IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 11311/2018

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

20-5-19 [signature]
DATE SIGNATURE

In the matter between:

DEMOCRATIC ALLIANCE **APPLICANT**

VS

THE PUBLIC PROTECTOR **RESPONDENT**

CASE NO: 13394/2018

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION — APPLICANT

Vs

THE PUBLIC PROTECTOR — RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The Democratic Alliance (the DA) and the Council for the Advancement of the South African Constitution (CASAC) launched applications based on the same facts. These applications, which were heard simultaneously, related to the investigating and reporting by the Public Protector (the PP) on the Free State's Department of Agriculture Vrede Integrated Dairy Project ("the Project") and sought to review and set aside the PP's report, because it was alleged that she acted unlawfully and in violation of her constitutional mandate in terms of section 182(1) of the Constitution and section 6 and 7 of the Public Protector's Act 23 of 1994, ("the PP Act").

[2] On 8 February 2018, the PP released Report, No 31 of 20187/2018 ("the Report") titled "*Allegations of maladministration against the Free State Department of Agriculture – Vrede Integrated Dairy Project*". The Report was the culmination of nearly four years of investigation by the incumbent PP and her predecessor, Adv Madonsela, into allegations of widespread corruption, maladministration and impropriety in respect of the Project.

[3] Both the DA and CASAC in essence sought an order that the PP's report be reviewed and set aside. Both also sought an order that the PP should pay the costs of this application in her personal alternative official capacity.

[4] In ***Absa Bank Limited & Others v Public Protector and others***[1] a personal costs order was granted against the PP the matter went on appeal to the Constitutional Court (CC) and the CC has not yet given judgment in that matter. This judgment was initially held back pending the judgment of the CC, but seeing the controversy surrounding the Project, and in order to prevent further delay in the matter, this Court deemed it in the interest of justice to deliver judgment on the merits and to postpone the judgment relating to costs until the CC has handed down its judgment in the ***Absa Bank*** matter.

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[1] [2018] 2 All SA 1 GP (Absa Bank)

[5] Although the application for review was initially based on the grounds for review provided for in the Promotion for Administrative Justice Act 3 of 2000 (PAJA), following the Supreme Court of Appeal's (SCA) decision in ***Minister of Home Affairs and Another v Public Protector of the Republic of South Africa***[2], the Applicants in the end only relied on the pleaded grounds of legality as the basis for the review.

[6] Initially the PP filed a notice to abide, but in due course filed answering affidavits, which contained a full blown attack on the merits of the applications. This aspect will be dealt with more fully in the judgment on costs.

FACTUAL BACKGROUND

[7] During 2012, the Free State Department of Agriculture (the "Department") launched a provincial policy intervention known as Mohama Mobung, which was aimed at revitalizing the Free State agricultural sector through investment in various initiatives. The Project was identified as a flagship project to realise such intervention. It was intended to uplift the Vrede community, through sustainable job creation opportunities.

[8] During April 2012 Estina (Pty) Ltd ("Estina") submitted a business proposal for the management of the Project at the Krynaauwslust Trust

[2] 2018 (3) SA 380 (SCA) para 37.

farm. It also represented, falsely, it would turn out later, that it was in partnership with an Indian company, Paras, which allegedly had the necessary technical expertise. On 5 July 2012, the Department submitted a request for approval to accept Estina's business proposal and to enter into an agreement with Estina, for the establishment and management of the Project.

[9] On 31 May 2013, the amaBhungane Centre for Investigative Journalism (amaBhungane) published their first article about the Project, this article was titled "Gupta farm cash cows in Free State". On 7 June 2013, another article titled "Gupta dairy project milks Free State coffers" was published.

[10] During October 2013 National Treasury (Treasury) investigated the Department's contracts with Estina. Some of the findings were disclosed by amaBhungane on 7 February 2014, after a leaked transcript of an interview between investigators and the Department's CFO, Ms Dipatle Dlamine (Ms Dlamini), was obtained. This report by Treasury was not made public.

[11] According to the amaBhungane report the following occurred:

(i) no supply chain procedures were followed;

(ii) no due diligence procedures were performed

(iii) grants were paid directly into Estina's bank account, without any evidence of how they were spent;

(iv) a feasibility study was only performed, after the contract was signed;

(v) the contract, apparently drawn up by Premier Ace Magashule's ("the Premier") legal advisors committed the Department to paying R342 million, while Estina would only be billed for the balance "if necessary";

(vi) small-scale farmers, who were supposed to be the beneficiaries of the Project, had only been identified at a much later stage, and could not explain how they had been chosen; and

(vii) approval for the Project had been rushed through, despite there being no budget, no feasibility study and no urgency.

[12] During 2017, hundreds of thousands of emails revealed the Gupta family's seemingly corrupt business dealings with the state and politicians ("the GuptaLeaks"). These emails were reported on at length by investigative journalists. They corroborated the earlier 2013 reports that the Project was tainted, not only by serious irregularities, but also possibly by corruption.

[13] During mid-2017, more than six months before the PP released her Report, three further investigative reports were published in the media. These reports, based on the emails in the GuptaLeaks, provided further evidence of alleged irregularities and possible corruption linked to the Project. The reports sought to illustrate that the Gupta family exercised control over the Project and that millions of taxpayers' monies were pilfered from the public purse. The reports alleged that senior provincial

officials, including the HOD, Mr Thabethe, (Mr Thabethe), MEC Mosebenzi Zwane (Mr Zwane) and the Premier may have been complicit in the wrongdoing.

[14] Treasury commissioned an investigation into the Department's contracts with Estina. The report was dated January 2013, but it must be a typographical error, as the report itself stated that Treasury was requested on 12 June 2013 to investigate the possibility of procurement irregularities, relating to the Project. It would seem then that the correct date of the report must be January 2014.

[15] In this report from Treasury the following findings were made, regarding the conduct of specific officials within the Department:

1.1 that Mr Thabethe was involved at "*every stage of the identification and appointment of Estina/Paras*". He signed the 99-year rent-free lease in Estina's favour and the agreement with Estina.

1.2 the Department made payment to Estina, without any form of oversight, and without verifying how funds were spent.

1.3 despite the Project having been justified, on the basis that the beneficiaries would benefit from it, the Department paid R114 million to Estina, before even identifying any beneficiaries.

1.4 the Premier and Mr Zwane were identified as being involved in various suspicious aspects of the Project. In particular, it was

stated they enabled, encouraged and authorised Mr Thabethe to execute the implementation of the Project.

1.5 both the Premier and Mr Zwane were involved in concluding the 99-year rent-free lease agreement with Estina.

1.6 the Premier signed a delegation of authority to Mr Zwane, to conclude a rental agreement between the Department and the municipality. Mr Zwane then delegated further authority to Mr Thabethe.

1.7 the Provincial Executive Committee, which the Premier headed, then approved Mr Thabethe's request to implement the Project, and supported the sourcing of additional funding of R84 million from the province.

1.8 mr Zwane, as MEC for Agriculture, personally contacted the MEC for Finance to request an urgent, expedited R30 million payment to Estina.

[16] In light of these findings, the Treasury report recommended that disciplinary action be taken against:

1. mr Thabethe for concluding an unlawful agreement on behalf of the Department, and for committing funds to the Project on the Department's behalf, when they were not available; and
2. the Chief Financial Officer, Ms Dhlamini, for failing to put in place proper financial oversight and controls.

COMPLAINTS

[17] Between 2013 and 2016, a Member representing the DA in the Free State provincial legislature, Dr Roy Jankielsohn MP (the "Complainant") lodged a series of complaints with the PP concerning the Project:

i. On 12 September 2013, the Complainant alleged maladministration in respect of the agreement between the Free State Province, Estina and its business partner.

ii On 28 March 2014, the Complainant submitted a further complaint, alleging that the government investment of R342 million was subject to hugely inflated costs, that compliance with environmental requirements was imperilled, and that between 40 and 100 cows had died and their carcases dumped in a stream running into the Vrede water catchment area.

iii On 10 May 2016 the Complainant submitted yet another complaint, including further allegations that—

a. Estina's appointment fell afoul of state procurement processes;

b. Estina misrepresented itself as being in partnership with Paras, a large Indian company, which could not have been overlooked by those who approved the project including the Premier;

c. Estina being both partner and implementing agent on the Project was highly irregular;

d. It appeared that Estina received R183 million for the construction of infrastructure and purchasing of cattle at inflated costs;

e. Estina was permitted to abscond from the Project without any accountability, once the FDC took over its management role;

f. The intended beneficiaries of the Project had been side-lined;

g. Serious irregularities revealed by the Treasury investigation against the HOD and Chief Financial Officer had been ignored by the provincial government and the Premier; and

h. The Department continued to make monthly payments even after FDC had taken over the Project.

THE POWERS AND DUTIES OF THE PP

[18] Before analysing the merits of the applications, it is important to consider the powers and duties of the PP, and her pivotal role in our democracy.

[19] The importance of the institution of the PP and her constitutional mandate was described in ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v***

Speaker of the National Assembly and Others[3] where it was stated that the PP is *"one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance*[4]*"*. It is a constitutional mechanism that "*gives the poor and marginalised a voice, and teeth [to] bite corruption and abuse excruciatingly*".[5]

[20] That the PP plays a special and indispensable role in South Africa's constitutional democracy has been illustrated in various instances and is thus trite. The office of the PP was created under section 181[6] of the Constitution to "*strengthen constitutional democracy in the Republic*". To achieve this objective, section 181(2) of the Constitution requires the PP to be independent and subject only to the Constitution and the law, and to be impartial. The PP is charged with rooting out improper conduct in Government for the public benefit. The institution of the PP was ultimately created to serve the people, and to protect

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[3] 2016(3) SA 580 (CC) (Nkandla)

[4] Nkandla para 52

5 Nkandla, para 52

[6] Section **181** of the Constitution of the Republic of South Africa, 1996, deals with the **Establishment and governing principles**

(1) The following state institutions strengthen constitutional democracy in the Republic:

(a) The Public Protector.

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

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

their interests against those in power, who might be tempted to abuse it for nefarious purposes.

[21] To perform her constitutional mandate and functions, the PP is vested with broad investigative and remedial powers. Under section 182(1) of the Constitution, the PP has the power –

> *"(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".*

[22] Sections 181(2) and (3) of the Constitution provide that the chapter nine institutions must exercise their powers and perform their functions without fear, favour or prejudice and oblige all organs of state to assist these institutions "*to ensure the independence, impartiality, dignity and effectiveness of these institutions*". The effect of these provisions is to provide a constitutional guarantee that these institutions will exercise their powers independently, impartially and effectively. Section 182 of the Constitution states that the powers of the PP are regulated by national legislation. The national legislation envisaged in this section, culminated in the promulgation of the PP Act.

[23] The PP is entitled to the assistance of other organs of state, where this may be required under section 181(3) of the Constitution. Other organs of state, through legislative and other measures, must assist and protect the PP to ensure the independence, impartiality, dignity and effectiveness of the institution.

[24] Section 6 of the PP Act, describes the matters that fall within the jurisdiction of the PP. It also describes how the PP assumes that jurisdiction, when matters are reported to her office or otherwise come to her attention.

[25] Under sections 6(4)(a)[7] and 6(5)(a)[8], the PP is competent to investigate, on her own initiative, or on receipt of a complaint, any alleged maladministration, abuse or unjustifiable exercise of power, improper or dishonest conduct, corruption or improper or unlawful

[7] **6 Reporting matters to and additional powers of Public Protector**

(4) The Public Protector shall, be competent-
a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged-
i) maladministration in connection with the affairs of government at any level;
(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to
public money;
[Subpara. (iii) substituted by s. 36 (1) of Act 12 of 2004.]
(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any
level or of a person performing a public function; or
(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;

[8] (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); [Para. (a) substituted by s. 7 of Act 22 of 2003 (wef 7 October 2003).]

enrichment in government affairs and the public administration or in state-owned or public entities.

[26] The PP Act, defines and expressly circumscribes the instances where the PP may refuse, or must refuse, to investigate a complaint reported to her office. Section 6 provides for only four such instances:

i. It provides in section 6(3) that:

"(3) The Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is –

(a) an officer or employee in the service of the State or is a person to whom the provisions of the Public Service Act, 1994 (Proclamation 103 of 1994), are applicable and has, in connection with such matter, not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act, 1994; or

(b) prejudiced by conduct referred to in subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter."

ii Under section 6(4)(c), the PP may at any time (prior to, during or after an investigation) *"refer any matter which has a bearing on an investigation to the appropriate public body or authority"*. The PP may, therefore, refer matters to another, more appropriate public body or authority, instead of investigating the matter herself.

iii Under section 6(6), the PP is prohibited from investigating "*the performance of judicial functions by any court of law*".

iv. Section 6(9) restricts the PP's power to entertain matters reported more than two years after the occurrence of the incident or matter concerned.

[27] Sections 7[9] of the PP Act describes the investigative powers of the PP. Scrutiny of these sections reveals the PP's extensive investigative

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[9] **7 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.

(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.

[Sub-s. (1) substituted by s. 9 *(a)* of Act 113 of 1998 (wef 27 November 1998).]

(2) Notwithstanding anything to the contrary contained in any law no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, the Deputy Public Protector or a person contemplated in subsection (3) *(b)* during an investigation, unless the Public Protector determines otherwise.

[Sub-s. (2) substituted by s. 8 *(a)* of Act 22 of 2003 (wef 7 October 2003).]

(3) *(a)* The Public Protector may, at any time prior to or during an investigation, request any person-

(i) at any level of government, subject to any law governing the terms and conditions of employment of such person;

(ii) performing a public function, subject to any law governing the terms and conditions of the appointment of such person; or

(iii) otherwise subject to the jurisdiction of the Public Protector,

to assist him or her, under his or her supervision and control, in the performance of his or her functions with regard to a particular investigation or investigations in general.

(b)(i) The Public Protector may 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 as the Public Protector may delegate to him or her.

(ii) The provisions of section 9 and of the regulations and instructions issued by the Treasury under section 76 of the Public Finance Management Act, 1999 (Act 1 of 1999), in respect of Commissions of Inquiry, shall apply with the necessary changes in respect of that person.

[Sub-para. (ii) substituted by s. 8 *(b)* of Act 22 of 2003 (wef 7 October 2003).]

[Para. *(b)* substituted by s. 9 *(b)* of Act 113 of 1998 (wef 27 November 1998).]

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

(b) The Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated.

(5) A direction referred to in subsection (4) *(a)* shall be by way of a subpoena containing particulars of the matter in connection with which the person subpoenaed is required to appear before the Public Protector and shall be signed by the Public Protector and served on the person subpoenaed either by a registered letter sent through the post or by delivery by a person authorised thereto by the Public Protector.

powers, which includes the power to subpoena any person to give evidence on affidavit or in person, to produce documents, or to appear as a witness.

[28] The PP is also vested with the power to enter, or authorise another person to enter any building or premises for purposes of an investigation and to search and seize anything on those premises that in her opinion has a bearing on the investigation, subject to obtaining a warrant as set out in section 7A[10].

[29] Under section 7(3) of the PP Act, she may call upon any person, at any level of government or performing any public function, to assist her in the performance of her functions with regard to a particular investigation. This includes the power to designate any person to conduct an investigation and to report to her. To emphasise both the importance and power of the PP, section 11 of the PP Act states that contempt of the PP is an offence.[11]

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(6) The Public Protector may require any person appearing as a witness before him or her under subsection (4) to give evidence on oath or after having made an affirmation.

[10] **7A Entering upon premises by the Public Protector**
(1) The Public Protector shall be competent to enter, or authorise another person to enter, any building or premises and there to make such investigation or inquiry as he or she may deem necessary, and to seize anything on those premises which in his or her opinion has a bearing on the investigation.
(2) The premises referred to in subsection (1) may only be entered by virtue of a warrant issued by a magistrate or a judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.
(3) ...

[11] **11 Offences and penalties**
(1) Any person who contravenes the provisions of sections 3 (14), 7 (2) and 9 of this Act, or interferes with the functioning of the office of the Public Protector as contemplated in section 181 (4) of the Constitution, shall be guilty of an offence.
[Subs.
(1) substituted by s. 12 (a) of Act 113 of 1998 (wef 27 November 1998).]
(2) Any person who fails to disclose an interest contemplated in section 3 (14), shall be guilty of an offence.
(3) Any person who, without just cause, refuses or fails to comply with a direction or request under section 7 (4) or refuses to answer any

[30] The PP must, like any public functionary, exercise her powers and functions lawfully in compliance with her constitutional and statutory mandate and duties. The proper and effective performance of the functions of the PP is of particular importance, given her constitutional mandate and the extraordinary powers that are vested in her office. When the PP fails to discharge her mandate and duties, the strength of South Africa's constitutional democracy is inevitably compromised and the public is left without the assistance of their constitutionally created guardian. It means that a vital constitutional check against abuses of public power is lost.

[31] It is for these reasons that the Court stated in ***Absa Bank*** that *"The Public Protector is subject to a higher duty and higher standards than ordinary administrators".*[12] Thus the failure by the PP to perform her functions properly and effectively is, therefore, a matter of grave constitutional importance.

[32] In ***Public Protector vs Mail & Guardian***,[13] the SCA specifically addressed the nature of the PP's duty to investigate complaints or suspicions of improper conduct and abuses of power in the public administration. The SCA held that, when the PP investigates a matter,

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question put to him or her under that section or gives to such question an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of section 7 (6), shall be guilty of an offence.
[Subs.
(3) substituted by s. 12 (b) of Act 113 of 1998 (wef 27 November 1998).]
(4) Any person convicted of an offence in terms of this Act shall be liable to a fine not exceeding R40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

[12] Absa Bank par 98

[13] 2011 (4) SA 420 (SCA) (Mail and Guardian).

she is obliged to be proactive, impartial and determined in her investigations and to retain "*an open and enquiring mind*".

[33] The Court described the benchmark of 'an open and enquiring mind' as follows:

" ... *That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that unduly believes. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit ...*"[14]

[34] It was argued, and correctly so, that this means that, when the PP conducts an investigation she is not entitled to be passive, supine and static in her approach. Nor can she fail to address complaints or allegations without good cause, or narrow the scope of investigations to the point that they do not meaningfully address the allegations and prima facie evidence of misconduct and impropriety in public affairs.

[35] In ***Mail and Guardian*** the Court further described the importance of public confidence in the PP's duty to be proactive in her investigations. The following was said in this regard:

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[14] Mail and Guardian par 22

"The Public Protector must not only discover the truth but must also inspire confidence that the truth has been discovered. It is no less important for the public to be assured that there has been no malfeasance or impropriety in public life, if there has not been, as it is for malfeasance and impropriety to be exposed where it exists. There is no justification for saying to the public that it must simply accept that there has not been conduct of that kind only because evidence has not been advanced that proves the contrary. Before the Public Protector assures the public that there has not been such conduct he or she must be sure that it has not occurred. And if corroboration is required before he or she can be sure then corroboration must necessarily be found. The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth."[15]

[36] It follows that when the PP receives complaints of impropriety or abuse of public office, she is obliged to use the powers vested in her. This will include her power to call for assistance from organs of state, or to refer matters to other appropriate authorities, to ensure that the complaint is properly and effectively addressed. Where an investigation is required, it should be conducted as comprehensively as possible, in order to inspire public confidence that the truth has been discovered, that her reports are accurate, meaningful and reliable, and that the remedial action that she takes is appropriate. That means, as the CC held in ***Nkandla***, *"nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a*

[15] Mail and Guardian, para 19

particular case".[16] Thus, if the remedial action does not meet these criteria, it will not be appropriate.

[37] The purpose of the PP's office is, in general terms, "*to ensure that there is an effective public service which maintains a high standard of professional ethics, and that government officials carry out their tasks effectively, fairly and without corruption or prejudice.*"[17]

[38] The failure to have regard to relevant facts and considerations can result in the irrationality of a decision. In ***Democratic Alliance v President of South Africa***[18], the CC devised a three-part test to determine when the ignoring of facts or considerations leads to irrationality:

1. whether the factors ignored are relevant;

2. whether the failure to consider the material concerned is rationally related to the purpose for which the power was conferred; and

3. whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.

[39] In ***Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd*** it was explained that, "*in order to be rational, the decision must*

[16] Nkandla paras *68 and 71(e).*

[17] South African Broadcasting Corporation Soc Ltd and others v Democratic Alliance & Others 2016(2) SA 522 (SCA) at para 26 (SABC)

[18] Democratic Alliance v President of South Africa, 2013(1) SA 249 para 39; See also Scalabrini Centre, Cape Town and Others v Minister of Home Affairs 2018 (4) SA 125 (SCA) para 51.

be 'based on accurate findings of fact and a correct application of the law".[19]

[40] It is against this legal framework that the PP's report and proposed remedial actions must be considered, to determine whether the requirements of legality have been met.

THE PUBLIC PROTECTOR'S REPORT

[41] On 8 February 2018, the PP published her Report. It is of importance to note that a provisional report was done by the PP's predecessor, Adv Madonsela, as these two reports have to be compared, within the factual matrix of what occurred in the implementation and execution of the Project. A comparison of the findings, conclusions and proposed remedial action is inevitable. The provisional report was included in the Rule 53 record and was dated November 2014.

[42] The PP described the scope of her investigation in the Report. She recorded that she investigated only the following three issues:

- *"Whether the Department entered into a Public Private Partnership (PPP) agreement for the implementation of the Vrede Dairy project";*

- *"Whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to*

[19] 2012 (2) SA 16 (SCA) at para 40.

budget evaluation, expenditure control and performance by Estina"; and

- *"Whether the prices for goods and services procured were inflated, specifically alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs".*

[43] Seen within the context of the factual background, the scope of the investigation, as identified by the PP, seems to be too narrow and seems to ignore the issues raised in the report from Treasury, the media reports as well as the complaints lodged. There does not seem any logical and legitimate explanation for the narrowing of the scope of the investigation.

[44] The PP also recorded in the Report that she did not investigate certain issues, due, she said, to capacity and financial constraints experienced by her office. The issues not investigated were the following:

a) the cause of the alleged deaths of cattle. She said that the Minister of Water Affairs intervened and issued instructions on the removal of the dead cows;

b) issues emanating from the complaint sent on 10 May 2016 [i.e., the complainant's third complaint], as the issues pertaining to the investigation were already identified;

c) the issue of value for money obtained by the Government in terms of the agreements, as it was, investigated by Treasury;

d) the newspaper articles on the emails reported, relating to the Gupta family, that surfaced around June 2017, referring to the Project were noted, but did not form part of the scope of her investigation;

e) how the money transferred to Estina was spent by Estina, as the Directorate for Priority Crime was dealing with the issue;

f) the matter relating to beneficiaries who were intended to benefit from the project was not investigated. Her reason for this was an alleged lack of information.

[45] It was accordingly not in dispute that the PP did not investigate the DA's third complaint. It was also not in dispute that the PP did not do the following:

a. investigate who the true beneficiaries of the Vrede Dairy project were;

b. investigate the role played by MEC Mr Zwane, the Premier, Mr Thabethe and Ms Dlamini in pushing through the project;

c. consider the allegations that were in the public domain that suggested that Mr Zwane and the Premier had corrupt relationships with the Gupta family and received kickbacks directly or through their family from the Gupta family, following the Project;

d. consider how President Zuma allegedly abused his position as President of the Republic to protect and promote the officials in the Free State province that had allegedly served the interests of the Gupta family through the Project;

e. address the fact that the Free State Provincial Government under the Premier had failed to implement National Treasury's recommendation that disciplinary action be taken against the Department of Agriculture's HOD and CFO.

[46] The PP also failed to investigate the impact of the Project on the so-called "farm empowerment" partner promoted by Mr Zwane, or the impact on the approximately eighty beneficiaries, who were supposed to have benefited as stakeholders in the Project.

[47] Her decision to limit the scope of her investigation so dramatically was irrational as it side stepped all the crucial aspects regarding the complaints and led to a failure on her part to execute her constitutional duty.

[48] In her report the PP indicated that on assuming office during October 2016, she took the following steps regarding the investigation into the Project:

a. she sourced four additional documents – namely, a list of employees at the Project; the milking records for the Vrede Dairy Farm from 1 April 2016 to 31 March 2017; the financial statements

for the Vrede Dairy Farm from September 2014 to March 2017; and a company report from CIPC on Vargafield (Pty) Ltd,

b. she held three interviews, namely with the Free State Department of Agriculture, the Manager of Studbook, SA Holstein Breeders Association and with the CFO of the Free State Development Corporation,

c. she conducted one inspection *in loco* at the Vrede Dairy Farm.

d. she consulted one website, the CIPC website (to confirm the details of the Mohoma Mobung company).

[49] The steps taken by her seem wholly inadequate, considering the magnitude and importance of the complaints raised.

[50] The PP claimed in her report not to have had information relating to the beneficiaries. However during December 2017 the leader of the DA, Mr Mmusi Maimane, attended the office of the PP. He took along several of the intended beneficiaries of the Project. At the meeting the lead representative of the beneficiaries was introduced to the PP, and her assistant was requested to take down the beneficiaries' contact details to facilitate future engagement with them. The record shows that the information was indeed obtained, and in the possession of the PP, and formed part of the Rule 53 record supplied by the PP. The DA also furnished the PP with the Department's list of intended beneficiaries, together with a letter of complaint from representatives of

the Beneficiaries' Steering Committee. In addition to recording the beneficiaries' identity numbers and addresses, the list also included their cell-phone numbers.

[51] Despite having access to this information the PP made no effort at all to engage with the intended beneficiaries. She, in her answering affidavit laid the blame on the DA and said that the DA failed to provide her office with the promised assistance to obtain statements from the beneficiaries.

[52] The DA denied this and stated that Mr Maimane agreed to assist the PP, where possible. It was agreed that Mr Maimane's office would be the contact point for communications from the PP. However, Mr Maimane did not give any undertaking to obtain statements from the beneficiaries for the PP's office, as is alleged. The PP requested no further assistance from the DA at all. One would have expected her office to request assistance if she needed it. This is yet another inexplicable failure on the part of the PP.

[53] In the context of what occurred some consideration must be given to the provisional report and how the final report deviated from it. As was detailed in the supplementary founding affidavits filed by the DA and CASAC, there are differences between the provisional report and the final report issued by the PP in February 2018. Some of the issues for investigation according to the DA and CASAC seemed to be narrowed, and several findings and remedial steps proposed were omitted from the final report. The PP's response in answer to the differences was:

"Whatever the difference in findings may be, they have not had any material effect in the lawful remedial action that I have taken within the powers conferred on me by the Public Protector Act and the Constitution."

[54] I do not deem it necessary to deal in detail with all these differences, but what is of importance, is the impact of these differences on the legality of the report and the appropriateness of the remedial action proposed by the PP.

[55] The first issue identified by the PP, was whether the Department improperly entered into a Public Private Partnership (PPP) agreement for the implementation of the Project. The provisional report prepared by Adv. Madonsela identified, the first issue as *"Whether or not the Treasury Prescripts in respect of Public Private Partnerships were adhered to and whether or not the contribution of 40% of the funds for an allocation of 49% of the shares in the company was contrary to Treasury prescripts".*

[56] Adv. Madonsela found that the prescripts in respect of the procurement of the agreement were not adhered to. This was confirmed by the Treasury report. According to Adv Madonsela this constituted maladministration. She pointed out, that after this report, which found that the agreement was unlawfully entered into, that the Free State Department of Agriculture proceeded to pay a further R143 950 million to Estina. She concluded *inter alia* that the conduct of the accounting

officer was improper and constituted maladministration and an abuse of power. It is patently obvious that this conclusion was correct. It is inconceivable that, following Treasury's report, the Department could, with impunity, proceed to pay out millions of rands to Estina and that the PP in her final Report failed to address this gross irregularity.

[57] In the final Report, the PP redefined the primary issue as follows: *"Whether the Department improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy project in violation of treasury prescripts".*

[58] The PP explained her narrowing of the issue in her answering affidavit as follows:

"The reason for this change is that National Treasury had already investigated the matter of adherence to National Treasury prescripts and made a finding. With our limited resources, it would have been imprudent to duplicate an investigation into the same issue."

[59] One must however keep in mind that Treasury had already found gross irregularities and non-compliance with procurement law, and had made recommendations, which had not been acted on by the Department or the Provincial Government. This should have been of great concern to the PP given her constitutional duties. She should have investigated the failure of the Department and the Provincial Government and she should have addressed those irregularities and failure to comply with procurement procedures. The excuse of financial constraints preventing

her from investigating certain aspects, being an impediment, will be dealt with later on, but financial constraints cannot explain her failure to act decisively and in accordance with the powers afforded to her.

[60] Significantly, whereas the provisional report had sought to give effect to Treasury's investigations and recommendations, the PP did not accept these findings. She instead found, that compliance with the requirements for concluding a PPP was not required for the Estina agreement. On what basis she could justifiably come to such a conclusion is unclear. It points either to ineptitude or gross negligence in the execution of her duties.

[61] She furthermore removed the remedial action that had been proposed in the provisional report, which required the MEC to implement the recommendations in the Treasury report.

[62] On the first issue, as redefined, the PP found that while "*the initial impression created was that the agreement between the Department and Estina was a public-private partnership*", this was not the case. The only basis for this conclusion, is the finding of Treasury's report that the arrangement was neither a PPP nor a sole provider agreement.

[63] The PP followed the same reasoning by citing other formal requirements for a PPP that were not followed in respect of Estina, including the critical requirement of prior approval from Treasury, to support her conclusion that the project was not a PPP.

[64] The PP missed the point completely and erred in coming to the aforesaid conclusion. When Treasury stated that *"The investigation has revealed that the Vrede project is neither a PPP nor a sole provider arrangement"*, it clearly meant, when read in proper context, that it was neither a valid PPP nor a sole provider arrangement, as the supply chain management processes prescribed for them were not followed. This inference is the only logical one in the broader context of the Report. Treasury did not find, as suggested in the final Report, that the "*inherent requirements*" for a PPP were not present but went further and actually pronounced on the legality of the Project.

[65] It also did not follow from the Treasury's findings that the Department was not required to follow the processes prescribed for a PPP arrangement, in concluding the Project as the PP found. The Department was obliged to follow the prescribed processes, and it acted unlawfully in not doing so.

[66] The conclusion by the PP was clearly irrational. The fact that the PPP was not registered did not determine or change the nature of the commercial arrangement. Instead it suggested that, if the true nature of the commercial transaction was indeed a PPP, then there were serious irregularities in the conclusion of the transaction and that should have been the focus of her investigation.

[67] One would have expected the PP to have engaged in an examination of the true, inherent nature of the agreement entered into between the

Department and Estina. The PP did not enquire any further into the nature of the irregularities committed, or whether the agreement and execution thereof resulted in misappropriation of public funds. This is inexplicable seen in the broader context of her duties and powers.

[68] The PP removed all findings contained in the provisional report, against the Department, of non-compliance with statutory requirements. She relegated these too vague and inconclusive "*observations*" in her report.

[69] The PP considered whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to budget evaluation, expenditure control and performance by Estina. In addressing this issue, the PP recorded, repeatedly, that the Department failed to furnish supporting documents to verify the correctness of the financial statements it produced, including invoices and proof of payments for goods and services procured. However, she failed to exercise her statutory powers to obtain the Department or Estina's records: She issued no subpoenas for bank records, and accounts; She did not call any persons to appear before her to give evidence on the expenditure, accounting thereof, and services procured; She conducted no search to obtain such evidence. None of this was denied by her in her answering affidavit. Instead, the PP said the following:

"In 2014 my office was informed by the department that information or documents required were never in possession of the department, but that of Estina. An attempt to get documents or information from Estina was unsuccessful, as Estina had closed shop and the building out of which it used to operate had been abandoned and vacated. As a result

of the above, my office was unable to secure the documents by way of subpoena or search and seizure".

[70] There was no explanation for why the PP failed to subpoena any of the implicated officials to answer questions under oath or to produce whatever records the Department was required by law to retain, in particular, by the Public Finance Management Act.

[71] The PP could have conducted a search and seizure at the Department and the offices of the implicated officials, to obtain whatever evidence might have been available as to the implementation and management of the Project. The provisional report had required other investigative agencies to conduct such investigations, subject to the PP's oversight. This requirement was however removed from the final Report and thus it was never done.

[72] Therefore, instead of proactively investigating the nature and extent of the irregularities committed to uncover the facts, the PP merely drew "*an inference*" that "*no management and monitoring of the project in relation to budget, expenditure control and performance by the Department before the project was handed over to the FDC".*

[73] The PP's findings on this issue, ultimately, were as follows:

> "*6.2.1 The allegation that the Department failed to manage and monitor implementation of the terms of agreement is substantiated.*
>
> *6.2.2 No documents and/or policies or measures were provided by the Department that proper financial control and risk management of the Project were in place. The*

Public Protector could find no evidence or indication that the Accounting Officer invoked the provisions of the agreement in respect of the control over the Project and this raises serious concern. This concern was supported by the report of the Accountant General and the lack of effective, efficient and transparent systems of financial and risk management and internal control amounts to gross negligence and maladministration.

6.2.3 No supporting evidence in the form of actual invoices/receipts was submitted to substantiate the expenditure as claimed in the financial statements submitted except for 9 invoices for procurement of cattle.

6.2.4 The evidence outlined earlier points to gross irregularities in ensuring the effective and efficient performance of the agreement and resulted in maladministration.

6.2.5 From the above it is clear that this amounts to gross negligence and also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act."

[74] The aforesaid must be compared with the provisional report which found:

"8.2.2 No supporting evidence in the form of actual invoices/receipts was submitted to substantiate the expenditure as claimed in the financial statements submitted. In fact the payment vouchers for the disbursement of the R173,950 million to ESTINA were substantiated only by the project proposal of ESTINA/PARAS and the agreement concluded between the Department and ESTINA.

8.2.3. From the above it is clear that this amounts to gross negligence, maladministration and ultimately irregular expenditure in terms of Treasury prescripts.

8.2.4 In terms of the Regulations a PPP agreement does not divest the accounting officer of the responsibility for ensuring that the relevant institutional function is effectively and efficiently performed in the public interest. The evidence I have outlined earlier points to gross irregularities in ensuring the effective and efficient

performance of the agreement and resulted in irregular and fruitless expenditure." [Court's emphasis]

[75] The finding in paragraph 6.2.2 of the final report is identical to the finding in the provisional report. However, the findings of irregular expenditure in the provisional report were omitted from the final report. In the light of all the facts, this omission by the PP is inexplicable. One may justifiably ask whether this was done for some ulterior purpose. Unfortunately no explanation was given by the PP for these changes.

[76] The PP also determined whether the prices for goods and services procured were inflated. On this issue, the provisional report stated that independent evidence indicated that, prices of processing equipment and the cows purchased were considerably higher than market value, which confirmed that proper procurement processes were not followed. It indicated that lack of proper monitoring and control measures were the reasons for discrepancies noted in the financial statements, which in turn pointed to gross negligence and maladministration which led to fruitless expenditure.

[77] These findings were revised by the PP. In the final Report, there are no findings of inflated prices and irregular and fruitless expenditure. The revised finding reads simply as follows:

> *"6.3.1 The allegation that the prices for goods and services procured were inflated, specifically expenses in respect of construction, processing equipment, procurement of cows and administration costs is difficult to determine".*

[78] The following explanation is given in the answering affidavit for this conclusion:

> *"6.3.1.1. ESTINA did not follow public procurement processes when procuring the services of the service providers in the project;*
>
> *6.3.1.2. Due to the lack of resources and financial constraints, the Public Protector was unable to conduct a comprehensive investigation in order to determine the fair market value for goods and services procured; and*
>
> *6.3.1.3. The Public Protector was not provided with all the invoices and proof of payments for the goods and services procured by Estina on behalf of the Department."*

[79] The PP's contention that she was unable to obtain market prices is unsustainable. There was no reason, as the DA argued, why one of her staff appointed for investigations in her office could not assess the market value of the goods and services procured. Assessing the market value of the goods procured requires obtaining quotations from suppliers. The DA's staff performed this task to assess the market value of the cattle procured, and furnished this information to the PP in the complainant's second complaint. It seems that the PP chose to simply ignore the information supplied to her and then blamed financial constraints for her failure to execute this simple task.

[80] Furthermore, Treasury's report had included a report by a senior economist at AgriSA on the costs and value for public money associated with the Project. The senior economist, Mr Maree, considered the project proposal, business plan and feasibility study

that Estina provided to the Department. Mr Maree raised several red flags in his assessment, which ought to have been investigated further.

[81] Mr Maree recommended that a detailed cost analysis of the project should have been be done on the basis of more detailed information. However, on the information available, Mr Maree advised that the costs associated with the project were very high, with a good probability that the state would not receive value for money on the project in its current state.

[82] Mr Maree's full report was exhibit 27 to Treasury's report, which the PP stated she never received. Instead of requesting Treasury to furnish her with Mr Maree's report and the other annexures, the PP merely stated that resource constraints in her office made it impossible for her to determine whether fair market value for goods and services was obtained. She did not explain why she simply did not request Treasury to supply her with the report. The PP made no mention at all of Mr Maree's assessment, even though she had Treasury's report which summarised the outcome of his assessment.

[83] The lack of invoices and proof of payments furnished by the Department were also not a satisfactory explanation. The PP should have exercised her statutory powers to obtain the necessary financial records from the Department and Estina to determine what was paid for, to whom, and what amounts were paid.

[84] The failure of the PP to execute her constitutional duties in investigating and compiling a credible and comprehensive report points either to a blatant disregard to comply with her constitutional duties and obligations or a concerning lack of understanding of those duties and obligations.

CAPACITY AND FINANCIAL CONSTRAINTS

[85] The PP explained in her affidavits that capacity and financial constraints impeded her office's capacity to investigate the complaints appropriately. One cannot disregard the fact that the PP's office, as many other state institutions' capacities, are often constrained by inadequate financial and other resources.

[86] The Court's approach to evaluating a defence that budgetary constraints precluded a public functionary from fulfilling its constitutional obligations was dealt with in ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail***[20]. The CC adopted a context-sensitive, reasonableness standard. It enquired whether the functionary had shown that it had taken all reasonable measures within its available resources. The Court held:

> *"...an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be*

[20] 2005 (2) SA 359 (CC).(Rail Commuters)

provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."[21]

[87] In ***City of Johannesburg Metropolitan Municipality vs Blue Moonlight Properties 39 (Pty) Ltd & another***[22], the CC responded to a claim by the City of Johannesburg that it did not have sufficient resources to provide for temporary emergency housing. The CC rejected this contention, holding that *"it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations"*.[23] The CC also upheld the SCA's findings that the City had not shown that it lacked the resources to meet its obligations. In its judgment, the SCA emphasised, inter alia, the fact that the City's claims about the affordability of meeting demands were made "*in the vaguest possible terms*", and that the City did not state that it was unable to reallocate resources within its available budget.[24]

[88] The PP in her answering affidavit did not set out supporting facts to illustrate why a proper investigation could not be accomplished. This made it very difficult to determine whether in this instance, this defence

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[21] Rail Commuters, para 88
[22] 2012(2) SA 104 (CC) (Blue Moonlight)
[23] Blue Moonlight, at para 74
[24] Blue Moonlight, at para 71.

should be accepted as a bona fide impediment to her ability to execute her duty.

[89] In this instance there was not only a provisional report by her predecessor, but also a report by Treasury that clearly indicated misappropriation of funds on an astronomical scale. There were also countless media reports implicating certain individuals and linking them to the project of state capture. All of these should have assisted the PP in her investigation, and should have limited the financial impact of the investigation on her resources.

[90] One must consider whether taking certain steps, during the investigation would have had caused a huge financial drain on the PP's resources. It would seem that, if one considers the provisional report and Treasury's report, a huge amount of work had already been done, which should have limited the expenses that the PP had to incur to properly and adequately complete her investigation.

[91] The PP's most blatant failure was to not properly investigate the circumstances surrounding the beneficiaries of the Project, this she also blamed on a lack of resources. The PP had the names and telephone numbers of some twenty beneficiaries, and some even visited her offices with Mr Maimane. Yet no attempt was made to get a statement from any of them. In this regard she put the blame on the DA and said that they undertook to get the statements. Leaving the duty in the hands of a political party was totally inappropriate and could potentially have impacted on the impartiality of any statement so

obtained. Whether the DA did give such an undertaking or not, is in my view, irrelevant, as it was the duty of the PP to follow up and obtain those statements. The beneficiaries were the people who should have taken centre stage in this investigation, as they were the people, the vulnerable ones, for which her office was specifically created and who were deprived of an opportunity to benefit and better their circumstances. Instead they were ignored and their interests were relegated to a mere peripheral issue. It is an absolute disgrace that some, as yet unidentified people, benefited, while the poor and the marginalized were yet again robbed of an opportunity to better their circumstances.

[92] The exercise to obtain their statements could not have caused a significant strain on her resources. In any event seeing that they were supposed to benefit from the Project, any resources that she had should have been spent to obtain their input. She had their particulars and telephone numbers, one would have expected her office at least to have contacted them and to have attempted to obtain statements from them. Their story has not been told, neither did they get any benefit from this project. Yet R342 million was paid to entities connected to this Project and unknown people were enriched. This, in my view, was the most significant failure of the PP to execute her constitutional duty in this investigation.

[93] As far as the missing annexures from Treasury's report were concerned, to request these annexures could not have required more

than an email. These annexures were essential, and she should have known that, it could have assisted her, and would have enabled her to limit the costs that could have been incurred by her own office. Yet no attempt at all was made to obtain these very important documents.

[94] Interviewing and taking statements from the implicated officials and interviewing the journalist who had reported on the project, seems to me to be quite simple and could not have resulted in huge expenditure. The PP's failures to undertake these simple and cost effective measures are to put it lightly, of serious concern, as it may point to a concerning incomprehension of the nature and extent of her obligation towards the people of this country and her obligations in terms of the Constitution and the PP Act.

[95] Whatever her office's resource constraints were, they could perhaps conceivably explain the narrowing of the scope of the investigation, but never explain and justify the irrational and arbitrary findings and material errors of law in the Report, or the inappropriate and ineffective investigation executed by her office.

THE DISCRETION TO "OPT OUT"

[96] The PP in addition stated in her affidavit that she exercised her discretion to "opt out" and not to investigate. Her suggestion in the answering affidavit that she deferred the investigation stood in direct contradiction with her statement that she decided to "opt out".

[97] The PP contended that she has "*a very wide discretion*" under the PP Act to "*opt-out*" and not to investigate even those complaints that fall within her jurisdiction. On this basis, the PP contended that it was open to her to refuse to investigate the third complaint at all.

[98] This is not a proper reading of the constitutional and statutory provisions contained in the legislation. The language used in the Constitution and the PP Act in describing the PP's powers and functions make it clear that the investigative power vested in the PP is coupled with a duty to exercise that power. It is accordingly clear from a proper reading of the Constitution and the PP Act, that the PP does not have such a wide discretion, as she claimed, to refuse to investigate a complaint that falls within her jurisdiction.

[99] If one compares the language used in section 6(4)(a) and section 6(4)(b) of the Act, the following transpires. Whereas section 6(4)(b) expressly confers a discretion on the PP in respect of the remedial action to be taken, section 6(4)(a) confers no such discretion in respect of the investigation of conduct under her jurisdiction.

[100] This interpretation is also supported by the wording of section 7(1) of the Act, which defines the PP's investigative power. Section 7(1) provides:

> *"(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.

(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."

[101] This provision confers a discretion on the PP to determine the format and procedure to be followed in investigating a complaint. It also affords the PP a discretion after a preliminary investigation, to determine the merits of the complaint and the manner in which the matter concerned should be dealt with. It does not, however, permit the PP to decline to conduct any investigation at all and in the context of her duties it would be inconceivable that the PP could have a discretion to choose to "opt out" in the context of the factual background of this case.

[102] The effect of these provisions, it seems to me, is that when the PP receives a complaint reporting a matter within her jurisdiction, she must conduct at least a preliminary investigation to determine the merits of a complaint, unless one of the exceptions in section 6 applies. Only after conducting a preliminary investigation of the merits, may she, for good reason, decline to investigate the matter further. Should she find that there is merit in the complaint that requires further investigation, she is obliged to either investigate the matter herself, or to refer the matter for further investigation to another appropriate

authority. Should she choose to undertake a further investigation, she must investigate the matter proactively and effectively.

[103] This textual interpretation must be favoured when the empowering provisions are read purposively and in light of section 39(2)[25] of the Constitution, that is, in the manner that best promotes the spirit, purport and objects of the Bill of Rights. The interpretive injunction in section 39(2) requires the Court, not only to avoid an interpretation that may limit rights in the Bill of Rights, but also to prefer any interpretation that best promotes those rights.[26]

[104] The CC has interpreted statutory provisions that confer a power on a functionary as '*a power coupled with a duty to use it*' in several cases.[27] In ***Saidi and Others v Minister of Home Affairs and Others***[28] the CC held that section 22(3) of the Refugees Act imposed a duty on Refugee Reception Officers to extend asylum permits pending finalisation of the judicial review of a decision refusing asylum. Section 22(3) reads as follows:

"*A Refugee Reception Office may from time to time extend the period for which a permit has been issued ... or amend the conditions subject to which a permit has been so issued.*

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[25] Section 39(2) of the Constitution provides:

"(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

[26] *Saidi and Others v Minister of Home Affairs and Others [2018] ZACC 9 at para 38, and the references cited therein.*

[27] *See, for instance, Van Rooyen v The State (General Council of the Bar of South Africa Intervening) [2002] ZACC 8; 2002 (5) SA 246 (CC) para 34 - 35; Joseph v City of Johannesburg South African Police Service v Public Servants Association 2007 (3) SA 521 (CC) para 19 - 20.*

[28] *2018(4) SA 333 (CC)*

The CC held that interpreting the "may" as a "must" was required, as *"This interpretation better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application"*[29].

[105] Interpreting the PP's power to investigate a complaint of improper conduct as a *'power coupled with a duty to investigate'*, better promotes the constitutional objects and the rights in the Bill of Rights. It also ensures the impartiality and independence of the PP, by ensuring that the PP cannot be selective regarding which investigations to conduct and cannot be subjected to pressure by any person *not* to investigate a complaint.

[106] This interpretation also ensures that complaints about corruption, abuses of public power and resources are properly investigated, exposed and remedied. Since corruption and abuses of power for self-gain inevitably impact on the realisation of the rights in the Bill of Rights, In ***Glenister v President of the Republic of South Africa***[30] the following was held:

" ... Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.[31]*"*

In the majority judgment, Moseneke DCJ and Cameron J stated:

"There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public

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[29] Saidi, par 35

[30] 2011 (3) SA 347 (CC), Glenister

[31] Glenister, par 57

fraudulence and imperils the capacity of the State to fulfil its obligations to protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.[32]"

[107] The investigation of such complaints is vital to the protection and promotion of rights in the Bill of Rights. The investigation of complaints submitted to the PP is also a key mechanism for promoting the foundational constitutional democratic principles of accountability, openness and responsiveness and the principles governing public administration.

[108] The importance of the investigations and remedial action of the PP for the protection of the rights in the Bill of Rights, was emphasised by the Constitutional Court in ***Nkandla***. It was stated that:

> *"In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action. Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real.*

[32] Glenister, par 166

Her investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw State power...

... The purpose of the office of the Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State affairs, all spheres of government and State controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant."[33]

[109] The Report by the PP did not address the major issues raised in the complaints, nor the numerous indications of irregularities. In this instance the PP did nothing to assure the public that she kept an open and enquiring mind and that she discovered, or at least attempted to discover the truth.

THE REMEDIAL ACTION PROPOSED BY THE PP

[110] The Public Protector directed the following remedial action to be taken:

> *"7.1 The Premier of the Free State Province [i.e. Mr Ace Magashule] must:*
>
> *7.1.1 Initiate and institute disciplinary action against all implicated officials involved in the Vrede Dairy Farm project;*

[33] Nkandla at paras 54-56.

7.1.2 Submit the report regarding the remedial action in 7.1.1 to the Public Protector after the conclusion of the disciplinary processes;

7.1.3 Ensure that he conducts a reconciliation of the number of cows initially procured and found during April 2017 as per his undertaking (...);

7.1.4 Ensure that he submits an implementation plan within 30 days of the issuing of this report.

7.2 The Head of the Free State Department of Agriculture [i.e. Mr Mbana Peter Thabethe] must:

7.2.1 Ensure that the officials of the Supply Chain Management Division and Management of the Department are trained on the prescripts of the National and Provincial Treasuries in respect of procurement and specifically in respect of deviations;

7.2.2 Take corrective measures to prevent a recurrence of the failure of the management process referred to in this report;

7.2.3 Ensure that all Departmental staff involved in the implementation and execution of Projects are properly trained and capacitated to manage Projects assigned to them;

7.2.4 Develop and revise current policies for the implementation of internal control measures in line with Treasury prescripts and regulations."

[111] The Applicants, in both applications took issue, not surprisingly, with the fact that the Premier and the Head of Department, Mr Thabethe,

who were both implicated in the Project were tasked with taking disciplinary actions, corrective measures and departmental training to avoid a recurrence of the incident.

[112] The result was that it was left to the Premier, who was himself implicated, to determine who constituted an "implicated official". Despite admitting that he was an implicated official, the PP failed to identify Mr Thabethe in the findings as a primary instigator in the scheme and held responsible as the accounting officer.

[113] The PP, in order to justify her stance pertaining to the remedial action in respect of the HOD, stated that the Executive Authority (ie the MEC) has no power to discipline a provincial HOD. She contended that, only the Premier has that power in terms of the Public Service Act. However, this legal conclusion is obviously incorrect. Under the Public Finance Management Act 1 of 1999 ("the PFMA"), read with the National Treasury Regulations, the head of department, as the "accounting officer" is accountable to the Executive Authority responsible for the department. The MEC is specifically empowered to commence investigations and take disciplinary action against the accounting officer in the event of alleged financial misconduct.

[114] The provisions of the Public Service Act (sections 16A(1)(a) and 16B(1)(a)) similarly provide that "*the relevant executive authority*" is responsible for taking disciplinary action against the head of department. The "executive authority" in relation to a provincial

department is defined to mean *"the member of the Executive Council responsible for such portfolio"*.

[115] Secondly, the PP contended that she referred generally to "implicated officials", because she "*wanted to ensure that all officials who worked on the project are not excluded from disciplinary action*". But this did not explain the removal of the specific direction in the provisional report that disciplinary action be taken against the HOD, who played a pivotal role in the alleged irregularities that occurred.

[116] The removal of this specific direction was especially inappropriate and irrational given that the PP afforded the Premier, the discretion to determine who the "implicated officials" were as already stated. This must be seen in the context that the Premier had recorded in his response to the section 7(9) notice that there was "*no credible basis for taking disciplinary steps against the Head of Department*". This position taken by the Premier should have deeply concerned the PP and should have influenced her consideration of appropriate remedial actions. To put people who are implicated in wrongdoing in a position to investigate that very same wrongdoing, is absurd and goes against every known principal of law and logic.

[117] In the provisional report, the PP directed that the disciplinary action was to be taken by the HOD against the incumbent and implicated HOD, Mr Thabethe, as he was "an implicated official".

[118] This remedial action was removed by the PP in her final Report and in so doing she rendered the remedial action that was required to be implemented by the HOD, ineffective and irrational, the instructions to the HOD could not be expected to be properly implemented or achieve their purpose, unless coupled with the specific requirement that the incumbent HOD be subjected to disciplinary action.

[119] The PP's third change to the remedial action in the provisional report was the removal of the requirement that the Premier and the MEC must *"ensure that the findings of the Accounting General are noted and the recommendations as mentioned in his report of January 2013 are implemented"*. This referred to the report prepared by Treasury's Specialised Audit Services and ENS Forensics. The Treasury report had recommended that:

a. disciplinary action be taken against the HOD, Mr Thabethe for his role in concluding the agreement between the Department and Estina and for committing the Department financially, without ensuring that funds were available;

b. disciplinary action be taken against the Department's Chief Financial Officer, Ms Dhlamini for failing to ensure that proper financial oversight and controls were in place before transferring funds to Estina;

c. no further money was to be invested in the project until the risk factors identified in the report were addressed;

d. the project must be reassessed and the necessary due diligence completed to ensure that the project is viable, with various specific steps to be taken for the reassessment.

[120] The PP did not give any explanation for the removal of the aforesaid action proposed in her answering affidavit.

[121] In the provisional report, it was proposed that matters be referred for further investigation to other appropriate public authorities. All such remedial action was removed from the Report. The PP made several arguments to justify these amendments. She *inter alia* contended that there was no need to investigate the political leadership in the Province, because "*there was nothing in the main complaint, second complaint or the Provisional Report which implicated the Premier*".

[122] This answer is factually incorrect, for various reasons. In his first and second complaints, the Complainant raised concerns about the lack of transparency, non-compliance with procurement law, and the failure to obtain value for money in the implementation of the Project. The complaint was levelled against the "Free State Provincial Government" in general. The fact that he did not mention the Premier specifically did not mean that the Premier was not implicated in the complaints, as he was the Premier of the Free State Provincial Government and as such, the head of the Provincial Government, who was instrumental in the conclusion of the suspect agreements and who ensured that the irregular payments were made.

[123] The Premier's personal involvement in promoting the Project and the close association between the Premier (through his son, Tshepiso Magashule, who was employed by the Gupta family) and the Gupta-associates involved in Estina, was reported in the media from as early as 2013. Likewise, Mr Zwane's direct involvement in facilitating the Project, and the allegations of kickbacks from the Gupta family was a matter of public record.

[124] The PP did not explain her failure to investigate, or at least to refer to another authority to investigate, the allegations in the Complainant's third complaint. These included the specific allegations that the Estina contract "*was approved by the legal department in the Office of the Premier*", *and that the National Treasury's findings and recommendations had been "ignored by the provincial government and the Premier*". It must also be noted, as already stated, that the Premier in his response to the section 7(9) notice, disregarded Treasury's findings and recommendations.

[125] The PP contended that the remedial action in respect of the SIU had "been overtaken by events" specifically because: *"The idea of sending these matters for investigation to the SIU was to recover irregular expenditure. But by the time the final report was finalised the recovery of irregular expenditure was already under way by the Hawks and the SIU."*

[126] The remedial action directed in the provisional report in respect of the SIU was not merely "to recover" irregular or illegal expenditure. It was considerably broader, and reads as follows:

> *"The Head of the Special Investigating Unit to: Conduct a forensic investigation into serious maladministration in connection with the Vrede Dairy Integrated Project of the Free State Department of Agriculture, the improper conduct by official of the Department and the unlawful appropriation or expenditure of public money or property with the view of the recovery of losses by the State".*

[127] The PP justified her decision not to investigate the third complaint that was lodged on 10 May 2016, because, she said, it was too late to do so. One must in this regards note that the final report was only issued in February 2018. It is inconceivable that, having regard to the dates, she could seriously contend that it was too late for her proper consideration.

[128] The removal of the remedial action in the provisional report referring the matter for further investigation by the SIU, (to conduct a forensic investigation, into serious maladministration, improper conduct and unlawful expenditure) and to the Auditor-General (to conduct a forensic and due diligence audit verifying the expenditure of public money), was explained by the PP as follows: the reason that Adv Madonsela referred these matters for investigation to the SIU was to recover irregular and illegal expenditure, and by the time the final report was finalised, that was already underway by the Hawks and Asset Forfeiture Unit (the "**AFU**") and had thus been "*overtaken by events*". It

was incorrect to state, as the PP did, that the remedial action was "*overtaken by events*". Even if the SIU and the Hawks had commenced an investigation to recover money unlawfully obtained under the Project, they were no longer required by the PP to do so.

[129] It is crucial to note that these remedies were removed from the provisional Report before the PP was even aware of any parallel investigations, which immediately causes one to doubt the truthfulness of this explanation. The aforesaid is clear, because they had already been removed from the Report when the section 7(9) notices were sent to the Premier and Mr Thabethe, among others, on 7 June 2017.

[130] The investigation into improper conduct by officials, which the PP claimed she could not undertake previously, because of financial and resource constraints, would have been referred in the provisional report to the SIU for investigation. The PP omitted that remedial action.

[131] CASAC argued that the PP was mistaken that the SIU investigation proposed in the provisional report was only about recovering irregular and illegal expenditure. It was instead aimed to secure the recovery of losses. It expressly included a forensic investigation into "*serious maladministration*" and, more importantly, "*the improper conduct by officials of the Department*". This argument is clearly correct. The instruction to the SIU was coupled in the provisional Report, with a reporting obligation and ongoing monitoring by the PP. The provisional Report stated that "*The referral of the report to the Special*

Investigation Unit and the Auditor General will be monitored on a bi-monthly basis".

[132] The PP stated that *"The remedial action involving the SIU and the Auditor General were removed because I considered that I did not have the power to instruct either of them to conduct an investigation on my behalf".*

[133] That remedial action was successfully challenged on review in the matter of ***ABSA Bank***.[34] However the judgment in that matter was given on 16 February 2018, after the Report was published. In those proceedings, the PP had defended the remedial action as being within her powers.

[134] In the ***ABSA Bank***[35] matter, the Court noted that the provisions of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act) are important in assessing remedial action directed at the SIU. Section 2 of the SIU Act provides that the President may establish special investigating units. Section 4 refers to the functions of a SIU whereas section 5 sets out the powers of such a unit. Subsection (6)(b) provides:

> *"The Head of a special investigating unit may refer any matter which, in his or her opinion, could best be dealt with by the Public Protector, to the Public Protector and the Public Protector may, if he or she deems it appropriate, refer any matter which comes to*

[34] Absa Bank, par 23

[35] Absa Bank, par 23

his or her attention and which falls within the terms of reference of a special investigating unit, to such unit."

[135] The Court interpreted this provision as follows:

"Again *the operative words applying to both a SIU and the Public Protector are 'may refer'. This subsection allows the Public Protector and the head of a SIU to refer matters to one another. The SIU is a statutory institution established by the President in terms of section 2 of this Act. It has, like the Public Protector, only those powers assigned to it by statute. This subsection does not create a hierarchy between the two. Each can bring a matter to the attention of the other, but neither can instruct the other on how to deal with a matter."*[36]

[136] In ***Absa Bank*** the Court also considered the wording of s 6(4)(c) of the PP Act, which empowers the PP "to bring to the notice of and to refer any matter, or to make an appropriate recommendation to another public body or authority. The Court said:

"It does not empower the Public Protector to be prescriptive or to instruct the SIU as to how to deal with the matter she brings to its notice. Once the Public Protector has referred a matter to the SIU, or has made an appropriate recommendation, she has exhausted her powers under this subsection. The decision as to how the matter must be handled is not that of the Public Protector, but the prerogative of the public body or authority concerned, in this instance the SIU."[37]

[137] Although the PP is clearly empowered to refer a matter to the SIU for investigation, as is specifically provided for in section 5(6)(b) of the SIU

[36] Absa Bank, supra, par 23
[37] Absa Bank, supra, para 69

Act. The effect of the ***ABSA Bank*** decision is that it is not open to the PP to instruct the SIU how to exercise its powers, as she had purported to do in the Report in that matter.

[138] As regards the Treasury report, the PP contended that the remedial action directed at this office in the provisional report was incompetent, because *"the Auditor-General does audits of accounts and financial statements. He does not do forensic and due diligence investigations."*

[139] Section 188 of the Constitution, states that "*the Auditor-General may audit and report on the accounts, financial statements and financial management of ... " (b) any institution that is authorised in terms of any law to receive money for a public purpose"* [Court's emphasis].

[140] It is accordingly clear that the PP's contention in this regards is incorrect. The Public Audit Act no 25 of 2004 further defines the powers and functions of the Auditor-General. Section 4[38] of the Act

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[38] **4 Constitutional functions**

(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of-

(a) all national and provincial state departments and administrations;

(b) all constitutional institutions;

(c) the administration of Parliament and of each provincial legislature;

(d) all municipalities;

(e) all municipal entities; and

(f) any other institution or accounting entity required by other national or by provincial legislation to be audited by the Auditor-General.

(2) The Auditor-General must audit and report on the consolidated financial statements of-

(a) the national government as required by section 8 of the Public Finance Management Act;

(b) all provincial governments as required by section 19 of the Public Finance Management Act; and

(c) a parent municipality and all municipal entities under its sole or effective control as required by section 122 (2) of the Municipal Finance Management Act.

(3) The Auditor-General may audit and report on the accounts, financial statements and financial management of-

(a) any public entity listed in the Public Finance Management Act; and

(b) any other institution not mentioned in subsection (1) and which is-

(i) funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(ii) authorised in terms of any legislation to receive money for a public purpose.

(3A) The discretion of the Auditor-General as contemplated in subsection (3) applies to any public entity contemplated in subsection (3) *(a)*and any other institution contemplated in subsection (3) *(b)* that meets prescribed criteria.

[Sub-s. (3A) inserted by s. 2 *(a)* of Act 5 of 2018 (wef 1 April 2019).]

defines the Auditor-General's constitutional functions. Section 5 of the Public Audit Act defines the "*other functions*" that are extended to the Auditor-General under the Act. These include the power, under s 5(1)(d) (read with s 29) –

"to carry out an appropriate investigation or special audit of any institution referred to in section 4(1) or (3) [which includes provincial state departments and administrations] if the Auditor-General considers it to be in the public interest or upon the receipt of a complaint or request".[39]

[141] Accordingly, the Auditor General is vested with special investigative powers, which extend beyond its regular auditing function, and which may be exercised in the public interest and on request.

[142] Furthermore the PP contended that she did not have the legal power to instruct either the SIU or the Auditor-General to conduct an investigation. This interpretation of the law is incorrect as section 6(4)(c) of the PP Act expressly empowers the PP to, at any time prior to, during or after an investigation, refer any matter to the appropriate public body or authority to make an appropriate recommendation.

[143] The PP was clearly aware of this fact, as she included the following in her final Report:

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(4) In the event of any conflict between this section and any other legislation, this section prevails.

[39] Sections 5(2)(a) and 5(3) further provide that the Auditor-General may "co-operate with persons, institutions and associations, nationally and internationally", and "may, in the public interest, report on any matter within the functions of the Auditor-General and submit such a report to the relevant legislature and to any other organ of state with a direct interest in the matter"

> *"There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act".*

[144] The Court held in ***Nkandla***[40] as follows, *"[i]t ought to be borne in mind that the Public Protector regularly instructs members of the executive, including high-ranking government officials, to exercise discretionary powers assigned by law to them."* In that case, the Court was provided with various examples where the Public Protector *"had instructed organs of state to perform functions that are ordinarily left to their discretion".*

[145] The PP committed yet another error of law, when she assumed that she lacked such a power. The evidence suggested, that she was aware that she possessed the power, but elected nevertheless to exclude the remedial action.

[146] In the light of the analysis set out above I am of the view that the remedial action in the report obviously did not constitute an effective remedial action. It did not redress or undo *"prejudice impropriety, unlawful enrichment or corruption"*[41] that occurred during the project. In ***Nkandla*** the following was said regarding appropriate remedial actions[42]:

> *"[68] Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the*

[40] Nkandla, par 68 and 71
[41] Nkandla, par 68 and 71
[42] Nkandla, par 68 & 69

Public Protector could do in terms of the interim Constitution. It connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint. Remedial action must therefore be suitable and effective. For it to be effective in addressing the investigated complaint, it often has to be binding. In SABC v DA the Supreme Court of Appeal correctly observed:

'The Public Protector cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct the implementation. It follows that the language, history and purpose of s 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for state misconduct, which includes the power to determine the remedy and direct its implementation.'

[69] But, what legal effect the appropriate remedial action has in a particular case depends on the nature of the issues under investigation and the findings made…."[43]

[147] An analysis of the aforesaid illustrates the many failures of the PP in the conclusions she arrived at and the ineffectiveness of the remedial action proposed by her.

CONCLUSION

[148] The PP accused the DA of having political motives, while it is definitely not inconceivable and even probable that such an agenda may exist, the PP should rise above any political agenda real or perceived and should look objectively at the complaints lodged, irrespective of where it may emanate from, and whatever the political objectives may be. Anyone, including any political party, should feel confident that the PP will investigate any legitimate complaint properly and objectively. The PP, like judicial officers, should transcend criticism and act without fear, favour and prejudice in all matters that come before them. The public should rest assured that those that preside over them or investigate their complaints will always execute their duties with due regard to the principles of the Constitution and the Rule of law.

[149] Regarding the question of rationality it is important to note what was stated in ***Pharmaceutical Manufacturers Association of South Africa & others vs President of the Republic if South Acrica &***

[43] Nkandla, par 68 & 69

others explained, "*[d]ecisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.*"[44]

[150] Accordingly, the starting point is to determine what the purposes are of the PP's powers and functions generally, and her powers to investigate and take remedial action specifically.

[151] The purpose of her specific power to investigate and report is to discover and expose evidence of corruption and prejudice, with a view to maintaining an effective public service and good governance. The purpose of her power to devise and implement remedial action is to remedy instances of corruption and prejudice, to ensure that those responsible are held accountable and that those affected obtain appropriate relief and to prevent re-occurrence of the same conduct.

[152] Given the above, in my view the Report is unlawful and unconstitutional and as a result fails to comply with the requirement of legality. In particular, the PP has failed to comply with section 6 of the PP Act and section 182 of the Constitution. This follows because of her failure to properly investigate the complaints of 12 September 2013 and 28 March 2014, seen together with her failure to use her statutory powers, and to adopt the stance of a proactive investigator. She contravened section 6(4)(a) and 6(5) of the Public Protector Act and section 182(1)(a) and (b) of the Constitution.

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[44] 2000 (2) SA 674 (CC) at para 85

[153] The failure to properly investigate the complaints of 12 September 2013 and 28 March 2014 was plainly irrational, in that it was not rationally related to the purpose of the PP or her specific powers to investigate and report, it was also not rationally related to the information before her, which provided at least *prima facie* evidence of corrupt activity. Relevant considerations were ignored which point to irrationality. There had also not been a correct application of the law as was set out above.

[154] The failure to have regard at all to the complaint of 10 May 2016, or to have regard to the information in the public domain of evidence implicating high-ranking public officials and the Gupta family in corruption was irrational in that the facts ignored related directly to the serious allegations of corruption and malfeasance in the Project and were patently relevant.

[155] Her proposed remedial action, which envisaged that implicated senior officials act as the arbiters of disciplinary proceedings and procurement training, contravened section 6(4) of the PP Act and section 182(1)(c) of the Constitution, in that it failed to devise a remedy that was appropriate, proper, fitting, suitable or effective, as a result her failure to devise an appropriate, proper, fitting, suitable or effective remedy was irrational.

[156] The PP's belief that she was not empowered to take remedial action referring the matter to another organ of state for further investigation constituted a profound mistake of law as fully explained above.

[157] It is now trite that a Report of the PP is legally binding and of full force and effect until it has been reviewed and set aside[45]. Section 172[46] of the Constitution provides the starting point. In terms of section 172(1)(a)[47], as a matter of constitutional principle, an invalid decision must be declared invalid.[48]

[158] Following a declaration of invalidity, this Court has the power to order a just and equitable remedy under section 172(1)(b)[49]. As a default position, the just and equitable relief must be aimed at correcting or reversing the consequences of the invalid exercise of public power:

> *"Logic, general principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality."*[50]

[159] Having found that an exercise of public power is constitutionally invalid, the court must grant appropriate relief that is corrective of the consequences of unlawfulness. This demands that the report be declared invalid, reviewed and set aside. Due to the specific circumstances in this case it will not be appropriate to refer the matter back to her.

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[45] Nkandala, paras 73-75.

[46] **172 Powers of courts in constitutional matters**

[47] (1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency

[48] Bengwenyama Minerals (Pty) Limited v Genorah Resources (Pty) Limited 2011 (4) SA 113 (CC) at para 84.

[49] *(b)* may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[50] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (6) BCLR 641 (CC) para 30.

[160] As a result I make the following order:

1. **It is declared that in investigating and reporting on the Vrede Dairy Project for purposes of her report No 31 of 2017/18, dated 8 February 2018, the PP failed in her duties under section 6 and 7 of the Public Protection Act and section 182 of the Constitution.**

2. **The PP's report No 31 of 2017/18 date 8 February 2018 is accordingly reviewed, set aside and declared unlawful, unconstitutional and invalid.**

3. **The costs order is postponed *sine die*.**

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:	23 – 24 October 2018
DATE OF JUDGMENT	20 MAY 2019

CASE NO: 11311/2018

ATT FOR APPLICANT:	MINDE, SHAPIRA & SMITH ATTORNEYS
ADV FOR APPLICANT:	S BUDLENDER et J BLEAZARD CTABATA
ATT FOR RESPONDENT:	TSHISEVHE GWINA RATSHIMBILANI INC
ADV FOR RESPONDENT:	V NGALWANA (SC) et F KARACHI et L RAKGWALE

CASE NO: 13394/2018

ATT FOR APPLICANT:	LEGAL RESOURCES CENTRE
ADV FOR APPLICANT:	M LE ROUX et M MBIKIWA
ATT FOR RESPONDENT:	TSHISEVE GWINA RATSHIMBILANI INC
ADV FOR RESPONDENT:	A PLATT (SC) et C DAUDS