CASES / VONNISSE

HOLDING THE EXECUTIVE TO ACCOUNT?

Public Protector v President of the RSA 2021 (9) BCLR 929 (CC)

1 Introduction

This case is part of a growing body of jurisprudence relating to the Public Protector (PP). In particular, it concerns the PP's mandate, contained in section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution), to "investigate any conduct in state affairs, or in the public administration, that is alleged or suspected to be improper or to result in any impropriety or prejudice". The PP is further empowered in terms of the Public Protector Act (23 of 1994) (PP Act) to investigate, *inter alia*, maladministration, the unjustifiable exercise of power and dishonest conduct.

In terms of this statutory framework, the PP's primary function is to hold the executive to account. The Constitutional Court judgment that is the focus of this case note is an example of the PP attempting to hold the President accountable, but failing to do so as a result of producing an error-strewn report that was rejected by a full bench of the High Court and by a majority of judges in the apex court. On the facts, it is possible that had another PP produced a different report – one that satisfied the judges' concerns – the President might have been less successful in avoiding public accountability.

Apart from the main issue of the (at time of publication) now-suspended PP's inability to hold the President to account, the judgment is significant from an administrative law perspective. In particular, the judgment adds to the debate on whether the PP's remedial action amounts to administrative action.

Although the Supreme Court of Appeal (SCA) held in 2018 that the PP's remedial action does not constitute administrative action, the question has yet to be definitively dealt with by the Constitutional Court, with judges generally being content to leave the question open. Confusingly, the court *a quo* held that it was common cause that the PP's reports do not amount to administrative action, but the judgment nevertheless made numerous references to the right to just administrative action. While Jafta J chose to leave the question open in *Public Protector v President of the RSA* (2021 (9) BCLR 929 (CC)), he engaged with the SCA's judgment in *Minister of Home Affairs v Public Protector* (2018 (3) SA 380 (SCA) (*Home Affairs*)) and set out some guidelines on how the issue could be dealt with in the future.

The judgment also explores the applicability of the *audi alteram partem* rule to the manner in which the currently suspended PP (as at time of publication) conducted her investigations. Jafta J and Mogoeng CJ, who wrote the majority and minority judgments respectively, differed markedly on this aspect of the case, with the former holding that the PP had acted in a procedurally unfair manner and that this was sufficient to vitiate her findings. Mogoeng CJ, on the other hand, warned that a rigid application of the *audi* principle in this case could result in the ends of justice being denied. Jafta J incorrectly held that it is necessary for the PP to invoke the Promotion of Administrative Justice Act (3 of 2000) (PAJA) in the decision-making process undertaken as part of her investigations. In fact, procedural fairness in the form of *audi alteram partem* is recognised at common law and applies under the principle of legality.

Another area of administrative law that was developed in this case is the ground of review relating to errors of law. This was the main ground upon which the High Court and the Constitutional Court chose to dismiss the PP's submissions. In particular, both courts found that the PP had added words to paragraph 2.3(*a*) of the Executive Ethics Code (Proc R41 in *GG* 21399 of 2000-07-20) (Code), which had the effect of altering the legal test contained therein in order to match the facts as interpreted by the PP. It was held in both courts that this was a material error of law, and that it was sufficiently grave that the PP's findings should be set aside on this ground alone.

2 Facts

On 6 November 2018, the President appeared in the National Assembly and was asked the following question by Mr Mmusi Maimane, the leader of the opposition:

> "Mr President, here I hold a proof of payment that was transferred to say that R500 000 had to be transferred to a trust account called EFG2 on 18 October 2017. This was allegedly put for your son, Andile Ramaphosa ... Following on that, I have a sworn affidavit from Piet Venter, stating that he was asked by the chief executive officer of Bosasa to make this transfer for Andile Ramaphosa. Mr President, we can't have family members benefiting ... I would like to ask you, right away today, that you bring our nation into confidence and please set the record straight on this matter. Thank you very much." (Public Protector's Report No. 37 of 2019/20 5)

The President chose not to insist that the accepted procedure of submitting the question to him in advance and in writing be followed and he answered as follows:

> "I proceeded to ask my son what this was all about. He runs a financial consultancy business, and he consults for a number of companies, and one of those companies is Bosasa where he provides services on entrepreneurship, particularly on the procurement process. He advises both local and international companies. Regarding this payment, I can assure you, Mr Maimane that I asked him at close range whether this was money obtained illegally, unlawfully – and he said this was a service that was provided. To this end, he actually even showed me a contract that he signed with Bosasa ... The contract also deals with issues of integrity, issues of anti-corruption, and all that." (PP's Report *supra* 5)

Soon after this session, it was revealed by one of the President's advisers that the R500 000 payment was not intended for the President's son, Andile, but was earmarked as a donation to the CR17 campaign by Mr Gavin Watson, the CEO of African Global Operations, formerly known as Bosasa (*Public Protector v President of the RSA supra* par 30). Subsequently, the President wrote a letter to the Speaker of the National Assembly explaining that the answer he provided in the National Assembly was incorrect. The CR17 campaign also explained to the media that the President did not know the details concerning donations made to the campaign; as a result, he had no knowledge of Mr Watson's donation on 6 November 2018.

Notwithstanding the President's letter to the Speaker, Mr Maimane filed a complaint with the PP on 26 November 2018, citing section 4 of the Executive Members' Ethics Act (82 of 1998) (Ethics Act). In the complaint, he repeated his claim that he had proof of the payment to Andile Ramaphosa. The complaint further alleged: "there is possibly an improper relationship existing between the President and his family and African Global Operations" (*PP v President of the RSA supra* par 34). The Deputy President of the Economic Freedom Fighters (EFF), Mr Floyd Shivambu, subsequently lodged a second complaint against the President calling on the PP to establish the veracity of the President's statement that he had seen a contract between his son and African Global Operations and whether the President had deliberately misled Parliament.

The President was then invited by the PP to submit a written response to Mr Maimane's complaint, which he did in January 2019 (*PP v President of the RSA supra* par 27). In May, the PP invited the President to a meeting, following which he responded in writing to her preliminary report. In her final report, published on 19 July 2019, she dismissed the President's submissions made in response to the preliminary report and concluded that the President had contravened paragraph 2.3(*a*) of the Code. The report also concluded that the President had failed to disclose the donation made to him. The PP also believed that certain of the payments raised a reasonable suspicion of money laundering. The PP also alleged that the President had exposed himself to a risk of conflict between his official responsibilities and his private interests. Finally, the report found he had contravened section 96(1) of the Constitution.

The PP also added supervisory orders to her remedial action, instructing the Speaker, the National Police Commissioner and the National Director of Public Prosecutions (NDPP) to submit implementation plans explaining how they were planning to give effect to her instructions. Following the publication of the PP's Report, the President – joined by the Speaker and the NDPP – filed a review application in the Pretoria High Court. The PP and the EFF opposed the application, and the AmaBhungane Centre for Investigative Journalism NPC (amaBhungane) was granted leave to intervene in order to launch a constitutional challenge in respect of the Code.

The PP was unsuccessful in the High Court and the Office of the Public Protector (OPP) was ordered to pay costs on the punitive scale of attorney and client. The PP then applied for leave to appeal the decision of the High Court directly to the Constitutional Court. In that court, the majority judgment dismissing her was written by Jafta J (Madlanga, Mhlantla, Theron, Tshiqi JJ

and Mathopo and Victor AJJ concurring) and handed down on 1 July 2021. Mogoeng CJ wrote a dissenting judgment largely in support of the PP.

3 Judgment

In arriving at his decision, Jafta J dealt with a number of themes that arose from the High Court judgment. Each of these is discussed below. Mogoeng CJ's reflections on these themes are also considered.

3 1 Misleading Parliament

Jafta J carefully examined whether the PP had correctly concluded that the President had contravened the Code by misleading Parliament. In order to contravene the Code, an Executive member must provide inaccurate information with the intention of misleading Parliament. Providing inaccurate information alone is not enough to breach the provisions of the Code. The following extract from the PP's Report suggests that she misinterpreted the Code:

> "President Ramaphosa's reply was in breach of the provisions of paragraph 2.3(a) of the Executive Ethics Code, the standard of which includes deliberate and inadvertent misleading of the Legislature. He inadvertently and/or deliberately misled Parliament, in that he should have allowed himself sufficient time to consider the question and make a well-informed response." (PP's Report *supra* par 5.1.34)

According to Jafta J, in the PP's mind, the mere fact that the President gave an inaccurate answer was enough to constitute an infringement of the Code. Furthermore, the PP altered the wording of the Code by adding the words "inadvertently and/or deliberately" (par 59). By doing so, the PP changed the wording of the Code "so as to match with the facts" (*Public Protector v President of the RSA supra* par 60).

The PP's approach to this issue led the High Court to conclude that her finding was "fatally flawed due to a material error of law" (*President of the RSA v Public Protector* (2020 JDR 0406 (GP) par 55). Jafta J agreed with the High Court that the PP's findings should be set aside based on this ground alone as the nature of the error was sufficiently serious so as to affect the outcome of the case.

Mogoeng CJ ruled that the PP was incorrect in recording that the President deliberately misled Parliament and when using the words "wilful" and "inadvertent" interchangeably when the terms are mutually exclusive. In his view, however, the PP – despite clear evidence to the contrary – did not unlawfully change the Code; rather than amending it, she had derived an incorrect meaning from the Code (*Public Protector v President of the RSA supra* par 202–203).

3 2 Donations given to the CR17 campaign

The PP's findings relating to donations made to the CR17 campaign dealt with the twin issues of whether the President "exposed himself to any situation involving the risk of a conflict between his official duties and his

private interest or used his position to enrich himself and his son through business owned by African Global Operations" (PP's Report *supra* par 7.2.1). The PP framed the issues in this way even though Mr Maimane's complaint only referred to a conflict between his official duties and his private interests. Jafta J questioned whether the PP could widen the scope of a complaint made in terms of section 4 of the Ethics Act. He further observed that the manner in which the complaint was framed suggested that the PP was undecided about which of the two grounds applied.

Jafta J also voiced his concerns about the "quality of reasoning leading up to the various findings" (*PP v President of the RSA supra* par 71). For instance, the PP concluded that the President personally profited from donations made to the CR17 campaign, but her report – a summary of the evidence heard during the enquiry – did not support this.

The evidence of the witnesses appearing before the PP is recorded in summary form in the report. The report records that Ms Donne Nichol, one of the CR17 campaign managers, had confirmed that the identities of donors and amounts pledged were not communicated to the President. It was also stated in the report that the campaign managers confirmed the truth of each other's evidence (PP's Report *supra* 68–69). Despite this, the PP chose to rely instead on additional e-mail evidence suggesting that the President played a prominent role in the CR17 campaign.

In Jafta J's view, the PP set out to demonstrate that the President had personally benefitted from donations made to the CR17 campaign. He concluded that the managers' testimony did not support this idea and the e-mail evidence merely demonstrated that the President participated in the activities of the campaign. He felt that that the PP simply ignored the evidence of the campaign managers because it did not match the email evidence. In this light, Jafta J held that, on the facts, the President did not personally benefit from donations made to the campaign (*PP v President of the RSA supra* par 80).

With regard to a possible conflict of interest between the President's official responsibilities and his private interests, Mogoeng CJ alluded to the "billions of Rands received by African Global Operations in *irregular State tenders*" (par 155). For its part, the EFF argued that the President was not able to evade disclosing information by "wifully remaining ignorant" of donations made to the campaign (par 81). Jafta J rejected this submission, as it missed the point: the issue was not whether the President wilfully kept himself in the dark regarding campaign donations but whether he personally benefitted from those donations.

3 3 Competence to investigate the affairs of the CR17 campaign

The President's lawyers submitted that the activities of the CR17 campaign fell outside the PP's jurisdiction. The court observed that section 182(2) of the Constitution provides the PP with additional powers as determined by appropriate legislation, such as the PP Act and the Ethics Act. However, none of the powers emanating from section 6 of the PP Act related to the

activities of the CR17 campaign and, in respect of the Ethics Act, none of the complaints covered the affairs of the campaign. As a result, neither the PP Act nor the Ethics Act authorised the PP to conduct an inquiry into the activities of the campaign. Regarding section 182(1) of the Constitution, Jafta J held that when a political party arranges internal elections, this does not amount to exercising a public power.

Counsel for the EFF argued that the PP's jurisdiction to enquire into the dealings of the campaign was founded in section 96(2)(*b*) of the Constitution. Counsel for the party further argued that, as the ruling party, the ANC "undoubtedly influences the direction of the State" (par 103). Jafta J acknowledged that this was true but held that the ruling party and the State remained separate bodies: "the bright line separating the party from the state remains intact" (par 103). Mogoeng CJ, by contrast, held that it "required a hair-splitting exercise" to "seek to draw a line between the pursuit of the Presidency of the ANC and the desire to rise to the highest office of President of our country" (par 165). Although his reflections may reflect the political reality in South Africa, it is critical for the judiciary to uphold the constitutional separation between the ruling party and the State.

3 4 Money laundering

According to the PP, the manner in which the donation of R500 000 was made gave rise to a suspicion of money laundering. The amount of R500 000 was part of a sum of R3 million that was transferred from Mr Watson's account into the account of Miotto Trading. This company was owned by an employee of African Global Operations, who was ordered to transfer R500 000 to the CR17 campaign's trust account (par 41).

The complaints to the PP were made in terms of section 4 of the Ethics Act, which makes no mention of money laundering. The PP made reference to the Prevention and Combatting of Corrupt Activities Act (12 of 2004) (PCCA). However, the PCCA does not refer to the offence of money laundering. Counsel for the PP tried to account for this error by arguing that the incorrect Act had been cited inadvertently. The court noted, however, that extensive reference had been made by the PP to the PCCA in her report and she had, in fact, equated money laundering with bribery and corruption (PP's Report *supra* par 5.3.10.68–5.3.10.70). Apart from specified offences in terms of the PCCA, crimes are not reported to the PP, but are investigated by the South African Police Service. The court also pointed out that money laundering is not listed in section 6(4) of the PP Act and, apart from certain offences listed under the PCCA, crime is not referred to the PP for investigation (par 115).

3 5 Administrative action and audi alteram partem

Tied to the issue of the applicability of the *audi alteram partem* principle is the lack of certainty surrounding the question of whether the PP's remedial action qualifies as administrative action. Jafta J chose to leave this question open, noting that the application of the *audi* principle was not dependent on whether the PP's constitutes administrative action or not.

Regarding the implementation of the *audi* principle, section 7(9) of the PP Act makes it clear that where it is apparent that adverse remedial action is to be taken in respect of a particular person, the PP must provide that person with an opportunity to make representations. In this respect, the President claimed that the emails relied on by the PP were not made known to him and, in addition, he was not afforded an opportunity to make representations in this regard. Jafta J held that the PP was legally bound to make the emails available to the President and to allow him to make representations and emphasised the far-reaching consequences of not doing so:

> "a decision based on adverse information which was not disclosed to the affected person and in respect of which that person was not heard, is fatally defective and ought to be set aside." (par 130)

Mogoeng CJ, however, held that in determining how the *audi alteram partem* rule applies to the PP, reference must be made to how the rule is applied in civil and criminal court proceedings. He disagreed with the notion that the *audi* principle compels the PP to inform an affected party of the remedial action she intends to take. He argued that in any civil or criminal matter before a court, a judge or magistrate is under no obligation to inform any of the parties of the decision he or she intends to hand down. Occasionally, preliminary observations from the bench are made known to the parties, but these are not given as a result of any legal obligation to do so. He believed that the same principle should apply to the PP and section 7(9) of the PP Act should be interpreted in this way.

Mogoeng CJ further held that the *audi* principle is designed to "yield substantive justice and equity" and is not a "mechanical instrument" (par 184). In assessing how to apply the *audi* principle regarding the email evidence, Mogoeng CJ noted that evidence that is irregularly obtained may be admissible even in criminal cases. The emails in question were not only relevant but they revealed the untruthfulness of the version presented to the PP by the President and the campaign managers – that there was an intentional plan to make sure the President did not get to know the identity of donors, the amounts they donated as well as how the money was spent. He was scathing in his assessment of the President's conduct who, in his view, had knowingly given a false version of events to the PP, which was unethical. With regard to the *audi* principle, he believed that a "somewhat simplistic and mechanical application of the *audi* principle could only be at the expense of substantive justice and equity" (par 193).

3 6 AmaBhungane's constitutional challenge

In the High Court, AmaBhungane challenged the constitutional validity of the Code in terms of section 96 of the Constitution (which concerns the conduct of cabinet ministers) but was unsuccessful. Jafta J criticised that decision on a number of grounds. For instance, he ruled that the High Court mistakenly held that the Promotion of Access to Information Act (2 of 2000) (PAIA) was applicable. The High Court also held that the relief sought by amaBhungane was to have the Code amended so as to necessitate the disclosure of "donations made to campaigns for positions within political parties" by members of the Executive (par 144). This, in the view of the High Court,

would threaten the separation of powers. Jafta J disagreed; if it was found that amending the Code was not just and equitable, other remedies were available. He stated that the High Court had erroneously held that amaBhungane's challenge was impermissible and he remitted the matter to the same court for a fresh hearing.

4 Comment

4 1 Misleading Parliament

This is not the first time that Advocate Mkhwebane has made an error of law. In the *Gordhan* case, she also misconstrued the Code when she found that Pravin Gordhan had violated paragraph 2.3(*a*) of the Code by deliberately misleading Parliament (*Gordhan v Public Protector* [2019] (3) All SA 743 (GP)). In her report, the PP averred that Gordhan had dishonestly kept secret the fact that a member of the Gupta family was present at a particular meeting. He later submitted that, in preparation for his appearance at the Zondo Commission, his chief of staff had informed him that a member of the Gupta family had been present; Gordhan later disclosed this to the Commission. The EFF also submitted in that case that it didn't matter that Gordhan may not wilfully have misled Parliament and that an innocent error on his part was sufficient. This was rejected by Potterill J in the Pretoria High Court, who ruled that Gordhan had established a *prima facie* right to an interdict based on the facts presented to the court (par 22–24).

In addition to an error of law, the PP also made an error of fact when she found that the President had misled Parliament while acting in good faith (PP's Report *supra* par 7.1.4). In court pleadings, the PP claimed:

> "reliance by the *court a quo* that I found that the President was ostensibly acting in good faith to justify its reasoning that I accepted that the President acted in good faith simply misconstrues the issue." (President's Submissions in the Main Application CCT No. 62/2020 par 29)

Hoexter and Penfold have identified the court *a quo*'s judgment as an "especially notable recent example" of an error of law where the PP was "found to have been fatally confused" about the scope of a provision of a code (Hoexter and Penfold *Administrative Law in South Africa* 3ed (2021) 389). In that case, the PP maintained that "if she had made an error at all it was an immaterial error of form over substance" ([2020] 2 All SA 865 (GP) par 207). In response, the High Court remarked that her "submission shows a flawed conceptual grasp of the issues with which she was dealing" (par 207).

Regarding the issue of whether an error of law is reviewable in instances where PAJA does not apply, the SCA held, in *Premier of the Western Cape v Overberg District* (2011 (4) SA 441 (SCA) par 37–38), that a provincial executive had not acted in accordance with section 139(4) of the Constitution and that the principle of legality applied. With respect to errors of law, the distinction between process and substance in administrative law requires a court of review to establish whether a decision was arrived at in a satisfactory manner, not to ask whether the decision maker was right or

wrong (Hoexter and Penfold *Administrative Law* 389). In the leading case of *Hira v Booysen* (1992 (4) SA 69 (AD)) – the decision that established the materiality test for an error of law – Corbett CJ provided the following examples of different kinds of errors of law:

> "where a tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'." (*Hira v Booysen supra* 367)

The case of *Public Protector v President of the RSA* (*supra*) provides an example of an error of law that goes beyond the types of error set out in *Hira v Booysen* (*supra*). Jafta J referred to a "series of weighty errors some of which defy any characterisation of an innocent mistake" (par 137). One of those errors – the claim by the PP that the offence of money laundering was contained in the PCCA – could be explained as a failure of the PP to apply her mind to the relevant issues as described in *Hira v Booysen* (*supra*). The PP also disregarded "uncontroverted evidence" that the President did not derive any personal benefit from CR17 donations. The principal error in the case, however, is far more serious as the PP changed the wording of the Code in order to give the "phrase 'wilfully misleading' the meaning of 'inadvertently misleading' for it to fit established facts" (par 137).

Quoting the SCA in *Public Protector v Mail and Guardian* (2011 (4) SA 420 (SCA)), Jafta J offered advice on how PPs could avoid errors of law in the future by emphasising that investigations by the PP should be directed with an "open and enquiring mind" (par 22):

> "I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring."(par 22)

The questions posed by the PP led to the incontrovertible fact that the President did not know about donations to the CR17 campaign and that he did not personally benefit from them. Jafta J suggested that, had the PP possessed an "open and enquiring mind", she would have accepted those facts. Proceeding with an "open and enquiring mind" means that the PP should be "open to being persuaded to reach whatever conclusion [is] justified by the facts" (par 140).

Mogoeng CJ acknowledged that it was incorrect of the PP to decide that the President deliberately misled Parliament and to use the words "wilful" and "inadvertent" interchangeably. Even though it was established that the PP had clearly added words to the Executive Code, he claimed the following:

> "I am also concerned about any notion that she somehow amended the Code without authority. I think hers was more of giving a wrong meaning to a legal instrument than amending it." (par 203)

Interestingly, this is not the first instance where Mogoeng CJ has written a dissenting judgment in support of Advocate Mkhwebane. In *Public Protector v South African Reserve Bank* (2019 (6) SA 253 (CC)), he placed great emphasis on the importance of the State's – in this case the PP's – ability to investigate and expose unethical conduct. Despite finding that the PP "got the law completely wrong by acting as if it was open to her to direct parliament to amend the Constitution" (par 64), he highlighted the need to

> "vigilantly guard against making personal costs against State functionaries acting in their official capacities fashionable, which is likely to have a chilling effect on their willingness to confront perceived or alleged wrongdoing especially by the rich, powerful or well-connected." (par 6)

4 2 Donations given to the CR17 campaign

According to Mogoeng CJ, when people or organisations from outside the ANC made donations to the CR17 campaign, the result was that the President exposed "himself to a situation involving the risk of conflict" (par 162). To emphasise his point, Mogoeng CJ referred to extracts from his own judgment in *My Vote Counts*:

> "Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally ... Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a 'rightful place' in the family of nations ... Only when there is a risk of being exposed for receiving funding from dubious characters or entities that could influence them negatively, for the advancement of personal or sectoral interests, would all political parties and independent candidates be constrained to steer clear of such funders and be free to honour their declared priorities and constitutional obligations." (*My Vote Counts NPC v Minister of Justice and Correctional Services* (2018 (5) SA 380 (CC) par 40–42)

When it was revealed that Bosasa had given R500 000 to the CR17 campaign, that the campaign had spent millions of rands, and that the PP had bank statements from the CR17 campaign in her possession, it seemed that her report would be certain to "deal a devastating blow" to the President (De Vos "Why Busisiwe Mkhwebane Has Been a Godsend to Cyril Ramaphosa and the CR17 Campaign" (11 March 2020) https://www.dailymaverick.co.za (accessed 2022-08-27)). However, the PP's report proved to be of such poor quality – as well as being deficient in impartiality and fairness – that both the High Court and the Constitutional Court had no alternative but to reject it.

4 3 Competence to investigate the affairs of the CR17 campaign

The PP widened the scope of the investigation to include donations made to the CR17 campaign, but it was determined by Jafta J that she lacked the

jurisdiction to do so. In terms of the Constitution, the PP is empowered to enquire into any conduct in state affairs or in the public administration; and in terms of the PP Act, she may probe private entities but only in relation to public funds. It's clear that the PP lacks the jurisdiction to investigate matters squarely within the private sphere.

Importantly, Jafta J held that the Code does not apply to internal party elections and is concerned with the promotion of "open, democratic and accountable government" (par 91). In a futile attempt to counter this, counsel for the PP sought to equate the election of the President of the ANC with being elected President of South Africa. It is clear, however, from a reading of the Constitution, that the President is elected by the National Assembly.

In his dissenting judgment, Mogoeng CJ held that the President was a "direct and primary beneficiary" of the donation in question and the CR17 campaign was "all about him" (par 165). He was adamant that avoiding disclosure "as a result of the juristic veneer of the likes of the CR campaign would encourage corruption and malfeasance in South Africa" (par 166). While his comments regarding the separation between political parties and the state are constitutionally inaccurate, his call to "pierce through the trust veil" resonates strongly with those who seek to promote accountability and openness (par 169).

4 4 Money laundering

Arguably the most damaging part of the High Court and Constitutional Court judgments (from the PP's perspective) deals with the PP's submission that the CR17 campaign was involved in money laundering. The PP again misconstrued the empowering legislation (s 4 of the Ethics Act), which did not empower her to investigate that aspect of the investigation. Aware of this, the PP invoked the PCCA, concluding that this statute criminalised money laundering. She also invoked section 6(4) of the PP Act when investigating the money laundering allegations. However, the PCCA does not provide for the crime of money laundering, and nor is the offence listed in section 6(4) of the PP Act as falling within the PP's competence, which led Jafta J to rule that the PP misconstrued the Ethics Act, the PCCA and the PP Act (par 112–115).

Counsel for the PP tried to account for this error by arguing that the incorrect Act had been cited by mistake. The court noted, however, that extensive reference to the PCCA had been made in the PP's report. It was clear that the PP interpreted the PCCA as criminalising financial offences, including money laundering. In doing so, she had misconstrued the PCCA. Usually in cases where it is pleaded that an "innocent" reference has been made to the wrong Act, counsel will refer the court to the existence of proper authority elsewhere. For instance, in *Minister of Education v Harris* (2001 (4) SA 1297 (CC)), the Minister of Education issued a notice in terms of the National Policy Act (84 of 116) instead of the Schools Act (27 of 1996). Sachs J noted that there was no suggestion in the affidavits that the Minister had made an administrative error. Furthermore, the notice cited the National Policy Act three times, so the court concluded that the provision had been purposefully selected (par 18). In *PP v President of the RSA* (*supra*), the PP

deliberately chose to rely on the PCCA and when it was pointed out that the legislation was irrelevant, she did not refer the court to the existence of relevant authority elsewhere.

4 5 Administrative action and audi alteram partem

In order to determine whether PAJA applies, in each case involving judicial review, it is necessary to determine whether the action in question constitutes administrative action (Hoexter and Penfold *Administrative Law* 149). If it does, then the action must be founded in terms of PAJA. O'Reagan J affirmed this in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004 (4) SA 490 (CC)), where she held

> "[t]he cause of action for the judicial review of administrative action now ordinarily arises from the PAJA, not from the common law as in the past." (par 25)

However, in the first decade following PAJA's promulgation, its increasing overlap with the principle of legality has resulted in a relatively high number of cases in which PAJA was not invoked when it ought to have been. There have also been cases where courts have found it unnecessary to consider the applicability of PAJA, either because the matter in question was provided for by the principle of legality, or because the parties in a particular case had conceded that legality applied (Hoexter and Penfold *Administrative Law* 171–172).

In a number of decisions over the past five years, the Pretoria High Court has held that the PP's remedial action constitutes administrative action (*Minister of Home Affairs v Public Protector* 2017 (2) 597 (GP); *Absa Bank v Public Protector* [2018] 2 All SA 1 (GP); *SARB v Public Protector* 2017 (6) SA 198 (GP)). The Constitutional Court has largely left the question open – for example, in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC), Mogoeng CJ mentioned in passing that

> "[w]hether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal." (par 74)

The Supreme Court of Appeal (SCA), however, held in *Home Affairs* that the PP's decisions are not administrative in nature. In that judgment, Plasket AJA correctly stated that an applicant for judicial review "does not have a choice as to the 'pathway' to review". If the action in question is judged to be administrative action, then the application must be founded in terms of section 6 of PAJA. If the action is "some other species of public power", then the principle of legality applies (*Home Affairs* par 28). Plasket AJA then listed a number of factors that distinguish the decisions of the PP from those of an administrative nature. First, the OPP is a peculiar institution intended to reinforce constitutional democracy; it is not one of the public administration institutions. Secondly, it is an independent "purpose-built watch-dog" that answers to Parliament, not the Executive. Thirdly, the OPP is not a state department and is "functionally separate" from the state administration: "it is only an organ of state because it exercises constitutional

powers and other statutory powers of a public nature". Fourthly, the OPP's main function is to investigate, report on and remedy malfeasance, not to administer. Lastly, the PP is given broad discretionary powers regarding what complaints to accept and how to investigate them: her powers are "as close as one can get to a free hand to fulfil the mandate of the Constitution" (*Home Affairs* par 36–37).

In the court *a quo*, the High Court held:

> "[I]t is common cause that, based on the decision of the Supreme Court of Appeal in *Minster of Home Affairs v Public Protector*, the Public Protector's reports do not constitute administrative action." (*President of the RSA v Public Protector* ([2020 2 All SA 865 (GP) par 159 and 162)

Despite this unequivocal statement, reference is made later in the same judgment to the right to just administrative action (par 157, 159 and 161). As a consequence, Hoexter and Penfold have commented that

> "[u]nfortunately, the court's reasoning on the point is not particularly instructive: it is clouded by several references to the President's right to just administrative action under s 33(1) of the Constitution – a provision whose application seemed to have been ruled out." (Hoexter and Penfold *Administrative Law* 575)

This lack of clarity has continued in the Constitutional Court, where judges have chosen to leave open or ignore the question of whether the PP's remedial action should be regarded as administrative action, while also making reference to section 33 of the Constitution and PAJA. For example, in *Public Protector v South African Reserve Bank* (*supra*), the court, without deciding the question of whether the PP's remedial action constitutes administrative action, and without making reference to *Home Affairs* (despite that judgment being handed down in the SCA over a year previously), Khampepe and Theron JJ held that the PP "was reasonably suspected of bias in terms of s 6(2)*(a)*(iii) of the Promotion of Administrative Justice Act" (par 168). They also made reference to the "parties' ability to enforce their rights under s 33 of the Constitution to administrative action that is lawful, reasonable and procedurally fair" (par 185).

In *Public Protector v President* (*supra* par 118), Jafta J emphasised that he was not persuaded that the factors relied on by Plasket AJA in *Home Affairs* distinguished the decisions of the PP from those of an administrative nature. In particular, he disagreed with the idea that because a power is directly derived from the Constitution it necessarily means that its exercise is not administrative in nature, and he emphasised that administrative action came "into existence from the exercise of public power". He further argued that the SCA – contrary to the Constitutional Court's jurisprudence – placed greater emphasis on the identity of the functionary who exercised the power than on the nature and impact of the power itself (par 119). In doing so, he referred to two previous Constitutional Court judgments – *President of the RSA v South African Rugby Football Union (SARFU*) (2000 (1) SA 1 (CC)) and *Sidumo v Rustenburg Platinum Mines Ltd* (2008 (2) SA 24 (CC)) – which came to the conclusion that the focal point of any enquiry into whether the exercise of power constitutes administrative action should be on the nature of the power rather than on the functionary who applies it:

> "In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising." (*SARFU* par 141; see also *Sidumo supra* par 203)

Contrary to Jafta J's claims regarding *Home Affairs*, it appears from a reading of that judgment that Plasket AJA was (in accordance with *SARFU*) mindful of the need to place a greater importance on the nature and impact of the power itself than on the identity of the functionary who exercised the power. In particular, he emphasised that the OPP's main function is to investigate, report on and remedy malfeasance, not to administer. He also stated that the OPP exercises constitutional powers and other statutory powers of a public nature. Overall, Jafta J's criticism of *Home Affairs* suggests that he is sympathetic to the idea that the PP's remedial action should be regarded as administrative action, a question that has yet to be decided by the Constitutional Court.

Jafta J's explicit reason for leaving that question open was that the *audi* principle applied to the case regardless of whether or not the PP's remedial action was to be regarded as administrative action (par 120). This contradicted his earlier statement that the *Home Affairs* decision appeared to be "at variance" with the Constitutional Court's decision in *South African Reserve Bank* (*supra*), where the court "implicitly endorsed the application of the Promotion of Administrative Justice Act (PAJA) in the decision-making process followed by the Public Protector when she takes remedial action" (par 50). Elsewhere in the judgment, he asserted that "PAJA proclaims procedual fairness which is inclusive of the *audi* principle" (par 117). In *South African Reserve Bank*, Khampepe and Theron JJ stated that the fact that the PP did not allow the Reserve Bank or Absa an opportunity to respond to adverse findings against them did not *per se* warrant an inference of bias. They justified this on the basis that "procedural unfairness and bias are two independent grounds of review under PAJA" (*South African Reserve Bank supra* par 170).

The problem with this approach is that sections of PAJA cannot be invoked on a "piecemeal" basis where the action being reviewed does not constitute administrative action. It is also apparent that the requirement of an opportunity to make representations is recognised at common law and has "been applied to non-administrative action under the legality principle on occasion" (Hoexter and Penfold *Administrative Law* 512). For example, the court *a quo* held that the PP should have given the President notice of far-reaching remedial action intended to be taken against him. In arriving at this conclusion, the court made reference to section 7(9)(*a*) of the PP Act, which provides as follows:

> "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."

The High Court went further by stating:

> "[T]he right to be afforded a reasonable opportunity to make representations on matters that may detrimentally affect one's interests is a well established principle of natural justice and of our common law. It is an important component of the right to just administrative justice and is expressly recognised as such in the Constitution. Whether or not a decision maker has complied with this obligation or not will depend on the facts of the particular case." (par 157)

While the reference to the *audi* principle being rooted in natural justice and the common law is helpful, the court's reference to "the right to administrative justice" – as discussed earlier – is confusing. Ultimately, even though PAJA did not apply, and the case was decided under the legality principle, it is significant that a full bench of the High Court decided that the *audi* principle was applicable even though notice of the remedial action was not required by section 7(9)*(a)* of the PP Act (Hoexter and Penfold *Administrative Law* 575).

In his dissent, Mogoeng CJ disagreed with the majority's view that the PP is obliged to inform a party of any proposed remedial action if that party is likely to be adversely affected by it. In arriving at this conclusion, he pointed out that in civil litigation, judges and magistrates are not under any "*audi*-induced obligation" to inform the parties of any proposed remedies (par 180). This reasoning, however, contradicts the rationale set out by the SCA that a court is an "inaccurate comparator" for the OPP (*South African Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA) par 45).

4 6 AmaBhungane's application

Having been remitted to the Pretoria High Court, amaBhungane's constitutional challenge was heard in September 2021 by the same bench: Mlambo JP and Matojane and Keightley JJ. In bringing the application, amaBhungane sought a prospective declaration together with a year's suspension to allow the Code to be amended in order to align it with the Constitution. AmaBhungane's application highlighted the importance of transparency in political life and submitted that donations can have a profoundly damaging effect on democracy, particularly if they remain undisclosed. AmaBhungane's constitutional challenge was founded on section 1(*d*) of the Constitution (with its emphasis on accountability, responsiveness and openness) as well as on section 96, which forbids members of the executive from "exposing themselves to any situation involving a risk of conflict between their official responsibilities and their private interests" (*AmaBhungane Centre for Investigative Journalism NPC v President of the RSA* [2022] 1 All SA 706 (GP) par 30). The court granted the application and declared the Executive Ethics Code to be unconstitutional and invalid for 12 months to allow for the defect to be remedied (par 54). AmaBhungane subsequently approached the Constitutional Court for a confirmatory order in terms of section 172(2)(*d*) of

the Constitution and, after hearing the matter in May 2022, the court reserved judgment.

4 7 Previous reports from the Office of the Public Protector

It is instructive to include a brief discussion of significant reports compiled by the former PP, Advocate Thuli Madonsela, and the present PP in order to draw comparisons between how those reports were received by the courts and how the courts have responded to the present case concerning the investigation into the CR17 campaign.

Madonsela's report entitled "When Governance and Ethics Fail" investigated allegations of maladministration and abuse of power within the SABC (PP's Report No. 23 of 2013/14). The scale of the maladministration prompted Madonsela to direct not only that remedial action be taken, but also to insist on an implementation plan being implemented within strict timelines. These were not adhered to. The matter was ultimately heard in the SCA, and the resulting judgment meant that the PP's powers to address maladministration and mete out weighty remedial action were increased (*SABC v DA supra*). In *Oudekraal Estates (Pty) Ltd v City of Cape Town* ([2004] 3 All SA 1 (SCA) par 26), the SCA held that until a decision taken by an administrator is set aside by a court in judicial review proceedings, it exists in fact. In *SABC v DA*, Navsa and Ponnan JJA extended the *Oudekraal* principle to apply it to decisions taken by the PP based on her "unique position" in South Africa's "constitutional order" (par 45). At no point did the court criticise Madonsela's findings and remedial action, with the focus of the judgment being placed on the nature of her powers.

The well-known "Secure in Comfort" report regarding the non-security upgrades at Nkandla (PP's Report No. 25 of 2013/14) had far-reaching implications for her own office and that of former President Jacob Zuma. In arriving at her findings, the PP relied on section 96 of the Constitution, the Ethics Act and the Code. In particular, section 96(2)(*c*) prohibits members of the Executive from using "their position ... to enrich themselves or improperly benefit any other person". The PP found that there was a

> "direct connection between the position of President and the reasonably foreseeable ease with which the specified non-security features, asked for or not, were installed at the private residence. This naturally extends to the undue enrichment." (*Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly supra* par 9)

At no point in the *EFF* judgment did Mogoeng CJ challenge the PP's findings or her interpretation of the law. He ultimately held that the PP's findings and remedial action are binding in certain circumstances, thus expanding the PP's powers.

Finally, the "State of Capture" report was reviewed by a full bench of the Pretoria High Court at the request of President Zuma (PP's Report No. 6 of 2016/17). In her report, she concluded that the President had contravened the Ethics Act and the Code by exposing himself to a situation involving the risk of conflict between his official duties and his private interests. She submitted that he had also used his position to enrich himself and the Gupta

family. As in the *EFF* case, Mlambo J, writing for a unanimous court, did not challenge the PP's findings and remedial action. In a decision that had profound ramifications for the entire country, he ruled that the PP, in certain circumstances, had the power to direct the President to appoint a commission of inquiry (*President of the RSA v Office of the Public Protector* 2018 (2) SA 100 (GP) par 85). As a result of this ruling, the highly consequential Zondo Commission was ultimately set up. Former President Zuma unsuccessfully challenged the decision in both the SCA and Constitutional Court.

With respect to the current PP, her report entitled "Alleged Failure to Recover Misappropriated Funds" (PP's Report No. 24 of 2017/18) concerned financial support that the South African Reserve Bank (SARB) had previously provided to a number of financial institutions that were in financial distress, including Bankorp Limited, subsequently acquired by Absa. In the High Court, the PP was found to be reasonably suspected of bias and her conduct was held to be procedurally unfair. The PP appealed this decision, arguing that the High Court had wrongly conflated bias and the *audi alteram partem* principle, having "found bias on an *audi* question" (*Public Protector v South African Reserve Bank* (*supra* par 168). In dismissing the appeal, Khampepe and Theron JJ, writing for the majority, disagreed, stating that the "context in which a public official conducts themselves in a procedurally unfair manner may, however, indicate bias on the part of that official" (par 170). The judgment is also notable for upholding a punitive costs order against the PP, in terms of which she was ordered to personally pay 15 per cent of SARB's costs.

The Department of Agriculture in the Free State set up a programme aimed at securing investment in various agricultural projects, one of which was a dairy enterprise in Vrede run by Estina (Pty) Ltd. The project was blighted by irregularities and corruption and the PP launched an investigation culminating in a report (PP's Report No. 31 of 2017/18). In the Pretoria High Court, Tolmay J handed down a damning judgment, setting aside her report (*Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 3 All SA 127 (GP)). Among the reasons given was that the PP's decision to drastically curtail the scope of her investigation was irrational. He also found that the PP's report was unlawful and unconstitutional, and that the PP had failed to act in accordance with section 6 of the PP Act and section 182 of the Constitution. Tolmay J also ordered the PP to pay 7,5 per cent of the DA's costs and 7,5 per cent of Casac's costs *de bonis propriis*.

The "Report on Allegations of an Irregularity in the Approval of Early Retirement with Full Pension Benefits" (PP's Report No. 24 of 2019/20) has been mentioned above in relation to the allegation that Pravin Gordhan misled Parliament. In this case, the PP alleged that Gordhan, while Minister of Finance, improperly approved Ivan Pillay's early retirement. It was alleged that Gordhan had acted dishonestly in handling the matter and had placed Pillay at an advantage. A full bench of the High Court concluded that the PP's findings and remedial action were irrational. In addition, the court held that she had committed numerous errors of law and chose to set aside her report (*Gordhan v Public Protector* [2020] ZAGPPHC 777).

It is apparent that the report relating to the CR17 campaign is a continuation of a trend that came to define Advocate Mkhwebane's term of office. A series of reports emerging from the OPP have indicated widespread corruption and malfeasance across South Africa, but legal errors have left the courts with little option but to set aside many of the current PP's reports. This was not the case under her predecessor, when the courts generally approved of the PP's reports and chose to expand the powers of her office.

5 Conclusion

The overall theme of this important case is how best to hold the executive to account. The link between the President and Bosasa via the CR17 campaign – exposed as a result of this case – has been immensely damaging to President Ramaphosa's public image and has hampered and undermined his ability to tackle corruption, arguably the most important tenet of his administration's overall policy. The judgment is also significant from an administrative law perspective, adding to the debate about whether the PP's findings constitute administrative action.

While Jafta J elected to keep open the question of whether the PP's remedial action constituted administrative action, he criticised the *Home Affairs* judgment primarily on the basis that Plasket AJA had placed greater emphasis on the identity of the functionary who exercised the power than on the nature and impact of the power itself. He also wrongly implied that PAJA applies to the decision-making process followed by the PP even in a matter not involving administrative action. Although the SCA has held that the PP's decisions do not constitute administrative action, the court *a quo* makes numerous references to the right to just administrative action, which does not apply in cases founded on the principle of legality. It is clear from both these judgments that greater clarity on the question of whether the PP's decisions amount to administrative action is required from the Constitutional Court. It is also clear from an analysis of the judgment (particularly the grounds of review relating to error of law and the *audi* principle) and related judgments that the courts have lost patience with Advocate Mkhwebane as a result of her numerous flawed reports and recommendations.

With regard to amaBhungane's constitutional challenge, the Pretoria High Court has declared the Executive Ethics Code to be unconstitutional and it appears likely that the Constitutional Court will confirm this order in terms of section 172(2)(*d*) of the Constitution. A revised Code will help to promote accountable, transparent and open government by ensuring that members of the Executive are obliged to disclose campaign donations.

The major findings in significant reports such as those relating to Nkandla, the SABC and the State of Capture have stood firm in the face of judicial scrutiny. Unfortunately, this exalted standard has not always been repeated in Advocate Mkhwebane's reports. It is also possible that the courts have drawn comparisons between Advocate Mkhwebane's reports and those of her predecessor when adjudicating matters. In respect of *Public Protector v President of the RSA* (*supra*), as a result of numerous errors, the focus of the judges – and the public – has inexorably shifted from the President and donations to the CR17 campaign to the failings of the former PP herself. The

case can be seen as yet another missed opportunity to hold the executive to account. Had the report been legally unassailable, the real issue at play – donations to the CR17 campaign – might have faced greater legal scrutiny.

Paul Swanepoel
(University of KwaZulu-Natal)