

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA****RE: MEDIA SUMMARY: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v THE OFFICE OF THE PUBLIC PROTECTOR AND OTHERS (91139/2016)**

The President of the Republic of South Africa seeks to review the remedial action in the Public Protector's Report entitled "*State of Capture*" (the Report) as well as an order that the matter be remitted to the Public Protector for further investigation which was abandoned during argument. The Report concerns an investigation by the Public Protector into complaints of alleged improper and unethical conduct by the President, certain State functionaries and the Gupta family, relating to the appointment of Cabinet Ministers and Directors of State-owned entities (SOEs), which possibly resulted in the improper and corrupt award of state contracts and other benefits to businesses of the Gupta Family. The remedial action directed the President to appoint a commission of inquiry to investigate the matters identified in the Report and the President sought to review and set aside specific paragraphs 8.4, 8.7 and 8.8 of the remedial action.

These specific paragraphs of the remedial action direct the President to appoint, within 30 days, a commission of inquiry, headed by a Judge solely selected by the Chief Justice; that the commission of inquiry be given powers to collect evidence, no less than that of the Public Protector and that the commission of inquiry is to complete its task and the present the report on the findings and recommendations to the President within 180 days, whereafter the President is to submit a copy with an indication of his intentions regarding the implementation to Parliament within 14 days of releasing the Report.

The application was opposed by the current Public Protector and various political parties: the Economic Freedom Fighters, the United Democratic Movement, Congress of the People and the Democratic Alliance. The application was also opposed by Ms Mentor and a public benefit organisation, Council for the Advancement of the South African Constitution.

The Report was issued by the Public Protector after she received the following three complaints: the first complaint, on behalf of the Dominican Order, a group of Catholic priests, was in regard to allegations that Mr Jonas and Ms Mentor, were offered Cabinet positions by the Gupta family as well as an investigations into all business dealings of the Gupta family with government departments and SOEs; the second complaint, made by Mr M Mainmane, leader of the DA, was in regard to allegations that Mr Jonas and Ms Mentor, were offered Cabinet positions and that the investigation should look into the President's conduct in relation to the alleged corrupt offers and Gupta family involvement in the employment of Cabinet Ministers and directors of SOE boards; the third complaint, by a person whose

name is withheld, was based on media reports alleging that the Cabinet had become involved in holding banks accountable for withdrawing banking facilities for Gupta-owned companies.

Based on these three complaints the Public Protector identified the following main issues for investigation: whether the President has breached the Ethics Act and had acted improperly and in violation of the Ethics Code, in exposing himself to a situation involving the risk of conflict between his official duties and his private interest, used information entrusted to him to enrich himself and business owned by the Gupta family; whether the President has allowed members of the Gupta family and his son to be involved in the process of removal and appointment of the Minister of Finance in December 2015, various members of Cabinet and members of boards of directors of SOE's; whether the President prejudiced anyone by his conduct; whether Cabinet Members had improperly interfered with the relationship between banks and Gupta-owned companies. The Public Protector also identified other related issues for investigation.

The review application of the President is essentially directed at the lawfulness and rationality of the remedial action and were based on the following ground: that Constitution vest the power to appoint a commission of inquiry on the President and the President alone and the Public Protector does not have the power to direct him to appoint such commission which offends the separation of powers; the direction that the Chief Justice should appoint the Judge to head the commission of inquiry is irrational and there is no reason to suggest that the President would be biased in selecting such Judge; the Public Protector acted beyond her powers when she directed the manner in which the commission is to be implemented, such power is the prerogative of the President; the Public Protector acted in contravention of the Ethics Act and the Public Protectors Act, improperly outsourcing the investigation to a commission; the Public Protector only has power to resort to remedial action where an investigation has been completed and finding of impropriety or prejudice have been made; the Public Protector's reasons for taking the remedial action is irrational in as far as it is based on a lack of adequate resources and on the limited qualification of her successor, Advocate Mkhwebane.

The Full Bench ultimately had to determine whether the President's constitutional power to appoint a commission of inquiry, can permissibly be limited by remedial action taken by the Public Protector. The Court held that even though the Constitution vests in the President the power to appoint a commission of inquiry, this power is not an untrammelled one and it must be exercised within the constraints that the Constitution imposes. The Court held that the President's power to appoint a commission of inquiry will necessarily be curtailed where his ability to conduct himself without constraint brings him into conflict with his obligations under the Constitution. The Court held that the Public Protector's investigative powers are of the widest character and that her role is to protect the public from any conduct in state affairs or in any spheres of government that could result in any impropriety or prejudice and in order to fulfil this role, the Public Protector is empowered to take binding remedial action that is capable of remedying the wrong in the particular circumstances. The power of the Public Protector include directing or instructing members of the Executive, including the President, to exercise powers entrusted to them under the Constitution where it is so required. The Court referred to the Constitutional Court judgment of *Economic Freedom Fighters v Speaker, National Assembly* where the Constitutional Court confirmed the binding power of remedial action taken by the Public Protector.

Based on this finding, it followed that the primary ground for review, that it was unlawful for the Public Protector to instruct the President to appoint a commission of inquiry, is without merit.

The Court held that the Public Protector did exactly what was expected of her in terms of her mandate: she investigated the three complaints of “*State Capture*” to the extent possible; made *prima facie* findings on the basis of her investigation and took remedial action. The argument by the President that the Public Protector acted beyond her powers and attempted to delegate her mandate to a commission of inquiry, cannot be sustained.

In regard to the argument that the remedial action is inconsistent with the Ethics Act due to a commission of inquiry being unable to investigate a breach in the Ethics Code the Court held the following: the Public Protector’s power to take remedial action stems from the Constitution and not the Ethics Act, this argument is thus, misconceived.

In respect of the President’s argument that the remedial action taken is unlawful due to the fact that the Public Protector did not make findings of impropriety or prejudice, the Court held that on a proper interpretation of s 182(1) of the Constitution, read with the Public Protector Act, the taking of remedial action by the Public Protector is not subject upon findings of impropriety or prejudice.

Whether the remedial action is appropriate the Court held that there are compelling *prima facie* evidence that the relationship between the President and the Gupta family had evolved into “*state capture*” and that the matter is of great public concern. The outcome of the investigation by the Public Protector is deeply concerning and due to the Public Protector, not having access to the necessary resources, the Public Protector, thinks it best for a commission of inquiry to be instituted in order to achieve her goals of truth-finding and restoring confidence. The Court held that commissions of inquiry are by their nature open and transparent to the public and possess a number of important advantages. And taking into consideration the budgetary constraint and the scale of the investigation to be done, find the judicial commission of inquiry suitable to carry out the investigation.

In regard to the direction that the Chief Justice is to select the Judge who is to preside over the Commission of inquiry, the Court held that the President has a clear interest in the outcome of the commission and that there is no reason why the recusal principle should not apply to the President. The Public Protector foresaw that the credibility of the process may be compromised and she was aware of the public perception in matter and it is not only appropriate but necessary that someone other than the President select the head of the commission. There is further no constitutional prohibition on the President seeking and adopting the advice of the Chief Justice.

The Court held further that the allegations of “*State Capture*” are of national importance and that the directions by the Public Protector, that the commission of inquiry, should be seized with the at least the same power as she, is justified as the Commissions Act does not provide a commission with the power to enter a premises in order to search and seize evidence. In regard to the direction that the President reports to Parliament within fourteen days of releasing the report the Court held that it was a wise and necessary precaution in order to ensure that recommendations of the commission are implemented. The Court held further that the Public Protector’s concerns regarding her successor was justified and rational

and in order for the matter to be finalised without delay, it would not have made sense to pass the matter to her successor to start from scratch. The decision taken by the Public Protector, substantiated by the reasons submitted for taking remedial action, satisfy the rationality test.

The third to fifth respondents submitted that the President has perempted his right of review, which submission is based on the President, publicly stating that he intends to establish the commission of inquiry to investigate the allegations of “*state capture*”. The Full Bench held in this regard the utterances made by the President, in Parliament, and the press statement issued by the Presidency, indicated in the clearest possible terms that the President accepted the necessity of establishing the judicial commission of inquiry referred to in the remedial action and that it undoubtedly amounted to a peremption.

The following order was made: 1. the application is dismissed. 2. It is declared that the remedial action in the Public Protectors Report, No 6 of 2016/17 date 14 October 2016 and entitled “*State of Capture*” (the Report), is binding; 3. the President is directed to appoint a commission of inquiry within 30 days, headed by a Judge solely selected by the Chief Justice; 4. the President shall take all steps which are necessary to give effect to the remedial action and shall ensure that: 4.1 the Judge who head the commission of inquiry is given the power to appoint his/her own staff and to investigate all the issues using the record of the Public Protector’s investigation and the State of Capture Report; 4.2 the commission of inquiry is to be given powers of evidence collection that are not less than that of the Public Protector; 4.3 the commission of inquiry is to complete its task and present its report within 180 days. The President shall submit a copy with an indication of his intentions regarding the implementation to Parliament within 14 days of releasing the Report; 4.4 the commission of inquiry is adequately resourced by the National Treasury. 5. The Public Protector shall deliver a copy of this order to the President and the Chief Justice within five days of the grant of this order. 6. The costs of this application are to be paid by the President, in his personal capacity.