



CONSTITUTIONAL COURT OF SOUTH AFRICA

Public Protector v South African Reserve Bank

CCT 107/18

Date of hearing: 27 November 2018

Date of hand down: 22 July 2019

MEDIA SUMMARY

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

On Monday 22 July 2019 at 10h00, the Constitutional Court handed down judgment in the Public Protector's application for direct leave to appeal against the personal and punitive costs order made against her by the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court ordered the Public Protector, Ms Busisiwe Mkhwebane, to personally pay 15% of the costs of the South African Reserve Bank (Reserve Bank) on a punitive attorney and client scale, including the costs of three counsel. This order followed from litigation between the Reserve Bank and the Public Protector in which the Reserve Bank was successful. In the event that direct leave to appeal was granted to the Public Protector, the Reserve Bank sought conditional leave to cross-appeal against the High Court's refusal to declare that the Public Protector had abused her office in conducting an investigation pertaining to the Reserve Bank.

On 19 June 2017, the Public Protector published her final report regarding the financial assistance of R1.125 billion that was provided by the Reserve Bank to Bankorp Limited between 1985 and 1991. The remedial action recommended by the Public Protector directed the Chairperson of the Parliamentary Portfolio Committee to take steps to amend the Constitution in order to strip the Reserve Bank of its primary object of protecting the value of the currency and to amend its consulting obligations with the Minister of Finance. The Reserve Bank successfully brought an urgent application before the High Court seeking to review and set aside this remedial action. The Public Protector's final report further required the Special Investigating Unit to approach the President to take certain steps to recover the ostensibly misappropriated public funds from ABSA Bank Limited who had purchased Bankorp Limited in 1992. Pursuant to a second review application

brought by the Reserve Bank, the High Court set aside the Public Protector's remaining recommended remedial action. It was in the second review that the High Court granted the personal and punitive costs order which is the subject of this appeal.

In a majority judgment penned by Khampepe J and Theron J (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Mhlantla J and Petse AJ concurring), the Constitutional Court held that there was no sound basis to justify an interference with the High Court's exercise of its true discretion to award personal and punitive costs against the Public Protector. The Constitutional Court held that personal costs orders against public officials, like the Public Protector, whose bad faith conduct falls short of what is required of them, constitute an essential, constitutionally-infused mechanism to ensure that they act in good faith and in accordance with the law and the Constitution. The Constitutional Court held that the need to hold government to the duty of proper court process is sourced in the Constitution itself, and that personal costs orders are not granted against public officials who conduct themselves appropriately. They are granted when public officials fall egregiously short of what is required of them.

Furthermore, the Constitutional Court upheld the High Court's finding that the Public Protector had acted in bad faith and agreed that she had exceeded the bounds of her potential indemnification under the Public Protector Act. The Constitutional Court held that the Public Protector's entire model of investigation was flawed, and that she was not honest about her engagements during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report. Furthermore, the Constitutional Court held that the Public Protector had failed to explain why she had not disclosed any of her meetings with the Presidency in the final report, or why, contrary to her general practise, she did not produce transcriptions of her meetings with the Presidency or the State Security Agency. Moreover, the Constitutional Court found that the Public Protector had put forward a number of falsehoods in the course of litigation, including misrepresenting under oath before the High Court that the economic analysis which underpinned the final report was based on expert economic advice, which it was not. In the Constitutional Court, the Public Protector's various explanations of her conduct were found to be contradictory. The Constitutional Court concluded that the punitive aspect of the costs order against the Public Protector must stand in light of the standard of conduct expected from public officials and the number of falsehoods put forward by the Public Protector in the course of the litigation. It was for these reasons that the Public Protector's appeal was dismissed.

In relation to the Reserve Bank's conditional cross-appeal, the Constitutional Court held that in light of the High Court's decision not to deal with the merits of the declarator, the Constitutional Court did not have the benefit of any other courts' judgments on this matter. The Constitutional Court further held that it may be that the circumstances of this case justify the granting of a declaratory order sought by the Reserve Bank, but this order should not be granted in the absence of the Public Protector having had sufficient opportunity to respond to the request for the declarator. The Reserve Bank's application for leave to conditionally cross-appeal was accordingly dismissed.

The minority judgment, penned by Mogoeng CJ (Goliath AJ concurring), held that the High Court judgment should have been set aside because not only was no harm shown to exist but the basic personal costs' definitional requirements of gross negligence and bad faith were not shown nor were they met. The minority judgement held that it was ironic that the High Court found it extremely reprehensible that the Public Protector did not know what the High Court said she should have known when the High Court itself did not know what she should have known.

The minority judgment asserted that substantive justice requires that no litigant ought to be left exposed to undeserved ruination just because they did not expressly plead non-compliance with basic legal requirements that have clearly not been complied with. Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. The minority judgment held that courts exist not to crush or destroy, but to teach, caution or punish constructively. The order for costs against the Public Protector would, according to the minority, predictably ruin her financially and possibly shipwreck her occupation.

The minority judgement held that an order for personal costs against a representative litigant ought to bear a demonstrably clear correlation to the gravity of the wrongdoing that it is said to have occasioned. The minority judgement further held that it cannot be seriousness or a mark of displeasure in a vacuum that is not supported by the danger that flows or could flow from the impugned conduct.

The minority judgment concluded that the High Court should not have mulcted the Public Protector, as a representative litigant, in punitive costs purely for opposing all three applications to the end. The minority judgment held that in doing so, the High Court was influenced by wrong principles and a misdirection on the facts, resulting in a decision which could not reasonably have been made by a court properly directing itself to all relevant facts and principles.