

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Before:

The Honourable Mr Justice L G Nuku
The Honourable Mr Justice M Francis
The Honourable Mr Justice J D Lekhuleni

CASE NO: 8500/2022

In the matter between:

THE PUBLIC PROTECTOR OF SOUTH AFRICA

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**THE CHAIRPERSON OF THE SECTION 194
COMMITTEE**

Second Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

**ALL POLITICAL PARTIES REPRESENTED
IN THE NATIONAL ASSEMBLY**

Fourth to Seventeenth Respondents

Date of hearing : Friday 16 September 2022

Date of Judgment : Tuesday 11 October 2022

JUDGMENT

THE COURT:

INTRODUCTION

- [1] The applicant has brought an application on an extremely urgent basis in terms of section 18(1) and section 18(3) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") to render the judgment of this Court delivered on 9 September 2022 ("the judgment") to be operational and executable, pending any application for leave to appeal or appeal delivered in respect thereof.
- [2] The detailed background to the facts of this dispute between the parties is set out in the judgment and we, therefore, do not intend reciting these facts herein in any great detail. Also, for the sake of convenience, we use the nomenclature for the parties as used in the judgment.
- [3] The parties cited in the application were the same as those cited in the Part B proceedings. The identities of the protagonists who actively participated changed somewhat. The first and second respondents did not participate in this application and filed notices to abide the decision of this court. The sixteenth respondent, the Pan Africanist Congress of Azania ("the PAC"), joined the tenth and eleventh respondents in their support of the Public Protector; all three respondents will be referred to hereinafter in this judgment as "the supporting respondents". The DA and the President opposed the application.

- [4] The judgment was delivered as a sequel to Part B of a two-part application. In Part A of the application, the applicant sought amongst other things an interim interdict and/or mandamus prohibiting the President from taking any steps to suspend her and the withdrawal of the letter in which the President sought representations regarding her possible suspension.
- [5] A full court, on 10 June 2022, dismissed all of the relief sought by the applicant in the Part A proceedings.
- [6] The President suspended the applicant a day earlier, on 9 June 2022.
- [7] In the Part B proceedings before this court, the applicant was granted leave to file an amended notice of motion which was a necessary consequence of the decision of the court in the Part A proceedings. Because the applicant was suspended, she now sought an order in terms of section 172(1) of the Constitution declaring the decision of the President to suspend her on 9 June 2022, to be irrational, unconstitutional, and invalid.
- [8] The parties filed a Joint Practice Note in which they listed the issues to be determined by this court.

- [9] After having considered the papers and having heard the arguments proffered by the legal representatives in relation to the issues to be determined, this Court granted an order which is reproduced verbatim below:

****Order***

[187] In the result the following order is made:

187.1 It is directed that the matter be heard as one of urgency and the normal rules are dispensed with in terms of Rule 6(12)(a);

187.2 The application to amend the notice of motion is granted;

187.3 The application for leave to challenge the authority of Seanego Attorneys Inc to represent the applicant is refused;

187.4 The relief sought in paragraphs 3.1, 3.4, 3.5, 3.6 and 5 of the amended notice of motion is dismissed;

187.5 The decision of the President to suspend the applicant is declared invalid,

187.6 The suspension of the applicant is set aside effectively from the date of this order;

187.7 Each party is to pay its costs."

- [10] After the judgment was delivered, the parties held widely differing views about the effect of the judgment.
- [11] The applicant was of the view that the judgment uplifted her suspension and reinstated her immediately so that she could resume her duties as Public Protector. The DA, on the other hand, was of the view that the judgment was of no force and effect until confirmed by the Constitutional Court. The attorneys for the DA conveyed this view to the applicant's attorneys less than 30 minutes after the judgment was delivered. Just over an hour later, the applicant's attorneys responded to the DA's attorneys in which it was disputed that it was necessary to refer this judgment to the Constitutional Court for confirmation. The DA's stance was said to be legally flawed and an attempt by it to frustrate the applicant's resumption of her duties as Public Protector. The applicant thereafter made public pronouncements about her reinstatement and her intention to return to work on Saturday, 10 September 2022, notwithstanding her ongoing section 194 Impeachment inquiry.
- [12] Later in the evening of 9 September 2022, the DA delivered a "Notice of Appeal alternatively Notice of Application for Leave to Appeal" ("the appeal notice") directly to the Constitutional Court. An e-mail was then sent to the applicant's attorneys confirming that the aforesaid notice had been sent. It was also stated in the e-mail that the delivery of the appeal notice had the effect of ensuring that the applicant's suspension remained effective regardless of the applicant's view that the judgment

was not subject to confirmation by the Constitutional Court. As a consequence, the applicant launched this application.

[13] The applicant brought this application as a matter of extreme urgency and on exceptionally truncated timeframes. The application was delivered by e-mail at approximately 17h00 on Saturday, 10 September 2022 in which the applicant sought an urgent hearing on Tuesday, 13 September 2022. The respondents were required to deliver any notice of intention to oppose on or before 10h00, on Sunday, 11 September 2022, and answering affidavits on or before 10h00 on Monday, 12 September 2022.

[14] The President noted his intention to oppose the application on Sunday, 11 September 2022. He indicated, however, that he was not in a position to comply with the timeframe for delivering the answering affidavit. As it turned out, the full court could not be convened on Tuesday, 13 September 2022 and, instead, the date of 16 September 2022 was proposed, which date was acceptable to all the parties concerned.

[15] Thereafter, the parties' legal representatives met virtually to agree to a revised timetable for the filing of papers. Provision was made for the applicant to file a supplementary affidavit, the filing of answering affidavits by the respondents, and the filing of a composite reply by the applicant.

[16] The President filed a notice of appeal to the Constitutional Court which was intended to be considered together with that court's confirmation of the judgment. He also filed a conditional application for leave to appeal directly to the Constitutional Court in the event that the Constitutional Court found that the judgment was not subject to confirmation.

[17] The Deputy Public Protector, Ms Nompilo Kholeka Gcaleka, who was appointed as the Acting Public Protector when the applicant was suspended, sought the leave of this court to intervene in this application and to join the main application as the eighteenth respondent. This application was opposed by the applicant.

ISSUES FOR DETERMINATION

[18] The parties filed a Joint Practice Note which listed the following issues to be determined by this court:

[18.1] Whether the matter justified the urgency with which it was brought;

[18.2] Whether in terms of sections 167(5) and 172(2)(a) of the Constitution, the Order has no force until it is confirmed by the Constitutional Court;

[18.3] If not, whether the applicant is nonetheless entitled to seek relief in terms of section 18(1) read with section 18(3) of the Act.

[18.4] If the applicant is entitled to seek relief in terms of section 18(1) read with section 18(3) of the Act, whether the applicant has made out a case for the order to be implemented pending the appeals that have been lodged.

[18.5] Regarding the question of costs:

[18.5.1] Whether the President and/or the DA should be ordered to pay costs on a punitive scale; and

[18.5.2] Whether the applicant should be ordered to pay the costs of the DA in her personal capacity and on a punitive scale.

[19] This judgment is structured as follows:

[19.1] Firstly, we deal with the preliminary issues of urgency and the application to intervene;

[19.2] Secondly, we summarise the parties' submissions on whether or not section 172 of the Constitution and/or section 18 of the Act applies to the matter at hand; and

[19.3] Finally, we discuss the parties' submissions in the context of the judgment and the applicable law.

PRELIMINARY ISSUES

URGENCY

[20] The application was brought as one of extreme urgency with very truncated timelines.

[21] According to the applicant, the application was brought on such an urgent basis due to the actions of the DA. The applicant was of the view that the judgment reinstated her immediately and that the DA's action of filing the appeal notice was designed to prevent her return to work. As she had been away from work for some three months, she considered it imperative that she resume her duties as soon as possible. The applicant stated that she had no option but to bring this application to restore the effect of the judgment.

[22] Furthermore, the applicant submitted that her dignity, privacy, and reputation rights were implicated which necessitated this application being dealt with swiftly. The DA had launched an application for leave to appeal within hours of the judgment being handed down and could not, therefore, legitimately claim that the matter should not be dealt with on an urgent basis. In addition, this matter has been dealt with on an urgent basis in both the Part A and Part B proceedings. Finally, the applicant contended that the nature of the matter is such that it cannot be heard in due course and the public interest and the interests of justice dictate that the matter be heard as a matter of extreme urgency.

[23] While conceding that this matter ought to be heard on an urgent basis, both the DA and the President opined that the matter did not have to be heard on an extremely urgent basis.

[24] We do not deem it necessary to engage with those submissions in opposition to this application being heard on an urgent basis. It cannot be denied that this is a matter that is of great importance to all the parties concerned and the public. It involves the head of a chapter 9 institution and the President who is the head of state and of the national executive of the government of the country. We are of the view that there is a clear public interest element that demands the finalisation of this matter without delay. Crucially, in recognition of the parties before it and the nature of the dispute, all the courts that have hitherto been seized with this dispute have dealt with it on an urgent basis and, in our view, this application should be treated no differently. The status and position of the applicant is a live dispute that requires urgent resolution by an appropriate appellate court. The issues raised in the judgment are weighty and a speedy resolution is in the interests of all concerned and, above all, in the interests of justice. It does not assist anyone to have the matter delayed unnecessarily or to be heard in the ordinary course which may be some months down the line. The parties involved are familiar with the issues, filed comprehensive papers with extensive heads of argument, and none appeared to have been unduly fettered in the presentation of their case despite the inconvenience of the truncated timelines they had agreed

upon. Accordingly, we are satisfied that the relief sought ought to be considered on an extremely urgent basis and not in the ordinary course.

- [25] In the circumstances, the court does not find any substance in the point *in limine* relating to urgency.

APPLICATION TO INTERVENE

- [26] According to the Deputy Public Protector, no issue is taken with any of the parties over the lawfulness or otherwise of the applicant's suspension. Intervention is sought, however, for the purpose of "putting the true facts accurately" before this court about the performance of the office of the Public Protector currently and during the time that the applicant has been on suspension. This is necessitated by the fact that, in her affidavit in support of this application, the applicant made certain factual allegations with regard to the impact that her suspension has had on the performance of the office of the Public Protector in relation to amongst other things the Phala Phala investigation and the general work of the office.

- [27] The Deputy Public Protector's application for leave to intervene was only opposed by the applicant. No opposing affidavit was delivered and legal argument was presented during the hearing on why the intervention application should be dismissed. In essence, it was argued that the Deputy Public Protector failed to establish a sufficient legal interest in this application or the main application. It was

also contended that the Deputy Public Protector was conflicted in that the only interest that she had in the matter was to stay in the post of the applicant as a Public Protector. The longer she stays in the post the longer she holds the office of Acting Public Protector.

[28] The requirements that an applicant has to meet in order to apply to intervene in legal proceedings are well known. Such an applicant must demonstrate a direct and substantial interest in the subject matter of the proceedings and must make such allegations that will show that he or she at least has a *prima facie* case that would entitle him or her to relief¹.

[29] The SCA has set out the test to intervene as follows:

*"[T]he issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned."*²

[30] The SCA went on to state that:

"This has found to mean that if the order or judgment sought cannot be

¹ *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC) at para [9].

² *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 9. See also, *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at para 12.

*sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."*³

- [31] The Deputy Public Protector will have to demonstrate that she has a legal interest in the subject matter of this application and the main application that may be prejudicially affected by the judgment of the court. This also means that she must show that she has a right adversely affected or likely to be adversely affected by the order sought⁴. The Part B application, in so far as it is relevant to the Deputy Public Protector, dealt with the applicant's suspension and the events preceding that application. In this application, the applicant seeks the immediate enforcement of the judgment which amongst other things declared her suspension to have been unlawful. By her own admission, the Deputy Public Protector does not take issue with the lawfulness or otherwise of the applicant's suspension. While, at a general level, she may well have an interest in protecting the organisation, being functionally in charge of the office of the Public Protector in the absence of the applicant, this does not rise to the level of a legal interest in the subject matter of the litigation before the court in the Part B proceedings or the issues in dispute in this application. As it will become clearer later in this judgment, neither the Deputy Public Protector in her personal capacity or the office of the Public Protector are affected prejudicially by the judgment in this matter.

³ *Gordon ibid* at para 9.

⁴ *SA Riding for the Disabled Association v Regional Land Claims Commissioner op. cit* at 4G-5A.

[32] It follows, therefore, that the application to intervene must thus fail. The applicant did not seek a costs order in the event that the application to intervene was dismissed. In any event, the application appears to be motivated by a genuine concern on the part of the Deputy Public Protector and cannot be said to have been instituted frivolously or vexatiously. Accordingly, the application to intervene is dismissed with no order as to costs.

PARTIES' SUBMISSIONS

[33] Before we briefly describe the submissions of the parties, it is expedient to set out the wording of the relevant statutory enactments in full:

[33.1] **Section 167(5) of the Constitution**

"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force".

[33.2] **Section 172 of the Constitution - Powers of courts in constitutional matters**

"(1) When deciding a constitutional matter within its power, a Court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2)(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity, has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

- (d) *Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."*

[33.3] Section 18 of the Superior Courts Act – Suspension of decision pending appeal

- "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
- (2) Subject to subsection (3), unless the court under exception circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.*
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the*

court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[34] In her notice of motion and founding affidavit, the applicant seeks an order declaring the judgment to be operational and executable in terms of section 18(1) and 18(3) of the Act. The legal submissions advanced by the applicant were expanded in her supplementary founding affidavit and a more detailed exposition of her case was provided in her composite reply. The submissions advanced in her reply was a response to the submissions of the DA and the President in their answering affidavits. The applicant also "adopted" some of the legal submissions made by the supporting respondents in their answering affidavits. We will only deal with those aspects of the parties' submissions that are immediately relevant to the Court's decision in this matter.

[35] The applicant requests this Court to declare that the following parts of the Order are immediately executable in terms of section 18 of the Act:

[35.1] *"187.5 The decision of the President to suspend the applicant is declared invalid ("the 187.5 order"); and*

[35.2] *187.6 The suspension of the applicant is set aside effectively from the date of this order" ("the 187.6 order").*

[36] The applicant submitted that the 187.5 order and the 187.6 order (which are collectively referred to hereinafter as "the relevant orders") were not made in terms of section 172(2)(a) of the Constitution and are, therefore, not subject to confirmation by the Constitutional Court. As such, the relevant orders are, in general terms, executable in the interim provided a successful application is made in terms of section 18(1) and (3) of the Act.

[37] According to the applicant, the relevant orders are to be read disjunctively as they are self-standing orders and should be interpreted as separate orders.

[38] The applicant submitted that the 187.5 order refers to the President's "decision" and not his "conduct" and, in the context of this matter, this distinction is not merely a matter of semantics. In the notice of motion, the applicant specifically prayed for an order "setting aside the conduct and/or decisions" of the President in terms of section 172(1) of the Constitution. This, according to the applicant, shows that even at that stage it was always the intention of the applicant to distinguish between the President's "decision" and "conduct". In line with this logic and the structure of the prayers, this court has declared as invalid the "decision" of the President to suspend the applicant.

[39] The applicant contended that the 187.6 order is akin to a review decision. It is either an ordinary common law order or a just and equitable order as contemplated in section 172(1)(b) of the Constitution. The impugned decision of the President,

so it was argued, was specifically pleaded on the basis of the common law ground of bias and/or of a reasonably apprehended bias, and separately upon a constitutional ground of a conflict of interest in terms of section 96(2)(b) of the Constitution. Both challenges are, in effect, premised on the failure of the decision-maker to bring an independent mind to bear in respect of the decision made.

[40] According to the applicant, whatever the position is in relation to the declaration of invalidity, the 187.6 order has nothing to do with section 172(2). It constitutes a just and equitable remedy in terms of section 172(1)(b) and/or the findings based on the common law. It is a self-standing order which is not dependent on the declarator contained in the 187.5 order.

[41] It was further argued that the order in paragraph 187.6 incorporates two distinct constituent parts or sub-orders, namely the order setting aside the suspension, and the effective date of the implementation of the order, being 9 September 2022. It was submitted that the order setting aside the suspension is an "ordinary" order which is based on findings of actual and/or reasonably apprehended bias in terms of the common law and a conflict of interest. The order imposing an effective date is clear and unambiguous and was just and equitable relief that was of immediate effect until the DA served its appeal notice.

[42] The applicant submits that even if section 172(2)(a) applies, it does not follow that section 18 of the Act does not apply. This is so because section 18 of the Superior

Courts Act applies to a decision which is the subject of an application for leave to appeal or of an appeal. In this matter, both the DA and the President have lodged an appeal in terms of section 172(2)(d) of the Constitution. Secondly, the word "appeal" in section 18 is not qualified or restricted to exclude a section 172(2)(d) appeal and is, therefore, applicable to the present matter. Thirdly, this court is any event entitled in terms of section 172(2)(b) to grant "other temporary relief" to a party, pending a decision of the Constitutional Court on the invalidity of the President's conduct, and the other temporary relief necessarily includes the relief envisaged in section 18. Fourthly, if the relevant orders still have to be confirmed by the Constitutional Court, they are interim in nature and are not final in effect and, therefore, these orders fall to be dealt with as interlocutory orders under section 18(2). As such, the relevant orders are not suspended by the application for leave to appeal or an appeal and take effect immediately unless an aggrieved party applies in terms of section 18(3) to suspend the orders.

- [43] The applicant submitted that section 18 of the Superior Court's Act applies and that she has discharged the heavy onus imposed by section 18 before leave to execute may be granted. These statutory requirements are exceptional circumstances, irreparable harm on the part of the victorious party, and no irreparable harm on the part of the losing party⁵. The applicant submits that she also satisfied the additional requirement of prospects of success⁶.

⁵ *Knoop NO v Gupta (Execution)* 2021 (3) SA 135 (SCA).

⁶ See, *Minister of Social Development Cape v Justice Alliance of South Africa* [2016] ZAWCHC 34 (1 April 2016).

[44] The supporting respondents aligned themselves with the applicant's submission that the applicable orders must be viewed as self-standing orders and must be interpreted disjunctively. They submitted that this Court declared the President's decision to suspend the applicant invalid as required in section 172(1)(a) of the Constitution. This part of the declaration of invalidity is subject to confirmation by the Constitutional Court. However, this court then limited the order of invalidity to operate prospectively and the 187.6 order was granted as a just and equitable order in terms of section 172(1)(b). They contended that the 187.6 order is not an order of constitutional invalidity but it is a just and equitable interlocutory order granted in terms of section 172(1)(b) and is not suspended by an application for leave to appeal in terms of section 18 of the Act. Such an order, so it was argued, is not subject to confirmation because it is granted to mitigate the effects of an order of constitutional invalidity granted under section 172(1)(a) pending confirmation of that order by the Constitutional Court. If the 187.6 order is to be suspended pending confirmation by the Constitutional Court, this would defeat the purpose of the just and equitable order and entrenches the very unjust and iniquitous conduct that the order seeks to remedy.

[45] In the alternative, the supporting respondents argued that the 187.6 order constitutes "other temporary relief" envisaged in section 172(2)(b) of the Constitution which the court making the order of constitutional invalidity has a discretion to grant, even of its own accord, in order to mitigate the effects of the unconstitutional suspension of the applicant.

[46] In tandem with the applicant, the supporting respondents also submitted that because an order granted under section 172(2)(b) is a temporary order, it is not susceptible to section 18(1) of the Act. This order, by its nature, provides temporary relief to mitigate the effects of an order of invalidity pending the decision of the Constitutional Court and confirmation proceedings. An application for leave to appeal, therefore, does not suspend an order granted under section 172(1)(b), alternatively section 172(2)(b) of the Constitution, on the basis that such orders are interlocutory and, therefore, fall within the ambit of section 18(2) of the Act.

[47] The supporting respondents further contended that even if the court was not in agreement with the aforesaid submissions, it did not follow that section 18 of the Act did not apply. This section applies to a decision which is the subject of an application for leave to appeal or of an appeal. In this matter, both the DA and the President lodged appeals in terms of section 172(2)(d) of the Constitution. According to the applicant, the word "appeal" in section 18 is not qualified or restricted to exclude a section 172(2)(d) appeal. Section 18 is, therefore, applicable to the present situation.

[48] According to the DA, this Court declared the President's decision to be invalid because it was contrary to the constitutional principle of legality and section 96(2)(b) of the Constitution. The DA submits that section 18 of the Act cannot be employed to enforce and execute the judgment of this Court. Because the order of invalidity concerns the conduct of the President, the judgment must be confirmed

by the Constitutional Court in terms of section 172(2(a)) read with section 167(5) of the Constitution. Until such time as the Constitutional Court has pronounced on this issue, the Order has no force or effect and, accordingly, the court has no jurisdiction to grant the relief sought by the applicant.

[49] The DA submitted that, in any event, even if the enforcement mechanism expressed in section 18 of the Supreme Courts Act was theoretically available to the applicant, she has failed to meet the jurisdictional requirements that are necessary for the immediate enforcement and execution of the judgment. There are no exceptional circumstances that warrant the departure from the default position in relation to the ordinary effect of the appeal processes that the full court's order is suspended. On the contrary, so it was argued, there are several courts which have previously, in circumstances similar to that of the applicant, held that there are exceptional circumstances to in fact justify the enforcement of suspension pending the appeal⁷. Furthermore, the applicant will suffer no irreparable harm if the judgment is not enforced. On the other hand, the DA and the public interest will suffer irreparable harm if this court's judgment is enforced.

[50] The President's submissions were aligned with the arguments advanced by the DA. To the extent that there were variations in their submissions, it was more a matter of emphasis rather than any difference of substance.

⁷ See, for example, *Democratic Alliance v South African Broadcasting Corporation SOC Ltd & Others* 1All SA 530 (WCC), and *Ntsemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA).

DISCUSSION

[51] The framework for the hierarchy and jurisdiction of courts in South Africa is prescribed in Chapter 8 of the Constitution. In terms of the applicable legislative scheme, the Constitutional Court occupies a special place in this framework. It is the highest court of the Republic and the ultimate guardian of the Constitution and its values⁸.

[52] In *Pharmaceutical Manufacturers Association of South Africa*⁹, the Constitutional Court commented on section 172(2)(a) of the Constitution and noted that: *"The section is concerned with the law-making acts of the legislatures at the two highest levels, and the conduct of the President who, as head of State and the head of the Executive, is the highest functionary within the State. The use of the words "any conduct" of the President shows that the section is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State. That purpose would be defeated if an issue concerning the legality of conduct of the President, which raises a constitutional issue of considerable importance, could be characterised as not falling within*

⁸ Section 167(3)(a) of the Constitution. See also, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others – Judgment on recusal application 1999 (4) SA 147 (CC)* at para 72.

⁹ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)* at para 56.

s172(2)(a), and thereby removed from the controlling power of this Court under that section".

[53] The Constitutional Court has repeatedly confirmed that its special role is necessary to preserve the comity between the judicial branch and the executive and legislative branches of government¹⁰.

[54] The Constitutional Court in *Von Abo*¹¹ noted that sections 167(5) and 172(2)(a) of the Constitution serve separate but complimentary purposes. Section 172(2)(a) confers constitutional jurisdiction on the Supreme Court of Appeal ("SCA") and the High Court subject to the express oversight of the Constitutional Court in relation to orders on the constitutional validity of national and provincial legislation and the conduct of the President. On the other hand, section 165(5) delineates the power of the Constitutional Court in relation to the same class of orders of constitutional invalidity made by the SCA and the High Court. Both provisions serve the vital purpose of ensuring that orders of invalidity directed at the appropriate class of the President's conduct have no force unless confirmed by the Constitutional Court.

[55] It follows that the Constitutional Court makes the final decision whether the conduct of the President is unconstitutional. No order to this effect by any other court has any force until the Constitutional Court has pronounced on the issue. In other

¹⁰ See, for example, *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 586 (CC), and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others – Judgment on recusal application* *op cit*.

¹¹ *Von Abo v President of Republic of South Africa* 2009 (5) SA 345 (CC) at para 31.

words, a High Court order declaring the conduct of the President to be inconsistent with the Constitution has to be confirmed before it can be of any force or effect. As the Constitutional Court stated in *Sibiya*, such an order is inchoate – it is a valid order but has no effect¹².

[56] Section 172(2)(c) of the Constitution further requires national legislation to provide for the referral of an order of constitutional invalidity to the Constitutional Court. The Superior Courts Act and the Constitutional Court's Rules provide the procedure and mechanism for doing so.

[56.1] Section 15(1)(a) of the Superior Courts Act provides that whenever the High Court "*declares ... conduct of the President invalid as contemplated in section 172(2)(a) of the Constitution, that court must, in accordance with the rules, refer the order of constitutional invalidity to the Constitutional Court for confirmation*".

[56.2] That must be read with Rule 16(1) of the Constitutional Court's Rules which provides: "*The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order.*"

¹² *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* 2005 (5) SA 315 (CC) at para [43].

[56.3] The Registrar of the Court, therefore, has an obligation to refer the matter for confirmation, independent of any action that any of the parties may take. Obviously, the Court will have to direct the Registrar to refer the matter.

[57] The fate of this application hinges on the interpretation of the judgment. The basic principles applicable to construing documents also apply to the construction of a Court's judgment or order.¹³ As to the proper approach in this regard, the Constitutional Court in *Parsons*¹⁴ stated that *"the starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or the order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention"*.

[58] In *Capitec Bank Holdings Ltd and Another*¹⁵, the SCA quoted with approval its earlier judgment in *Natal Joint Municipal Pension Fund*¹⁶ and reiterated that when interpreting a contract, the language used, the context in which it is used, and the purpose of the provision should be taken into consideration. In *casu*, Unterhalter AJA further stated: *"Most contracts, and particularly commercial*

¹³ *HLB International (South Africa) v MWRK Accountants and Consultants* (113/2021)[2022] ZASCA 52 (12 April 2022).

¹⁴ *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29.

¹⁵ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA).

¹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

*contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with a text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a license to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text*¹⁷. This comment is apposite to the type of iterative process engaged in by a court when crafting its judgment and the interpretive exercise that must be engaged in when considering the judgment.

[59] If on a reading of the judgment or order as a whole, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, or qualify, or supplement it¹⁸.

[60] As noted, the judgment is a consequence of the Part B proceedings instituted by the applicant. In paragraph 1 of the judgment, the court noted what the application was all about and stated in this regard:

"[1] The applicant applies to this court in terms of the provisions of section 172(1) of the Constitution for orders declaring certain conduct and/or decisions ("the impugned conduct or decisions") of the first, second and third respondents to be irrational, unconstitutional and invalid, as well as for consequential relief of a just and equitable remedy."

¹⁷ *Capitec Bank Holdings Ltd and Another* *ibid* para [51]

¹⁸ *Department of Transport v Tasima (Pty) Ltd* 2018 JDR 1122 (CC) at para [43].

[61] In so far as the impugned conduct or decision of the President is concerned, paragraph 4 of the judgment records that:

"[4] The impugned conduct and/or decisions in respect of the (the President) relate to his decision to suspend the applicant as well as the preliminary steps he took leading up to the suspension."

[62] The parties filed a Joint Practice Note prior to the hearing in which they listed the issues to be determined by this Court. In so far as the President is concerned, the issues to be determined as agreed by the parties is reflected in paragraph 35.6 of the judgment which reads:

"35.6 Whether the impugned conduct of the President ought to be declared to be irrational and/or inconsistent with the Constitution in terms of section 172(1)(a) of the Constitution because:

35.6.1 it was premature and/or ultra vires as the proceedings envisaged in section 194(3)(a) of the Constitution had not started as at 17 March 2022, 9 June 2022, or at all;

35.6.2 it was tainted by actual or reasonably apprehended conflicts of interests emanating out of six different and identified investigations;

35.6.3 of alleged breaches of section 96 of the Constitution,”

- [63] Paragraph 35.7 of the judgment also records that this court was to determine “*the just and equitable remedies that ought to be granted in terms of section 172(1)(b) of the Constitution.*”
- [64] The question that arises is whether the President’s decision to suspend the Public Protector can properly be characterised as “conduct of the President” under sections 172(2)(a) and 167(5) of the Constitution. The applicant has sought to draw a distinction between the decision and conduct and submits that it is only conduct and not decisions that fall to be referred to the Constitutional Court for confirmation. No authority was provided for this submission, which is not surprising.
- [65] The Constitutional Court in a number of instances has characterised a “decision” of the President as constituting “conduct” of the President, the invalidity of which required confirmation by the Constitutional Court. Thus, for example, in *Democratic Alliance*¹⁹, the Constitutional Court held that the decision of the SCA that the President’s decision to appoint the National Director of Public Prosecutions was invalid, was “conduct of a President” subject to confirmation under section 172(2)(a).

¹⁹ *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) at para 3. See also *Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC) at para 4, *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC), and *Association of Regional Magistrates of Southern Africa v The President of the Republic of South Africa* *op cit*.

[66] The contention by the applicant that the declaration of the President's suspension of the applicant as being unlawful is rooted in the common law and does not fall under the rubric of "conduct of the President" in terms of section 172(2)(a) of the Constitution, misstates the law and is a gross mis-characterisation of the reasons underpinning the court's finding in this regard. The suspension of the applicant was based on the exercise of a constitutional duty to consider the suspension of the applicant once the section 194 (or impeachment) inquiry commences. In other words, the authority to suspend the applicant is granted to the President in terms of a constitutional provision (section 194(3)(a)) and when he suspended the applicant, the President was exercising a public power conferred on him by the Constitution.

[67] As the DA correctly pointed out, the court's finding is based on the principle of legality and the President's breach of a constitutional duty not to involve himself in a decision where there may be a conflict of interest. This is made abundantly clear in paragraph 161 of the judgment which bears repeating:

"[161] More importantly, the President as a servant of the Constitution, is under an obligation to obey its commands. He is enjoined to uphold, defend, and respect the Constitution. The President had a duty to exercise his public power within the parameters of the law. It is trite that the exercise of public power must comply with the Constitution and the doctrine of legality. To this end, we share the views expressed by the Full Court, where the court noted

that the principle of legality, being an incident of the rule of law, dictates that those who exercise public power, including the President, must comply with the law. The Full Court noted that the role of the rule of law as a form of constitutional control on the exercise of public power was given expression in Affordable Medicines Trust and another v Minister of Health and another, where Ncgobo CJ stated:

"[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundations for the control of public power." (footnotes omitted)

- [68] Given the forgoing comments and analysis of the judgment, there cannot be any doubt that what this Court was dealing with in the Part B proceedings was in the nature of a constitutional matter. Having decided that the President's conduct was inconsistent with the Constitution, the court was obliged to declare such conduct invalid. This is reflected in the 187.5 order. Having made a declaration of invalidity,

the court went on further to make a just and equitable order in terms of section 172(1)(b) of the Constitution as it was quite entitled, but not obliged, to do. This is reflected in the 187.6 order: indeed, the parties had agreed that the just and equitable relief to be granted was an issue to be determined by this court.

[69] Given the remit of the issues to be determined by this court, the order of the court is a composite one and the orders granted in respect of the President must be interpreted conjunctively rather than as stand-alone orders as contended for by both the applicant and the supporting respondents. This court was requested to determine a constitutional matter involving the President's conduct. Once it made a pronouncement on this issue, it then made a just and equitable order setting aside the suspension but limited its retrospective effect. The court's reasoning in respect of the just and equitable remedy granted is reflected in paragraphs 172 to 175 of the judgment. In essence, the court decided that the suspension should apply prospectively because if it was applied retrospectively, this would have no practical positive effect but would risk disrupting the affairs of the office of the Public Protector. It is as simple as that.

[70] Even if the applicant did not request an order of just and equitable relief, once the court decided to set-aside the suspension, it may well have been obliged to indicate whether the order of suspension should apply retrospectively or

prospectively. As the Constitutional Court noted in ***National Coalition for Gay and Lesbian Equality***²⁰:

"[87] ...All courts competent to make declarations of constitutional validity have the power to make an appropriate order under s 172(1)(b)(i) if such order, in the circumstances of a particular case, is 'just or equitable'. This was in fact so held in S v Ntsele. The real issue is whether, in the circumstances of this case, an order limiting the retrospectivity of the declaration of invalidity would indeed be just and equitable, on a proper construction of that concept in the context of the section and the Constitution as a whole.

[88] To the extent that a Court of first instance has this power, such Court must grapple with its exercise. This is necessary because in a given case it might be necessary to receive evidence in order to decide whether, and in what manner, such power should be exercised. It is essential that the Court of first instance receive and if necessary adjudicate on such evidence, and not a Court of appeal or this Court on confirmation. The importance of following such a procedure has been stressed by the Court in similar contexts on a number of occasions." (footnotes omitted)

²⁰ ***National Coalition for Gay and Lesbian Equality v Minister of Justice*** 1999 (1) SA 6 (CC) at para 87-88.

[71] Thus, when the court stated in paragraph 187.6 of the judgment that the order was to apply from the date of "this judgment", all it meant was that the judgment would not apply retrospectively. The court's reasoning in this regard would then be before the Constitutional Court when the latter court considers the confirmation of this judgment.

[72] The just and equitable order (the 187.6 order) was not intended to provide "temporary relief" in terms of section 172(2)(b) as contended by both the applicant and the supporting respondents. Nowhere in the judgment does the issue of temporary relief arise; this is not surprising as no such relief was requested and no argument was presented to that effect.

[73] As noted, the relevant orders are not self-standing and do not exist separately and independent of each other. The section 187.6 order is ancillary to, and a consequence of, the section 187.5 order. In any event, even if the orders were stand-alone orders and the order granting just and equitable relief was not a consequential or an ancillary order, both orders still have to be referred for confirmation. This was made clear by the Constitutional Court in *Dawood*²¹ when it stated that:

"It is not only the direct order of unconstitutionality itself that must be

²¹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para [18] ("*Dawood*").

confirmed but all the orders made by the High Court that flowed from that finding about unconstitutionality. If this court were to find that the High Court's conclusion that a section 25(9)(b) (of the Aliens Control Act 96 of 1999) is inconsistent with the Constitution is incorrect, none of the orders made consequent upon that finding would stand."

[74] Since the Constitutional Court makes the final decision whether or not the conduct of the President is constitutional, it follows that this Court's order declaring the President's decision to be inconsistent with the Constitution has to be confirmed before it can be of any force or effect. The judgment, while valid, is inchoate and has no effect. Of course, the judgment had not yet been referred to the Constitutional Court when this application was brought. We refer further to this issue later in this judgment.

[75] The judgment cannot be suspended. Nor can it be operationalised or executed simply because there is nothing that can operate or upon which execution can be levied²². The relevant orders have not been confirmed and, irrespective of the wording used, there is nothing that can be suspended. The judgment has no independent existence but is conditional upon confirmation by the Constitutional Court. This being the case, on a purely textual basis, section 18 of the Superior Courts Act does not apply.

²² See the comments of Harms JA in a similar context in *MV Snow Delta: Serva Ship LTD v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) at para 752 A-B.

[76] Section 18(1) of the Superior Courts Act suspends the operation and *execution* of a decision that is the subject of an appeal. The term "execution" has been held to mean the "carrying out" or the "giving effect" to the judgment in a manner provided by law such as by a specific performance sequestration, and the ejection from premises²³. "Execution" is the process for enforcing the judgment and it is only available when the claim or *l/s* has been judicially resolved²⁴. Section 18, therefore, contemplates a binding decision²⁵. The default position is that the execution of a binding judgment is suspended pending the decision of the application for leave to appeal or appeal.

[77] That section 18(1) of the Superior Courts Act cannot apply to a judgment that is of no force or effect is a logical consequence of a textual interpretation of the aforesaid section. The wording of section 18(1) of the Act signifies that in the absence of an application for leave to appeal or an appeal, the judgment in question is not suspended and is in fact deemed final. The noting of an appeal suspends the execution of a judgment appealed against which logically means that in the absence of such an appeal, the judgment is not suspended and is in fact deemed executable and, thus, final. This means that if section 18(1) applied to an order in terms of section 172(2)(a) of the Constitution that required confirmation by the Constitutional Court, and if no appeal is noted or lodged, such an order will have immediate effect. This conclusion flies in the face of the wealth of

²³ *Reid and Another Godart and Another* 1938 AD 511.

²⁴ Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa*, 5th edition, V2 by Cilliers, Loots and Nel.

²⁵ See, the comments of Navsa JA in *Ntlemenza v Helen Suzman Foundation and Another op. cit.*, para [25].

Constitutional Court authorities to the effect that a judgment that has to be referred to the Constitutional Court for confirmation has no force or effect until confirmed. The applicability of section 18(1) will also be destructive of, and undermine, the supervisory role of the Constitutional Court in matters dealing with Presidential conduct.

[78] Both the applicant and the supporting respondents invoked section 18 of the Superior Courts Act and, in this regard, made much of the fact that the DA and the President lodged appeals and conditional applications for leave to appeal. It was submitted that this triggered section 18 of the said Act. Perhaps, not surprisingly, neither the applicant nor the supporting respondents could offer any relevant legal authority to support this submission. Indeed, their submissions in this regard were long on sophistry but short on legal authority.

[79] During oral argument, Counsel for the applicant sought to rely on the judgment of Masuku AJ in the matter of *Uitzig*²⁶ in support of the submission that section 18 of the Act applies to all appeals of decisions and orders regardless of the nature of the matter, the court from which the judgment emanates, or the court in which the appeal is lodged. However, *Uitzig* does not deal with the appeal of a judgment requiring confirmation by the Constitutional Court. *Uitzig* dealt with the issue of whether section 18(1) of the Superior Courts Act applied to all decisions and orders

²⁶ *Uitzig Secondary School Governing Body v MEC for Education, Western Cape* 2020 (4) SA 618 (WCC).

including those that had been unsuccessful in the court *a quo* and not only those that were granted.

[80] Section 172(2)(d) of the Constitution regulates the situation where an appeal relating to an order of constitutional invalidity is lodged. This section confers on any person with a sufficient interest an automatic right to appeal directly to the Constitutional Court in respect of an order of constitutional invalidity granted by a Court. Leave to appeal is not required as is the case with ordinary appeals lodged in terms of the Superior Courts Act²⁷. Indeed, section 16 of the Act, which applies to appeals generally, expressly states that this section is "(s)subject to section 15(1), the Constitution or any other law" (own emphasis).

[81] Accordingly, the fact that the DA and President lodged appeals is of no consequence to the referral by this court of the judgment to the Constitutional Court for confirmation. The referral is quite independent of any appeals that may be lodged. In *Dawood*²⁸, the Constitutional Court confirmed that notwithstanding the withdrawal of appeals, it was nevertheless, in terms of the constitutional scheme, bound to determine the order of invalidity. Once the matter is referred to the Constitutional Court, that court is obliged to determine the constitutionality of any order referred to it. In substance, the noting of an appeal in terms of s 172(2)(d) of the Constitution is merely an indication of the DA and the President of their intention to oppose the confirmation of the order of constitutional invalidity. Such

²⁷ See section 16 of the Superior Court's Act.

²⁸ Op. cit, para [18]

an appeal cannot have the effect of rendering final and binding a decision that is by operation of law not final and binding.

[82] This court has rejected the argument that the part of the order relating to just and equitable relief is a temporary order that fell to be dealt with in terms of section 172(2)(b) of the Constitution. A further related submission was made principally by the supporting respondents that the order relating to just and equitable relief is not suspended by noting an appeal or the filing of an application for leave to appeal because it is an order contemplated in section 18(2) of the Superior Courts Act as it is in the nature of an interlocutory order. This being so, it was argued, the default position in terms of section 18(2) applies. Such an order takes effect immediately and is not capable of being suspended pending the decision on the application for leave to appeal or an appeal, unless an application is made in terms of section 18(3) that such an order be stayed pending the application for leave to appeal or an appeal. This submission is without substance.

[83] Quite simply, section 18(2) of the Superior Courts Act cannot apply since the order relating to just and equitable relief (that is, the 187.6 order) was not intended to be a temporary or interlocutory order. As to what constitutes an interlocutory order, Corbett JA in ***South Cape Corp (Pty) Ltd***²⁹ stated the following:

"In a wide and general sense the term 'interlocutory' refers to all orders

²⁹ ***South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd*** 1997 (3) SA 534 (AD) at 549G.

pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation."

- [84] Having regard to what is considered to be an interlocutory order, the judgment is anything but interlocutory. It is a valid judgment on all the issues in dispute *albeit* that the judgment is of no force and effect and is conditional on confirmation by the Constitutional Court.
- [85] Given the conclusion reached, especially in connection with the non-applicability of section 18 of the Superior Courts Act to the matter at hand, it is not necessary to consider the merits of the application and determine if the applicant has discharged the onus for the grant of an order for the immediate operation and enforcement of the judgment.
- [86] In terms of rule 16 of the rules of the Constitutional Court, the Registrar of the Court which made the order of constitutional invalidity must, within 15 days of such order, lodge with the Registrar of the Constitutional Court a copy of such order. In terms of section 15(1) of the Superior Courts Act, it is the court that must, in accordance with the rules, refer the order of constitutional validity to the Constitutional Court for confirmation. The referral of a judgment to the Constitutional Court for confirmation thus appears to be an administrative task performed by the Registrar of the relevant court on the direction of the Court whose judgment is subject to confirmation.

[87] There is no injunction making it obligatory for a court to include in its order a direction to the Registrar to refer a judgment to the Constitutional Court for confirmation. One would normally expect that, having identified the issues to be determined, the parties will be aware when a dispute entails a declaration of constitutional invalidity that requires confirmation by the Constitutional Court. But, perhaps, this places too much reliance on the parties to apply their common sense. It may, therefore, be a salutary practice to include an order in all such matters directing the Registrar of the court to refer the matter to the Constitutional Court for confirmation. Such an approach may well limit the issues in dispute. In this case, however, given the fractious nature of the relationship between the parties, it is unlikely to have deterred the resultant legal skirmish – especially, if regard is had to the manner in which the applicant framed her case.

[88] The judgment of this court was delivered on Friday, 9 September 2022 at approximately 14h30. In the ordinary course, the court would have directed the Registrar of the High Court to refer this matter to the Constitutional Court after the intervening weekend. As it turned out, less than an hour after the Court had granted its judgment, there was an exchange of correspondence which initiated a flurry of activity that eventually culminated in the hearing of this application. This court, thus, had no option but to deal with the application and the ensuing litigation.

[89] In summary, the court concludes that:

- [89.1] The decision of the President to suspend the Public Protector amounts to "conduct of the President" for the purposes of section 172(2) of the Constitution;
- [89.2] The declaration of constitutional invalidity by this court in relation to the President's conduct had to be referred to the Constitutional Court for confirmation, and the referral is independent of any steps taken by any of the parties;
- [89.3] Paragraphs 187.5 and 187.6 of the judgment are composite, not self-standing, orders, and must be referred to the Constitutional Court;
- [89.4] Section 172(2)(b) of the Constitution has no application to the judgment; and
- [89.5] Section 18 of the Superior Courts Act has no application to this matter.

COSTS

- [90] The applicant sought costs on a punitive scale against the DA and the President in his personal capacity. A similar order was sought by the DA against the applicant in her personal capacity. In his answering affidavit, the President sought an order for costs including the costs of three counsel. It is unclear if the cost order sought was against the applicant in her personal capacity. In any event, in the Joint Practice Note agreed to by all the parties, no costs order is sought by the President.

[91] In this matter, the DA has been substantially successful and this Court does not see any reason why costs should not follow the course. We do not believe, however, that the applicant should be mulct with costs in her personal capacity. The applicant and her legal representatives laboured under an erroneous impression that the 187.6 order was operative from 9 September 2022. However, it does not appear that the application was pursued recklessly or frivolously or vexatiously or in bad faith. Indeed, it appears that the DA and the President, too, may well have harboured some degree of uncertainty on the proper interpretation of the judgment. Thus, the DA, despite having raised the issue that the relevant orders required confirmation by the Constitutional Court and that it had an automatic right of appeal in terms of section 172(2)(d) of the Constitution, still considered it necessary to file an application for leave to appeal directly to the Constitutional Court in the event that it was wrong that it was entitled to an automatic appeal. The President filed a similar application to appeal directly to the Constitutional Court, going even further by filing a conditional appeal to the SCA.

[92] Unfortunately, this matter was unnecessarily burdened by voluminous and irrelevant documentation submitted as part of the record. The DA conceded that a significant portion of its answering affidavit (343 pages) was filed in error. There is no reason why the DA should gain any benefit from its own burdensome conduct. In the circumstances, the DA cannot recover any costs associated with the delivery of the irrelevant and unnecessary documentation filed as part of the record.

ORDER

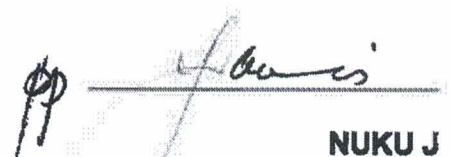
[93] In the result, the following order is granted:

[93.1] The application to intervene by the Deputy Public Protector is dismissed with no order as to costs.

[93.2] The applicant's application is dismissed.

[93.3] The Public Protector is directed to pay the costs of the DA and such costs are to include the costs of two counsel where so employed.

[93.4] The costs awarded to the DA in terms of paragraph [93.3] above shall exclude any and all costs associated with the delivery of the documents attached as pages 290-382, pages 425-530, and pages 565-711 to its answering affidavit.



NUKU J



FRANCIS J



LEKHULENI J

APPEARANCES

For the Applicant	Advocate D Mpofu, SC Advocate B Shabalala Advocate H Mathlape
Instructed by	Seanego Attorneys Inc (ref: TNS/PUB1/0028)
For the 1 st & 2 nd Respondents	Advocate A Breitenbach, SC Advocate U Naidoo Advocate A Toefy
Instructed by	Office of the State Attorney, Cape Town (ref: Mr L Manuel)
For the 3 rd Respondent	Advocate G Budlender SC Advocate K Pillay, SC Advocate M Adhikari Advocate N Luthuli
Instructed by	Office of the State Attorney, Cape Town (ref: Mr M Owen)
For the 5 th Respondent	Advocate S Budlender, SC Advocate M Bishop
Instructed by	Minde Shapiro & Smith Attorneys (ref: Ms E Jonker)
For the 10 th & 11 th Respondents	Advocate V Ngalwana SC Advocate T Masuku, SC Advocate M Simeiane
Instructed by	Ntanga Kkuhlu Inc (ref: Mr Ntanga/U0007/22)