations of "*State Capture*" are of national importance. The Public Protector evidently recognised that it was in the public interest that the commission of inquiry commence the second phase of the investigation urgently and expeditiously.

[160] It is also evident that the Public Protector required the President to report to Parliament within fourteen days of releasing the report, so as to ensure Parliamentary scrutiny and accountability in regard to the implementation of the Report. This was a wise and necessary precaution in order to ensure that the recommendations of the commission are implemented and not rendered nugatory. This aspect of the remedial action is necessary, rational and appropriate and the President's arguments to the contrary must be rejected.

[161] Among the reasons advanced by the Public Protector for instructing the President to establish a commission of inquiry are the following: (1) she lacked adequate resources; (2) she had not completed the investigation and her term of office was coming to an end; and (3) she had concerns about the limited qualifications and experience of her successor, Advocate Mkhwebane.

[162] The President contends that these reasons are irrational and could not have constituted a lawful and proper basis for her to take remedial action.

[163] The President asserts that the lack of financial resources, if true, could have been addressed by approaching Parliament for funds. The Public Protector counters this assertion by pointing out that she has never been provided with sufficient financial and other resources, to complete the investigation into "*State Capture*". The investigation has been "*hamstrung*" by the late release of funds and this situation was compounded by the inadequacy of the funds allocated (R1.5 million). In her answering affidavit, the current Public Protector, emphatically states that it is not possible for the office of the Public Protector to finalise the investigation, due to a lack of resources.[52] These allegations are not seriously disputed by the President. The President's assertion must thus be rejected.

[164] The President refers to the typed transcript of the meeting that took place between himself and the Public Protector on 6 October 2016. He points out that during their discussions the Public Protector said the following about her successor, Advocate Mkhwebane:

> *"… The Public Protector that you have appointed only operated as a senior investigator in the Public Protector's office. That is a level junior to her current position and she is acting at a senior position. So she herself will still have to acclimatise to this new position where she is not at their level. She has to re-supervise and quality assure everything that they have to say. I'm just saying if we now bring the new Public Protector per se, that is not even a solution …"*

[165] The President advances the argument that it was irrational for the Public Protector to instruct him to establish a commission of inquiry because the Public Protector's term of office was coming to an end and because she had concerns about her successor's ability.

[166] In our view, the Public Protector's concerns were entirely justified and rational. It was important that the matter be finalised as soon as possible and

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[52] See paras 129 & 130, supra.

there would, inevitably have been a delay, if she passed the matter on to the new Public Protector. Advocate Mkhwebane would have had to start from scratch. She would have had to familiarise herself with a veritable mass of information and documentation. This would have seriously delayed the finalisation of the investigation. Advocate Mkhwabane's qualifications were relevant as to the amount of time it would have taken her to complete the investigation and this was therefore not an irrational consideration.

[167] It is settled law that where decision is challenged on the grounds of rationality, the Court is obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved.[53] The three reasons given by the Public Protector for the taking of the remedial action satisfy that rationality test.

[168] In the premises, the President's review on the basis of the aforesaid three grounds is groundless and falls to be rejected.

PEREMPTION

[169] The third, fourth and fifth respondents submit that the President has perempted his rights of review.

[170] The basis for this submission is that subsequent to the issue of the Report, the President told Parliament, and publicly stated, that he intends to establish a commission to investigate the allegations of "*State Capture*" contained in the Report. In so doing, the President has acquiesced in the Public Protector's findings and the remedial action.

[171] The conduct forming the basis of the peremption argument is this. On 26 May 2017, the Office of the Presidency released a statement, seeking to

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[53] *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para [90]; *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

explain to the media the position of the Presidency in relation to the review application and stated:

> *"The Presidency has noted recent media reports alleging that President Jacob Zuma is opposed to the implementation of the remedial action of the Public Protector as contained in 'The State of Capture' report relating to the establishment of a judicial commission of inquiry. This is incorrect."*
>
> ...
>
> *None of the grounds set above for the President's application for review of the Public Protector's report suggest in any way that he is opposed to the establishment of the commission of inquiry."* [Our Emphasis]

[172] On 15 June 2017, the media reported that the President is consulting his lawyers about setting up a commission of inquiry into allegations of "*State Capture*". The media article appeared on the *Eye Witness News* online website.

[173] On 22 June 2017, the President answered questions in the National Assembly. In response to a question from Khubisa MP about *"State Capture"* and the recent release of emails from firms operated by the Gupta family, the President said:

> *"We have taken a decision to establish the judicial commission of inquiry and the emails will be part of that. So, we are not leaving them unattended to, then we will be able to speak about the emails with a serious scientific investigation which should tell us exactly what happened and to what extent are they disrupting the life of South Africans. So, in a sense those are covered in the enquiry that is going to be made and we are moving as fast as possible to establish the commission."*

[174] Later, Singh MP asked a question that referred again to the emails and asked the President how he *"... will ensure that radical economic transformation remains untainted by the hands of the state capture elite"*. The President responded:

"Former Public Protector investigated and that means something has been done. Some of the aspect of the report had been taken to review, so there has never been quietness and it can't be correct to say whilst Rome is burning then people are just sitting.

And then the new Public Protector is also attending to that report and secondly, you said Parliament itself is discussing the matter, so this important institution is also doing something. So, it is not as if Rome is burning, people are just sitting <u>and the President has taken a decision to establish the judicial commission of inquiry and is about to announce when it will start</u>. So, it is not as if the Rome is burning nothing is happening. Many things are happening and we are therefore taking the report seriously and indeed at the right time when the institutions have investigated, we will certainly come to know about who is burning the Rome.

Now, further interesting things is that if because there is capture kind of situation, how many institutions should investigate and which will be the one that will produce the good results. The Public Protector is doing something, right? There is going to be a judicial commission of inquiry but there is also going to be Parliament. I am interested to know which of all of these will really produce the report that we will all say this is the report with the kind of findings and recommendations that have instruments to implement." [Our Emphasis]

[175] In his replying affidavit, the President disputes that he has perempted his review rights. He states:

"Firstly, for me to have perempted my right to challenge the impugned remedial action, such peremption must be shown that I have acquiesced unequivocally. The evidence shows differently. I consistently made it plain that the implementation of the impugned remedial action would be unconstitutional for reasons already advanced. It is therefore factually wrong that I have acquiesced unequivocally.

Secondly, all my statements referred to by the respondents that I have stated that I will appoint a commission of inquiry did not say that I would do so in furtherance of the impugned remedial action."

[176] The legal principles pertaining to peremption are well established. In *Dabner v SA Railways & Harbours*,[54] Innes J stated:

> *"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven."*

[177] In *Gentiruco AG v Firestone SA (Pty) Limited*,[55] Trollip JA said:

> *"The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order."*

[178] What emerges from these cases is that the common-law doctrine of peremption applies to judgments or orders of Court. Peremption, like waiver, is not lightly presumed, and the *onus* is upon the party alleging peremption to establish conduct that clearly and unconditionally demonstrates acquiescence in and a decision to abide by the judgment or order.

[179] In his heads of argument, counsel for the President submits that: *"A statement by the President that 'they have decided to appoint a commission of inquiry, is not a judgment, neither can it be deemed to be a civil judgment to qualify as a peremption".* As we understand the argument, what is in fact

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[54] 1920 AD 583 at 594.

[55] 1972 (1) SA 589 (A) at 600A-B.

contended for is that the remedial action is not to be equated with a judgment or order of a Court and, therefore, the doctrine of peremption is not applicable.

[180] We do not agree with that submission. The Public Protector's remedial action has all the attributes of a judgment. It is binding and has the force of law and its legal consequences must be complied with or acted upon. Compliance therewith is not optional and it has binding effect until properly set aside by a Court of law.[56]

[181] The President's assertion that his utterances in Parliament and in the media did not amount to an acceptance or acquiescence in the remedial action cannot be accepted. On a proper reading of the statement released by the Office of the Presidency on 26 May 2017, it is plainly evident that the President was not opposed to the implementation of the remedial action contained in the Public Protector's "*State of Capture*" Report and that reports to the contrary were incorrect. This was a clear intimation that the President accepted the remedial action contained in the Report, relating to the establishment of a judicial commission of inquiry.

[182] As previously mentioned, on 22 June 2017, the President responded in Parliament to questions relating to the issue of "*State Capture*" and during that response indicated that a decision to appoint a judicial commission of inquiry had been made. The President stated:

> *"We have taken a decision to establish the judicial commission of inquiry and the emails will be part of that."* [Our Emphasis]

Significantly, the President does not say in that statement that a decision has been taken to establish *"a judicial commission of inquiry"* but rather that a decision has been taken to establish *"the judicial commission of inquiry"*. The

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[56] Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) paras [73]–[75].

use of the word *"the"* is a clear reference to the commission of inquiry contained in the remedial action of the Public Protector.

[183] That this was the President's intention is also evident from the following statement made in response to the question posed by Singh MP:-

> *"... and the President has taken a decision to establish the judicial commission of inquiry and is about to announce when it will start."*

Here, too, the use of the word *"the"* can only be a reference to the commission of inquiry proposed by the Public Protector in the remedial action.

[184] The statements made by the President in the National Assembly are not ordinary statements but were made in Parliament before the legislative body to whom the President is accountable. They were made by the President in his position as Head of State. Section 92(2) of the Constitution provides that Members of the Cabinet - which includes the President - are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

[185] By his utterances in Parliament, and in the aforementioned press statement issued by the Presidency, the President has indicated in the clearest possible terms that he accepts the necessity of establishing the judicial commission of inquiry referred to in the remedial action contained in the Public Protector's State of Capture Report. This undoubtedly amounts to a peremption of the President's right to review the remedial action.

CONCLUSION

[186] For these reasons, none of the grounds of review has any merit, and the President is not entitled to the relief that he seeks. The remedial action taken by the Public Protector is lawful, appropriate, reasonable and rational.

In the premises the President's application cannot succeed and must be dismissed with costs.

COSTS OF THE APPLICATION

[187] There could therefore have been no doubt in the President's mind when initiating this application, seeking as he did, to challenge the Public Protector's power to constrain his power through remedial action, that his own powers were not untrammelled in the face of such remedial action. The overarching basis for the remedial action challenged by the President is that he is personally implicated in the malfeasance and improper conduct investigated by the Public Protector. The personal conflict of the President presents an insurmountable obstacle for the President and lends credence to the conception of the remedial action by the Public Protector. Additionally, the statement by the President to the media and in Parliament, expressing an unequivocal intention to establish a commission of enquiry and thereby perempting any justifiable basis to challenge the remedial action, points to the reckless misconception underpinning the President's application seeking to review and set aside the remedial action. The review application was a clear non-starter and the President was seriously reckless in pursuing it as he has done. His conduct falls far short of the high standard expressed in section 195 of the Constitution.

[188] In *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng*, the Supreme Court of Appeal made clear that Courts would consider holding public officials personally liable for costs where they *"acted in flagrant disregard of constitutional norms"*, in a *"high-handed manner"*, and *"played the victim"* in litigation. The Supreme Court of Appeal was cognizant of the fact that in such situations not granting a personal costs order would ultimately expose taxpayers to foot the bill for the actions of wayward officials. The Supreme Court of Appeal's view was that a personal costs order *"might have a sobering effect on truant office bearers."*[57]

[57] 2013 (5) SA 24 (SCA) para 54.

[189] Taking all the circumstances sketched and the considerations made we are of the view that the President was ill advised and reckless in launching the challenge against the remedial action of the Public Protector. He is aware that since allegations of "*State Capture*" initially surfaced and more so, after the Public Protector's report the matter remains in the public domain and requires decisive action and resolution. His Court challenge has resulted in further delaying the resolution of the "*State Capture*" allegations.

[190] We make the point that the Public Protector's report has uncovered worrying levels of malfeasance and corruption in the form of utter disregard of good corporate governance principles, some bordering on fraud, in Government departments and SOEs. This invariably involves large amounts of tax payer funds and state resources. The *"insidious destruction"* mentioned by the Supreme Court of Appeal in *Mail & Guardian*[58] is a real prospect if this is not addressed decisively. In our view the President had no justifiable basis to simply ignore the impact of this corruption on the South African public. His conduct also falls far short of the expectation on him as Head of State to support institutions of democracy such as the Public Protector. The remedial action of the Public Protector presented him with an opportunity to confront and address the problem. Our view is that the President had no justifiable basis to launch the review application in the circumstances. In doing so he was reckless and acted unreasonable. Our view is that this is a proper case where a personal costs order is justified and should be granted.

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[58] *Supra.*

ORDER

[191] In the premises, the following order is made:

1. The application is dismissed.

2. It is declared that the remedial action in the Public Protector's Report, No 6 of 2016/17 dated 14 October 2016 and entitled "*State of Capture*" (the Report), is binding.

3. The President is directed to appoint a commission of inquiry within 30 days, headed by a Judge solely selected by the Chief Justice who shall provide one name to the President.

4. The President shall take all steps, do all things and sign all documents which are necessary to give effect to the remedial action. Without limiting the generality of the aforegoing, the President shall ensure that –

4.1 the Judge who is to head the commission of inquiry is given the power to appoint his/her own staff and to investigate all the issues using the record of the Public Protector's investigation and the State of Capture Report, No 6 of 2016/17 as a starting point;

4.2 the commission of inquiry is to be given powers of evidence collection that are no less than that of the Public Protector;

4.3 the commission of inquiry is to complete its task and present its report with findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his/her intentions

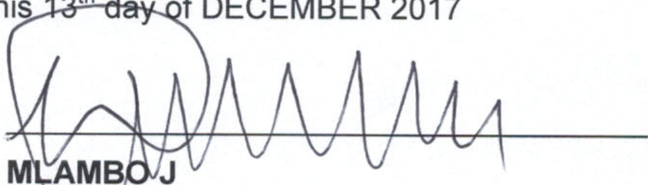
regarding the implementation to Parliament within 14 days of releasing the Report;

4.4 the commission of inquiry is adequately resourced by the National Treasury.

5. The Public Protector shall deliver a copy of this order to the President and to the Chief Justice within five days of the grant of this order.

6. The costs of this application are to be paid by the President, in his personal capacity, on the scale as between attorney and client, including the costs consequent upon the employment of two counsel. The costs are to include the costs of the second respondent's conditional counter-application.

DATED at PRETORIA on this 13th day of DECEMBER 2017

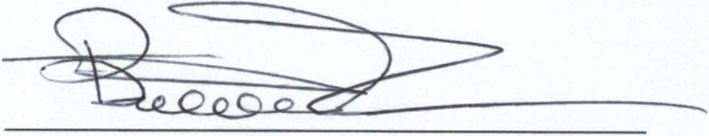


MLAMBO J

JUDGE PRESIDENT OF THE HIGH COURT,

GAUTENG DIVISION.

I agree:

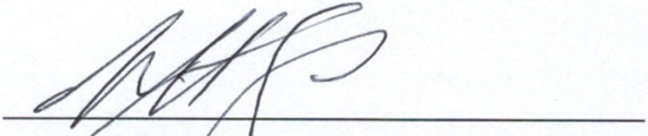


BORUCHOWITZ J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION.

I agree:



HUGHES J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION.

DATE OF HEARING : 24 and 25 October 2017

DATE OF JUDGMENT : 13 December 2017

APPEARANCES:

ON BEHALF OF THE

APPLICANT : I A M SEMENYA SC

A L PLATT SC

M A DEWERANCE

INSTRUCTED BY	:	THE STATE ATTORNEY, PRETORIA Ref: I CHOWE/7313/2016/Z75
ON BEHALF OF THE 1ST & 2ND RESPONDENTS	:	V MALEKA SC N H MAENETJE SC N C FERREIRA
INSTRUCTED BY	:	ADAMS & ADAMS Ref: ANM/7N/TWS/LT3436
ON BEHALF OF THE THIRD RESPONDENT	:	T NGCUKAITOBI K PREMHID
INSTRUCTED BY	:	IAN LEVITT ATTORNEYS
ON BEHALF OF THE 3RD & 4TH RESPONDENTS	:	D MPOFU SC M QOFA
INSTRUCTED BY	:	MABUZA ATTORNEYS Ref: ET MABUZA
ON BEHALF OF THE SIXTH RESPONDENT	:	S BUDLENDER M BISHOP YANELA NTLOKO
INSTRUCTED BY	:	MINDE SCHAPIRO & SMITH INC Ref: ELZANNE
ON BEHALF OF THE SEVENTH RESPONDENT	:	GOTZ N LEWIS Z MAKGALAMELA

INSTRUCTED BY	:	WEBBER WENTZEL Ref: T PHALA 3013932
ON BEHALF OF THE 8TH RESPONDENT	:	MM LE ROUX O MOTLHASEDI
INSTRUCTED BY	:	WERKSMANS Ref: H JACOBS