IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NO: 79808/16

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

13 December 2017 .....

DATE SIGNATURE

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Applicant
And	
THE OFFICE OF THE PUBLIC PROTECTOR	First Respondent
PUBLIC PROTECTOR	Second Respondent
Intervening parties	
ECONOMIC FREEDOM FIGHTERS	First Intervening Party
UNITED DEMOCRATIC MOVEMENT	Second Intervening Party
CONGRESS OF THE PEOPLE	Third Intervening Party
DEMOCRATIC ALLIANCE	Fourth Intervening Party
VYTJTIE MENTOR	Fifth Intervening Party

JUDGMENT

MLAMBO JP:

[1] The crisp issue requiring determination is whether the President of the Republic of South Africa, President JG Zuma (the President) should personally bear the legal costs incurred in this matter. The President, represented by the State Attorney, had launched an urgent application, on 13 October 2016, being the day before the release of a report by the Public Protector on what has become known as State Capture.[1] The sole objective of the President's application was to interdict the Public Protector from finalising and releasing that report.

[2] The President sought to prevent the finalisation and release of the report through the interdict, until such time as he had been afforded a reasonable opportunity to provide input into the investigation carried out by the Public Protector. The President's application sparked off a frenzy of activity by way of intervening applications by the Economic Freedom Fighters (EFF), United Democratic Movement (UDM), Congress of the People (Cope), Democratic Alliance (DA),[2] Ms Vytjtie Mentor (Ms Mentor) and much later, the Minister of Corporate Governance and Traditional Affairs, Mr David Douglas Van Rooyen (Minister Van Rooyen). The President initiated two further interlocutory applications. All the applications mentioned were initiated and dealt with in an atmosphere of urgency with the consequence that the Deputy Judge President of the Division became involved in case managing the matter.

[3] When the stage was set for the President's application to be heard, he withdrew it and tendered costs on the attorney and client scale as well as the costs occasioned by the employment of two counsel where applicable. It was then that argument was advanced by all the intervening parties, that the President be ordered to pay all the legal costs occasioned by his application personally.

[4] The basis for the order sought against the President is firstly that the application launched by him had nothing to do with his official responsibilities

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1 We use this phrase following the title given to the Report by the Public Protector – 'State of Capture'. This is the Public Protector's report in the investigation into complaints of improper and unethical conduct by the President and officials of state organs due to their alleged inappropriate relationship with members of the Gupta family.

2 These are all political parties registered with the Independent Electoral Commission and have representation in the National Assembly.

as President and Member of the National Executive, but was aimed at protecting his personal interests. For this reason, so it was contended, he had no justifiable basis to appoint the State Attorney to represent him in the matter, it being contended that he should have enlisted his own private legal representatives. The other basis advanced for the personal costs order sought against the President is that he conducted the litigation in an unreasonable and reprehensible manner that would justify this Court mulcting him, personally, in a punitive costs order, as a mark of its displeasure.

[5] Argument was heard from all the intervening parties, save for the first and second respondents, who elected to abide the decision of the court. The President opposed the order sought against him. After hearing argument on the point, we reserved Judgment and invited all the parties to file further written argument within two weeks if they so wished. The order granted for this part of the hearing on 1 November 2016 was to the following effect:

> 1. 'The application is withdrawn.
> 2. The Public Protector is ordered to publish the report forthwith and by no later than 17:00 on 2 November 2016, including through publication on the Public Protector's website.
> 3. The applicant is ordered to pay the costs of the application on the attorney and client scale, including the costs of two counsel where so employed, including the costs of the Public Protector.
> 4. The question whether the costs so ordered are to be paid by the applicant in his personal capacity is reserved.'

[6] All the parties submitted further written argument on the costs issue. This court is indebted to the parties for the written arguments received. The determination sought to resolve the costs question renders it necessary to briefly set out the salient background circumstances and litigation chronology of the matter. Where necessary we also consider the contentions of the parties in the main matter as some aspects thereof are relevant to the resolution of the issue. The report which is at the centre of this matter arose out of an investigation undertaken by the Public Protector into a complaint lodged by the Democratic Alliance (DA), one of the intervening parties, and another entity, The Dominican Order, relating to alleged improper and

unethical conduct by the President and other officials of state organs arising from their alleged inappropriate relationship with members of the Gupta family and one of the President's sons.

[7] Upon receipt of the complaints, the Public Protector wrote to the President in March 2016, informing him of the complaints. The Public Protector also informed the President that her office was still considering her options regarding the requested investigation. She further stated that her office didn't have the necessary resources to undertake an investigation of such magnitude. The Public Protector also invited the President to provide comment, if any, regarding the allegations made against him. That letter was not received by the President and the Public Protector resent it in April 2016 and this time it was received by the President. In her letter the Public Protector stated that she was obliged in terms of section 3 of the Executive Members Ethics Act 82 of 1998 (the EMEA) to investigate and report on alleged breaches of the Executive Members' code within 30 days of receipt by her office of a complaint. The letter also stated that the Public Protector would not be able to meet this deadline due to inadequate resources. The President did not respond to this letter.

[8] During September 2016, the Public Protector wrote a further letter to the President requesting a meeting with him, inter alia, to brief him about the investigation into allegations of State Capture as well as afford him an opportunity to answer to the allegations levelled against him. Subsequent to this letter and more correspondence exchanges between the two offices, the Public Protector met with and interviewed the President. The meeting was short-lived as the President requested more information as well as additional time to consider the allegations made against him. He also requested an opportunity to put questions to those who had made allegations against him. The Public Protector subsequently refused to accede to the President's requests and notified him that she was continuing with her investigation with a view to releasing a report by mid October 2016.

[9] The Public Protector's intention to proceed and finalise the preliminary investigation galvanised the President to launch his urgent application on 13

October 2016 to be heard on 18 October 2016. The President's basis for launching this application, on the urgent court roll was that he was at risk of being the subject of adverse factual findings without having been afforded an opportunity to be heard and to question those who had made allegations against him as well as to provide answers and input into the investigation.

[10] On the same day i.e. 13 October 2016, a somewhat identical application was also launched by Minister Van Rooyen. Notably Minister van Rooyen did not enlist services of the State Attorney to represent him, but briefed lawyers in private practice. In Part A (the interdict part), set down for hearing on 14 October 2016, Minister van Rooyen sought an urgent interim interdict against the Public Protector from finalising and releasing her report, to operate as a rule nisi pending the determination of Part B of the application. Minister Van Rooyen's basis for the application was similar to that of the President. Part A of that application was to be heard the following day i.e. 14 October 2016, being the date of the intended release of the report. Coincidentally 14 October 2016 was also the last day of the term of office of the outgoing Public Protector, Adv Madonsela, who had conducted the investigation resulting in the targeted report.

[11] On receipt of Minister Van Rooyen's application on 13 October, the attorneys acting for the Public Protector and her office, wrote to Minister Van Rooyen's attorneys, informing them that the Public Protector's report expressed no adverse findings and recommendations regarding Minister Van Rooyen and that, for that reason, there was no longer any basis to interdict the release of the report. The Minister was invited to withdraw his application. This letter was followed by an answering affidavit, on behalf of the office of the Public Protector, responding to the Minister's application. The deponent to that affidavit, Mr Christoffel Hendrik Fourie (Fourie), the Head of Legal Services in that office, stated that the Public Protector was in the process of completing the report into the investigation relating to the 'relationship between the Gupta family and the President'. Fourie stated, in the affidavit, that there was no risk of the report causing prejudice to Minister Van Rooyen in that it made 'no findings, expresse[d] no point of view, and [made] no recommendations involving allegations concerning' the Minister. However, Fourie in a later

paragraph in the same affidavit, made the disclosure that the Public Protector had actually finalised and signed the report. The apparent contradictory statements by Fourie in that affidavit feature prominently in the contentions of the parties in the main matter as well as with regard to the costs aspect. I will return to these shortly.

[12] Despite the invitation in the letter to withdraw his application and the averments in Fourie's affidavit, Minister Van Rooyen pressed for Part A of his application to be heard. The matter came before Fourie J[3] on 14 October 2016. Present in court were the legal teams representing the respondents ie the Office of the Public Protector and the Public Protector, Minister van Rooyen and the President. Also represented in court were the lawyers representing the EFF, UDM and COPE, who, on that day, launched a joint application to intervene in the Minister's and President's applications, coupled with a counter application. The DA was also represented in court even though it had not at that stage launched an intervening application.

[13] All the parties represented in court, through their legal representatives, engaged in discussions about the further conduct of the litigation and eventually consented to an order that effectively consolidated the two applications. That order also specifically provided that the Public Protector's report be preserved and put into safekeeping pending the final determination of the two applications. The full text of the 14 October 2016 order is:

'Order by agreement

1. The present application[4] is postponed to 1 November 2016 for hearing contemporaneously with the application under case number 79808/16[5] together with any intervention applications.

2. Pending the determination of this application in this court:

   a. The Public Protector's report in the investigation into complaints of improper and unethical conduct by the President and officials of state organs due to their alleged inappropriate relationship with members of the

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3 Judge D Fourie is also a member of this Bench.
4 The Van Rooyen application.
5 The President's application.

Gupta family, finalised and signed on 14 October 2016 ("the report"), will not be released to the public.

b. The report shall be preserved and kept in safe keeping.

3. The following dates shall apply to the filing of pleadings:

a. The Democratic Alliance is to file its application for intervention by 17 October 2016.

b. All answering affidavits must be filed by 21 October 2016.

c. All replying affidavits must be filed by 25 October 2016.

d. Heads of argument, if any, must be filed by 12.00 on 27 October 2016.

Costs are reserved.'

[14] In their application to intervene the EFF, UDM and COPE, sought leave to intervene in both applications ie the Van Rooyen and President's applications, and sought orders dismissing the said applications. They sought an order, in their counter application, that the Public Protector be ordered to issue her report forthwith but not later than 15 October 2016 as well as an order for costs in the event of opposition on the attorney and client scale as well as costs of two counsel. It must be pointed out, however, that in their intervening applications, these parties used the case number[6] allocated to Minister Van Rooyen's application. This fact becomes topical in the stance adopted by the President to the intervening application to his application by these parties. I will deal with this aspect later in this Judgment.

[15] The EFF, UDM and Cope specifically took issue with the President's utilisation of the State Attorney to represent him in the matter. They contended that the allegations that formed the subject of the Public Protector's investigation against the President were that he had, in his personal capacity, acted in concert with the Gupta family in an irregular and corrupt manner. They made the point that in his alleged dealings with the Gupta family, he was not acting in his official capacity as the President of the country and Member of the National Executive. They asserted that the President should have enlisted the services of private attorneys at his own

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cost as was done by Minister Van Rooyen. In their view there was no basis for the President to burden the taxpayer with the legal costs of his application. They thus contended that the President ought to be held liable, in his personal capacity, for the costs incurred in the matter.

[16] On 21 October 2016 the incoming Public Protector, Adv B Mkhwebane, filed an answering affidavit to both applications. For present purposes, it is relevant to mention only that in that affidavit, Adv Mkhwebane stated that her office would abide the decision of the court regarding the applications. She also stated that information at her disposal was that her predecessor, Adv Madonsela, had finalised her report on 14 October 2016 ie the day on which her term of office ended. Fourie also filed an affidavit confirming the averments in Adv Mkhwebane's affidavit.

[17] On the same day Minister Van Rooyen withdrew his application in its entirety, the parties having reached agreement that each party would bear their own legal costs in respect thereof. The notice of withdrawal expressly stated that no purpose would be served by pursuing the application as the Public Protector had confirmed that her report expressed no adverse findings and recommendations against the Minister.

[18] On 24 October 2016 the President filed an affidavit responding to the application for intervention by the EFF, COPE and the UDM. In that affidavit the President stated that even though he was cited as the second respondent by the intervening parties, it was clear when reference was made to the main application ie Minister Van Rooyen's application, that he, the President, was not a party in that application and that he was not permitted by law to respond to the intervening application until he had been joined as a party in that application. The President therefore did not respond to the allegations made by the intervening parties against his application.

[19] On the same day the President filed his answering affidavit to the DA's intervening application. The stance adopted by the President in that affidavit was to oppose the DA's application on the basis that the DA had neither *locus standi* nor a direct and substantial interest in the matter. On this basis the President opposed the DA's intervention and sought an order refusing the

DA's application. In this affidavit the President disputed the DA's allegation that the Public Protector had finalised her report. In this regard the President referred to Fourie's affidavit filed on 14 October 2016, specifically referring to the part where Fourie stated that the Public Protector was in the process of finalising her report.

[20] The President then referring to the DA's assertions that the Public Protector had finalised the report on 14 October 2016, stated that if the Public Protector had finalised her report without affording him an opportunity to respond to the issues raised against him, then she would have been in constructive contempt and would have violated his right to just administrative action. It was his contention that the investigation by the Public Protector was administrative action. As such her actions were subject to the administrative justice provisions. This entailed that any person affected by such action had the right to be afforded a reasonable opportunity to respond to allegations made against him/her before the investigation was finalised. He however stated further that if indeed the Public Protector had finalised her report in those circumstances, then the report had to be released. His actual words are 'then in that event the report should be released'.

[21] The President further stated that in those circumstances he still had the right to review the findings in the report. He also stated that should it transpire that the Public Protector had indeed finalised the investigation and signed the report, then in that event she was *functus officio*. She had, he argued, infringed his right to just administrative action. He further stated that his rights, as an implicated person in terms of section 7 of the Public Protector Act 23 of 1994, were infringed by the conduct of the Public Protector in allegedly failing to afford him a reasonable opportunity to make input in the investigation and before finalising it. He asserted such right in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He stated that even though the report had been finalised he retained the right to review it as he had not been afforded an opportunity to make an input before same was finalised.

[22] The President's statements about the report having to be released in view of the finalisation thereof by the Public Protector, unleashed a stream of

correspondence from all the lawyers representing the intervening parties. In such correspondence the assertion is made that the President's statements had the consequence that there was no longer a live issue and that all that the President had to do was to withdraw his application and that the report be released without further ado. Furthermore, all the lawyers included a threat in their correspondence that should the President persist with the litigation and not withdraw his application they would seek a punitive costs order against him personally.

[23] In fact the DA's attorneys, in their letter dated 24 October 2016, proposed that the President should consent to a draft order providing for the withdrawal of his application and for the report to be released and that each party pay their own costs. The letter requested that if the proposed order was accepted then such acceptance was to be communicated to them by 12 noon the next day failing which a punitive costs order would be sought against the President in his personal capacity. The State Attorney, on behalf of the President, rejected all proposals for the President to withdraw his application and for the report to be released.

[24] On 26 October 2016 the DA filed its replying affidavit to the President's answering affidavit to its intervening application. In that affidavit the DA refers to the statements by Fourie, in his 14 October 2016 affidavit that the report had been finalised and signed, as well as the President's statement to the effect that in those circumstances the report be released. On this basis the DA contended that this being the situation there was no longer a live dispute requiring resolution by the court. According to the DA there was no longer any basis for the President's application.

[25] On 27 October 2016 the EFF, UDM and Cope filed their replying affidavits to the President's answering affidavits to their application to intervene and to the DA's similar application. These affidavits reiterate these parties' interest in the applications and point out that the President's continuation with his application was misconceived. These intervening parties reiterated the relief they sought that the report be released without delay by no later than 8 November 2016. The President then elected to oppose the intervention application of the EFF,

UDM and COPE on the grounds that it was irregular and had not been properly brought. He relied on his stance that he had not been properly joined in their intervening application. In this regard, he issued a Notice in terms of Rule 30 seeking relief to set aside the intervening application.

[26] Amidst this litigation and correspondence frenzy, another intervening application was launched by Ms Mentor on the basis that she had a direct and substantial interest in the matter, especially as she was one of the persons who had alleged personal experience of some of the matters investigated by the Public Protector involving the Gupta family. She also made the point that the Public Protector was *functus officio* and that the relief sought by the President had become moot. The President opposed Ms Mentor's intervention application on the basis that she did not have a direct and substantial interest in the matter and that she lacked *locus standi* to enter the fray.

[27] On Saturday 29 October 2016, the President filed a supplementary affidavit wherein he sought to amend his initial notice of motion. The President later on in the same day filed an application for the postponement of the main application. These applications were preceded by a letter from the State Attorney to the respondents and all the intervening parties, suggesting that the matter was not ripe for hearing and seeking their consent for the matter to be postponed to a time when all necessary papers would have been filed. This approach was rejected by all the intervening parties hence the formal application for a postponement. The State Attorney had also on Saturday, 29 October 2016, written a letter to the Office of the Deputy Judge President seeking new directives in the light of his amendment and postponement applications.

[28] The primary basis for the President's postponement application was that it was only on 26 October 2016 that the Public Protector clarified that the investigation and report were finalised on 14 October 2016. The President stated that for this reason, he had to consider the impact of this clarification as well as the possibility of supplementing his original application. He stated that the issues raised by Ms Mentor in her intervening papers clearly showed that

the matter was not ripe for hearing hence the reason he had decided to supplement his papers, and also seek the postponement of the application.

[29] In his affidavit in support of the amendment application, the President stated that in view of the clarification of when the report was finalised, he sought amended relief. That amended relief was that he now sought an order declaring the conduct of the Public Protector in finalising the investigation, and signing the report as unlawful. The President further stated that the statement contained in his answering affidavit to the DA's intervening application, to the effect that if the report was final then it had to be released, was not what he intended to convey and that a typing error led to his statement being expressed in those terms.

[30] The President clarified that he had meant to say: 'Should it later transpire that the Public Protector produced a final report without affording me my right to just administrative action, then in that event the report should not be released.' He buttressed this statement by stating that the report could not be released in the format it was in as the Public Protector in finalising same without providing him with just administrative action, infringed his constitutional right. He was advised, he continued, that these were procedural irregularities that compromised the process leading to the finalisation of the report and thus the report had to be declared unlawful. He then contended that the Public Protector could not be *functus officio* of an unlawful report. In this regard the President referred to his statement in the answering affidavit to the DA's intervening application where he stated that the Public Protector was *functus officio* and argued that to the extent that his statement may be regarded as a concession, such concession was wrong in law. In this regard the President stated that he was advised that the court could not be bound by a concession that was wrong in law.

[31] Soon after the President launched his interlocutory applications, Minister Van Rooyen sought to re-enter the fray by launching another urgent application but this time, to intervene in the President's application. His primary basis was, as was the case in his previous application, to prevent the release of the report. This evoked opposition from the respondents and other intervening

applicants. At that stage on 31 October 2016, all possible applications having been filed, we then heard argument regarding the intervening applications of the EFF, UDM, Cope, DA, and Mentor in the President's application. We also heard argument regarding Minister Van Rooyen's urgent application to intervene in the President's application. Having heard full argument lasting a whole day, the intervening applications by the EFF, UDM, COPE, DA and Mentor were granted. The last minute attempted re-entry by Minister van Rooyen in the form of an urgent intervening application was struck off for lack of urgency, with costs. The President's applications for a postponement and for amended relief were refused. The order granted to dispose of all these applications reads as follows:

1. 'The Application of the Democratic Alliance to intervene as a party in the application of the *President of the Republic of South Africa v The Public Protector case no. 7808/16* is granted with costs.
2. The application of the Economic Freedom Fighters, United Democratic Movement and Cope to intervene as a party in the application of the *President of the Republic of South Africa v The Public Protector case no. 79808/16* is granted with costs.
3. The application of Ms MP Mentor to intervene as a party to the application of *President of the Republic of South Africa v The Public Protector case no. 79808/16* is granted with costs.
4. The costs of those applications, that is the intervention applications in *President of the Republic of South Africa v The Public Protector case no. 79809/16* shall include costs consequent upon the employment of two counsel where applicable.
5. The applications of the Democratic Alliance, the Economic Freedom Fighters, the United Democratic Movement and Cope to intervene as parties to the application of *Mr DD Van Rooyen case no. 84803/2016* are granted with costs. Including the costs consequent upon the employment of two counsel where applicable.
6. The application of *Mr DD Van Rooyen case no 84803/2016* is struck from the roll for lack of urgency with costs including the costs consequent upon the employment of two counsel where applicable.
7. The application for postponement and for amended relief by the President is refused with costs including the costs consequent upon the employment of two counsel where applicable.'

Issues requiring resolution:

[32] Having traversed the above background facts and circumstances as well as the chronology of the litigation, it is now opportune to turn to the issues requiring resolution. In essence two questions must be answered i.e. did the President conduct this litigation in a manner unbecoming of a reasonable litigant and was he vindicating his personal interests in doing so.

[33] The case advanced by the intervening parties that the President should be personally mulcted with the costs of this litigation, is that he has conducted this litigation in a manner unbecoming of a reasonable litigant. The gist of this argument is that the President's continuation with this litigation after the Public Protector's office had filed an affidavit on 14 October 2016 that the investigation had been finalised and the report signed, was unreasonable. In addition, it was argued that there was no justifiable basis for the continuation with the litigation by the President after he had stated in his answer to the DA's intervention application, that if the investigation was finalised and the report signed, then the report had to be released.

[34] It is necessary to undertake a factual enquiry of the circumstances on which the contentions of the parties are based. I can best do this by undertaking a simple factual analysis of the chronology of events from 14 October 2016. At that stage the only affidavits/papers (pleadings) that had been filed were the President's application, the intervention application of the EFF, UDM and Cope as well as the Public Protector's answering affidavit to Minister Van Rooyen's application, which set the cat amongst the pigeons so to speak. According to the intervening parties, the office of the Public Protector made it clear in that affidavit that the investigation had been finalised and the report had been signed. They contend that, that should have been the end of the matter, if one considers the foundational premise of the President when he launched his application. That premise was an investigation that was not finalised and no signed report.

[35] The President's written argument does not deal with these aspects of the case but focusses specifically on the argument that he committed perjury. This refers to the typing error aspect which I will deal with shortly. I am of course cognisant of the President's stance in his answer to the DA's intervention application as well as in his supplementary affidavit seeking a postponement and amended relief. What comes out clearly is that the President's mind-set is that Fourie's affidavit was contradictory as to whether the investigation had been finalised and the report signed.

[36] It is correct that in his affidavit, Fourie made two statements which appear to contradict each other. The President's stance is that this contradiction remained unresolved until this was clarified by the Public Protector on 26 October 2016, when Adv Mkhwebane confirmed that in fact the investigation had been finalised and that the report was signed on 14 October 2016 by Adv Madonsela. It should be pointed out, however, that this was not Adv Mkhwebane's first statement to this effect. She said so in her affidavit filed on 21 October 2016, in which she gave notice that her office would abide the decision of this court regarding the President's application.

[37] The President relies on this contradiction in his later affidavits, suggesting that this was because it was unclear to him what the correct position was. I must make the point that it is only the President who says he remained unclear about the true status of the report. Other parties accepted that the report had been finalised and signed. The President was clearly aware, from affidavits flying around, that all parties other than him accepted the finalised status of the report. The question must then be asked: if in fact the President was unclear about the status of the investigation and report, as he maintains, why was a letter not penned by his legal representatives to the Public Protector's lawyers seeking this clarification?

[38] I accept that when the President launched his application, there was no indication by the Public Protector that her report had been finalised. The only indication from her office was that she had intended to release her report on 14 October 2016 being the last day of her term in office. We, however, hold the view that everyone in court on 14 October, including the President's legal

representatives, was aware of Fourie's affidavit, more importantly the recordal he made in his second statement, that the Public Protector had finalised her investigation and signed the report. Significantly, this was recorded in the 14 October court order which was consented to by all the parties represented in court on that day, including the President (See para 15 above).

[39] The issue therefore is: was it reasonable for the President to simply focus on the first statement made by Fourie and ignore the second? My view is that it was completely unreasonable for the President to have persisted with his stance that the finalised status of the report remained unresolved from 14 until 26 October 2016. Furthermore, it was also unreasonable of him not to seek early clarification of the status quo in view of the fact that everyone involved in the litigation held a contrary view to his. I need say no more in this regard. The facts speak volumes of the clearly unreasonable stance adopted by the President.

[40] Attention must now be focused on what the President regards as allegations levelled at him that he has committed perjury. This is in relation to the President's statements in his answer to the DA's intervening application that if indeed the investigation was finalised and the report signed, then in that event the report had to be released. The intervening parties have argued that the President had accepted, when he made that statement, that if the Public Protector had already finalised the investigation and signed the report then there was no basis for the interdict that he was seeking. Their argument is that once he made that statement there was no longer any live issue in the application and he should have withdrawn it.

[41] It is noteworthy, of course, that the President subsequently filed a supplementary affidavit clarifying that his statement in the answering affidavit was incorrectly typed as he intended to convey that the report should not be released despite being finalised and signed. It was for this reason that the President sought to persist with the application but seeking the amended relief that the report was unlawful and should be set aside as he had not been afforded his rights before the process was finalised.

[42] Does the context of the case made out by the President support the President's submission that we are dealing with a typing error here? A notable fact is that the President's typing error correction so to speak, refers only to the first statement he made. He is completely silent about the two subsequent statements he also made. This is where the President comes unstuck. A simple consideration of the latter statements rules out a typing error or the possibility thereof. Reading in a typing error in the first statement simply creates an irreconcilable contradiction with his subsequent statements. I illustrate this by revisiting the statements at issue here:

(i) that if the investigation had been finalised and the report signed then the report had to be released;

(ii) that even if the report had been signed and the investigation finalised he still had the right to review the conduct of the public protector and seek the setting aside of the report; and lastly

(iii) that in the event the investigation had been finalised and the report signed then the Public Protector was *functus officio*.

[43] Clearly the second and third statements sequentially follow on the first and we should have been told whether they too suffered from typing errors. If they are left as they are, they remain at complete odds with a state of mind that the report should not be released as the President would have us believe. In fact the President's argument that his functus officio statement is wrong in law, presupposes a finalised and signed report. In fact the President's argument that his *functus officio* statement is a wrong in law, presupposes a finalised and signed report. The only conceivable reason one can fathom for the President's assertion of a typing error is that this was an attempt to buttress his quest for amended relief. However, that route is also doomed. The amended relief the President sought was confronted by serious legal conceptual difficulties. He sought to review and set aside the report without it being released. That this was conceptually flawed stems from the fact that the amended relief the President now sought was to review administrative action without following the mandatory Rule 53 or the Promotion of Administrative Justice procedure. There can clearly be no review and setting aside of

administrative action without the impugned decision being final and **in the absence of** in the absence of the record underpinning that decision. These findings render it unnecessary for us to further investigate if the President's conduct amounts to perjury. That is not our task in the context of this matter.

[44] Clearly the inevitable realisation that must have dawned on the President and his legal team was that his statements in his answering affidavit coupled with the amended relief he sought, ineluctably pointed to his application having lost its whole foundational premise. The right to review the report can only be premised on a finalised report and the Public Protector being *functus officio*. That meant that on all possible interpretations, the report had to be released and with that went the basis for the application. No other conclusion is possible and to suggest that in those circumstances the report was not to be released is misconceived. Faced with those odds the President must have realised that there was no basis whatsoever for him to persist further with the litigation; hence the decision to withdraw the application at the eleventh hour and tender costs.

[45] This demonstrates that the other unavoidable finding one must make is that the President was grossly remiss in ignoring all indications from 14 October 2016 that the previous Public Protector had finalised her investigation and signed the report. Whatever one may say about Fourie's statements in his affidavit of 14 October, the indications were clear from that day that the door had been firmly shut by the previous Public Protector. The recordal in the order of that day only emphasised the finality of that part of the previous Public Protector's investigation. A reasonable litigant would have realised this and aborted the application then and there.

[46] The President's persistence with the litigation, in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounts to objectionable conduct by a litigant and amounts to clear abuse of the judicial process. An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable

basis to mulct the culpable litigant with a punitive costs order. See in this regard *In Re Alluvial Creek Ltd*:[7]

'An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious.'

The decision in *Alluvial Creek* has been followed in a number of cases: see *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd & Another* 1997 (1) SA 157 (A) at 177D-F; *Camps Bay Ratepayers' and Residents Association & Another v Harrison & Another* 2011 (4) SA 42 (CC) para 76 and footnote 72.

[47] My view is that in this case a simple punitive costs order is not appropriate. I say this because that would make the tax payer liable for the costs. This is a case where this Court would be justified in finding that this is an unwarranted instance for the tax payer to carry that burden. The conduct of the President, and the context of the litigation he initiated, requires a sterner rebuke. There is not the slightest doubt that, properly considered, the background of the matter and the circumstances of the litigation show that the President had no acceptable basis in law and in fact to have persisted with this litigation. In fact, the President's conduct amounts to an attempt to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector.

[48] In *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government*[8] the SCA specifically discussed the personal liability of public officials for legal costs. It said:

'In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the Board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their

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7 1929 CPD 532 at 535.

8 2013 (5) SA 24 (SCA) para 54. See also Democratic Alliance v South African Broadcasting Corporation SOC Ltd; Democratic Alliance v Motsoeneng & Others [2017] 1 All SA 530 (WCC) paras 220-222 and Solidarity and Others v South African Broadcasting Corporation 2016 (6) SA 73 (LC) paras 74-78.

behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the Board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred.' (Emphasis added)

[49] The finding made regarding the issues considered and discussed on this aspect can only result in one conclusion, that the President persisted with litigation and forced the intervening parties to incur costs in circumstances when this should and could have been avoided as well as delaying the release of the report. In so doing he clearly acted in flagrant disregard for the constitutional duties of the Public Protector. What is also aggravating is the fact that the President's application was based on self-created urgency. Simply put, the President had become aware some six (6) months before his abortive application that the Public Protector was in possession of complaints implicating him in serious misconduct and he did nothing when he was invited for comment.

[50] Having come to this finding it is unnecessary to consider the interesting question whether the President was vindicating his personal interests when he initiated this litigation. It is necessary, however, to express the view that, without deciding the issue conclusively, the case made by the intervening parties on this leg was also not without merit. This is based on the fact that it is common cause that in his request for an investigation contained in the complaint lodged with the Office of the Public Protector, the leader of the DA stated:

'It is our contention that President Jacob Zuma may have breached the Executive Members Code by (i) exposing himself to any situation involving the risk of a conflict between their official responsibilities and their private interests, (ii) acted in a way that is inconsistent with his position and (iii) use their position or any information entrust to them, to enrich themselves or improperly benefit any other person. The prerogative to appoint Ministers and Deputy Ministers fall squarely at the feet of the President. He and only he is empowered by section 91 (2) of the Constitution of the Republic of South Africa, this power may not be delegated. If the allegations levelled by Ms Mentor that the President had knowledge and was present when members of the Gupta family offered her the position of Minister of Public Enterprise, he would be wilfully allowing persons to other than himself to appoint members of the Cabinet.

This conduct we submit would be a breach of the aforementioned provisions of the Executive Members Code.'

[51] In the letter to the President notifying him of the complaint received from the DA, the Public Protector, stated:

'In terms of Section 3 of the Executive Members Ethics Code, I have a peremptory duty to investigate a properly submitted complaint of a Member of Parliament. If you have any comments on the allegations levelled against you, I will appreciate a letter indicating such comments from you." In the same letter the Public Protector also mentioned the complaint received from the Dominican Order requesting her office to "conduct a systematic investigation under the Public Protector Act (PPA) 23 of 1994 into undue influence Ministers' and Deputy Ministers' appointments, possible corruption, undue enrichment and undue influence in award of tenders, mining licences and government advertisements...'

The Public Protector stated further in that letter that the request to her office was:

'To investigate the allegations of the two ANC members, Mcebisi Jonas (the deputy finance minister) and Vytjie Mentor, (previously the Chairperson of the Portfolio Committee on Public Enterprises), that they were offered cabinet positions in exchange for executive decisions favourable and beneficial to the business interest of the Gupta family. To investigate whether the appointment of Des van Rooyen to Minister of Finance was allegedly known by the Gupta family beforehand.'

[52] The portions mentioned in the preceding paragraph encapsulated the critical allegations that related to the President directly and they formed the basis of the investigation conducted by the Public Protector. The report that is at the centre of this litigation was the result of the investigation conducted by the Public Protector into the allegations referred to above, insofar as the President is concerned.

[53] The President's overarching basis for launching the application in the first place was that he faced the risk of the Public Protector issuing a report 'which may in all probability make findings adverse to me or my interests without any input on my part'. He further asserts that if 'the interim report impugns my integrity, it will no doubt be a breach of my fundamental right to dignity – a constitutional right. The Public Protector, as a Chapter 9 institution cannot be the one undermining the entrenched fundamental rights which everyone, including me, enjoys.' The President further stated that he had not been able to exercise his right to be heard in relation to the allegations made against him

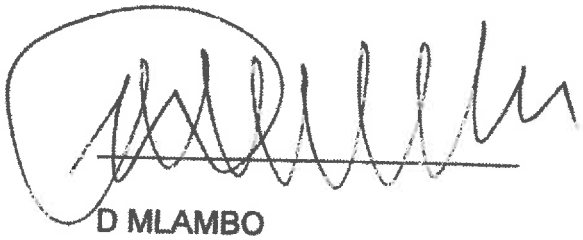
and that the public interest in releasing the report 'cannot outweigh my right to enforce a constitutional right to just administrative action,' and 'I therefore state that my constitutional right to just administrative action has been infringed.' (Emphasis added)

[54] The language used by the President, justifying his Court bid is clear and unambiguous – he was vindicating his individual rights under the Bill of Rights. That he was protecting his individual rights comes out more in his answer to Ms Mentor's application. He states therein that he was protecting his personal interests. Nowhere in his papers does he state in what respects the office of the Presidency would be detrimentally affected by the release of the report. In this regard the President's argument that the mere fact that the investigation was in terms of the EMEA is sufficient to locate this matter in the realm of his official capacity misses the point. That conclusion cannot simply follow as contended by the President. It is the nature of the conduct investigated that determines if the issue is personal or official. The President's argument boils down to this – any conduct of a Member of the Executive will qualify as official as long as it is investigated under the EMEA. This is a misnomer. Members of the Executive have private dealings in their personal capacities and these are quite distinct from their conduct whilst pursuing the interests, objectives and responsibilities of the departments they lead. Put differently, if that conduct falls outside the confines of the Constitution, more particularly Chapter 5 thereof, we fail to see how such conduct can be regarded as conduct of the Head of State acting in his official capacity.

[55] In the final analysis the President's overall conduct leaves me one option but to find that he must be held personally liable for all the costs that were occasioned from 14 October 2016, when Fourie stated that the previous Public Protector had finalised the investigation and signed the report. The President compounded matters when he persisted with the litigation, based on a supposed typing error, after initially conceding that the report be released if indeed the Public Protector had finalised the investigation and signed the report.

[56] In the circumstances the following order is granted:

1. The President is ordered to personally pay the costs referred to in paragraph 3 of the order made by this court on 1 November 2016 to the extent that such costs were incurred after 14 October 2016.



D MLAMBO

JUDGE PRESIDENT

GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

I agree

PM MOJAPELO

DEPUTY JUDGE PRESIDENT

GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

I agree

DS FOURIE

JUDGE

GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing	1 November 2016
Date of Judgment	13 December 2017

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