REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **21830/2014**

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

SIGNATURE Kubushi J DATE 13/3/17

13/3/2017

In the matter between:

MINISTER OF AGRICULTURE, FISHERIES AND FORESTRY — **APPELLANT**

VS

THE PUBLIC PROTECTOR — **RESPONDENT**

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] This application turns on the procedure the Public Protector adopts in terms of s 7 of the Public Protector Act No 23 of 1994 ("the Act") when investigating a complaint received by her office. In the circumstances of this matter, the crux is whether the procedure adopted by the Public Protector when she made her findings against the Minister of Agriculture, Forestry and Fisheries ("the Minister") that the Minister's action in refusing to defer the handover process to the South African Navy ("the Navy") of certain vessels owned by the Department of Agriculture, Forestry and Fisheries ("the Department") constituted maladministration resulting in fruitless and wasteful expenditure, was flawed. Related to that is the question whether a proper interpretation was given to s 7 of the Act.

[2] When the application was launched it raised three broad issues, namely, the Public Protector's powers when investigating a complaint under s 7 of the Act; the Public Protector's powers to stipulate remedial action in her reports under s 182 of the Constitution; and, the correct procedure followed by the Public Protector when investigating a complaint.

[3] At the commencement of the hearing the Minister's counsel abandoned two of the issues, namely the issues pertaining to the powers of the Public Protector and the Public Protector's power to stipulate remedial action in her reports. I was provided with three judgments in which these issues had already been dealt with and finalised. The three judgments are: *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) which laid to rest the issue whether the Public Protector's remedial action is binding. It was held in that judgment that the remedial action taken by the Public Protector is binding; *South African Broadcasting Corporation SOC Limited and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) wherein the nature of the Public Protector's powers was settled; and in *Minister of Home Affairs and Another v The Public Protector of the Republic of South Africa and Another* (High Court, Gauteng Division, Pretoria,

Case no. 76554/2013, 20 October 2016), unreported, the court dealt with both the powers and the remedial action of the Public Protector.

[4] Unlike the judgments referred to above where the powers of the Public Protector were in issue, in this instance, the procedure followed when conducting investigations is called into question. The argument before me is, thus, narrowed to only one issue, that of the procedure followed by the Public Protector when she made her findings against the Minister in relation to the Minister's action in refusing to defer the handover process of the vessels. In this respect I was, before the commenced of the hearing, in addition to the parties' respective heads of argument, provided with the following documents: the Minister's preparatory notes and the Public Protector's notes for oral argument. I am indebted to counsel.

[5] It is not in dispute that the decisions of the Public Protector are subject to judicial review. There appears to be some uncertainty as to whether the review of the Public Protector's decisions resides under the Promotion of Administrative Justice Act 3 of 2000 or under the principle of legality. As this matter does not turn on this point, I do not intend to go into the issue. For present purposes it is accepted that the decision is susceptible to review on grounds of legality.[1]

[6] A preliminary issue that I have to deal with first is that, together with her answering affidavit, the Public Protector filed an application for the late filing of the record and the delay in filing the answering affidavit. The Minister is not opposing this application. Consequently the application is granted.

[1] See Sidumo v Rustenberg Platinum 2008 (2) SA (CC) para 89.

FACTUAL BACKGROUND

[7] The Department is the owner of a fleet of seven vessels made up of one Arctic Supply Vessel, three Sea Fishery Research Vessels and three Sea Fishery Patrol Vessels ("the vessels"). The Department outsources the management service of these vessels by tender. A tender of the service was initially awarded to a company known as Smit Amandla Marine (Pty) Ltd ("Smit Amandla") in April 2000 for a period of five years. The tender was extended on numerous occasions thereafter the last of such extensions was to expire on 31 March 2012. During this time, two bid invitations were issued but subsequently cancelled. A third bid invitation was issued on 9 February 2011 and resulted in the tender being awarded to a company known as Sekunjalo Marine Services Consortium ("Sekunjalo") in November 2011. On 13 December 2011, Smit Amandla lodged an urgent application to court seeking an order, amongst others, reviewing and setting aside the award of the tender to Sekunjalo. The court application was settled on the advice of counsel resulting in the tender awarded to Sekunjalo cancelled. Due to certain exigencies, in particular, the lack of time within which to re-advertise the tender the Department made arrangements with the Department of Defence and Military Veterans ("the Department of Defence") for the Navy to take over management of the vessels for twelve months pending the award of the tender to an appropriate service provider. In this regard, the Minister and the Minister of Defence signed a Memorandum of Understanding ("MOU"). In accordance with the MOU, the vessels were to be transferred to the Navy on 31 March 2012, which date coincided with the day on which Smit Amandla's contract ended.

[8] In the meanwhile, the Public Protector received several complaints relating to the irregular award of the tender to Sekunjalo. This inspired the Public Protector to investigate the tender. The Public Protector commenced with the investigation on 1 August 2012. There were two main complaints to be investigated by the Public Protector. The first complaint was for the failure to adhere to procurement requirements when the award of the tender to Sekunjalo was made. This complaint does not form part of the issues before me. The second complaint was in regard to

the manning of the vessels soon after the contract between the Department and Smit Amandla had come to an end. The latter complaint was lodged by Smit Amandla.

[9] As the investigation progressed, media reports regularly alleged that the patrol fleet was lying unattended to on account of the Navy's alleged lack of competencies and capacity to undertake the responsibility at the required magnitude and later that the vessels had been damaged by disuse. And, as the investigation drew to an end, the public Protector was approached by a whistle-blower with allegations that the Department had irregularly contracted a company for the refurbishment of its vessels that had lost seaworthiness due to lying idle and lack of maintenance. The latter complaint was deferred to an offshoot investigation.

[10] After the investigation the Public Protector compiled and issued a provisional report. The provisional report was distributed on the basis of confidentiality to provide the complainants and other relevant parties involved with an opportunity to respond to its contents. On receipt of the comments the Public Protector finalised the Report. This is the Report that is the subject of this review application.

CIRCUMSTANCES UNDER WHICH THE MINISTER BECAME INVOLVED IN THE INVESTIGATION

[11] There were two complaints which directly referred to the Minister in the Report. Both complaints we lodged by Smit Amandla. Firstly, they claimed that the Minister had arbitrarily terminated their services at the end of the contract in retaliation of their whistle-blowing on the Sekunjalo award, and in contravention of the contractual provision that provided for a three month handover period. The Public Protector found this allegation to be unsubstantiated because the original contract requiring the three months handover period had lapsed and the arrangement between the Department and Smit Amandla was now on a month to month basis. The claim having been found not to be correct was dismissed.

[12] It would be that when the Public Protector investigated a further complaint by Smit Amandla against the Navy that the Public Protector made adverse findings against the Minister. The complaint by Smit Amandla was that the Navy did not have the necessary competencies and human resources to take over the task of maintaining and operating the vessels from the date ear-marked for the takeover, that is, 31 March 2012 and that if the handover proceeds service delivery will be compromised. Based on this complaint, on 28 March 2012 the Public Protector was approached by Ms Manana, a director of Smit Amandla, who requested the Public Protector to ask the Minister to withdraw the thirty day notice and abide the three months' notice that was in the original agreement that expired. Emanating from such meeting, and two days before the envisaged handover, that is on 29 March 2012, the Public Protector wrote a letter to the Minister requesting the Minister to reconsider handing over the vessels to the Navy on the face of allegations by Smit Amandla that if the vessels are handed over to the Navy service delivery will be compromised. On 30 March 2012, the Minister after consultation with the Director-General of the Department ("the Director-General"), wrote back and informed the Public Protector that it was not feasible to suspend the handover of the services as the vessels had already been handed over to the Navy. It needs to be stated here that the actual hand over of the vessels only took place on 31 March 2012 and the Navy commenced with the management function on 1 April 2012.

[13] In respect of the further complaint by Smit Amandla, the Public Protector made a finding that the Navy did not have the necessary capabilities at the time of the handover. This lack of capabilities, according to the Public Protector resulted in the lack of proper patrols and alleged deterioration of the vessels amounting to millions of Rand in refurbishment costs which in turn led to fruitless and wasteful expenditure. On that score, having made such a finding the Public Protector went further to make a finding that in view of the fact that the reasons for a prudent handover period persisted, 'the abrupt handover' by the Minister was ill advised and constituted maladministration on the part of the Minister. She also found the conduct of the Minister in rejecting her advice to suspend the handing over, to be improper and imprudent and as such constituted maladministration which led to fruitless and wasteful expenditure.

[14] Consequently, the Public Protector recommended appropriate remedial action against the Minister calling on the President to consider taking disciplinary action against the Minister for, what she referred to as, 'the Minister's reckless dealing with state money and services resulting in fruitless and wasteful expenditure, loss of confidence in the fisheries industry in South Africa and alleged decimation of fisheries resources in South Africa and delayed quota allocations due to lack of appropriate research'.

THE RELIEF SOUGHT BY THE MINISTER

[15] The Minister has, in this application, approached the court for an order to review, correct and/or set aside the investigation of the Public Protector, the findings and remedial actions thereof against herself and the Department as contained in the Public Protector's investigation report No 21/2013/14 titled 'Docked Vessels' ("The Report").

[16] The relief the Minister seeks is couched in the following terms:

> "That the Report and findings of the Public Protector in respect of the Minister and the Department of Agriculture, Forestry and Fisheries ("DAFF") contained in her report No. 21/2013/14 be reviewed and/or corrected and/or set aside.
>
> Alternatively to prayer 1, that the Report, to the extent that it makes adverse findings and recommendation against the Minister, be reviewed and corrected or set aside."

[17] I am informed that subsequent to the issuing of the Report the Department submitted an implementation plan called for in the Public Protector's remedial action against the Department. The implementation plan was submitted within the time periods stipulated in the Report. To the extent that the findings and recommendations of the Public Protector are applicable to the Department, all of the

remedial actions stipulated in the Report have been complied with. The basis for the review of this part of the application has thus fallen away. The application before me is now only in relation to the Minister. As such, the Minister seeks to review and set aside the Report in so far as it relates to her.

GROUNDS OF REVIEW

[18] The Minister's submission is that the procedure followed by the Public Protector is, to the extent that it is not in line with the provisions of the Act, invalid. The submission is based on the following factors:

Procedural Fairness

[19] The Minister's contention in this regard is as follows:

19.1 The Minister was not afforded an opportunity to be heard in order to dispute the facts upon which reliance is placed for the compilation of the Report and the findings that she was guilty of maladministration and responsible for wasteful and fruitless expenditure. According to the Minister, s 7 (9) of the Act is mandatory and compels the Public Protector to hear the implicated person and even afford such person a right to be legally represented and to cross-examine any person giving evidence against her before the Public Protector.

19.2 The Public Protector did not herself conduct an investigation, except making enquiries by correspondence. She delegated this duty to her officials. The officials interviewed certain persons and thereafter either reported or presented notes of interviews to the Public Protector. The officials either compiled the report under the Public Protector's direction or compiled jointly with her.

19.3 The process followed by the Public Protector in providing the Minister with the provisional report for her comment is not in consonant

with the provisions of s 7 (9) of the Act and is at odds with the *audi* principle in that:

19.3.1 There is no provision in the Act for a provisional report;

19.3.2 There is no provision in the Act for the forwarding of a provisional report to affected persons for their comments thereon;

19.3.3 The provisional report, when it was forwarded to the Minister, was not accompanied by the interviews of the complainant and other witnesses. In other words, the evidence that was found by the Public Protector was never made available to the Minister for comment; and

19.3.4 The Public Protector did not draw the Minister to any adverse evidence in the provisional report upon which the Minister was invited to comment.

19.4 The report in the nature presented by Public Protector is not as envisaged in the Act and does therefore not constitute an investigation. The manner in which the investigation was conducted vitiates the validity of the report and the report ought to be set aside.

19.5 The Minister was not given an adequate and timeous notice of the hearing at which she was detrimentally affected or implicated.

19.6 The procedure formulated by the Public Protector when investigations are conducted is unlawful since it has not been published in the Government Gazette as required in term of s 11 of the Act.

Legality

[20] The Minister's submission in this respect is that –

20.1 There was no allegation of corruption when the complaints were lodged.

20.2 The influence exerted on the Minister by the Public Protector to intervene when Smit Amandla's contract had come to the end was illegal and therefore the finding of the Public Protector was based on an illegal instruction.

20.3 As already stated, the Public Protector is supposed to have made rules relating to the conduct of the investigation. In the absence of such rules, the Public Protector ought to have followed the provisions of s 7 (4) read with s 7 (9) of the Act. The procedure of the Public Protector, to the extent that it is not congruent with the two sections, is flawed. The principle of legality dictates that a functionary must act within the confines of the empowering legislation. Her counsel relied for this submission on the judgment in *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 179G – I para 21

Rationality

[21] The findings in the Report against the Minister of maladministration and fruitless and wasteful expenditure never formed the subject matter of the complaints before the Public Protector.

[22] Despite diligent perusal of all the documents placed before this court as evidence upon which the finding was made, the Minister contends that:

22.1 There is no evidence implicating her in relation to maladministration; and

22.2 there is no evidence whatsoever to support the finding of wasteful expenditure in respect of the vessels at the time the report was compiled.

[23] There were no facts before the Public Protector to demonstrate lack of patrols, deterioration of vessels and fruitless or wasteful expenditure. The Navy was also not given an opportunity to participate in the investigation.

Bias

[24] The submission is that when the Minister refused to accede to the Public Protector's request to defer the handover to the Navy, the Public Protector then formulated a subject matter of investigation for the refusal to obey her instruction to intervene. Accordingly, it is argued, the Public Protector formulated her own complaint and investigated it and made a finding on her own complaint. As such, it is submitted, a perception is inescapable that she was biased in that finding. I was in this regard referred to a judgment in *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) at 605 para 30

THE PUBLIC PROTECTOR'S DEFENCE

[25] The submission by the Public Protector is that, at all times during the course of her investigation, she followed a process that was fair, diligent and consistent with s 7 of the Act. The Public Protector raises the following defences to the Minister's grounds of review:

Procedural Fairness:

[26] According to the Public Protector, the Minister's interpretation of s 7 is untenable for the following reasons –

26.1 Nothing in the Act stipulates that the Public Protector may only gather evidence in the form of affidavits or oral testimony given under oath or affirmation. In fact, the Act envisages the use of interviews and

documents as evidence. In this regard I was referred to subsections 7 (4) *(a)* and 7 (4) *(b)* of the Act.

26.2 The Act provides that the Public Protector may decide the format and procedure to be followed in conducting her investigations. I was, in this regard, referred to subsection 7 (1) *(b)* (i) of the Act.

26.3 The right to cross examine witnesses is only applicable when a witness has given evidence on oath or affirmation before the Public Protector in terms of s 7 (4) read with s 7 (6) of the Act.

26.4 The Minister's interpretation of s 7 would impede rather than aid the search for the truth as it will be cumbersome and it will take long to finalise investigations.

[27] The requirements of procedural fairness depend on the circumstances of each matter. The Public Protector referred to the judgment in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 56. The contention is that the Public Protector's duty to act in a procedurally fair manner was satisfied in this instance. It is argued that the Public Protector provided the Minister with comprehensive information of the evidence and allegations against her (in the provisional report) and allowed her (the Minister) ample time to respond.

Legality

[28] The submission is that the Public Protector's request for the Minister to intervene and extend the handover process was not illegal in that the Minister was not requested to act unlawfully. According to the Public Protector, the Minister is under a constitutional duty to put the public interest first and to ensure efficient, economic and effective use of state resources. She is accountable to Parliament for such resources and as such, irrespective of who the accounting officer is in terms of the PFMA, the Minister remains responsible for the activities of the Department.

Rationality

[29] The Public Protector contends that at all times during the investigation and the events that followed, she acted rationally in that:

29.1 There was a clear evidentiary basis for the adverse findings made against the Minister in the Report;

29.2 Her actions were procedurally fair in that she gave the Minister ample opportunity to respond to the allegations in the Report;

29.3 Her findings were actuated by reason and by her understanding of her duties under the law and not by malice.

Bias

[30] The Minister's contention in relation to bias cannot be sustained, so it is submitted. She failed, according to the Public Protector, to discharge the onus she bears to prove it. The Public Protector's counsel referred me to the judgment in *Turnbull-Jackson* above at para 30.

[31] The argument by the Minister that the Public Protector formulated and investigated her own complaint is misconceived because it ignores the fact that the Public Protector is expressly empowered to investigate matters on her own accord.

[32] The Public Protector is not aware of authority suggesting that where a functionary acts pursuant to a statutory power to investigate and that having done so, that it gives rise to a perception of bias.

THE LAW APPLICABLE

[33] The Public Protector's powers to initiate and conduct an investigation are set out in s 7 of the Act as follows:

Section 7 of the Act provides –

"7 ***Investigation by the Public Protector***

7 (1) (a) *The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6 (4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.*

(b) (i) *The format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.*

(ii) *The Public Protector may direct that any category of persons or all persons whose presence is not desirable, shall not be present at any proceedings pertaining to any investigation or part thereof.*

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

(3) (a) . . .

(b) (i) *The Public Protector may designate any person to conduct an investigation or any part thereof on his or her behalf and to report to him or her and for that purpose such person shall have such powers as the Public Protector may delegate to him or her.*

(iii) . . .

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

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

(5) . . .

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

(7) The Public Protector or any person authorised by him or her may administer an oath to or accept an affirmation from any such person.

(8) Any person appearing before the Public Protector by virtue of the provisions of sub-section (4) may be assisted at such examination by an advocate or an attorney and shall be entitled to peruse such of the documents or records referred to in sub-section (2) as are necessary to refresh his or her memory.

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

(b) (i) if such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.

(ii) such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.

(10) The provisions of this section shall be applicable to any person referred to in subsection (9).

(11) The Public Protector may make rules in respect of any matter referred to in this section which has a

bearing on an investigation or in respect of any matter incidental thereto, provided that such rules must be published in the Government Gazette and tabled in the National Assembly."

ANALYSIS OF THE EVIDENCE

The Procedure Followed by the Public Protector

[34] In brief, the procedure ordinarily followed by the Public Protector when initiating and conducting an investigation as set out in her heads of argument, involves the following steps:

34.1 A complaint is received, which specifies the nature of the problem and requests an investigation;

34.2 The Public Protector and her staff perform a preliminary investigation to determine the merits of the complaint and how best to conduct the main investigation;

34.3 If there is substance to the allegation or complaint, the Public Protector's office launches an investigation;

34.4 During the investigation, a number of methods are used for gathering information including interviews and meetings; a review of relevant correspondence; the perusal and analysis of relevant documents; a consideration of applicable legislation and other prescripts; and a review of records of the Companies and Intellectual Property Commission ("CIPC"). Interviews are conducted by the Public Protector or by a duly delegated member of her staff or by a duly authorised independent person.

34.5 With the assistance of her staff, the Public Protector drafts a provisional report. This report is sent to the complainant and any other person who is implicated or affected by the report. These individuals

are then given the opportunity to respond to the provisional or intended findings. This is done to give effect to the provisions of section 7 (9) of the Act (which is specifically brought to the attention of those to whom the provisional report is sent).

34.6 After consideration of the comments that are received on the provisional report/findings, the Public Protector, with the assistance of her staff evaluates and integrates the comments. Thereafter she edits and finalises the report.

34.7 The final report is then published and made accessible to the public. A copy is made available to the complainant and all persons implicated or affected thereby and to the relevant governing structures.

34.8 If the investigation is conducted under the Executive Members' Ethics Act, the report is submitted to the President, who has an obligation under section 3 to pass a copy to the Speaker of the National Assembly with his/her comments thereon.

[35] In this instance, the Public Protector submits that she followed the same process as set out above. The submission is not challenged by the Minister. The Public Protector's contention is that she conducted a preliminary investigation into the complaints and, having found that the complaints have merit, launched the main investigation on 1 August 2012.

[36] According to her, the investigation was extensive. Together with her staff, she gathered evidence through the following methods: an exchange of correspondence with all the relevant parties; meetings and interviews with the relevant stakeholders including the Minister, the Department, Sekunjalo, Smit Amandla, and the South African Maritime Safety Authority ("SAMSA"); the perusal of relevant documents including the minutes of the handover meetings attended by officials from the Department, Smit Amandla and the Navy; a consideration of the applicable legislation; and a review of the records of the CIPC.

[37] After concluding the investigation process, the Public Protector issued a provisional report to all the affected parties – including the Minister – for comments on 7 October 2013. She contends that all of the issues covered and the findings reached in the final report were included in the provisional report.

[38] As stated in the Public Protector's Report, the Minister having been furnished the provisional report, was given an extended period within which to consider it and to provide her comments. The extension of time granted to the Minister was from 7 October 2013 until 21 November 2013. Within the time period she was given, the Minister submitted a twenty five page comment in response to the provisional report. The Public Protector considered the comments and evaluated her Report and made the necessary changes. The final report was issued on 5 December 2013.

The question is, was the procedure followed by the Public Protector flawed? I do not think so. I say this in consideration of the following factors:

Procedural Fairness

[39] The duty to act fairly is concerned only with the manner in which the decisions are taken. It does not relate to whether the decision itself is fair or not.[2]

[40] Procedural fairness demands not only that a person implicated be given reasonable and timeous notice of the hearing, but also that he or she is at the same time informed of the substance of the allegations against him or her, with sufficient

[2] See Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) at 231G and Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A) at 758H – I

detail to know what the case is all about. What is sufficient information will depend on the facts of each individual case.[3]

[41] It is important to note that the Minister's main gripe is that she was never afforded an opportunity to be heard in order to dispute the facts upon which reliance was placed for the compilation of the Report and the findings that she was guilty of maladministration and responsible for wasteful and fruitless expenditure.

[42] As expounded earlier in this judgment, the finding of maladministration resulting in fruitless and wasteful expenditure was only made by the Public Protector after having investigated the lack of competencies on the part of the Navy. It could not have been possible for the Public Protector to have given the Minister notice before such evidence was procured by the Public Protector. What the Public Protector did was to provide the Minister with a provisional report setting out a summary of the evidence collected, the suggested findings and proposed remedial action.

[43] The Minister correctly argues that there is no allowance in the Act for the issuance of a provisional report as was furnished to her by the Public Protector. The Minister, however, overlooks the fact that the Public Protector discovered evidence that would result in an adverse finding against the Minister whilst investigating the alleged lack of competency on the part of the Navy. Having found that there was fruitless and wasteful expenditure occasioned by the Minister's rejection of her advice to suspend the handover, the Public Protector had to make means to inform the Minister of such adverse findings and also to give her an opportunity to comment thereon. Section 7 (9) *(a)* is very explicit in this regard. The section enjoins the Public Protector to afford any person who is being implicated during the course of an investigation, an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances. Under the circumstances in this

[3] See Du Preez-judgment above at 234H – I

instance, the Public Protector found it expedient that the Minister be afforded an opportunity to respond to the evidence adversely implicating her through the provisional report. And, indeed so, the Public Protector afforded the Minister such an opportunity. She furnished the Minister with the provisional report and the Minister respondent thereto.

[44] I do not think that the contention by the Minister that a provisional report does not satisfy the requirement of a fair hearing because it is based on facts that were never presented to the Minister holds water. In this instance, the Minister was given a fair opportunity to respond to all the allegations and findings in the Report including those in regard to the issue of maladministration and fruitless and wasteful expenditure when she was furnished with the provisional report for comment. She was also given ample time within which to respond to the provisional report. The provisional report was provided on 7 October 2013 and she was given extension of time, at her request, within which to respond to the report. The provisional report contained a summary of all the substantive allegations against her. According to the authorities all that she was entitled to at the investigative stage is the gist of the case against her and nothing else.[4]

[45] I must also mention here that the Minister was at all time's material hereto aware of the investigation against the Navy. For instance, in a letter dated 1 August 2012, the Public Protector informed the Minister of the various complaints she has received and amongst them was a complaint that the Department's vessels handed over to the Navy were currently not being utilised and managed for their intended purpose thus amounting to fruitless and wasteful expenditure and that the Navy was not an appropriate authority , nor did it have the necessary expertise and capacity to utilise, manage and maintain the vessels for its intended purpose.

[4] See Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another 2003 (3) SA 64 (SCA) para 22.

[46] The Minister is however of the view that the Public Protector misconstrued the provisions of s 7 (9) *(b)* in that the Public Protector must have, in terms of the said subsection, afforded the Minister the opportunity to appear before her (the Public Protector) and give evidence or to challenge the information placed before her through legal representation and to cross examine any person giving evidence against her. The Minister contends that the subsection compels the Public Protector to do so. I do not agree.

[47] Section 7 (9) *(b)* of the Act provides that the person implicated can only be afforded an opportunity to appear before the Public Protector and give evidence only where the evidence implicating such a person was submitted to the Public Protector during an appearance in terms of s 7 (4) of the Act. Subection (4) authorises the Public Protector to direct any person to submit an affidavit or affirmed declaration or to appear before her. Subsection (4) should be read with subsection (6). In terms of subsection (6) the Public Protector may require any person appearing as a witness before her under subsection (4) to give evidence on oath or to accept an affirmation from such person. It is clear from the procedure followed by the Public Protector in this instance, which is not disputed, that the Public Protector did not collect evidence by calling any person to appear before her and that she did not request any witness to give evidence on oath or by affirmation as envisaged in subsections (4) and (6) of the Act. The Public Protector has in her Report, as well as in her answering affidavit, set out the method she used to collect the evidence and none of those methods includes the appearance of witnesses before her. The methods the Public Protector used (not in dispute) are: exchange of correspondence, meetings and interviews, perusal of documents, consideration of relevant legislation and the review of records. Nothing is said about evidence gathered by appearance before the Public Protector or by means of evidence on oath or affirmation.

[48] Section 7 (8) of the Act, on the other hand, provides that a person may be assisted by an advocate or an attorney when appearing before the Public Protector by virtue of the provisions of subsection (4). As already indicated there was no appearance before the Public Protector in terms of subsection (4) of the Act. There

was as such no need for the Minister to be afforded legal representation in this sense.

[49] It is held that the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and that is to be taken into account in all its aspects. It is said that the principles of fairness are flexible and relative.[5]

[50] Yet the Minister, relying on the judgment in *Du Preez* above, goes further to argue that an investigation of the magnitude of the current matter, wherein large sums of monies are involved or alleged to have been misused, should be conducted in a formal manner requiring evidence either on affidavit or oral evidence under oath or affirmation. The Minister, it is submitted, ought to be given an opportunity to present *viva voce* evidence and be given an opportunity to cross examine the witnesses giving adverse evidence against her and be allowed legal representation at such hearing. In the *Du Preez*-judgment, the court, when considering the serious consequences that may result if adverse findings are made against the person affected by the decision, came to the conclusion that the appellants were unfairly treated by not being afforded reasonable and timeous notice of the hearing and informed of the substance of the allegations against them.

[51] In as much as I would agree that the two cases are similar in that the effect of their decision would have disastrous effect on the affected persons but that is where the similarities end. In my view, the facts in the *Du Preez*-judgment are distinguishable from the facts in this instance.

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[5] See Chairman, Board on tariffs and Trade and Others v Brenco Inc. and Others 2001 (4) SA 511 (SCA) para 14 and Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) para 56.

[52] Firstly, in this instance, no hearing was held or was to be held as was the case in the *Du Preez*-judgment. This matter is different from the *Du Peez*-judgment in that the adverse findings were arrived at after the evidence had been gathered. As such, this is not a case where the applicant would have been entitled to be given adequate and timeous notice. In any event, on the facts of this matter, the Minister was given ample and adequate time within which to comment on the provisional report.

[53] Secondly, on the facts of this matter, the Minster was not entitled to every piece of information in the possession of the Public Protector. She was entitled only to the 'gist' of the complaint. What was provided to her in the provisional report was sufficient to enable her to comment. And, she did, adequately, comment in a twenty five page document. As it has been held, fairness does not require that in an enquiry there was a general right to information in the possession of the interrogator.[6]

[54] Lastly, in coming to the conclusion it did, the court in the *Du Preez*-judgment was called upon to give a proper interpretation of s 30, and in particular s 30 (2) of the Promotion of National Unity and Reconciliation Act 34 of 1995. Section 30 provides for the procedure to be followed at investigations and hearings of Commission, committees and subcommittees. Section 30 (2), in particular, stipulates the procedure to be followed at such Commission, committees and subcommittees. The subsection provides for a specific procedure that must be followed. It is on the basis of this stipulation that the court in the *Du Preez*-judgment concluded as it did.

[55] This, however, is different from the matter before me. In this instance, the section sought to be interpreted is section 7 of the Act. Section 7 provides for

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[6] See Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others 2015 (2) SA 154 (SCA) para 19.

'Investigation by the Public Protector' and gives the Public Protector discretionary powers in terms of subsection 7 (1) *(b)* (i) to determine 'the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case' (my emphasis). This much, the parties are agreed. Subsection 7 (1) *(b)* (i), in particular, gives the Public Protector the power to determine 'the format and procedure to be followed in conducting any investigation'. It is quite clear that the investigation in the present matter could not only be conducted in a formal manner with evidence on oath and cross examination, as suggested by the Minister. Subsection 7 (1) *(b)* of the Act provides for other methods. The Public Protector was entitled, as provided for in the Act, to determine the format and procedure and she opted for the procedure used in this matter. There was no obligation on her to use the procedure the Minster suggests.

[56] Relying on the *Du Preez*-judgment again, the Minister submits that an investigation by the Public Protector must not be of a cursory nature but a proper investigation characterised by an open and enquiring mind and must display clear impartiality on the part of the Public Protector.

[57] My view is that, in this instance, the Public Protector's investigation is not of a cursory nature. The Public Protector did submit that the investigation was extensive. She investigated by reviewing various correspondences, perused documents, and held telephonic conversations and interviews with several departmental officials and other individuals. She even had to make use of members of her staff to assist her in the investigation. It cannot, therefore, be said that only just because the Public Protector did not conduct a formal investigation she did not have an open and enquiring mind during the investigation.

[58] It is trite that ordinarily investigative enquiries are not a court of law. Their proceedings are not judicial proceedings. They may not even be quasi-judicial for they decide nothing. They only investigate and report and as such, sit in private.

[59]. The Minister raised a veiled argument that the investigations by the Public Protector must now be held in a formal manner in the light of the Constitutional Court decision that held that the Public Protector's remedial action is binding. This begs the question whether, if all the investigations are to be formal, what is the status of the Public Protector's investigation. Will it now be regarded as a court of law or a quasi-judicial forum? Does it mean that all the other methods provided for in the Act are to be discarded for the formal investigation called for by the Minister? I do not think this court is in a position to can answer such questions. Safe to say that at the moment I am guided by the provisions of the Act which gives the Public Protector the wide discretionary powers of determining the format and procedure to be followed in conducting any investigation. Until such time as the Act is amended I am bound by its provisions.

[60] The Public Protector concedes that she did not conduct the investigation all by herself. In her answering affidavit she sets out the procedure ordinarily followed by her office when conducting investigations. She specifically states that: she makes use of her staff in gathering the evidence when performing the preliminary investigation; interviews are conducted by herself or by a duly delegated member of her staff or by a duly authorised independent person; with the assistance of her staff she drafts provisional reports; together with her staff she considers the comments in respect of the provisional report, integrates the comments, edits and finalises the final report.

[61] There is, thus, no doubt that from time to time the Public Protector does make use of her staff when investigating a complaint. In this instance, as well, she contends that the investigation was extensive and concedes that she did make use of her staff in the process of the investigation. She is entitled by law to make use of her staff. In terms of s 3 (1) *(c)* and (3) of the Act the Public Protector shall be assisted by such staff as shall be necessary to enable the Public Protector to perform her functions and every such person shall have such powers as the Public Protector may delegate to him or her. Staff members of the office of the Public Protector are in terms of s 6 (2) of the Act authorised to render necessary

assistance, free of charge, to enable any person to report a complaint. To take it further, the Public Protector is also empowered in terms of s 7 (3) *(b)* (i) of the Act to designate any person to conduct an investigation or any part thereof on her behalf and for that purpose such person shall have powers as the Public Protector may delegate to him or her.

[62] It is common cause that no *ad hoc* procedure was devised by the Public Protector as is required by the Act. As stated, s 7 (11) of the Act requires the Public Protector to prepare an *ad hoc* procedure for every investigation. None was done in this instance. It is my view, therefore, that in the absence of any determined procedure, the residual provisions of s 7 of the Act are to be applied. And, this is what the Public Protector did.

[63] I am, as such, satisfied that the requirements of fairness were properly met when the Public Protector afforded the Minister the opportunity to comment on her proposed findings in the provisional report. From the evidence, it is clear that by such a report, the Minister was apprised of the substance (the gist) of the evidence against her and invited to respond thereto and she accordingly responded.

Legality

[64] It is my view that the Public Protector's approach to request the Minister to defer the handover process was not illegal. The Public Protector made the Minister aware of the administration of the patrol vessels services and that the imminent handover of the vessels to the Navy was likely to cause severe prejudice to the stakeholders involved and to the public interest. This was due to the fact that the parties involved in the handover were not ready or able to ensure that the vessels would be properly manned and maintained in the period just after handover. In order to avert prejudice she, correctly so, approached the Minister to warn her.

[65] The Minister on the other hand, acted wantonly by not taking reasonable care and to determine whether the Navy was indeed ready and competent to take over and manage the vessels immediately after the handover. She instead accepted the Director-General's explanation at face value. I am in agreement with the Public Protector's submission that the Minister, unlike the Director-General, is under a constitutional duty to put the public interest first and to ensure efficient, economic and effective use of state resources. She remains at all times responsible for the activities of the Department. She should have acted with due diligence and taken reasonable care in the circumstances.

Rationality

[66] In this regard, the submission is that there were no facts before the Public Protector to demonstrate lack of patrols, deterioration of vessels and fruitless or wasteful expenditure. The Navy was also not given an opportunity to participate in the investigation.

[67] Much as the Minister would want to argue that she was not provided with the documents or statements of the interviews, the provisional report provided to her was the same as that provided to the Navy. Based on the said provisional report both the Minister and the Navy did not provide the same comments. The two are blaming each other. The Minister puts the blame of the deterioration of the vessels at the door of the Navy whilst the Navy's argument is that the vessels were received by them in a state of disrepair. I as a result tend to agree with the Public Protector for the findings she made against the Minister for if the Minister had allowed enough time within which to transfer the vessels to the Navy this situation could have been avoided.

[68] The evidence of both the Department and the Navy indicates that a period of at least three months is required for the handover process of the size of the vessels involved in this matter in order to ensure a seamless transition from one service

provider to another. The allowance of the three months handover period in the previous contracts with service providers is an indication of how intricate the process is. The three months period would also ensure that the vessels were ready and the new staff trained and had enough time to familiarise themselves with the vessels. The Navy in its response to the provisional report states that it took them six months to train the staff that was to man the vessels. A month for the handover was obviously not enough.

[69] All the parties concede that by the beginning of the Public Protector's investigation, on 1 August 2012, the condition of the vessels had deteriorated. All the parties, except the Navy are agreed that the deterioration happened when the vessels were under the custody of the Navy. What is clear, however, is that the vessels had deteriorated and could not be utilised as they required to be refurbished. The Navy in their response to the provisional report confirms that the vessels stood idle because they had deteriorated. The Navy had to use their own vessels to conduct some of the patrol work. By the time the MOU came to the end only three vessels had been utilised by the Navy.

[70] In her answering affidavit the Public Protector sets out the evidence that she relied on in coming to the finding that the handover to the Navy was abrupt and led to fruitless and wasteful expenditure and that the Minister's conduct constituted maladministration.

[71] The first evidence, according to the Public Protector, shows that the Navy was not ready or competent to take control of the vessels which resulted in the Public Protector concluding that the handover was abrupt. Such evidence includes:

71.1 The Minutes of the handover meetings conducted on 22, 23, 26, 27, 28 and 29 March 2012 as contained in annexures "TNM4", "TNM5", "TNM6", "TNM7", "TNM8" and "TNM9" respectively, attached to the answering affidavit and also referred to in the Report at page 22. The Minutes, according to the

Public Protector, show that the officials of the Department and Smit Amandla expressed concern and discomfort with regard to the imminent handover of the vessels to the Department, which was a precursor to the immediate takeover of the vessels by the Navy. Specifically at the meeting of 28 March 2012, two days before the envisaged handover, the Navy expressed its concern that:

71.1.1 It was having challenges keeping its own fleet afloat;

71.1.2 There was extensive information it still required from Smit Amandla before the handover; and

71.1.3 It would need to train its staff to provide the services required and that it would need at least a month or two to effect the handover.

71.2 The 'Risk Assessment of the Project Handover of the DAFF Fleet' which explicitly raised a number of the risks that flowed from the extremely short handover period. According to the risk assessment, the likelihood of the risks stated therein materialising is rated as at least 'medium' to 'high' and the impact to be felt if the risks would materialise is also rated as 'medium' to 'high'. In most instances, the suggested action to mitigate the risk is to have a proper structured handover program with a more reasonable time table.

71.3 As at 28 March 2012, there was no formal agreement concluded between the Department and the Department of Defence. The implementation Protocol between the Department and the Navy was only signed on 13 April 2012. This according to the Public Protector indicates that as at 31 March 2012 the Navy was not prepared for the handover.

71.4 The 'Request for Proposal' in respect of the tender involved in this matter which contemplates a 'six months' termination period provision. This, according to the Public Protector constitutes an acknowledgement by the Department of the complexity of the handover process and the need for adequate time for preparation of the handover.

[72] The second evidence shows that the vessels stood idle. In this regard the evidence includes:

72.1 A confidential report provided by a former employee of the Department ('Report for the Public Protector Investigators' dated 5 September 2013). This report was eventually made available to the Minister. The report confirms that:

72.1.1 The Department's fleet stood dormant in Simon's Town harbour for three months after the handover before any work was carried out.

72.1.2 As at June 2012, two months after the handover, the engines of the fleet had not been started since handover.

72.1.3 The vessels were not fully crewed and were deteriorating in condition.

72.1.4 By 10 May 2012 the technical survey and logistics audit had not been carried out by the Navy.

72.2 Annexure "TNM13" being a letter dated 20 August 2012 written by the Department to the Director-General Department of Defence and Military Veterans. The letter confirms that as at 20 August 2012, four and a half months since handover, no patrols were undertaken by any of the four patrol vessels and only one curtailed research cruise was undertaken by one of the three research vessels.

[73] The third evidence which showed that if the vessels stood idle, they would deteriorate and would require refurbishment was provided in interviews by officials from SAMSA, who are widely considered to be experts in this field. The interviews confirmed that if vessels of the kind in question are left to stand idle, they will rust, deteriorate and would require refurbishment.

[74] Evidence that the vessels required extensive refurbishment after they had been in the Navy's possession for a number of months was provided in interviews by the Department's officials Mr Ceba Mtoba and Mr W Rooifontein. The officials admitted that the Department was compelled to contract with two companies to assist with repairs, restoration and refurbishment of the patrol vessels to make them seaworthy again.

[75] In the course of her investigation and on the basis of the abovementioned evidence, the Public Protector discovered the following:

75.1 The Navy was not adequately equipped for the handover on 31 March 2012 and lacked the necessary capacity to crew and maintain the vessels in the period immediately after handover.

75.2 As a consequence the award of a contract the vessels were not manned for the intended purpose nor were they maintained and the deteriorated requiring to be refurbished.

75.3 The refurbishment costs of the vessels constituted unnecessary and wasteful expenditure and could have been avoided had reasonable care been exercised by the Minister when considering the handover to the Navy.

[76] In my view the Public Protector has been able to establish that there was ample evidence (facts) upon which she relied on in coming to her findings against the Minister in this regard. I had an opportunity to peruse the minutes on which the Public Protector relied for evidence and in addition to the concerns she raises this is what I found in some of those minutes:

76.1 At the meeting held on 22 March 2012 the following concerns were raised: it was confirmed that the Ministerial Memorandum of Agreement was not yet in place; risks in the truncated handover process were pointed out – the risk assessment had not been compiled; in the opinion of the Department's representatives a proper handover of the vessels could not be

achieved in the five working days remaining; many of the questions raised at the meeting could not be answered.

76.2 At the meeting of 28 March 2012 a plan for the handover was still to be developed. It was not certain who to hand the ships over to – whether Smit Amandla was to handover the vessels to the Department which will in turn hand them over to the Navy or directly to the Navy. The parties were also doubtful where the handing over would occur on 31 March 2012 – no berthing plan was in place. A concern was raised that the process of transferring assets usually takes three months as against two days in this instance. Stock taking and the audit of all the stores had not been done. No survey of the fleet had been done – surveyors were not appointed yet. There was, actually, no clarity as to what was to happen on 31 March 2012.

76.3 The 'Risk Assessment of the Project Handover of the Fleet' was prepared by Smit Amandla six days before the 31 March 2012 handover.

76.4 In annexure "TNM13" the Department admits that as at 20 August 2012 the Navy had not carried out the programmes for both the patrol and research vessels. There appears to have been no response by the Navy to this letter. In the absence of a response from the Navy, the Public Protector was entitled to conclude that the programmes had not been carried out. The vessels are used for the benefit of the Department and as such the Department would know when the service required has not been provided. From the contents of the letter it is clear that the Department was receiving reports from its Fisheries Management Branch that major objectives of that Branch were not being met as a result of the programmes not being satisfactorily carried out.

[77] Section 63 of the PFMA enjoins the accounting officer of a department (in this instance the Director-General) to report to the executive authority (the Minister in this instance) on a monthly basis. For all intends and purposes the Minster is responsible for her Department. Her responsibilities in terms of ss 96 and 195 of the Constitution include avoiding arbitrary exercises of public power and putting public

interest first, and ensuring efficient, economic and effective use of state resources. This is what the Minister ought to have done in the circumstances of this case.

[78] The Minister having signed the MOU with the Minister of Defence, it would, thus, be safe to assume that she was aware that in terms of this MOU the vessels were to be transferred to the Navy for further management. Even though she was not the functionary involved in the day to day running of the process she ought to have placed herself in a position to know what was happening. In the ultimate end, the Minister is responsible for the workings of her Department and must be held accountable for this.

[79] Concerns were raised and the Public Protector made her aware of such concerns and the Public Protector requested the Minister to extend the handover period. I refuse to accept that as at 29 March 2012 when the Public Protector requested the Minister to defer the handover, the Minister was not aware of the numerous challenges facing the handover. For example she had not signed the MOU. The MOU was signed on 30 March 2012 and it provided, amongst others, for the handing over of the fleet to the Navy on 31 March 2012 and for a Service Level Agreement or Implementation Protocol ("SLA"). In her letter of 30 March 2012, in response to that of the Public Protector, the Minister informs the Public Protector that her concerns will be addressed in the SLA together with any other that may emerge from the audit contemplated in clause 4 of the MOU. As *per* the Navy's response to the provisional report, at the time of handing over, the audit of the vessels had not been done because the time permitted for the handover did not allow for the audit to occur. The SLA was only signed on 18 April 2012 when the vessels had already been transferred to the Navy on 31 March 2012 and the Navy had commenced with the management function as at 1 April 2012. It is common cause that the issues raised by the Public Protector in her letter dated 29 March 2012 are in respect of the handover process and the SLA does not deal with the handover process but the implementation of the service management of the fleet after it shall have been handed over to the Navy. The Minister opted not to defer the handover process without exercising reasonable care. Had she exercised reasonable care, she would

have realised that a handover process of only thirty days was not well thought out and impractical and she would have deferred the handover. She would have also realised that there was no implementation plan for the handing over of the vessels in place and that the SLA does not deal with such implementation plan.

[80] Based on the evidence that was at her disposal when she made the findings and to the extent that the Minister rejected the Public Protector's request to extend the handover process, the Public Protector is correct to have concluded that the handover was abrupt and that the Minister's actions in this regard constituted improper conduct and maladministration which resulted in fruitless and wasteful expenditure.

[81] It is not correct that the Navy was never given an opportunity to participate in the investigation with regard to the handover process. The Public Protector states in her answering affidavit that she interviewed a number of officials from the Navy in November 2013 as *per* the list at page 19, paragraph (e) of the Report. When she weighed up all the evidence gathered during such interviews the Public Protector came to the conclusion that the Navy had not been ready to operate and maintain the vessels. The representatives from the Navy were given an opportunity to read and respond to the allegations and findings in the provisional report in November 2013. Their responses were incorporated in the revision and finalisation of the Report. A meeting was also held with some of the officials in the Navy on 18 November 2013 to get clarification and further documentation is support of the Navy's written response to the provisional report. Based on their response and the clarification, the remedial action contained in the provisional report in respect of the Navy was excluded in the Report.

[82] Based on the aforesaid facts, the Public Protector's finding that the Navy had neither the capacity or competence to man, manage and maintain the vessels when it received them on 1 March 2012, hence, the Minister's refusal to delay the

handover beyond 1 March 2012 was imprudent and led to the wasteful and fruitless expenditure, is in my opinion correct.

Bias

[83] Both counsel referred me in this regard to paragraph 30 in the Turnbull-Jackson judgment. The said paragraph reads as follows:

> "[30] The Constitution guarantees everyone the right to administrative action that is procedurally fair. Section 6 (2) *(a)* (iii) of PAJA, which is legislation enacted in terms of section 33 (3) of the Constitution to give effect to, inter alia, the right contained in section 33 (1) of the Constitution, makes administrative action taken by an administrator who was "biased or reasonably suspected of bias" susceptible to review. Whether an administrator was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person. To substantiate, borrowing from *S v Roberts*: [1999 (4) SA 915 (SCA) at para 30]
>
> (a) There must be a suspicion that the administrator might – not would – be biased.
> (b) The suspicion must be that of a reasonable person in the position of the person affected.
> (c) The suspicion must be based on reasonable grounds.
> (d) The suspicion must be one which the reasonable person would – not might – have".

[84] It is quite clear that a reasonable suspicion of bias must be tested against the perception of a reasonable, objective and informed person. The suspicion itself must be based on reasonable grounds.

[85] On the basis of the grounds the Minister relies on for this argument it cannot be said that there are reasonable grounds for the suspicion that the Public Protector was biased.

[86] As already stated earlier in this judgment, the Minister's allegation of bias is based on the ground that the Public Protector formulated and investigated her own complaint, which created a perception that the Public Protector was biased in her finding. This argument is misconceived. It ignores the fact that the Public Protector is empowered to investigate matters of her own accord. Section 6 (4) *(a)* and (7) read with s 7 (1) *(a)* of the Act enjoins the Public Protector, on her own initiative, to investigate any complaint and to conduct a preliminary investigation for the purpose of determining the merits of the complaint. In any event, the issues forming the subject of the findings arose after the Minister's refusal to defer the handover period. The Public Protector could not have already prejudged the issues by the time she approached the Minister and before the Minster's refusal was made.

[87] A further claim is that the Public Protector's findings were motivated by malice and that she did not apply her mind to the facts before her. This claim cannot hold water as well. It is clear from the Report and the answering affidavit that the Public Protector's findings were based on the evidence that was gathered during the course of investigation. That she harboured no malice, but was impartial, is borne out by her carefully reasoned report

[88] It is said that a finding of bias cannot be had for the asking. There must be proof; and it is the person asserting the existence of bias who must tender the proof.[7] Similarly, in this instance the Minister bears the onus to prove her allegation of bias. She has, however, failed to discharge the onus on her. There is, as such, no basis for the argument on bias.

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[7] See Turnbull-Jackson above at para 32.

EVEDENTIAL CHALLENGE

[89] Courts have said that an applicant who seeks final relief on motion, in the event of conflict, accepts the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[8]

[90] The Minister attacks the contents and veracity of some of the evidence tendered by the Public Protector, for example, the handover minutes on which the Public Protector relies on. The Minister, however, overlooks the fact that the evidence is presented on application before me and that on the principle enunciated in the *Plascon-Evans*-judgment, I have to decide in the Public Protector's favour. Moreover, I find the Minister's assertions on these papers untenable. In the circumstances, I have to reject her version and accept that of the Public Protector.

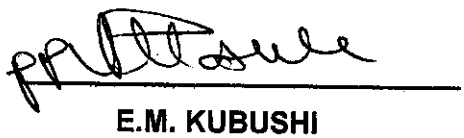
COSTS

[91] In my opinion cost in this matter should follow the successful party. The Public Protector prayed for costs including costs of two counsel. I have no reason none was advanced to deny such a cost order.

ORDER

[92] In the premises the application is dismissed with costs including costs of two counsel.

[8] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd1984 (3) SA 623 (A) at 634e – 635c.



E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Counsel for Applicant: Adv. BR Tokota SC

Assisted by: Adv DT Skosana SC

Instructed by: State Attorney

Cape Town and Pretoria.

Counsel for Respondent: Adv G. Marcus SC

Assisted by : Adv N Rajab-Budlender
Adv Emma Webber

Instructed by: Adams and Adams

Pretoria

Date heard: 9 and 10 November 2016

Date of judgment: 13 March 2017