IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

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

DATE 20/10/16 SIGNATURE

CASE NO: 76554/2013

DATE: 26/10/2016

IN THE MATTER BETWEEN

MINISTER OF HOME AFFAIRS	1ST APPLICANT
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	2ND APPLICANT
AND	
THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA	1ST RESPONDENT
REGINALD ANANIUS MARIMI	2ND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicants seek an order reviewing and setting aside the final report by the first respondent ("the Public Protector") on an investigation into certain alleged conduct of employees of the Department of Home Affairs. The final report is dated 25 July 2013.

[2] In the alternative, orders are sought to review and set aside certain specific findings contained in the aforesaid final report. There is also a prayer for declaratory relief to the effect that the Public Protector acted *ultra vires* her powers in making the findings and imposing the remedial actions contained in the report.

[3] The applicants also seek a costs order.

[4] The application is opposed by the Public Protector.

The second respondent, the aggrieved official of the Department of Home Affairs who asked the Public Protector to investigate the matter, played no active part in the proceedings.

[5] Before me, Mr Mokhari SC, with Mr Platt, appeared for the applicants and Mr Maleka SC, with Mr Ben-Zeev, appeared for the Public Protector.

Brief notes about the somewhat unusual procedural journey travelled by this case

[6] The earlier, factual and procedural, chronology of events can be summarised as follows:

- The events forming the subject of the Public Protector's investigation, namely alleged misconduct by the second respondent while officiating as First Secretary employed by the Department of Home Affairs as a member of the South African Embassy in Cuba, took place in 2009.

- Other events central to the investigation, including exchanges between the second respondent and officials of the Department of Home Affairs, took place mainly in 2010.

- The letter of complaint lodged by the second respondent with the Public Protector, is dated 14 February 2011.

- As mentioned, the final report, which is the subject of the attack on review, is dated 25 July 2013.

  There was also a provisional report.

  The final report was submitted to the first applicant (then the Minister was Ms Pandor) and the second applicant (Mr Apleni, who also deposed to the founding affidavit) in terms of the provisions of section 8(1) of the Public Protector Act, no 23 of 1994 ("the Public Protector Act").

- A copy of the report was also provided to the second respondent, Mr Marimi (the complainant).

- The review application was launched in December 2013.

[7] It is appropriate to summarise more recent procedural developments:

- The application came before me on 13 February 2015.

Because one of the central issues in this case was the question whether the findings and remedial actions of the Public Protector were legally binding and, as such, reviewable by a court, or not, I debated with counsel the findings of the learned Judge in *Democratic Alliance v South African Broadcasting Corporation Ltd and Others*, then already reported as 2015 1 SA 551 (WCC) to the effect, broadly put, that the findings of the Public Protector were only "recommendations", and the question whether my judgment should be held in abeyance pending the final outcome of the aforesaid case, by then the subject of an application for leave to appeal.

No conclusive arrangement was made, and the matter proceeded.

- Shortly after judgment was reserved following conclusion of the proceedings before me, a new legal team representing the Public Prosecutor informed me that their client had written a letter indicating that representations made on her behalf before me to the effect that she endorsed the argument that her findings and remedial action only amounted to recommendations which were not binding was not in line with her personal views on the matter and also not in line with what she had argued in another case. I was informed that the Public Prosecutor was abandoning the mentioned argument, reaffirming her stance that her findings were binding and reviewable, but persisting with her opposition to the review application on the substantive grounds on the "merits" which had been advanced on her behalf.

- I called for further submissions on the subject and both sides filed written supplementary heads of argument. It was submitted, correctly in my view, on behalf of the Public Prosecutor that the abandonment of the argument in relation to the Public Protector's powers had no impact on her continued opposition to the substantive grounds of review. She was entitled to abandon a legal argument raised on her behalf and no prejudice was caused to the applicants in the process.

- I was also informed that leave to appeal to the Supreme Court of Appeal was granted by the learned Judge in the Western Cape Division on 23 April 2015. I ruled that my judgment would be held in abeyance pending the outcome of those appeal proceedings.

- As it happened, the judgment in the appeal, reported as *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 2 SA 522 (SCA) was published in the April 2016 Law Reports. Broadly, it was held that the findings of the Public Protector are binding and reviewable by a court.

- By then the "Nkandla case" reported as *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 3 SA 580 (CC) was due to be heard in the near future, and the final word would be spoken on the nature of the powers of the Public Protector. Again, it was agreed in exchanges I had with both sides that the judgment would be held in abeyance pending the

outcome of the last-mentioned case. It was published in June 2016, although the outcome was known before that.

When the result became known, I invited the parties to file further written submissions which, in the end, they declined to do.

- Against this background, the judgment was prepared.

Brief synopsis of the underlying circumstances leading to this litigation

[8] During 2009 the second respondent, Mr Marimi, to whom I will also, at times, refer as "the complainant" was employed by the Department of Home Affairs but attached to the South African Embassy in Cuba as a First Secretary.

[9] On 17 February 2010, the Cuban Deputy Minister of Foreign Affairs called the South African Ambassador to discuss certain alleged serious incidents in which the complainant and a Second Secretary had allegedly been involved.

[10] On 22 February 2010 the Cuban Ministry of Foreign Affairs (presumably the aforesaid Deputy Minister) sent an *aide memoire* to the South African Ambassador setting out certain details of the alleged misconduct of the complainant and the Second Secretary.

[11] Because the bulk of the misdemeanours appears to be attributed to the Second Secretary, who is named in the *aide memoire*, I shall refer to him only as "Secretary M" or "Mr M" in order to protect his identity for present purposes.

[12] The following alleged misdemeanours are attributed to Secretary M in the *aide memoire*:

- He "was the one responsible for a traffic accident on 29 November 2009, when he impacted from behind a car that stopped at a traffic light". The occupants of the car got out to complain to the South African diplomat and when "no agreement was reached" Secretary M drove on, dragging the aggrieved fellow motorist on the hood of his car for several metres.

  This event, in particular, had a strong social repercussion because of a number of people who witnessed it.

- Documents from the National Revolutionary Police report an incident involving Secretary M in the city of Cienfuegos to the effect that Secretary M, who was in a state of intoxication, insulted a group of citizens "throwing them a can of beer". When Secretary M was spotted later on at a gas-station he refused to show identification documents. He replied in a disrespectful manner and insulted the two patrol officers who appeared on the scene.

- On 8 June 2009 Secretary M, when he was stopped by the police for having infringed the traffic laws during early morning hours and for driving his car in an irregular manner "with the car radio extremely high" refused to show his documentation to the authority; and in 2009 Secretary M was involved in another traffic accident about which there was no police intervention as the involved parties reached an understanding.

[13] The *aide memoire* then goes on to list the alleged transgressions of the First Secretary, the complainant:

- He was involved with Secretary M in the incident that took place in Cienfuegos on 15 March 2009 and he has been involved in other serious traffic laws violations (no details are supplied).

- On another, "very dangerous occasion", he tried to "go through an unauthorised area and he had to be detained by State Security agents" (again no details).

- "Last December 2009, this First Secretary attacked physically and insulted in a disrespectful manner an Airport Customs official".

[14] So much for the alleged transgressions. Importantly for present purposes, it is then stated in the *aide memoire* that, in recognition of the excellent relations between the two countries, the Cuban Foreign Ministry "had agreed that the Deputy Minister summon the Ambassador with all these elements and, without requesting him to get them out of the country or to declare them *personas non grata*, point out to him emphatically that new incidents would not be tolerated" (emphasis added, for reasons which will appear later).

[15] In conclusion of the *aide memoire*, it is stated that incidents such as those described affect in a negative manner the image of the bilateral relations between the two countries and the hope is expressed that appropriate measures will be taken to prevent a recurrence.

[16] In her final report of 25 July 2013 ("the report" or "the final report") the Public Protector states that she received a letter of complaint from the complainant on 14 February 2011 in which she alleged that:

- On 26 April 2010 he received a letter from the Deputy Director-General of Immigration Services, of the Department of Home Affairs, informing him that the Department was in possession of documentation which contained allegations of serious acts of misconduct against him whilst he was a transferred/diplomatic official based in the South African Embassy in Cuba.

- The letter stated further that based on these allegations he was withdrawn with immediate effect and he would be notified of the disciplinary steps that the Department would institute against him.

- The allegations were not investigated in terms of the Public Service Co-ordinating Bargaining Council ("PSCBC") Resolution 1 of 2003: Disciplinary Code and Procedures.

- On 26 May 2010 he instructed his attorneys to write a letter of enquiry to the Department to which there was no response.

  On 26 July 2010 he, himself, wrote a letter to the Deputy Director-General in which he raised concerns regarding the delay by the Department to respond to his attorneys' enquiry and the fact that he was not provided with a copy of the allegations levelled against him. Again there was no response.

- On 1 September 2010, he received a letter from one Mr Malaka stating that the Department intended to institute disciplinary action against him and that he should respond within five working days why disciplinary action should not be instituted against him, to which he responded on 2 September 2010. Nothing further was heard from the Department.

It is convenient to quote extracts from the complainant's letter of 2 September 2010 in response to Mr Malaka's letter of the previous day:

> "Firstly allow me to appreciate the opportunity afforded to me to respond to the information received by the Department from the Department of International Relations regarding the allegations levelled against me. I wish to raise the following concerns with the Department.
>
> 1. The Department of Home Affairs took a unilateral decision to recall me without following all procedures as stipulated in the Labour Relations Act.
> 2. The Department of Home Affairs was issued with a letter from (the name of the attorney acting for the complainant) on 26 May 2010 who was acting on my behalf (see attached copy) and no response was given.
> 3. A letter of withdrawal was issued on 26 April 2010 but I was only served with the letter of intent on 1 September 2010 (four months and five days) which to me was unfair as I lost certain benefits that was due to me during that period.

4. The Department did not wait for the Ambassador's report or the Department of International Relations before I was recalled. The Department of International Relations was only informed a month after the letter was given to me.

5. With regard to the intended allegations levelled against me, kindly forward me with physical evidence so that I can be in the position to respond to them.

It will be appreciated if my concerns are urgently addressed so that one can be in a better position to answer to these allegations as well as to state the reasons why I should not be disciplined."

As I said, nothing further was heard from the Department.

- From May until December 2010 the complainant did not receive USD 42 896 (R307 897,19 as per the exchange rate then) in allowances due to him from the Department.

- The Department acted unfairly against him for the following reasons:

  (i) the decision by the Department to withdraw him prior to a procedurally fair disciplinary hearing was improper and a violation of his constitutional right to fair labour practice;

  (ii) the Department's decision to withhold the payment of his Cost of Living Allowance ("COLA") on the basis of his withdrawal was improper and prejudiced him; and

(iii) the Department failed to finalise the disciplinary proceedings within a reasonable period of time so that his reputation could be cleared and the unresolved matter has resulted in prejudice to his reputation.

[17] This inspired the Public Protector to investigate the complaint in terms of her powers as defined in the Constitution of the Republic of South Africa, 1996 ("the Constitution") and the Public Protector Act, no 23 of 1994.

[18] In terms of her powers, the Public Protector brought out a detailed and lengthy provisional report which was dated 12 December 2012 which she delivered to the Minister and the second applicant, calling for their comments. The provisional report already contained details of her provisional findings and the remedial action she was contemplating in terms of her powers as described in section 182(1)(c) of the Constitution.

Lengthy comments were received from the second applicant, and fully dealt with in the final report of 25 July 2013.

The Public Protector also had a personal meeting with the second applicant on 30 January 2013. The minutes of that meeting form part of the record.

[19] Apart from the meeting, details are stipulated in the final report of key sources of information consulted by the Public Protector during the course of the preparation of her provisional and final reports: there was correspondence with the complainant, correspondence with various officials in the Department of Home Affairs,

correspondence with various officials in the Department of Correctional Services to which the complainant was transferred at a later stage, voluminous documents relating to the complaint in the form of letters and e-mail correspondence between the complainant and the Department, the Department of International Relations and Co-operation ("DIRCO") and the Department of Home Affairs and correspondence between the Public Protector and DIRCO as well as the Department of Home Affairs.

She also consulted legislation and other prescripts including the Constitution, the Labour Relations Act 66 of 1995 ("the LRA"), the Standard Contract of Placement in Foreign Mission used by the Department of Home Affairs, the already mentioned PSCBC Resolution 1 of 2003: Disciplinary Code and Procedures as well as the Foreign Service Dispensation of 2010. In addition, there was correspondence between the complainant and the Department including the letter which the complainant's attorney addressed to the Department in May 2010.

[20] The indexed record of proceedings supplied by the Public Protector, as respondent in a review application, in terms of rule 53, runs into more than 270 pages.

[21] So much for the brief background synopsis.

Brief references to the applicable legislation

(i) The Constitution

[22] These appear to be the relevant provisions of the Constitution for present purposes:

- Section 2 stipulates that the Constitution is the supreme law of the Republic and law or conduct inconsistent therewith is invalid, and the obligations imposed by it must be fulfilled.

- Section 23 stipulates that everyone has the right to fair labour practices.

- The Public Protector is one of the Chapter 9 "state institutions supporting constitutional democracy".

The Public Protector is the first of those state institutions that "strengthen constitutional democracy in the Republic". The Public Protector was established in terms of section 181(a) of the Constitution. There are five other such institutions.

It is convenient to quote the remaining subsections of section 181:

> "(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."

In the latter regard, it appears that the final report, in this matter, was tabled in parliament.

- Section 182, under the heading "Functions of Public Protector" deals with the Public Protector as the first of these Chapter 9 institutions. It does so in the following terms:

"(1) The Public Protector has the power, as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation (my note: an obvious reference to the Public Protector Act).

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."

In terms of section 183 the Public Protector is appointed for a non-renewable period of seven years.

(ii) <u>The Public Protector Act</u>

[23] For the sake of brevity, I will attempt to deal briefly with extracts of this Act which appear to me to be relevant for present purposes:

- The long title stipulates that the Act is "to provide for matters incidental to the office of the Public Protector as contemplated in the Constitution, and to provide for matters connected therewith".

- In this regard, the preamble specifically refers to the provisions of sections 181 to 183 of the Constitution. There is also a reference, in the preamble, to sections 193 and 194 of the Constitution, dealing with the appointment and removal from office of the Public Protector. This is not applicable for present purposes.

- Section 5, under the heading "**Liability of Public Protector**", stipulates:

  "(1) The office of the Public Protector shall be a juristic person.

  (2) The State Liability Act, 1957 (Act 20 of 1957), shall apply with the necessary changes in respect of the office of the Public

Protector, and in such application the reference in that Act to 'the Minister of the Department concerned' shall be construed as a reference to the Public Protector in his or her official capacity.

(3) Neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to parliament or made known in terms of this Act or the Constitution."

- Section 6 under the heading "**Reporting matters to and additional powers of Public Protector**", is a lengthy provision. I will attempt to condense references thereto as far as is practicable.

- Section 6(1) stipulates that the complaint submitted to the Public Protector must be by means of a written or oral declaration under oath or after having made an affirmation specifying the nature of the matter in question and the grounds for the complaint. Section 6(1)(b) stipulates in the alternative that the complaint may be made by any other means that the Public Protector may allow with a view to making his or her office accessible to all persons (my note: a complaint offered by the applicants to the effect that the process was flawed because the complaint letter was not under oath, has no merit: the Public Protector clearly has a discretion to allow the complaint to be made by such other means that she may consider appropriate).

- In terms of section 6(3) "the Public Protector **may refuse** (my emphasis) 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."

  (My note: there is no merit, in my view, in an argument offered by the applicants to the effect that the investigation was premature because the complainant had not exhausted all his remedies in terms of the Public Service Act before approaching the Public Protector: it is clear from the provision that the Public Protector **may refuse** (my emphasis) to investigate a matter under such circumstances that she has a discretion and that the provision is not couched in mandatory language. In any event, it appears that the complainant made diligent efforts by entering into correspondence with the Department, personally and through his attorney, as illustrated, without any meaningful response thereto.)

- Section 6(4) provides:

  "(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) ...

(iv) ...

(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."

- Section 6(4)(b) makes provision for the Public Protector, in her sole discretion, to resolve disputes by way of mediation, conciliation or negotiation or to adopt other steps to achieve such resolution. This is not strictly applicable for present purposes.

- The same applies to sections 6(4)(c) and (d) and also subsections (5), (6), (7), (8) and (9).

- Section 7 deals with the investigation as such which may be conducted by the Public Protector and there is also provision for a preliminary investigation to

be conducted for the purpose of determining the merits of the complaint. In this case, as I mentioned, a provisional report was also brought out.

There is clear provision, in section 7(1)(b)(i) that 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. I need not dwell any further on these provisions, and the same applies to the provisions of section 7A.

- Section 8 provides for the publication of the findings of the Public Protector, including reports to the National Assembly and tabling of the findings of a particular investigation.

- I need not deal with sections 9, 10 and 11, or 14 and 15.

- Section 13, under the heading "**Application of Act**" stipulates:

  "The provisions of this Act shall not affect any investigation under, or the performance or exercise of any duty or power imposed or conferred by or under, any law."

The findings and remedial measures taken by the Public Protector are binding, and in a proper case, reviewable by a court

[24] In *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others ("SABC v DA")* 2016 2 SA 522 (SCA) the following is said at 547G-548D (only extracts are quoted):

"If indeed it were aggrieved by any aspect of the Public Protector's report, its remedy was to challenge that by way of a review ... thus, absent a review, once the Public Protector had finally spoken, the SABC was obliged to implement her findings and remedial measures."

[25] At 552H-553C the following is said:

"To sum up, the office of the Public Protector, like all Chapter 9 institutions, is a venerable one. Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by section 41 of the Constitution. Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector. Moreover, an individual or body affected by any finding, decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector. A mere power of recommendation of the kind suggested by the High Court appears to be more consistent with the language of the interim Constitution and is neither fitting nor effective, denudes the office of the Public Protector of any meaningful content, and defeats its purpose ... Before us, all the parties were agreed that a useful metaphor for the

Public Protector was that of a watch-dog. As is evident from what is set out above, this watch-dog should not be muzzled."

[26] In *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 3 SA 580 (CC) ("*EFF v Speaker*") the following is said at 606D-F:

"The power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution. Just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity. The contention that regard must only be had to the remedial powers of the Public Protector in the Act and that her powers in the Constitution have somehow been mortified or are subsumed under the Public Protector Act, lacks merit. To uphold it would have the same effect as 'the tail wagging the dog'."

[27] At 610E-G, the learned Chief Justice says:

"This is so because our constitutional order hinges also on the rule of law. No decision grounded in the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To

achieve the opposite outcome lawfully, an order of court would have to be obtained." (Emphasis added, this subject of administrative action will be revisited later.)

[28] At 611C-D, the learned Chief Justice states:

"Our foundational value of the rule of law demands of us, as law abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force."

[29] I add, simply for the sake of detail, but not considering this to be applicable for present purposes, that the learned Chief Justice pointed out that, in certain instances, the legal effect of the appropriate remedial action may not be binding in the true sense of the word. He states, at 608D-F:

"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. As common sense and section 6 of the Public Protector Act suggests, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. And so might recommending litigation or a referral of the matter to the relevant public authority, or any other suitable recommendation, as the case might be. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to the nature, context and language, to determine what course to follow."

[30] In the result, and subject to the last-mentioned remarks, I have to conclude, as I do, that the findings of the Public Prosecutor in this particular matter, and the remedial action she decreed, are binding unless set aside in this review application.

[31] It also follows, that arguments to the contrary offered in the Public Protector's answering affidavit and the heads of argument of her counsel appearing before me, which arguments the Public Protector in any event abandoned, as explained earlier, fall to be rejected.

Do the decisions of the Public Protector amount to administrative action as intended by the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")?

[32] It stands to reason that this question will not apply to those decisions of the Public Protector which are mere recommendations, as explained by the learned Chief Justice, *supra.*

[33] Before me, it was argued on behalf of the applicants that the provisions of PAJA do come into play in this case. The contrary was argued on behalf of the Public Protector. This stance may be affected by the later abandonment of the argument by the Public Protector that her decisions are not binding.

[34] I could not find a clear answer in *EFF v Speaker* to the question as to whether or not the decisions of the Public Protector amount to administrative action in the particular sense of the word. The closest I could find was the words, already quoted, at 610E-F that "Whether the Public Protector's decisions amount to administrative action or not,

the disregard for remedial action by those adversely affected by it amounts to taking the law into their own hands and is illegal ..."

[35] I have mentioned the words of the learned Judges of Appeal in *SABC v DA* at 552H-J to the effect that "Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application ..."

[36] It does, however, appear, if I understood the judgment correctly, that the learned Judges of Appeal considered the decisions of the Public Protector to amount to administrative action. They state the following at 546C-G:

> "Regarding the first consideration, (my note: comparing the powers of the Public Protector with that of a court) it is so that section 165(5) of the Constitution provides: 'An order or decision *by a court* binds all persons to whom and organs of state to which it applies' (our emphasis). But the court is an inaccurate comparator and the phrase 'binding and enforceable' is terminologically inapt and in this context conduces to confusion. For it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences and cannot simply be overlooked (*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) ...) It was submitted, however, that that principle applies only to the decision of an administrative functionary or body, which the Public Protector is not. It suffices for present purposes to state that if such a principle finds application in the decisions of an administrative functionary, then, given the unique position that the Public Protector occupies in our

constitutional order, it must apply with at least equal or perhaps even greater force to the decisions finally arrived at by that institution. After all, the *rationale* for the principle in the administrative-law context (namely, that the proper functioning of a modern state would be considerably compromised if an administrative act could be given effect to or ignored, depending upon the view the subject takes of the validity of the act in question (*Oudekraal* paragraph 26)), would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports."

[37] In *Public Protector v Mail and Guardian Ltd and Others* 2011 4 SA 420 (SCA) the learned Judge of Appeal, with respect, appears to adopt a more robust and pragmatic approach to the subject at 426A-C:

"There is no dispute in this case that an investigation and report of the Public Protector is subject to review by a court. I do not find it necessary to pronounce upon the threshold that will need to be overcome before the work of the Public Protector will be set aside on review. It would be invidious for a court to mark the work of the Public Protector as if it were marking an academic essay. But I think there is none the less at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in this case."

[38] In terms of section 5(1) and section 5(2) of the Public Protector Act, the office of the Public Protector shall be a juristic person, and the State Liability Act shall apply with the necessary changes in respect of the office of the Public Protector, and in such application a reference in that Act to "the Minister of the Department concerned" shall be construed as a reference to the Public Protector in his or her official capacity.

From this it appears, on a general reading of these provisions, that the Public Protector enjoys a status equal, at least, to that of a Minister.

[39] An "organ of state" is defined as follows in section 239 of the Constitution:

> "(a) Any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution –
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation;
>
> but does not include a court or a judicial officer."

[40] It seems to me that the Public Protector, performing her functions in terms of the Constitution and the Public Protector Act can properly be described as an organ of state in that sense.

I am not aware of any specific pronouncement on this question by another court, neither was I referred to such.

It is, with respect, not clear to me exactly how to interpret the words of the two learned Judges of Appeal in *SABC v DA* at 546D-G (already quoted, but revisited for the sake of convenience) when they say -

> "It was submitted, however, that that principle (my note: that until a decision is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences) applies only to the decision of an administrative functionary or body, which the Public Protector is not. It suffices for present purposes to state that if such a principle finds application in the decisions of an administrative functionary, then, given the unique position that the Public Protector occupies in our constitutional order, it must apply with at least equal or perhaps even greater force to the decisions finally arrived at by that institution. After all, the *rationale* for the principle in the administrative-law context (namely, that the proper functioning of a modern state would be considerably compromised if an administrative act could be given effect to or ignored, depending upon the view the subject takes of the validity of the act in question (*Oudekraal* paragraph 26)), would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports." (Emphasis added.)

It is not clear to me whether the learned Judges found that the Public Protector is not an administrative functionary or only considered a submission to that effect. Either way, it appears that they pronounced the decisions finally arrived at by the Public Protector to be at least akin to those of an administrative functionary. As far as I can

gather, they did not pronounce on the question as to whether or not the Public Protector is an organ of state in the spirit of section 239 of the Constitution.

[41] I turn to the PAJA definition, in section 1, of administrative action:

> "'**Administrative action**' means any decision taken, or any failure to take a decision, by –
>
> (a) an organ of state, when –
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include – " (then follows a number of exclusions which, in my view, do not apply for present purposes).

[42] If I am wrong in my conclusion that the Public Protector is an organ of state, then, at least, she is a juristic person (having been pronounced to be one in mandatory terms by section 5(1) of the Public Protector Act and having been placed in the position of the Minister by section 5(2)) "when exercising a public power or performing a public function in terms of an empowering provision".

[43] What does cause some uncertainty, is whether the Public Protector's actions can, after all, be classified as "administrative action" in the spirit of PAJA if they are required, in order to fall inside that definition, to "adversely affect the rights of any person and which has a direct, external legal effect".

At first blush, one is not inclined to see the actions of the Public Protector as adversely affecting the rights of any person, although they certainly have been recognised, in view of the authorities quoted, as having a "direct, external legal effect".

[44] In *Minister of Defence and Military Veterans v Motau and Others* ("*Motau*") 2014 5 SA 69 (CC) there is a lengthy discussion about the concept of "administrative action" as defined in PAJA from 82F-86E.

However, only certain elements of administrative action namely whether the actions of the Minister in that case was of an administrative nature and whether the action fell under any of the listed exclusions came up for specific consideration. The elements of adversely affecting rights and a direct external legal effect were not dealt with.

What is plain, is that it appears from the judgment, at 83C-E, that a court considering an application of this nature is obliged to make a "positive decision in each case whether a particular exercise of public power ... is of an administrative character". In this regard, the learned Judge refers to *Sokhela and others v MEC for Agricultural and Environmental Affairs (Kwa-Zulu Natal) and Others* 2010 5 SA 574 (KZP) at paragraph [60].

Broadly speaking, it appears that executive actions are, in essence, high-policy or broad direction-giving powers which would generally include the formulation of policy whereas administrative action is "the conduct of the bureauracy in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals" – *Motau* at 84B-E.

The observation of the learned Judge, at 85C-E, that "while administrative powers more commonly flow from legislation, PAJA's definition of 'administrative action' expressly contemplates that the administrative power of organs of state may derive from a number of sources, including the Constitution" appear to be in complete harmony with the position of the Public Protector.

[45] I revisit the concern which I have raised namely that, judging by the definition, administrative action must "adversely affect the rights of any person" before it can be classified as such in the spirit of the PAJA definition. After all, the actions of the Public Protector are generally considered not to have this unfortunate result.

The answer may be contained in the following remarks of the learned Judge of Appeal in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at 323D-F:

> "While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse)

seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of the Constitution. Moreover, that literal construction would be inconsonant with section 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandom serving to emphasise that administrative action impacts directly and immediately on individuals."

- Section 33 of the Constitution referred to by the learned Judge, in section 33(1), stipulates that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair"; and

- Section 3(1) of PAJA, mentioned by the learned Judge provides:

  "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

[46] From the aforegoing, I understand the learned Judge of Appeal to have held that the PAJA definition was not intended to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person". The two qualifications, referred to, were intended rather to convey that administrative action is action that has the capacity to affect legal rights. There appears to be emphasis on the fact that administrative action impacts directly and immediately on individuals.

On this particular subject, the central issue appears to be (as also alluded to by the learned Judge of Appeal, but from a slightly different angle), that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair – section 3(1) of PAJA.

These conclusions appear to be in harmony with what one generally expects from the Public Protector (a state institution supporting constitutional democracy – section 181(1) of the Constitution) namely generally achieving positive results for all concerned rather than adversely affecting the rights of any person. However, if the latter were to become a reality, the action taken by the Public Protector must be procedurally fair.

[47] Against this background, I have come to the conclusions, and I find, that –

(1) As a general proposition, the decisions and actions of the Public Protector amount to administrative action as intended by PAJA.

(2) If I am wrong in this conclusion, the decisions of the Public Protector amount to something akin to administrative action, a la *SABC v the DA*.

(3) Either way, the actions and decisions of the Public Protector can, in a proper case, be challenged in terms of PAJA, as was done in this case by the applicants. Where appropriate, there will also be room for a so-called "legality review" if it is alleged that the Public Protector exercised powers and performed functions beyond that conferred upon her by law – see, for example,

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 1 SA 374 (CC) at 400D-G.

More about the Public Protector's final report: issues selected by her for decision and her findings after considering responses received from the applicants

[48] The final report is a lengthy, comprehensive, well crafted and detailed affair running into some 46 pages, and 100 pages if the annexures are included.

The final report was, as I have mentioned, preceded by a provisional report. This was an equally detailed document, presenting the applicants and other recipients thereof with a clear picture of the findings which the Public Protector was considering to make and inviting those affected to furnish comments, which they duly did. In line with the statutory requirements, proper notice was given to all concerned and the reports were tabled in parliament.

[49] In this regard, I consider it appropriate to remark, at the outset, that I am satisfied, at least on the overwhelming probabilities, that, judging by the quality of the reports and other aspects of the investigation mounted by the Public Protector, her investigation was clearly "conducted with an open and enquiring mind" which appears to be the main feature of the investigation required by the learned Judge of Appeal in *Mail and Guardian* at 426A-C, already quoted above, for the work of the Public Protector to pass muster and to avoid being set aside on review.

[50] The report, under the heading "unjust forfeiture" is one in terms of section 182(1)(b) of the Constitution and section 8(1) of the Public Protector Act.

[51] In terms of section 182(1)(a) of the Constitution (already mentioned) the Public Protector has the power, as regulated by national legislation, 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.

In terms of section 6(4) of the Public Protector Act, the Public Protector shall be competent to investigate, on her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level, and any alleged abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by any person performing a public function. There are other powers too.

[52] In terms of the provisions of section 7(1)(b) of the Public Protector Act, the format and the procedure to be followed in conducting any investigation shall be determined by her with due regard to the circumstances of each case.

[53] In the introduction to the report, it is stated that it communicates the Public Protector's findings and directives on appropriate remedial action following her investigation into a complaint lodged by Mr Marini, the second respondent, on 14 February 2011 alleging improper prejudice suffered as a result of the decision of the Department of Home Affairs to withdraw him from a posting at the Cuban Foreign Mission in April 2010, based on allegations of acts of misconduct in Cuba.

"The alleged maladministration involved the Department's failure to afford him an opportunity to answer to the allegations against him before the decision to withdraw him was made, the Department's failure to institute a disciplinary hearing against him regarding those allegations subsequent to his return to South Africa and the withdrawal of his Cost of Living Allowance (COLA), (estimated to be USD 42 896), which he was entitled to as a designated official posted in Cuba."

[54] According to what is stated in the introduction to the report, the Public Protector considered and investigated the following issues:

"(a) Did the Department withdraw the complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?

(b) Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the complainant prior to his resignation unreasonable and improper? (My note: the "resignation" referred to appears to be the transfer to the Department of Correctional Services.)

(c) Was the Department's decision to withhold the complainant's Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?

(d) If the answer to any of the above issues is in the affirmative, was the complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?"

[55] Section 6(4)(a)(v) of the Public Protector Act provides:

"The Public Protector shall, be competent –

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged –

(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."

[56] I turn to the Public Protector's response, in the report, to certain arguments raised by the applicants questioning her jurisdiction to investigate this particular complaint.

Public Protector's response to arguments about her jurisdiction

[57] The applicants challenged the jurisdiction of the Public Protector to investigate this complaint on two grounds:

- The Public Protector does not have the necessary jurisdiction to investigate an unfair labour practice complaint which ought to be dealt with in terms of the Labour Relations Act of 1995. The Public Protector acted *ultra vires* the enabling legislation, being the Constitution and the Public Protector Act. Her action in this regard is tainted with illegality so that her findings fall to be set aside. This appears to be a so-called "legality review" as referred to.

The Public Protector responded to this argument by remarking that the provisions of the Labour Relations Act are subject to the Constitution. She relied on section 182(1) of the Constitution which provides, as I already pointed out, that the Public Protector has the power, as regulated by national legislation 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. She also has the power to take appropriate remedial action as stipulated in section 182(1)(c) of the Constitution. (Emphasis added.)

She also has additional powers as prescribed by national legislation (in this case the Public Protector Act). Here it is useful to revisit the provisions of section 6(4)(a) of the Public Protector Act which stipulates that the Public Protector is competent to investigate, on her own initiative or on receipt of a complaint, **any** alleged maladministration in connection with the affairs of government at **any** level as well as **any** alleged abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function. (Emphasis added.)

In her report, the Public Protector argues that the authority relied upon by the applicants, *Gcaba v Minister for Safety and Security and Others* 2010 1 SA 238 (CC) has to do with a comparison of the jurisdiction of the High Court and Labour Court when it comes to so-called labour matters, concurrent jurisdiction in certain areas and exclusive jurisdiction of the Labour Court in other areas. It has nothing to do with the jurisdiction of the Public Protector as ordained by the Constitution itself and the Public Protector Act. I find myself in respectful agreement with this approach. The powers of the Public Protector are extremely wide and she is competent to investigate **any conduct** in state affairs or in the public administration **in any sphere of government** (emphasis added). The powers are extended even further in terms of section 6 of the

Public Protector Act. There is no provision in the Constitution or the Public Protector Act to the effect that the Public Protector's powers, as circumscribed, fall to be excluded in certain instances, such as where the Labour Court has exclusive jurisdiction when compared with the jurisdiction of the High Court. To argue otherwise, would lead to a situation where the powers of the Public Protector are severely curtailed and arguments that particular alleged maladministration or misconduct fall inside the jurisdiction of a certain court rather than that of the Public Protector, despite the wide powers ordained by the Constitution.

Finally, I add that the applicants did not rely, before me, on the provisions of section 13 of the Public Protector Act which, as I mentioned, stipulates that the provisions of that Act shall not affect any investigation under, or the performance or exercise of any duty or power imposed or conferred by or under, any law. In my view this does not amount to an ouster of jurisdiction and a curtailment of the wide powers of the Public Protector which she enjoys in terms of the constitutional and other legislative provisions.

I am consequently of the view that there is no merit in the argument that the Public Protector acted beyond the scope of her powers by not paying deference to the provisions of the Labour Relations Act. Indeed, when making out a case for improper conduct in her report, the Public Protector referred to the Labour Relations Act on a number of occasions.

- The remaining attack by the applicants on the jurisdiction of the Public Protector is based on the provisions of section 6(3) of the Public Protector Act, to the effect that she **may refuse** (my emphasis) to investigate a matter where the complainant has not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the Public Service Act, and also other legislation referred to in section 6(4) and 6(5).

  The Public Protector responded, in my view correctly, that the provisions of section 6(3) are not couched in mandatory terms. She has a discretion whether or not to refuse to investigate if other internal remedies have not been exhausted. She states in her report that, upon assessment of this complaint, it was clear to her that there was a *prima facie* case of alleged maladministration and for that reason she decided to investigate the matter in terms of her wide powers, for example those stipulated in section 6(4)(a) of the Public Protector Act and, no doubt, section 182 of the Constitution.

  Again, I find myself in respectful agreement with this approach.

The findings of the Public Protector

[58] In leading up to these findings, the Public Protector, in her report, dealt with the relevant issues, documentation and arguments offered by the applicants in compelling terms.

[59] What is plain, is that the Public Protector, in the course of her report, meticulously analysed and considered all the arguments and counter-arguments. She studied the

relevant documentation and pronounced thereon. I consider it unnecessary, for present purposes, to analyse all the arguments and observations and documentation and to embark upon unnecessary repetition.

[60] It is clear that the Public Protector properly applied her mind to all the issues and, inasmuch as it may be necessary to pronounce upon the so-called "merits" when adjudicating upon a review application against the decision of an administrative functionary, a subject which I will deal with later in this judgment, I am unable to criticise any of the findings.

[61] What is also patently clear, as I have already suggested earlier, is that the Public Protector conducted this investigation "with an open and enquiring mind", in the words of the learned Judge of Appeal in *Mail and Guardian* at 426A-C.

[62] For the sake of detail, I proceed to quote the findings as they appear in the conclusionary portion of the final report:

> "10.1 **Did the Department withdraw the Complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?**
>
> 10.1.1 The Department withdrew the Complainant from a foreign posting in Cuba on the basis of allegations of misconduct against him.
>
> 10.1.2 The withdrawal was in violation of clause 5.3 of its contract with him, which required that he be withdrawn on the recommendation of the host country or the Head of the Mission

(my note: there was no evidence to the effect that such a recommendation was made. Indeed, the opposite was suggested in the *aide memoire* which I dealt with at the beginning of this judgment with the Cuban Foreign Minister stating that it had been agreed that the Ambassador would be summoned 'with all these elements and, without requesting him to get them out of the country or to declare them *personas non grata*, point out to him emphatically that new incidents would not be tolerated').

10.1.3 The conduct of the Department was improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

10.2 **Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the Complainant prior to his resignation unreasonable and improper?**

10.2.1 The Department delayed to hold a disciplinary hearing to deal with allegations of misconduct against the Complainant (my note: indeed, it is common cause that no disciplinary hearing ever took place).

10.2.2 The delay was in violation of paragraph 7.2(c) of the Public Service Disciplinary Code and Procedures which requires that a disciplinary hearing be held within a maximum period of 60 days.

10.2.3 The delay was unreasonable and improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

10.3 **Was the Department's decision to withhold the Complainant's Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?**

10.3.1 The Department withheld the Complainant's Cost of Living Allowance (COLA) due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him.

10.3.2 The Department's decision to withhold the Complainant's cost of living allowance due to allegations of misconduct against him contravened paragraph 6.2.1(iii) (COLA) of the Foreign Service Dispensation read with the DPSA letter dated 22/02/2006, which provides that an official who is recalled due to a Labour Relations action he/she is regarded as being on official duty and hence is entitled to be paid the appropriate percentage of COLA.

10.3.3 The conduct of the Department in withholding the Complainant's COLA after withdrawing him due to allegations of misconduct against him was improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and

10.4 **Was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act by the Department's decision to withdraw him from the Cuban Foreign Mission, the delay in holding a disciplinary hearing against him regarding allegations of misconduct in Cuba and the withholding of his COLA due to him by virtue of being posted at a Foreign Mission?**

10.4.1 The Complainant suffered an injustice or prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act; in that

10.4.1.1 he was treated unfairly;

10.4.1.2 he unfairly lost his Cost of Living Allowance that he was legally entitled to;

10.4.1.3 his name and reputation remained tarnished due to the failure to afford him an opportunity to clear his name; and

10.4.1.4 his human dignity was impaired."

Remedial action

[63] In terms of the powers conferred upon her by section 182(1)(c) of the Constitution, the Public Protector took the following remedial action:

"11.1 The Director-General of the Department should ensure that the complainant's allowances which accrued to him in terms of his contract of placement in the Cuban Foreign Mission entered into with the Department, is paid to him together with interest at the prescribed rate of 15,5% per annum from the date of his withdrawal from Cuba until the date he transferred to Correctional Services;

11.2 The Director-General of the Department should investigate the reasons why the case was not dealt with properly and take the necessary action against any person who may have failed to act as required by law and policy; and

11.3 The Director-General of the Department should ensure that the complainant is provided with a letter of apology for the prejudice he suffered as a result of the conduct of the Department in this matter."

[64] In compliance with her powers, the Public Protector stated that she would be monitoring compliance with the remedial action that she had taken.

The proper approach when deciding the review application

[65] In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 3 SA 346 (SCA) the learned President of that Court says the following at 353I-354C:

> "In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively *unreasonable*: compare *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another.* (My note: the reference is 2002 3 SA 265 (CC) at 282-283 paragraph [46].) As made clear in *Bel Porto*, the review

threshold is *rationality*. (My note: at paragraph [89].) Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in section 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see section 6(2)(h))."

[66] On this subject, the following remarks of the learned Judge in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at 513B-D are also of particular significance for present purposes:

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution." (Emphasis added.)

While dealing with *Bato Star*, I find it useful to revisit my earlier remarks and conclusions that the actions of the Public Protector amount to administrative action in terms of PAJA, by referring to these words of the learned Judge in *Bato Star* at 506I-507A:

> "The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action of the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."

[67] The learned author Cora Hoexter, *Administrative Law in South Africa* 2nd ed at page 352 says the following:

> "As I see it, the distinction between appeal and review can best be served by distinguishing between the two distinct usages of the word 'review': review as a process and as a remedy. The process of review, judicial scrutiny of administrative action, is sometimes harmless in itself – provided it is not taken further. The danger lies not in careful scrutiny but in 'judicial overzealousness in setting aside administrative decisions that do not coincide with the Judge's own opinions'. Judges will be less likely to usurp administrative powers if they remember that review for reasonableness does not demand perfection (or what

the court regards as perfection), but ought indeed to give scope for legitimate diversity. The important thing, then, is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision. This was put very well by the court in *Carephone* paragraph [36] (my note: this is a reference to *Carephone (Pty) Ltd v Marcus NO* 1999 3 SA 304 (LAC)).

'In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" in some way or another. As long as the Judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.'"

[68] For all the reasons mentioned, and against this background, I am satisfied that the outcome of the Public Protector's investigation is rationally justifiable and her decisions and the remedial action taken fall within the bounds of reasonableness.

It follows that I am not persauded that a proper case was made out by the applicants, so that the review application must fail.

Costs

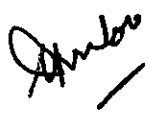
[69] There appears to be no reason why the costs should not follow the result. Two counsel were also employed by both sides, so that an appropriate order should be made in that regard.

[70] I add that it is regrettable, in my view, that the applicants chose to litigate. It is clearly stipulated in section 181 of the Constitution, as already mentioned, that other organs of state, through legislative and other measures, must assist and protect Chapter 9 institutions like the Public Protector to ensure the independence, impartiality, dignity and effectiveness of these institutions.

The order

[71] I make the following order:

1. The application is dismissed.
2. The applicants, jointly and severally, are ordered to pay the costs which will include the costs flowing from preparation of additional heads of argument after judgment was reserved and also consequent upon the employment of two counsel.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

76554-2013

HEARD ON: 13 FEBRUARY 2015
FOR THE APPLICANTS: W R MOKHARI SC ASSISTED BY A PLATT
INSTRUCTED BY: THE STATE ATTORNEY
FOR THE 1ST RESPONDENT: I V MALEKA SC ASSISTED BY O BEN-ZEEV
INSTRUCTED BY: NKADIMENG ATTORNEYS