CONSTITUTIONAL COURT OF SOUTH AFRICA

Democratic Alliance and Another v Public Protector of South Africa and Others

CCT 251/22; CCT 252/22 and CCT 299/22

Date of hearing: 24 November 2022

Date of judgment: 13 July 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 13 July 2023 at 10h00, the Constitutional Court handed down judgment in three consolidated applications emanating from the judgment and order of the High Court of South Africa, Western Cape Division, Cape Town (High Court) declaring the President's decision to suspend the Public Protector invalid. The first and second applications are applications for leave to appeal brought by the Democratic Alliance (DA) and the President against the High Court's order in terms of section 172(2)(d) of the Constitution and rule 16 of the Rules of the Constitutional Court (Rules). The third application is an urgent application for leave to appeal brought by the Public Protector against the judgment and order of the Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Full Court) delivered on 11 October 2022. The DA and the President are the first and second applicants in the consolidated applications. The Public Protector is the first respondent and the Speaker of the National Assembly (Speaker) and the Chairperson of the section 194 Committee are the second and third respondents respectively. The fourth to seventeenth respondents are all the political parties represented in the National Assembly. Only the tenth, eleventh and sixteenth respondents (African Transformation

Movement (ATM), Pan Africanist Congress of Azania (PAC) and United Democratic Movement (UDM)) (Political Parties) participated in the proceedings.

The applications concerned the following questions. First, whether the order of the High Court declaring the President's decision invalid and setting aside the Public Protector's suspension is subject to confirmation by the Constitutional Court in terms of section 172(2)(a) and (d) of the Constitution. Second, whether section 18 of the Superior Courts Act, which regulates the suspension of a court order pending an appeal, may be of application to the High Court's order.

The matter finds its genesis in the order made by this Court on 4 February 2022 in *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others (Speaker)*. In *Speaker*, this Court amended rule 129AD(3) of the Rules adopted by the National Assembly on 3 December 2019 (National Assembly Rules). In terms of the amended rule, the section 194 Committee, which conducts the enquiry into the removal of chapter 9 office bearers from office, "must afford the holder of a public office the right to be heard in his or her defence and to be assisted by a legal practitioner or other expert of his or her choice". Following the aforementioned order, on 10 March 2022, the Speaker of the National Assembly wrote a letter to the President advising him that the section 194 Committee, having considered the order of this Court in *Speaker*, resolved to continue with its consideration of the motion for the removal of the Public Protector from office. On 17 March 2022, the President wrote a letter to the Public Protector informing her of the letter received from the Speaker of the National Assembly and invited the Public Protector to provide reasons as to why he should not suspend her pending finalisation of the work of the section 194 Committee.

On 1 April 2022, the Public Protector filed an application in terms of section 172(1) of the Constitution and sought orders declaring the conduct of the Speaker (writing the letter to the President), the conduct of the President (the letter initiating the suspension process) and the conduct of the Section 194 Committee (proceeding with the section 194 enquiry) irrational, unconstitutional and invalid. She launched the application in Part A and Part B. On 1 June 2022, a former senior investigating officer and deputy director general of Home Affairs, Mr Arthur Fraser, laid criminal charges against the President in relation to grave allegations of

criminal misconduct involving foreign currency allegedly stolen at the President's Phala Phala farm. On 3 June 2022, the office of the Public Protector received a complaint against the President from ATM's president, Mr Vuyo Zungula requesting an investigation into any part which the President might have played in the commission of the alleged crimes, specifically breaches of the Executive Members Ethics Act 32 of 1998 or the President's oath of office. On 7 June 2022, the Public Protector wrote a letter to the President instructing him to answer 31 questions in relation to an investigation she was conducting into an alleged incident of theft of foreign currency that took place at Phala Phala farm owned by the President. On 9 June 2022, the President suspended the Public Protector, and the Deputy Public Protector took over the functions of the Public Protector.

On 10 June 2022, the High Court dismissed Part A of the application by the Public Protector. It held that the decision by the Speaker of the National Assembly to send President a letter did not constitute an illegal conduct or decision. The High Court held that the proceedings envisaged in section 194 of the Constitution are a matter of common interest between the National Assembly as the Legislature and the President as a member of the Executive. According to the Court, the Speaker, as a representative and leader of the National Assembly, was obliged to inform the President of the status of the section 194 proceedings. In the Part B judgment, the High Court considered the line of events leading up to the suspension on 9 June 2022. The sequence of events, according to the Court, constituted objective facts that found a basis to form a reasonable perception that the Public Protector's suspension was triggered by her decision to investigate the President. The High Court therefore declared the President's decision to suspend the Public Protector invalid, set aside the suspension effective from the date of its order and ordered each party to pay its own costs.

The Public Protector then unsuccessfully approached the Full Court in terms of section 18 of the Superior Courts Act to render the judgment of the High Court to be operational and executable, pending any application for leave to appeal or appeal delivered in respect thereof. The Full Court held that the Constitutional Court must make the final determination whether the conduct of the President is unconstitutional and the order of the High Court in the present case had to be confirmed by the Constitutional Court before it had any effect.

In this Court, the DA submitted that the suspension of the Public Protector in the current circumstances was necessary to protect the integrity of the Office of the Public Protector and the effectiveness of the section 194 process while an investigation is underway. As to the High Court's order that the President's decision to suspend the Public Protector was tainted by bias, the DA submitted that a claim of personal bias rests on the assumption that a certain decision will benefit the decision-maker. It further submitted that in the present case, section 194 sets out safeguards to ensure that the President's decision is not exercised arbitrarily. The DA also opposed the Public Protector's application for leave to appeal against the order of the Full Court. It contended that section 18 of the Superior Courts Act does not apply to orders that are the subject of confirmation under section 172(2) of the Constitution. The President's submissions align with those of the DA. He added that the determination of whether there is a risk of conflict of interest in the exercise of official duties requires that there must be a real risk that the exercise of official responsibilities will be tainted by private interests. He submitted that the Public Protector failed to demonstrate existence of risk.

The Public Protector's main contention was that there is no valid section 172(2)(d) application before this Court. Accordingly, this Court cannot reach the grounds of direct appeal advanced by the DA and the President. She argued that the relevant part of the High Court's order does not relate to the conduct of the President as contemplated in section 172(2)(a) of the Constitution and thus requires no confirmation by this Court. The Political Parties filed submissions in this Court supporting the Public Protector's case. They challenged the Full Court's finding that section 18 of the Superior Courts Act was not triggered by the High Court's judgment and contended that the applications brought by the DA and the President amount to an impermissible request for this Court, on appeal, to interfere with the discretion exercised by the High Court.

In a unanimous judgment, penned by Maya DCJ, this Court held that there was a rational reason for the precautionary suspension of the Public Protector. In coming to that conclusion, this Court considered the Independent Panel report by Justice Nkabinde which found that there was prima facie evidence of incompetence on her part. This was also based on numerous judicial assertions where her capacity to hold office as a Public Protector was brought under scrutiny.

First, this Court had to determine whether the decision to suspend the Public Protector constitutes "conduct of the President" as envisaged in sections 167(5) and 172(2)(a). This Court reiterated the position delineated in its previous decisions. It held that the phrase "any conduct of the President" should be given wide meaning and interpretation. The apparent purpose of the provisions is to ensure that this Court should control declarations of constitutional invalidity made against the highest organs of state. Moreover, this Court referred to analogous judgments where this Court held that declarations of invalidity of a decision by the President was subject to confirmation within the ambits of section 167(5) and 172(2)(a). The Public Protector was unable to distinguish these judgments from the present matter and thus the Court held that the decision to suspend the Public Protector is subject to confirmation as enumerated in sections 167(5) and 172(2)(a).

Second, the Public Protector argued that the President was disqualified by section 96(2)(b) of the Constitution from suspending her due to conflict of interest allegedly arising from various investigations involving the President. According to the Public Protector, the President was disqualified from making a decision to suspend her because of the conflict of interest or the risk of a conflict between his official responsibilities and private interests. A mere risk of a conflict suffices to render his decision unlawful, even if there is no reasonable apprehension of bias. The Court focussed on whether there was a risk of conflict. It elucidated that the risk must be real but need not materialise. The risk must be of such a nature that it would reasonably be apprehended by a reasonable person. A standard requiring more, from the person asserting the risk of a conflict, than the reasonableness standard would not be appropriate because it would unnecessarily shield the executive from the necessary public scrutiny.

On the facts of the present matter, the Court held that the mere fact that the Public Protector is investigating the President cannot create a reasonable apprehension of bias or expose him to a risk of conflict between his official responsibilities and private interests. The power to suspend the Public Protector is not a power that the President can exercise without safeguards; it is a tightly constrained power which may not be exercised on a whim or for flimsy reasons. The President can only exercise this power after a committee of the National Assembly commences proceedings

for her removal. The President neither determines the duration of the suspension nor decides whether there are credible allegations against the Public Protector. That depends on the National Assembly and its processes. His role is confined to imposing a precautionary suspension to protect the Office of the Public Protector which achieves nothing for his benefit because it does not delay, let alone end, the investigation against him. The Acting Public Protector must continue with the investigation. Moreover, the President has no power to choose who will replace the Public Protector or to influence them as this is governed by section 2A(7) of the Public Protector Act. Thus, the Court concluded that the facts adverted do not show that the President acted in a manner which exposed him to a situation involving the risk of a conflict between his official responsibilities and private interest. The Court highlighted that the President stood to gain nothing from suspending the Public Protector. More so, there is no support on the record for the submission that the President suspended the Public Protector to influence the outcome of the Phala Phala investigation and benefit from the delay that the suspension would cause.

In addition, this Court rejected the findings of the High Court that the decision to suspend the Public Protector was "hurried" and "retaliatory". This conclusion was based on a series of events that preceded the decision of the President to suspend the Public Protector. On 17 March 2022, began communicating with the Public Protector regarding suspension and was invited to provide written reasons as to why he should not suspend her. Following his letter of 17 March 2022, the President granted the Public Protector no less than four extensions and undertakings not to make a decision. These facts illustrate that there was an intent to afford the Public Protector more time to make representations. The late emergence of the Phala Phala allegations cannot taint a process which was neither hurried nor irrational. Thus, this Court concluded that there was no exposure on the President's part to the risk envisaged in section 96(2)(b). Having reached this conclusion, it held that it was unnecessary to decide the question of bias because, at the level of facts (that is, whether there was a reasonable apprehension of bias), the conclusion would be the same as above.

This Court upheld the DA and the President's appeals and dismissed the conditional application for confirmation of the High Court orders. The Court also set aside the orders of the Full Court of the Part B Judgment. The Court further dismissed the Public Protector's cross-appeals and her

section 18 application for leave to appeal, which it found was an entirely unnecessary and anticipatory proceeding for which our court procedures make no provision.

This Court concluded that the Public Protector has not conducted herself in a manner that would justify mulcting her with costs in respect of the appeals and cross-appeals. Thus, the nature of these proceedings warranted the application of the *Biowatch* principle, and the Court decided not to award costs. In relation to the costs of the section 18 application for leave to appeal, the Public Protector was ordered to pay the costs of this application in her personal capacity, as there was no indication that the section 18 application was authorised by the Office of the Public Protector which had undertaken to settle her legal costs in respect of the appeals.