



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 66063/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

28/05/2021

DATE

SIGNATURE

In the matter between:

MAWETHU CAWE
JABULILE NKOSI
TSHEGOFATSO MALOKA
XOLA STOCK
LINDA CECIL NENE
LUNGELWA SHANDU

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant

and

PUBLIC PROTECTOR OF THE REPUBLIC OF
SOUTH AFRICA

First Respondent

MINISTER OF TELECOMMUNICATIONS
AND POSTAL SERVICES

Second Respondent

JUDGMENT

MOLEFE J

[1] The applicants apply for an order reviewing and setting aside the first respondent's final report dated 28 August 2018¹, alternatively, reviewing and setting aside the findings made in paragraph 6 of the report, the remedial action imposed in paragraph 7 of the report, and the monitoring in paragraph 8 of the report. The review is premised on procedural unfairness, irrationality and illegality of the first respondent's investigation. The applicants further seek a punitive costs order against the first respondent.

[2] The application is opposed by the first respondent. The second respondent has served a notice to abide the Court's decision, and the third respondent is not opposing the application.

FACTUAL MATRIX

[3] The Board of Directors of Universal Service and Access Agency of South Africa ("USAASA") was appointed by the Minister of Telecommunications and Postal Service ('the second respondent') for a 3 (three) year term. The applicants were all members of the Board until they were removed by the second respondent on 30 August 2018. The third respondent was appointed as the Chief Executive Officer of USAASA on 23

¹ Report No 13 of 2018/2019.

May 2016 for a fixed 3 (three) year term. The appointment was made in terms of section 82A of the Electronic Communications Act.²

[4] On 11 June 2017, the Board adopted a resolution placing the third respondent on suspension. However, the suspension was never implemented due to the intervention by the Minister. The Board then appointed a three-member sub-committee to identify issues in relation to the conduct and performance of the third respondent on all areas on which the Board had taken resolutions. A preliminary report by the sub-committee was adopted, resulting in a Board resolution to institute disciplinary proceedings against the third respondent.

[5] On 1 March 2018, the Board adopted a resolution to place the third respondent on suspension with full pay. The third respondent filed an urgent application in the Labour Court challenging his suspension, and also sought an order to interdict the disciplinary inquiry which was to commence on 25 April 2018 as an occupational detriment. On 24 April 2018, the Labour Court struck the application from the roll with costs for lack of urgency.

[6] The disciplinary inquiry chaired by an independent chairperson commenced on 25 April 2018, and the third respondent was charged with serious acts of misconduct and financial irregularities. During the inquiry, the third respondent failed to attend the hearing and informed the chairperson that he was ill and had been hospitalised. The inquiry was postponed to 31 May and 1 June 2018 in order to accommodate the third respondent, and these dates were communicated to him.

² Act 36 of 2005.

[7] On or about 25 May 2018, the third respondent advised the chairperson of the disciplinary hearing that he had lodged a protected disclosure complaint with the Public Protector (the first respondent), and as a result, the disciplinary hearing should be postponed. The request for a postponement was declined, and the disciplinary hearing proceeded in the third respondent's absence.

[8] The litigation between the applicants and the Public Protector has its genesis in the third respondent's complaint, which he lodged with the Public Protector on 15 May 2018. The issues contained in the complaint are *inter alia* that –

8.1 the appointment and remuneration of the Company Secretary by the USAASA Board was in violation of the provisions of the Companies Act, the USAASA Recruitment and Selection Policy, the Electronic Communications Act 36 of 2005 ('the ECA'), the Public Finance Management Act 1 of 1999 ('the PFMA') and other relevant legislation and prescripts that regulate the appointment and remuneration of the company secretary of USAASA; and

8.2 the corrupt and undue interference by the applicants against attempts by third respondent to legally set aside the continuation of the unlawful and irregular process embarked upon regarding the production and manufacturing of Set Top Boxes in terms of the Broadcasting Digital Migration.

[9] On 24 May 2018, the Public Protector issued a notice in terms of section 8(1) of the Protected Disclosure Act³, and advised the applicants that she had accepted the third respondent's complaints and classified the information disclosed as a

³ Act 26 of 2000

'Protected Disclosure'. In that notice the Public Protector requested the applicants not to subject the third respondent to occupational detriment.⁴

[10] On 25 May 2018, the Public Protector addressed a letter to the applicants in which she requested that the Board should suspend all further disciplinary processes against the third respondent, pending the outcome of the Public Protector's investigation. A legal opinion was obtained by the applicants from a Senior Counsel, who advised the USAASA board that the first respondent had no authority to request the halting of the disciplinary inquiry while an application on the same facts was still pending before the Labour Court.

[11] On 30 May 2018, the third respondent sent an email to the chairperson of the disciplinary inquiry, requesting a postponement due to ill health, and Mr Abongile Madiba of the Public Protector's office was copied in the email. This request was also denied by the chairperson of the inquiry and the disciplinary hearing was completed in the third respondent's absence and he was subsequently dismissed.

RELEVANT LEGAL PRINCIPLES

The Protected Disclosure Act ('the Act')

[12] The Act is designed to protect whistle blowers who make protected disclosures⁵ against occupational detriments such as victimisation and dismissal.

⁴ Supplementary Answering Affidavit, Annexure 'SAA1' pages 724-726.

⁵ Definition of "disclosure" is any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following: (a) that a criminal offence has been committed, is being committed or is likely to be committed;

The object of this Act are –

- (a) to protect an employer, whether in a private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
- (b) to provide for certain remedies in connection with any occupational detriments suffered on account of having made a protected disclosure; and
- (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

[13] Section 3 of the Act provides that no employee may be subjected to any occupational detriment by his or her employer on account or partly on account of having made a protected disclosure.

[14] The office of the Public Protector was created under section 181 of the Constitution⁶ to strengthen constitutional democracy in the Republic. Section 181(2) requires the Public Protector to be independent and subject only to the Constitution and the law, and to be impartial. The Public Protector is charged with rooting out improper conduct in Government for the public benefit. The institution of the Public Protector was ultimately created to serve the people, and to protect their interests against those in power, who might be tempted to abuse it for nefarious purposes.⁷

(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which that person is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) . . . (e) . . . (f) . . . (g).

⁶ The Constitution of the Republic of South Africa, 1996.

⁷ *Democratic Alliance v Public Protector; Council of the South African Constitution v Public Protector* 2019 (3) All SA 127 (GP) para 20.

[15] Under section 182(1) of the Constitution, the Public Protector has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct, and to take appropriate remedial action. The chapter nine institutions must exercise their powers and perform their functions without fear, favour or prejudice, and obliges all organs of State to assist these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.⁸

[16] The powers of the Public Protector are regulated by the Public Protector Act,⁹ and she has a duty to act lawfully. In *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector*¹⁰ it was held that:

"[30] The PP must, like any public functionary, exercise her powers and functions lawfully, in compliance with her constitutional and statutory mandate and duties. The proper and effective performance of the functions of the PP is of particular importance, given her constitutional mandate and the extraordinary powers that are vested in her office. When the PP fails to discharge her mandate and duties, the strength of South Africa's constitutional democracy is inevitably comprised, and the public is left without the assistance of their constitutionally created guardian".

[17] In *Economic Freedom Fighters v Speaker, National Assembly & others*¹¹ it was stated that the Public Protector is:

⁸ Sec 181(2) and (3) of the Constitution.

⁹ Act 23 of 1994

¹⁰ *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 (3) All SA 127 (GP), para 30.

¹¹ *Economic Freedom Fighters v Speaker, National Assembly & others* 2016 (3) SA 580 CC, para 52.

"one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance".

[18] Section 7 of the Public Protector Act describes the investigative powers of the Public Protector, which includes the power to subpoena any person to give evidence on affidavit or in person, to produce documents, or to appear as a witness.

THE PROCEDURAL UNFAIR INVESTIGATION

[19] If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, and that such implication may be to the detriment of that person, or that an adverse finding pertaining to that person may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.¹²

[20] It is evident that the Public Protector Act provides for the right to be heard. The court in *Hlophe v Constitutional Court of South Africa & others*¹³ stated that:

"The foundation of the right to be heard is not only constitutional; it is also anchored in the common law principle of *audi alteram partem* that recognises as part of the rules of natural justice, the right to every person to be consulted or heard before a decision or step is taken that affects or may affect such person".

¹² Section 7(9) of the Public Protector Act.

¹³ *Hlophe v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289 (25 September 2008) para 20.

[21] On 24 May 2018, the Public Protector issued a notice in terms of section 8(1) of the Act, purporting to be initiating an investigation into the allegations of maladministration, corruption, improper conduct and abuse of power by the Board of Directors of USAASA, lodged by the third respondent.¹⁴ The investigation was into:

"(2.1) The irregular appointment and remuneration of the Company Secretary in terms of the provisions of the Companies Act, USAASA staffing policy, the Electronic Communication Act, the Public Finance Management Act, as well as other relevant legislations and prescripts regulating the appointment and a remuneration of a company secretary and in this instance, specifically for USAASA, and

(2.2) The ostensible corrupt and undue interference by the Board of USAASA in attempts by the CEO to legally set aside a continuation with the unlawful and irregular process embarked upon regarding the Broadcasting Digital Migration, in particular the production and manufacturing of set top boxes, a matter which is of national importance resulting in the Board of Directors unconscionably suspending the CEO from duty".

[22] This was then followed by a section 7(9)(a) notice of the Public Protector Act on 15 June 2019, whereby the applicants were given 5 (five) days to respond to those aspects of the evidence that may implicate them in the investigation.

[23] In response to the section 7(9) notice the applicants sent a letter to the Public Protector on 20 June 2018, requesting her to remove Mr Madiba from the investigation as he had taken an interest in the matter and had shown his unfair bias. The contents of Mr Madiba's email dated 31 May 2018 sent to the Board were:

"Dear Mam, I think this now constitutes contempt of the Public Protector which must be actionable as such. The notice was submitted to the Board and they know about the protected

¹⁴ Annexure "MC7", page 144

disclosure that was filed with the Public Protector. *Bayadelele* and nothing else. Perhaps Mr Namasisi can advise of an appropriate action to take against the entire Board".

[24] Counsel for the applicants submits that this statement is highly prejudicial and shows that the outcome of the investigation and the remedial action in the report have been pre-determined. Counsel argued that it was after Mr Madiba's email of 31 May 2018 above that on 15 June 2018 the Public Protector issued the section 7(9) notices with a request that the applicants should respond to the notices by 22 June 2018.

[25] Following the receipt of the section 7(9) notices, the applicants wrote a letter to the Public Protector informing her that her refusal to remove Mr Madiba from the investigation left them with no option but to approach the Court for an appropriate relief, including setting aside of her investigation as procedurally unfair and tainted with irrationality and illegality. The investigation was already complete and the Public Protector only published the final report which was sent to the applicants on 10 August 2018, on 5 February 2019.

[26] In *S v Roberts*,¹⁵ the Court stated that:

"A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fair, but that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused".

[27] The objective is to manifest that conduct of a fair investigation must be evident to the parties involved. Justice must not only be done, but must manifestly be seen to

¹⁵ *S v Roberts* 1999 (4) SA 915 (SCA) para 25.

be done.¹⁶ This implies that not only actual bias but also the reasonable perception of bias disqualifies the Public Protector or her officers from continuing to preside over the investigation. It is therefore enough that the applicants had a reasonable suspicion that Mr Madiba as the Chief Investigator might be biased. The Public Protector ought to have removed him.

[28] Contrary to the Public Protector's contention that the findings at that stage were only provisional "*based on the information and evidence obtained so far as well as the conduct of the Board. . .*", I agree with the applicants' submission that it was at this very stage of the investigation that the Public Protector violated the applicants' rights to be heard. Natural justice was implied because of the seriousness of the allegations and the potential damage to the applicants' reputation if they were not given an opportunity to be heard at the representation stage.¹⁷

[29] The Public Protector had a duty to afford the applicants an opportunity to reply to the complaints before a report was issued. In this regard the investigation was therefore procedurally unfair, and the report stands to be set aside.

DISCIPLINARY INQUIRY

[30] The Public Protector Act defines and expressly circumscribes the instances where the Public Protector may refuse or must refuse to investigate a complaint reported to her office.

Section 6(3) provides that:

¹⁶ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB256 at 259.

¹⁷ *Hlophe v Constitutional Court of South Africa & others*, para 70.

"(3) The Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is an officer or employee in the service of the State; or is a person to whom the provisions of the Public Service Act 1994 (Proclamation 103 of 1994) are applicable and has, in connection with such matter not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act, 1994; or prejudiced by conduct referred to in subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter".

The Public Protector may at any time (prior to, during or after an investigation), refer any matter which has a bearing on an investigation to the appropriate public body or authority.¹⁸

[31] In her letter dated 31 May 2018, the Public Protector requested the applicants to keep the disciplinary proceedings against the third respondent in abeyance for 7 days to give her time to investigate the third respondent's complaint. The applicants' submission is that they could not accede to this request because it was unlawful. When the third respondent lodged the said complaint with the Public Protector, he had already approached the Labour Court on the same allegations to uplift his suspension, and to interdict the applicants from proceeding with the disciplinary inquiry.¹⁹ The application was struck from the roll for lack of urgency.

[32] In a letter dated 30 May 2018, the applicants informed the Public Protector at the onset of her investigation that the matter of protected disclosure as alleged by the third respondent was still pending on the merits before the Labour Court, and that the third respondent had not exhausted his legal remedies as provided for in section

¹⁸ Section 6(4)(c) Public Protector Act.

¹⁹ Annexures "RH 10" and "RH 11".

6(3)(b).²⁰ The applicants' requested the Public Protector to not entertain the third respondent's complaint in this regard but she refused to oblige, despite the pending court process.

[33] The Public Protector's findings with regard to whether the applicants violated the provisions of the Act by refusing and/or frustrating and/or by failing to assist the Public Protector to investigate the protected disclosure lodged by the third respondent, and proceeding with a disciplinary inquiry against him despite having been notified of a complaint in terms of the Act, that was lodged with her against the applicants are detailed in her report.²¹ The Public Protector found that the applicants subjected the third respondent to occupational detriment on account of having made a protected disclosure which was in violation of section 3 of the Act.

[34] It is the applicants' submission that the Public Protector ought to have allowed the matter pending before the Labour Court to conclude instead of investigating the matter herself. The Labour Court had refused the third respondent's application to interdict the disciplinary proceedings but his application was *lis pendens* since the matter was still to be heard on the merits, and the application was not withdrawn.

[35] The Act affords an employee the right to approach any court having jurisdiction, including the Labour Court for appropriate relief or to pursue any other process allowed or prescribed by any law.²² It does not provide for an employee to elect one forum over the other or both. Consequently, the applicants were within their rights to continue with the disciplinary proceedings against the third respondent, and the Public

²⁰ Section 6(3)(b) of the Public Protector Act.

²¹ Report pages 87 to 89 paras 61-6.12

²² Section 4 of the Protected Disclosure Act.

Protector's finding that the applicants should have halted same is in my view unlawful and ought to be set aside.

THE APPOINTMENT OF THE COMPANY SECRETARY

[36] The interpretation and implementation of the provisions of section 83(5) of the Electronic Communications Act²³ (the ECA) is the source of the difference between the parties. The section 83 reads as follows:

"CEO and Staff of Agency

The Agency is under the direction and control of the CEO appointed by the Board. The CEO must employ a staff, including senior management and such other persons as may be necessary to assist him or her with the performance of the functions of the Agency;

2. . . .

3. . . .

4. . . .

5. The CEO must employ a staff, including senior management and such other persons as may be necessary to assist him or her with the performance of the functions of the Agency".

[37] The USAASA Delegation of Authority of September 2015 under the heading "Personnel Matters", provides for the appointment or dismissal of the prescribed officer i.e. Company Secretary and the Chief Financial Officer ("CFO") to be recommended by the CEO for the approval by the Board.²⁴

[38] Section 56(2)(c) of the Public Finance Management Act ("PFMA") states that the Board's delegation or instruction to the CEO in terms of section 56(1) of the same Act does not divest the Board of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty. The Board also has the

²³ Act 36 of 2005.

²⁴ Annexure "RH 15".

power under section 56(3) of the PFMA to confirm, vary or revoke any decision taken by the CEO as a result of a delegation or instruction in terms of subsection (1).

[39] In his complaint to the Public Protector, the third respondent made an allegation that by appointing the company secretary at a salary above the one advertised for the post, the applicants' committed an impropriety. This impropriety was also disclosed to the Auditor General and the Treasury.

[40] The application of section 83(5) of the ECA in relation to the appointment of a company secretary is qualified. Although the CEO may appoint the company secretary, this appointment remains subject to approval by the Board. The appointment of the company secretary is therefore the purview of the Board. In her report, the Public Protector was wrong in her reliance on section 83(5) of the ECA in respect of the appointment of a company secretary being the purview of the third respondent to the exclusion of the Board. In addition, the power to appoint a company secretary is a corporate governance matter.²⁵ The purpose of the King Report is to promote the highest standards of corporate governance in South Africa. The Code of Corporate Practices and Conduct contained in the King Report applies *inter alia*, to State-Owned Entities and agencies that fall under the PFMA, including the USAASA.

[41] In my view, the USAASA Board complied with the PFMA and the ECA which provide for and recognise the powers of the Board to control the affairs of the USAASA, and ensure compliance with its policies, and all the applicable legal prescripts. There was therefore nothing untoward in the Board's appointment of the company secretary,

²⁵ King Code IV report of 2016. "Annexure RH 16".

and the first respondent's finding in this regard was irrational and unlawful and should be set aside.

COMPANY SECRETARY'S REMUNERATION

[42] The Public Protector's finding is that the applicants contravened section 51(1)(b) and 51(1)(h) (ii) of the PFMA for non-compliance with the USAASA Recruitment and Selection Policy. Rule 17 of the policy reads:

"APPOINTMENT OF CANDIDATES ON REMUNERATION ABOVE MINIMUM NOTCH OF THE SALARY RANGE ENTRY (PERSONAL NOTCH)

17.1 If there is a need to recruit a competent employee with rare, critical or exceptional expertise and skills and such an employee cannot be recruited at the salary level indicated in the job weight, the CEO may authorise the granting of a salary above the minimum notch of the salary level as indicated by the job weight. This will depend on the circumstances of the candidate and the availability of funds. . ."

[43] The company secretary, Ms Motloung was earning in the region of R1.5 million at her previous employment, and the previous company secretary was earning R1.3 million. It is the applicants' submission that the appointment of Ms Motloung at the same salary level could not have been a deviation from the operational policies of the USAASA, as it was clearly in line with clause 5.1.9.3 of the Protocol, which provides that remuneration of directors should take into account the need to attract, incentivise and retain high quality skill, experience and expertise as well as loyalty and commitment to the SOE.²⁶

²⁶ Clause 5.1.9.3 of the Protocol provides that: "Any scheme employed in remunerating directors should take into account the need to attract, incentivise and retain high quality skill, experience and expertise as well as loyalty and commitment to the SOE".

[44] It is further the applicants' submission that they had authority to vary the recommendation of the third respondent and increase the company secretary's salary grade in terms of the Delegation of Authority, which also provides expressly that remuneration of EXCO members is made under the recommendation of the third respondent, and subject to the approval of the Board.

[45] In my opinion, the view held by the Public Protector that the company secretary is on the same level of employment as a senior manager and therefore a level 3 employment is wrong. The Protocol on Corporate Governance in the Public Sector reads at clause 5.1.4.4 that:

"The company secretary should provide a central source of guidance and advice to the Board and within the SOE as a whole on matters of business ethics and good governance. As a result, it is imperative that a company secretary's appointment be subject to the same "fit and proper test" to which a new director's appointment is subject. The company secretary's performance should also be appraised in the same manner as that for the directors of the SOE".

[46] It suffices therefore that any scheme employed in remunerating a company secretary should follow the provisions of 5.1.9.3 above.

[47] I am satisfied that the applicants' acted within their powers to remunerate the company secretary at an amount higher than was previously advertised for the post. They did not commit an irregular expenditure nor financial misconduct.²⁷ The Public Protector's finding against the applicants in this regard was irrational and should be set aside.

²⁷ Annexure "RH 19" letter from the AGSA dated 28 February 2018.

DISCLOSURE TO THE TREASURY AND THE AUDITOR GENERAL

[48] In her report, the Public Protector makes a finding that the third respondent was subjected to an occupational detriment in contravention of the Act by the applicants because he made a disclosure to the applicants, Treasury and the AGSA about the irregular appointment of the company secretary.

[49] It is the applicants' submission that the letters from the USAASA to the AGSA and Treasury were written pursuant to advice from the CFO, Mr Willie Olivier, who on 30 October 2017 took the initiative to apprise the third respondent of possible irregularities in the Board's approval of the company secretary's remuneration.²⁸ These letters were intended to seek advice and to report the matter to the AGSA as a matter of practice, as the appointment of the company secretary involved moneys in excess of one million rand (R1 million). By the third respondent's own admission, these letters emanated from his initiative to seek clarity on whether implementing the Board's decision to appoint a company secretary would not (i) attract an audit finding; (ii) not be non-complaint with policy; or (iii) not be deemed unlawful²⁹.

[50] Counsel for the Public Protector submitted that the applicants have failed to recognise that in fact the third respondent made the first disclosure to the applicants by writing a note by hand on the last page of Mr Olivier's submission wherein he stated that: *"I appeal to the Board to review in the light of the SIU, Salary desperations (sic) ECA, USAASA Polcny and need to avoid audit finding compromising labour relations and non-compliance with PFMA"*³⁰, which the applicants ignored. Counsel contends

²⁸ Annexure "RH22", page -

²⁹ Supplementary affidavit, Annexure "MD1"

³⁰ Answering Affidavit, Annexure "AA8" pages 610-618.

that the applicants, being the employer at the time, should have in terms of section 3B of the Act, commenced with an investigation into the matter or referred the disclosure to another body. Instead the applicants subjected the third respondent to occupational detriment in the form of his suspension and ensuing disciplinary inquiry.

[51] The letter dated 15 December 2017, from the third respondent to the applicants confirms that he notified the National Treasury and Auditor General of the issues related to the appointment of the company secretary. The letter to Treasury read as follows:

"the purpose of this letter is to seek advice from the National Treasury on the appointment of the Company Secretary at the Universal Service and Access Agency of South Africa (USAASA)

As the amount is above R1 000 000,00 (One million rand) it is being reported to the National Treasury and Auditor General of South African (AGSA)".

[52] Section 51(2) of the PFMA provides that:

"(2) If an accounting authority is unable to comply with any of the responsibilities determined for an authority in this Part, the accounting authority must promptly report the inability, together with reasons to the relevant executive authority and treasury".

[53] It is clear that the letter from the USAASA above was simply common governance practice which sought advice on whether the appointment of the company secretary resulted in non-compliance with applicable legislation and policies, and can by no means be regarded as protected disclosure by the Treasury and the AGSA. More importantly, the letter was not even written by the third respondent, but by the CFO of the USAASA.

[54] Furthermore, despite the CFO in a letter dated 24 October 2017 cautioning the third respondent on possible irregularities in remunerating the company secretary above level 13, the third respondent authorized a letter of appointment to the company secretary on 7 November 2017. I agree with the applicants' submission that these were not actions of someone concerned with impropriety. Consequently, the conclusion by the Public Protector's report that the third respondent's report to the AGSA and Treasury in such circumstances was protected disclosure is irrational and unlawful. The finding could not be further from the truth because the third respondent never made a protected disclosure to the Treasury and the AGSA.

REMEDIAL ACTION

[55] The issue regarding the powers of the Public Protector to take remedial action has come before our courts, and the courts have held that section 182(1)(c) of the Constitution empowers the Public Protector to determine the remedies and direct the implementation thereof in her pursuit of realising the constitutional purpose of her office. Based on a misguided believe that there was a protected disclosure, the Public Protector directs the following unprecedented form of remedial action in her report:

"Directing that the second respondent of Telecommunications and Postal Services take decisive and appropriate action against the Board, and the Board members should personally pay the costs of the litigation and the disciplinary inquiry effective from the date the first respondent informed the Board of the protected disclosure lodged with her, and further that an application be made to court for a declaration of the entire Board as delinquent directors;

Directing the Board to lift the third respondent's suspension; extend an apology to the third respondent for the manner in which the Board handled his complaint;

Directing the third respondent to recover from the Board members personally, the costs the USAASA incurred with regard to appointment and remuneration of the company secretary effective from the date the first respondent informed the Board of the protected disclosure lodged with her."³¹

[56] The Public Protector claims that her power and jurisdiction to investigate and to take appropriate remedial action justifies this extraordinary relief on the explicit premise that "*the Board violated the Protected Disclosure Act and defiant of the first respondent, which defiance is in violation of section 181(3) of the Constitution*". I have already found that the Public Protector had no powers to halt the disciplinary hearing. I have also noted that in her report she found that appointing and remunerating the company secretary above the level advertised did not constitute an irregular expenditure. However, she then contradicts herself in her findings and the remedial action.

[57] The Constitutional Court in *Economic Freedom Fighters*³² emphasized that although the Public Protector's powers to take appropriate remedial action is wide, it is certainly not unfettered. The remedial action is always open to judicial scrutiny. It is also not 'inflexible in its application but situational'. An appropriate remedial action in a particular case depends on the nature of the issues under investigation and the findings made. Remedial action is therefore context specific.

[58] In my view, the Public Protector's remedial action does not meet the criteria as set out in *Economic Freedom Fighters* supra. The remedial action is therefore improper and irrational and is set aside.

³¹ Report No 13 of 2018/2019, pages 62 and 64.

³² *Economic Freedom Fighters* para 84.

[59] The Public Protector's report is essentially premised on the basis that the disciplinary proceedings against the third respondent on 31 May 2018 constitute an occupational detriment and was instituted by way of retaliation against protected disclosures made by the third respondent to the Treasury and AGSA on 17 November 2017, and to the Public Protector on 15 May 2018.

[60] In *Public Protector v Mail and Guardian*³³, the Court specifically addressed the nature of the Public Protector's duty to investigate complaints or suspicious of improper conduct and abuses of power in the public administration. The SCA held that she is obliged to be proactive, impartial and determined in her investigations and to retain an open and enquiring mind.

[61] I am not satisfied that the Public Protector conducted her investigation as comprehensively as possible in order to inspire confidence that the truth had been discovered. Her report is inaccurate and not reliable, and the remedial action is irrational in that it is not rationally connected to the information before her and the reasons given for it. It is trite that a report of the Public Protector is legally binding and of full force and effect until it has been reviewed and set aside.³⁴ Following a declaration of invalidity, this court has the power to order a just and equitable remedy under section 172(1)(b) of the Constitution.³⁵ In this regard, the report is declared invalid and is reviewed and set aside.

³³ *Public Protector v Mail and Guardian* 2011 (4) SA 420 (SCA).

³⁴ *Economic Freedom Fighters*, paras 73-75.

³⁵ Section 172 of the Constitution of South Africa: (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; (b) may make an 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.

COSTS

[62] Counsel for the applicants submits that the Public Protector should be ordered to pay costs of this review on a punitive scale, as a measure and indication of the Court's displeasure at the manner in which she conducted the investigation, the reputational harm suffered by the applicants as a result, and the unnecessary costs incurred by the applicants in an effort to undo the damage caused to them by the report. On 5 September 2018, the Public Protector issued a media statement condemning the applicants' efforts to assert their rights by seeking to overturn her report and remedial action.³⁶

[63] The leading case on the award of costs on an attorney-and-client basis is *Nel v Waterberg Land bouwers Ko-operative Vereeniging*,³⁷ Tindall JA stated that by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just by means of such an order, to ensure more effectually than it can do by means of a judgment for party-and-party costs, that a successful party will not be out of pocket in respect of the expenses caused by litigation,

[64] The award of costs is a matter wholly within the discretion of the court, and this is a judicial discretion which must be exercised on reasonable grounds. Even the general rule, viz that costs follow the event is subject to the overriding principle that the court has a judicial discretion in awarding costs. An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour,

³⁶ Founding affidavit page 19, para 39, Annexure "MC10".

³⁷ *Nel v Waterberg Land bouwers Ko-operative Vereeniging* 1946 AD 597, interpreted with *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (ZH) at 143 D-144.

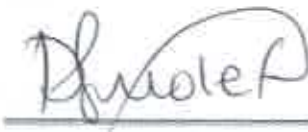
and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have.³⁸

[65] There is no reason why the ordinary rule in civil litigation that costs follow the result should not apply, given the facts and circumstances in this matter. I am not in agreement with the applicants' contention that the Public Protector should pay costs on a punitive scale.

ORDER

[66] I therefore make the following order:

1. The Public Protector's final report dated 28 August 2018 (Report No 13 of 2018/19) is reviewed and set aside.
2. The Public Protector to pay the costs of this application.



D S MOLEFE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION HIGH COURT,
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 May 2021.

³⁸ *Pienaar v Boland Bank* 1986 (4) SA 102 (O) at 116 B-C.

Appearances:

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