REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: **46269/18**

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

SIGNATURE ..... DATE 05/11/2019

In the matter between:

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| **THE PREMIER OF THE WESTERN CAPE PROVINCE** | **Applicant** |
| and | |
| **THE PUBLIC PROTECTOR** | **First Respondent** |
| **THE SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE** | **Second Respondent** |

## JUDGMENT

### Introduction

1. The applicant made application and sought an order that the findings and remedial action in paragraphs 5.2.22; 5.2.27; 5.2.37; 6.2; 7 and 8 of the Public Protector's Report No. 5 of 2018/19 entitled *"Report on an investigation into allegations of breach of the provisions of the Executive Ethics Code by the Premier of the Western Cape Provincial Government, Honourable Helen Zille"* are reviewed and set aside[1]. And costs, including costs of two counsel.

2. An order interdicting the implementation of the remedial action by the Public Protector set out in paragraph 7 of the Report was previously granted by this court in favour of the applicant pending the final determination of this application. The applicant is not the current Premier of the Western Cape but because when the cause of action arose she was Premier and launched this application in her capacity as such, I will refer to her as Premier and not as applicant in this judgment. I will accordingly refer to the Public Protector as such and not as respondent.

3. The matter was set down as a special motion for 4 September 2019, for one day. The matter duly proceeded on the day. The previous week the Constitutional Court had heard arguments in the appeal from the Supreme

[1] Part B of the Notice of Motion, page 3 of papers.

Court of Appeal in **Bongani Masuku and another v South African Human Rights Commission obo S.A. Jewish Board of Deputies**[2] and reserved its judgment.

4. I asked counsel how this state of affairs would affect how we traversed all issues in this application, particularly the interpretation of the meaning of the right to freedom of expression in section 16[3] of the Constitution[4]. Counsel contended that the pending judgment had no bearing on the issues in this matter. I also asked, for completeness and common ground on the section 16 debate, whether counsel (particularly for the Premier) contended that section 16(2) of the Constitution was an exhaustive list of unprotected expression as contemplated by section 16(1). Mr. Rosenberg on behalf of the Premier said it was. I left the matter at that and the arguments began.

5. I proposed to both counsel that since the Public Protector sought to argue a peremption point[5], a preliminary point of law that is dispositive of the entire application, I thought Mr. Masuku should be heard first on the point and then we would proceed to the rest of the application. Mr. Rosenberg suggested that he be allowed to argue his entire case, including a counterargument on peremption, and Mr. Masuku would argue the peremption point later. I allowed the application to proceed on this basis.

6. The matter could unfortunately not be finally debated on 4 September 2019 and postponed *sine die* for the parties to arrange a suitable date, ultimately being 10 October 2019 on which the arguments were finalized.

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[2] **[2018] ZASCA 180 (04 December 2018).**
[3] Placed in issue in this application.
[4] The Constitution of the Republic of South Africa Act, 108 of 1996.
[5] Paragraphs [13] to [19] of the Public Protector's Answering Affidavit ("AA"). Pages 430 - 435 of the papers.

## The nature and effect of the relief sought

7. The nature of the relief is to set aside the provisions of the Public Protector's Report that have been impugned by the Premier, and those paragraphs are as set out in the Notice of Motion[6]. Importantly is the remedial action proposed by the Public Protector, which is:

> "
>
> *The Speaker of the Western Cape Provincial Legislature must, within 30 days from the date of the report, table it before the Western Cape Provincial Legislature for it to take appropriate action to hold the Premier accountable as contemplated in sections 114(2), 133(2) & (3)(a) and 136(1) & (2)(b) of the Constitution."*[7]

8. The effect of the review is that the remedial action falls away.

9. The Remedial Action by the Public Protector enjoins the Provincial Legislature of the Western Cape to debate the matter of the Premier and to take appropriate action to hold the Premier accountable as contemplated in the sections aforementioned. The Premier is no longer the Premier of the Western Cape and it means the Provincial Legislature cannot sanction her as such. The issues in this application have thereby been rendered moot. Judicial review does not lie against moot matters, and the Constitutional Court has confirmed this principle repeatedly[8]. A court may only determine issues which "*no longer present existing or live controversies*" if the interests of justice so require[9]. In my view, a reasoned judgment in this matter is simply of academic significance and of no practical consequence.

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[6] Also analysed hereunder.
[7] Paragraph 7.1 of the Public Protector's Report, page 86 of papers.
[8] **Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC) at paragraph [54]**
[9] **Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) at paragraph [11]**

Further, it is not in the interests of justice. I nevertheless demonstrate hereunder for related reasons why this application must fail and to some extent have adverse costs consequences for both parties.

10. From the day that the Premier left her position of Premier of the Western Cape the issues became academic to entertain as the remedial action proposed would have been impractical to implement in the event the Premier failed in this application. This was a glaring set of circumstances and ought reasonably to have been picked up by counsel on both sides; all five of them. The matter nevertheless proceeded to hearing when such a hearing had obviously been rendered academic. On this ground I find that from that day, no party is entitled to any costs of whatsoever nature in this application. The only costs order I will make will be in respect of costs up to the date that the issues became moot and/or academic to entertain; the date the Premier left office of Premier.

11. Is this an abuse of court process? I do not know. And I desist from making a pronouncement in this regard. Lest I allow my personal feelings to cloud my judgment. And it is for this reason, and it alone, that I think this judgment is of interest to other judges; that they too should be alive to "regular" matters that find themselves on court rolls yet taking the administration of justice nowhere. Perhaps judges need to become more robust when it comes to costs orders, in order to discourage abuses.

## Background

12. Briefly, the factual background that gave rise to this application is as follows.

13. On or about 16 March 2017 the Premier, returning from an official State visit to Singapore, posted tweets about colonialism and lessons to be learnt from Singapore. The tweets generated a reaction from the Twitter public, and in later days on other media platforms. The Premier responded to some reactions on Twitter. Overall, the reaction was negative and this forced the Premier to subsequently apologise, although reserving her legal rights.

14. For reasons I have already touched upon and will further elaborate upon, I do not determine the "ordinary grammatical meaning" of the words in the tweets[10]. I therefore do not detail them. Suffice to say the majority of the people involved in the conversations on social media thought that the Premier was glorifying colonialism.

15. Because of the "outcry" on social media an ANC MP, Mr. Khayalethu Elvis Magaxa, lodged a complaint with the office of the Public Protector about the conduct of the Premier and requested the office to investigate. It was on the basis of the Premier being Premier of the Western Cape that the Public Protector was empowered to investigate[11].

16. And then the Public Protector compiled a Report, which is the subject matter of this application.

**Analysis of relief sought in respect of paragraph 5 of the Public Protector's Report.**

17. Paragraph **5.2.22** provides:

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[10] The issue has become moot.
[11] Section 7 of the Public Protector Act, 23 of 1994

"

*Such statements by Professor Gilley and the Premier are likely to cause tensions, divisions and violence in South Africa. Section 16 of the Constitution was therefore not created to allow anyone, particularly those in positions of influence, to make such statements. Subsection 16(2)(b) was created to curb such statements."*

18. Paragraph **5.2.27** provides:

"

*Similarly, in principle the Premier's tweet was protected by section 16 of the Constitution, but its impact in South Africa where racial perceptions are prevalent should not be overlooked. Subsection 16(2)(b) of the Constitution prohibits statements which could provoke a certain public reaction, capable of stirring up racial violence. The reaction of the South African public to the Premier's tweets is indicative of the likelihood of such tweets stirring up violence based on race and therefore in contravention of subsection 16(2)(b)."*

19. Paragraph **5.2.37** provides:

"

*Based on the evidence and the legal prescripts obtained, anlysed and evaluated it can be concluded that the Premier's conduct did not comply with the provisions of the Constitution and the Code."*

20. Paragraphs 5.2.22, 5.2.27, 5.2.37 are under a section titled *"Application of the relevant legal prescripts"* in the Public Protector's Report[12]; and only paragraph 5.2.37 is a conclusion. The others are her reasoning.

21. Therefore, the only competent relief is to review paragraph 5.2.37 and the rest of the paragraphs will thereby be rendered nugatory.

22. Paragraph 6.2[13] provides for reasons and the conclusion regarding whether the alleged tweets on colonialism made by the Premier violated the provisions of the Executive Ethics Code? The conclusions reached in this regard are:

    22.1. The conduct of the Premier in the circumstances is in violation of sections 2.1(d) and 2.3(c) of the Code and the Preamble, and sections 10, 16, 136(1) and (2)(b) of the Constitution;

    22.2. The conduct of the Premier also constitutes improper conduct in terms of section 182(1)(a) of the Constitution[14].

23. Paragraph 7 provides for Remedial Action that must follow the findings[15].

24. Paragraph 8 provides for the Monitoring of the aforesaid remedial action.

## Grounds of review

25. The Premier states that her grounds of review are; Firstly, under the principle of legality[16]. And then on grounds of review under the PAJA[17]. The

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[12] Pages 27-34 of the Public Protector's report, Pages 77 – 84 of the papers.
[13] Pages 85 – 86 of the papers.
[14] Paragraphs 6.2.6 and 6.2.7 of the Public Protector's Report.
[15] Page 86 of the papers.
[16] Paragraph [42] of the FA. Page 24 of papers.
[17] Paragraph [87] of the FA. Page 45 of the papers.

submission in this regard is that should it be found that the PAJA is applicable, the review grounds relied upon for the present cause of action will similarly be relied upon for relief in terms of the PAJA. No case is made out by the Premier regarding whether or not the Public Protector's findings and recommendations are "administrative action" as contemplated by the PAJA. Therefore no relief can be sustained in terms of the PAJA.

26. The legality grounds are:

26.1. Material errors of law in the application of section 16 of the Constitution;

26.2. Material error of fact in the application of section 16(2)(b) of the Constitution;

26.3. Material errors of law and/or fact in applying the Preamble and section 10 of the Constitution;

26.4. Material errors of law in the application of section 136 of the Constitution and the Executive Ethics Code[18];

26.5. The findings and remedial action are irrational[19];

26.6. The Public Protector's findings and remedial action unjustifiably limit the right to freedom of expression[20];

26.7. The remedial action does not comply with section 3 of the Executive Ethics Act, 1998;

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[18] Paragraphs [42] – [75] of the FA. Pages 24 – 41 of the papers.

[19] Rationality is a separate cause of action than legality. That findings are irrational is a rationality, as opposed to legality, argument.

[20] This would entail an interpretation of section 16 of the Constitution, and relevant sections for the analysis. And for reasons embodied in this judgment, I do not traverse this interpretation.

26.8. Grounds under the PAJA[21].

27. Therefore the Premier attacks the Public Protector's Report in at least 6 (six) and at most 8 (eight) respects.

28. The Premier has characterized her review grounds as those based on the legality principle in our law and that of rationality; two categories. The Premier mainly attacks the Public Protector's report in respect of material errors of law and/or fact committed by the Public Protector in making her pronouncements and, further, that they are irrational.

29. The application purports to demonstrate that all the findings attacked are either irrational or of such an error in law/fact as to warrant interference by a review court. The legality review ground to set aside the findings is not based on *ultra vires* or any other formal or substantive review ground. It is merely an adjunct to the material error of fact/law attack, premised on the supposition that any finding which is legally or factually flawed is a violation of the rule of law and accordingly unlawful.

30. The only *ultra vires* ground the Premier relies upon is that the remedial action does not comply with section 3 of the Executive Members Ethics Act, 1998. The Premier states that the Public Protector failed to submit a report within the required time and therefore "acted *ultra vires*"[22] in terms of the Executive Members Ethics Act, 1998. The Public Protector's response to this submission is that she had challenges regarding the timing of the submission of the Report but the President was informed about the delays. And, in any event, a failure to submit a Report on time cannot be a ground for review. I agree. Failing to act is not acting *ultra vires*. This ground of review cannot be sustained.

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[21] Paragraphs [76] to [79] of the FA. Pages 41 – 45 of the papers.
[22] Paragraphs 80 – 86 of the FA, pages 43 to 45 of the papers.

31. I invited Mr. Rosenberg to debate with me whether our jurisprudence permits for review of findings and recommendations of public functionaries on the basis only that the public functionary committed an error of fact/law? And if so, whether this review does not impinge on our appeal procedures? And if not, whether the review should only be allowed for material errors of fact/law? And if the answer is affirmative, how those material errors of law/fact are differentiated from ordinary errors for purposes of review? Especially against the background of our Constitutional Court[23] emphasizing the requirement to maintain the distinction between appeals and reviews. Lest appeals are prosecuted in the name of reviews.

32. Mr. Rosenberg contended that the exercise of public power is subject to rationality[24]. I agreed with him. I however disagreed with him on the contention that recent cases have included errors of fact/law committed by public functionaries as sufficient grounds for review and that this is one of the cases contemplated by those authorities. My view is that those authorities are distinguishable from this one because in those cases there were irregularities that affected the propriety of the findings, thereby rendering them vulnerable to judicial review[25]. Where an error is involved, such error must be material.

33. I cautioned against accusing every error of law, no matter how reasoned, of being a ground to review decisions by public officials. The office of the Chief Justice and Deputies Judge President may end up having to allocate "special review courts" for the "appeals" of decisions by public

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[23] **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) at paragraph [45]**

[24] This is a trite principle of our law.

[25] In an Appellate Division decision of ***Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika 1976 (2) SA 1 (A) at 20D-F***, the court held that in respect of statutory bodies the standard for interference on review has been extended to include not only instances where no evidence at all exists to come to a finding, but also instances where the evidence is not such that it reasonably supports the finding based on it. However, even then the material test is not whether a court would itself have come to a different conclusion. Thus the distinction between appeals and reviews remains unaffected.

functionaries; A judicial process that could be seen by the public as the "next logical step" in attacking a finding by a public functionary on any ground whatsoever; without considering whether the findings are in fact reviewable or are merely infirmed by an appealable error of fact or law. I suggested to him that for an error to be reviewable, it must be vitiated by a lack of independence on the part of the public functionary. My concern (And I go in line with emphatic pronouncements of the highest court in the land, emphasizing the importance to keep the distinction between appeals and reviews) is that appeal procedures where decisions of public functionaries are concerned could, with time, become abrogated by disuse.

**The complaint and response**

34. The complaint was lodged with the Public Protector by a member of the Western Cape Legislature. Essentially the basis upon which the MP was complaining was in respect of the Premier's violation of her duties and the Executive Ethics Code, enacted pursuant to the Executive Members Executive Act, 1998 and the Constitution.

35. An investigation ensued and the Public Protector gave the Premier a section 7(9) notice[26] to respond. In the response[27] the Premier argues that the Report misconceives and incorrectly interprets the Executive Ethics Code and what is in the interests of good governance[28].

36. The Premier avers in her founding affidavit that she did not violate the Code because the tweets were made in good faith and with no intention to cause any offence. Further, that the tweets did not undermine good governance

[26] Of the Public Protector Act, 1994.
[27] Page 137 to 151 of the papers.
[28] Page 139 – 140 of the papers.

but rather provoked legitimate public engagement. That people were free to disagree with her and that she, similarly, was entitled to respond to views expressed by the public. Further, that read properly and in context, the tweets demonstrated that in spite of its overall negativity, colonialism has left a legacy that can be repurposed to eradicate oppression, exploitation, racism and poverty – In a way that Singapore has succeeded in doing[29].

37. The Premier contends that the Public Protector materially erred in law/fact in finding that she violated section 136 of the Constitution and the Executive Members Ethics Act or in violation of section 182 of the Constitution.

38. The Premier then launched this application. We are here now.

## The rationality debate

39. The decision of a public functionary is constrained by the principle that it may exercise no power and perform no function beyond that conferred by law. And the power must not be misconstrued. It is also accepted that the decision must be rationality related to the purpose for which the power was conferred.[30]

40. Non-administrative action is also catered for by the Constitution in general, and more particularly by the broad principle of legality identified by the Constitutional Court as an aspect of the rule of law – A foundational value of our constitutional order[31].

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[29] Paragraphs 62 to 68 of the FA. Pages 31 to 34 of the papers.
[30] **Democratic Alliance and Another v President of the Republic of South Africa 2013 (1) SA 248 (CC) at paragraph [27]**
[31] **Fedsure Life Assurance LTD v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) at paragraph [59]**

41. Legality has a wider meaning that goes beyond administrative action. It refers to a broad constitutional principle that governs the use of all public power rather than the narrower realm of administrative action.

42. In **Albutt v Centre for Study of Violence and Reconciliation 2010 (3) SA 293 (CC)**[32], the court further expanded the principle of legality by treating procedural fairness as a requirement of rationality.

43. The principle of legality acts as a safety net; it gives the courts some degree of control over action that is not administrative action but that involves the use of public power. Legality has rightly been described as an "evolving concept" in our jurisprudence, whose full creative potential will be developed in a context driven and incremental manner.

44. The Premier submits that the Public Protector's findings and remedial action were irrational and, for this reason, offended the constitutional principle of legality. In particular, the Premier submits that the findings were not rationally connected to (i) the reasons given by the Public Protector in the Report; or (ii) the information before the Public Protector[33].

45. The Premier argued firstly that the conclusion(s) contained in the impugned paragraphs of the Report are not rationally connected to the reasons given for them. Mr. Masuku on behalf of the Public Protector submitted that reasons are given for the decisions.

46. My view is that the Premier is simply arguing with the Public Protector in this regard; contending that her decision is legally flawed. It may very well be. But that is not what a court of review concerns itself with, unless such error is vitiated by a lack of independence. Even then, it is the lack of independence more than the error of law that becomes the issue on review.

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[32] At paragraphs **[57]** to **[59]**

[33] Paragraph 69 of the FA, page 34 of the papers.

Erroneous judgments in law, particularly by public functionaries whose recommendations are binding, indeed violate the rule of law but it is not for a review court to interfere and substitute the decisions of public functionaries with its own [which could also be wrong and overturned on appeal]. The responsibility of the review court is to interrogate whether the public power was exercised rationally and the decision arrived at fairly and in accordance with its empowering provisions[34], **not** to be the functionary itself and write another Report. It should be enough for public officials to exercise their power rationally, fairly and in accordance with their empowering provisions. Anything more is onerous.

47. Then the Premier argued that the Public Protector had "selected" tweets and a few relevant legislative provisions in order to compile her Report. That she was unduly swayed by the public reaction to the tweets and this slant took her eyes away from the "ordinary grammatical meaning" of the tweets and the context within which the Premier made the comments; namely, her official visit to Singapore. This information before the Public Protector, the Premier argued, is not rationally connected to the findings of the Public Protector and renders the findings vulnerable to judicial review. This issue cannot be determined exclusive of considering the context of the complaint lodged with the Public Protector pursuant to a public outcry that even the Premier herself acknowledged and correctly apologized[35] for the offence that it caused to people who see colonialism differently.

48. What is of importance to me is that the Public Protector considered what she termed "Key sources of information". These include documents, correspondence sent and received, legislation and other prescripts and case law and other references[36]. No proper and sufficient case has been

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[34] **Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA 2000 (2) SA 674 (CC) at paragraph [90]**

[35] Annexure "FA 7", page 113 of the papers. Paragraph 31 of the FA, page 18 of the papers.

[36] Paragraph 31 of the FA, Page 18 of the papers.

made out that the Public Protector, given the information at her disposal, could not reasonably have arrived at the findings she did. Therefore nothing turns on the sufficiency or otherwise of the material before her.

**Errors of fact**

49. In exercising their functions, public bodies evaluate evidence and reach conclusions of fact. The court will not ordinarily interfere with the evaluation of the evidence or conclusions of fact reached by a public body properly directing itself in law. The exercise of statutory powers on the basis of a mistaken view of the relevant facts will, however, be quashed where there is no evidence available to the decision maker on which, properly directing himself as to the law, he could reasonably have formed that view. The court may also intervene where anybody has reached a decision which is based on a material misunderstanding or error of fact[37].

**The Public Protector's reasoning leading up to the conclusion in paragraph 5.2.37**

50. The Public Protector's reasoning that results in the conclusion that "*Based on the evidence and the legal prescripts obtained, analysed and evaluated it can be concluded that the Premier's conduct did not comply with the provisions of the Constitution and the code*" begins at paragraph 5.2.14.

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[37] Pepcor Retirement Fund and Another v FSB and Another 2003 (6) SA 38 (SCA) at paragraphs [39] and [47]

51. In summary [*and this is my summary of 14 paragraphs*] the Public Protector's reasoning is the following:

51.1. She dealt with what the Preamble of the Constitution provides;

51.2. That, as executive head of the Province, the Premier is required to uphold the tenets and prescripts of the Constitution;

51.3. What section 10 of the Constitution provides. The provisions of section 10 are supported by a case **[S v Makwanyane, a Constitutional Court judgment]**;

51.4. That there was an outcry and dissatisfaction from a section of the South African public who regarded the tweets as offensive and insensitive. Further, that as a result of this outcry, she found need and indeed occasion to apologise;

51.5. That the Premier indicated that the tweets were made in the context of her right to freedom of expression as provided for in section 16 of the Constitution. That this is a matter that is openly debated here and abroad. That she made reference to different authorities in response to her section 7(9) Notice[38] [of the Public Protector Act];

51.6. The Public Protector compared the conduct of the Premier to that of a certain Prof. Bruce Gilley, a United States academic who made similar comments about colonialism;

51.7. The Public Protector included some pictures depicting the horrific human rights abuses caused by colonialism. The Public Protector included **Pic A**[39]: A picture depicting the Bengal Famine of 1943,

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[38] Annexures "**FA 11**" and "**FA 12**", pages 122 to 151 of the papers.
[39] Page 30 of the Public Protector's report; page 80 of the papers.

which was the final British-Administered famine in India which claimed about 3 000 000 (three million) lives; And it is further *reported*[40] that in typical "colonial master" fashion Winston Churchill, at the loftiest heights of his folly, said Indians were to blame for their own deaths for breeding like rabbits. **Pic B**[41]. A picture depicting a white man being carried (so that he does not walk on his feet) on a shoulder trailer by Congolese blacks early in the 20th Century. **Picture B** is ugly but one can expect this of colonial masters, and we have always known that colonial masters will not lift a finger to do a thing with the colonised around.

51.8. **Picture A** is gruesome. When I saw it I did not believe that I was seeing a picture with dead people in it. At first glance it appeared as though I was looking at dead creatures but on a closer look I realised that it was dead people whose bodies, because of the vultures on the walls, must have heavily decomposed. I have in my life seen gruesome pictures, particularly those depicting what happened in the Rwanda and Burundi genocide; Beirut in Lebanon during the wars there; the famine in Ethiopia. But this picture A, is something else. I do not know a lot about history because I spent my formative education battling Mathematics and Science but there are many international tragedies and genocides that were always being talked about, yet one only discovers this now. Not that I can't not know but rather that, due to its magnitude, people should know this history. A well-orchestrated genocide indeed. **God Almighty please deliver the earth, particularly the Pan African people of Africa and its Diaspora, from this evil called colonialism!**

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[40] *My own spicing up of the words about Churchill; apt!*
[41] Page 81 of the papers.

51.9. I hope historians like Maanda Molaudzi who believe colonialism is dead (and on whose views, among others, about colonialism the Premier heavily relies for her submission that colonialism has its benefits[42]) have included this history when they write history books for our children and their children after them;

51.10. The Public Protector also made reference to the article in the Citizen newspaper that covered the story of Prof. Bruce Gilley. Such statements, the Public Protector reasons, made by Prof Gilley and the Premier are likely to cause racial tensions, divisions and violence in South Africa. Section 16 of the Constitution was therefore not created to allow anyone, particularly those in positions of influence, to make such statements. Subsection 16(2)(b), the Public Protector reasons further, was created to curb such statements;

51.11. The Public Protector then applied another case authority, namely, **Leroy v France**, a decision of the European Court of Human Rights ("ECHR"). That Leroy relied on Article 10 of the European Convention for his right to freedom of expression, and what the ECHR found;

51.12. In paragraph 5.2.27 she applies the principle set out in the ECHR case and reasons that: *"Similarly, in principle the Premier's tweet was protected by section 16 of the Constitution, but its impact in South Africa where racial perceptions are still prevalent should not be overlooked. Subsection 16(2)(b) of the Constitution prohibits statements which could provoke a certain public reaction, capable of stirring up racial violence. The reaction of the South African public*

[42] Paragraph 8 of the Premier's response to Public Protector's section 7(9) notice. Annexure "FA 11", pages 145 to 148 of the papers.

*towards the Premier's tweet is indicative of the likelihood of such tweets stirring up violence based on race and therefore in contravention of section 16(2)(b) of the Constitution";*

51.13. The Public Protector then deals with what section 114(2)(a) of the Constitution provides;

51.14. The Public Protector then deals with what sections 133(2) and (3)(a) and sections 136(1) and (2)(b) of the Constitution provides and their relationship with sections of the Executive Members Ethics Act, particularly section 2 thereof, and the Executive Code of Ethics;

51.15. It is only after the above analysis that the Public Protector concludes that: *"Based on the evidence and the legal prescripts obtained, analysed and evaluated it can be concluded that the Premier's conduct did not comply with the provisions of the Constitution and the Code"*[43].

52. The Premier's case in this regard is that the Public Protector erred in law in finding that the Premier contravened section 16 of the Constitution. This is an appeal argument not a review one. The conclusion is according to the Public Protector's logic. What a review court should look at is whether the reasoning and conclusion reached are reasonable and connected in the circumstances, <u>not</u> whether the conclusion reached is at odds with what the court would find.

53. Mr. Rosenberg, on behalf of the Premier, argued that the Public Protector failed to interpret the tweets in an objective manner and failed to apply the context within which the tweets were made. Regarding the objective interpretation of the tweets, I asked him where in the Premier's papers it

[43] Paragraph 5.2.37 of the Public Protector's report.

was that the Premier herself proffers an objective interpretation; that is, the "ordinary grammatical meaning" of the tweets? Mr. Rosenberg argued that there was similarly nowhere in the Public Protector's report where she proffers an objective interpretation.

54. Without a frame of reference as to what, on a proper construction, is meant by the words in the tweets, it is difficult for me to adjudicate in favour of the Premier unless I make a case for her on the "ordinary grammatical meaning" of the words in the tweets. I insisted that it was not for the Public Protector to proffer an objective interpretation of the tweets in this application, but rather that it was for her to rebut what the Premier was saying in her papers. He who alleges must prove[44]. There is nowhere in the Premier's papers where she makes these averments and, in my view, the papers are bad in law. Would be excipiable[45] were they particulars of claim.

55. In the result, I find that no proper case has been made out for the judicial review of the Public Protector's Report on the ground that it is irrational because the conclusions reached are not supported by the reasons given for them.

## Context

56. As the Premier correctly points out, for the evaluation of the offence contained in expression, the context within which the expressions are made is a very important consideration. The Premier relied on, among other

[44] A trite principle of our civil procedure.
[45] For failure to make the necessary averments in order to sustain an action. Rule 23 of the Uniform Rules of Court.

cases, the *Masuku and Another v SAHRC obo Jewish Board of Deputies* case for her argument on context.

57. The Premier put a lot of emphasis on the context of the tweets without connecting it to their "ordinary grammatical meaning". Mr. Rosenberg and I spent a considerable amount of time debating this point. I noted during the debates that none of the counsel before court had a dictionary in front them, even though at the heart of the application was meant to be the "ordinary grammatical meaning" of the words in the tweets, and the context within which they were made.

58. The Public Protector has, using her own logic, provided reasons for her conclusions. The law requires me to interfere with her findings only in instances where her conclusions are vulnerable to judicial review, not when I feel that a court of law would have reasoned differently or come to a different conclusion[46].

59. The Public Protector, in compiling a Report pursuant to a complaint by an ANC MP that the tweets created a public outcry and were possible contraventions of the Constitution and the Executive Ethics Code, had to compile it in accordance with the brief, and certainly taking the "outcry" on Twitter and other media platforms into account. Mr. Rosenberg referred me to tweets that he said were favourable to the Premier's cause[47]. The Premier submits that they are an indication that there was a robust and healthy debate. This submission is undermined by the Premier's own version that she appreciated the *overall harm* that they caused[48] and apologised. Besides, when I actually went through the tweets I realized that most of them were disparaging comments and some said "unprintable"

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[46] *Theron v Ring van Wellington case (supra)*
[47] Pages 356 – 369 of the papers.
[48] Paragraph 31, Page 18 of the papers.

things. Her argument that the tweets provoked a healthy debate is unsustainable.

60. There is overwhelming evidence that, on the whole, the tweets evoked feelings of anger and frustration [And the Premier herself acknowledges this]. Similarly, or by analogy of the Premier's argument, it is in the context of the reaction to the tweets and the complaint lodged that the Public Protector investigated the matter. It is in that context that the conclusions were reached. And it is in that context that the findings of the Report can be reviewed. That is, the attack must either undermine the reasonableness of the findings **or** show in some other way that the findings are vitiated by a lack of independence or *ultra vires* or infirmed by procedural irregularities, and therefore vulnerable to judicial review. Anything else is not enough for review.

61. The Premier argued that it was not necessary to set out in detail what the "ordinary grammatical meaning" of the tweets was. But that a consideration of the context will provide meaning to the tweets. I must be guided by what the parties submit. I am not a party to the matter but simply invited to become an arbiter of the "dispute" between the parties.

62. I feel seduced for a thesis on the interpretation of section 16 of the Constitution when it comes to public officials making comments on social media. Both counsel submitted that a reasoned judgment was important in this regard. There are case authorities on the interpretation of section 16.

63. The parties are the ones who must conceive the dispute and motivate for competent relief. That the "ordinary grammatical meaning" of the words is something that the court can go through, does not mean the court can *mero motu* take the lead and connect the ordinary meaning to the context. Parties must do this. Which did not happen in this case. And the context debate is liable to fail. I thus find.

**Peremption**

64. Mr. Masuku, for the Public Protector, argued a peremption point. He contended that the Premier's apology perempted her right to attack the impugned provisions of the Report. I invited Mr. Masuku to debate with me how the apology, made before the investigation, is to be taken as acquiescence by the Premier to the Public Protector's findings, which came later, thereby abandoning her appeal rights in law. This is also the Premier's defence on the point[49]. Mr. Masuku submitted that the fact that she apologized and that the apology was a seemingly heartfelt one, she acknowledged guilt and should be deemed in law to have abandoned her right to attack the impugned provisions of the Report. I disagree.

65. The Heads of argument are no more helpful in this regard. That is why I sought to thoroughly debate the point applying the principles set out in the cases, including the *locus classicus*[50] relied upon by the Public Protector herself in her Heads, with counsel in court to help my finding in this regard. No such argument was forthcoming from particularly the Public Protector's counsel, on whom the onus rested to prove that in this case peremption finds application.

66. In the circumstances, I will be acting beyond what I am invited to do in this matter if I reason a judgment on peremption without guidance by the arguments of the parties. Accordingly, this point also fails.

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[49] Paragraphs dealing with the peremption defence in the Replying Affidavit. Also in the Heads.
[50] **Dabner v SA Railways and Harbours 1920 AD 583 at 595. Quoted in paragraphs 20 – 22 of the Public Protector's heads.**

**Contraventions of the Executive Members Ethics Act ("EMEA") and the Executive Ethics code.**

67. The Premier contends that the Public Protector committed material errors of fact/law in a variety of respects in this regard.

68. I deal with each ground in turn.

69. Material error of law in the application of section 16 of the Constitution. The submissions in this regard are that the Public Protector relied on the public reaction to the tweets as evidence of the contravention of section 16(2)(b). Further, that the findings are materially informed by the erroneous interpretation and application of section 16. Further, that section 16(2) is definitional and does not prohibit any form of expression, neither can it be "contravened" and therefore the finding that the Premier contravened section 16(2)(b) of the Constitution is wrong in law. This is an argument against the Public Protector's conclusion, not an argument against her reasoning for the conclusion. To contravene the provisions of an Act of Parliament is to act contrary to/or not in accordance with those provisions. I do not see this as an unreasonable conclusion. To then argue that the finding by the Public Protector that the Premier contravened the provisions of an Act of Parliament is vulnerable to judicial review, is in fact arguing an appeal.

70. The only materiality offered by counsel on behalf of the Premier was that the findings have far reaching consequences. For reasons I have already outlined this ceased to be the case when the issues became moot.

71. Material error of fact in the application of section 16(2)(b). The material error is the finding that the Premier's tweets were "likely to cause racial tensions, divisions and violence in South Africa. The Premier submits that there is no evidence to support such a conclusion; A material error of fact!

The best evidence in this regard is the angry and threatening tweets that were sent by the public, as a result of which the Premier was forced to apologise. I leave the matter at that.

72. Material errors of law and/or fact in applying the Preamble and section 10. In this regard, even on the Premier's own version, there is reasoning by the Public Protector why she concludes that section 10 of the Constitution and Preamble have been violated[51]. On review I simply have to determine whether there has been a reasonable rationale and that the rationale is connected to the finding. Reasonableness is an important consideration on review. I find that the connection exists.

73. Material error of law in applying section 136 of the Constitution and the Executive Ethics Code. This is another argument against the Public Protector's conclusion. I similarly find that I am not entitled to interfere.

74. Rationality. Has been dealt with elsewhere in this judgment[52].

75. Findings and remedial action unjustifiably limit the right to freedom of expression. The Premier argues that the remedial action does not comply with the mandatory procedures that the Public Protector is required to follow, under sections 3(2)(a) and 3(5)(b) of the Executive Members Ethics Act. That the remedial action falls to be set aside as *ultra vires* because the Public Protector failed to timeously submit a copy of the Report to the President.

76. The Public Protector's answer to her failure to submit the report to the President on time is that the complaint was lodged in Cape Town and she was unable to finalise what she had to do within the required 30 days and she duly informed the President. The delay was occasioned by a number

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[51] Paragraphs 5.2.15 to 5.2.17 of the Public Protector's report.
[52] Under the rationality debate

of factors and she sets them out in her affidavit, and that on 11 July 2018 she submitted the report to the President. Further, that in any event a delay in furnishing the President with a copy of the Report cannot be a ground for review. I agree.

77. I thus find that the entire application fails.

**Costs**

78. It is trite in our law that, generally, costs follow the result.

79. Counsel for the Premier submitted in court that the matter is of critical public importance and is deserving of an order for costs occasioned by the employment of three counsel. I disagree. The litigious matter is no longer of any public importance.

80. In addition, the issues were not so complex as to require the employment of three counsel. In fact, issues ceased to be issues in this application.

81. For the Premier to proceed with such a matter in the face of moot issues; And for the Public Protector to also go through the motions and defend moot issues, should be a concern. Like people not paying attention! Trials go through a certification process; but applications "sneak in"...And sometimes, like in this case, ultimately find themselves on the special motion roll. This means that the Deputy Judge President must allocate a judge to deal with the matter and deliver a judgment. It takes time.

82. It is only fair for people who are aggrieved by the Public Protector's Reports to come to court for relief. People must challenge decisions of the Public Protector when unhappy. South Africa is a democracy. Yet, the Public

Protector must be given space to work; to protect the public. Not distracted, sometimes deliberately, from her work. But her office too must choose its battles with justice. They must exercise prudence when defending judicial attacks. Let us hope for fair play in this environment.

83. Because this application fails, the costs must be borne by the Premier. I considered imposing an order on a scale other than as between party and party but I thought more experienced judges will be more courageous to do that in the event of a frivolous appeal.

In the result, I make the following order:

(a) The application is dismissed.

(b) The applicant is to pay the costs of the first respondent on a scale as between party and party, up to and including the date on which the applicant left the office of Premier of the Western Cape; including costs of two counsel.

Malebo Habedi
Acting Justice of the High Court
Gauteng Provincial Division, Pretoria

Appearances:

Date of hearing : 04 September 2019 & 10 October 2019

Date of Judgment : 05 November 2019

For the The Premier of The Western Cape Province: Advocate S Rosenberg SC with Advocate K Pillay & J Bleazard (instructed by The State Attorney)

For The Public Protector: Advocate T Masuku SC with Advocate C J Quinn (instructed by Boqwana Burns Inc)