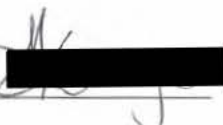




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	YRS
1 August 2025 DATE	 SIGNATURE

CASE NO.: 89658/2018

In the matter between:-

GREATER TAUNG LOCAL MUNICIPALITY

Applicant

v

THE OFFICE OF THE PUBLIC PROTECTOR

First Respondent

THE PUBLIC PROTECTOR

Second Respondent

THUSO BLOEM

Third Respondent

Heard on: 3 June 2025

Delivered: 1 August 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 1 August 2025.

Summary:

1. Mr Bloem's complaint to the Public Protector was that the Municipality, in retaliation of the protected disclosure made, caused his suspension and later his dismissal. He claimed to have suffered occupational detriment as envisaged in Section 3 of the Protected Disclosure Act.
2. The two core issues for determination was whether the Public Protector had jurisdiction to consider Mr Bloem's complaint and whether the remedial action was lawful.
3. Applying the principles enunciated in Minister of Home Affairs and Another v Public Protector of the Republic of South Africa 2018 (3) SA 380 SCA, this court found that the Public Protector had jurisdiction in terms of Section 182(1) of the Constitution to consider the complaint. The complaint, in essence, before the Public Protector was that Mr Bloem was prejudiced by the improper conduct of the Municipality.
4. Mr Bloem chose to have his dispute resolved in terms of Section 4(1)(b) of the Protected Disclosure Act which provides for the dispute to be resolved through "*any other process allowed or prescribed by any law*". The wide ambit of the said provision does not oust the Public Protector's jurisdiction.

5. The remedial action imposed should be appropriate, effective and address the complaint in a meaningful way. The term “appropriate remedial action” as envisaged in S182(1)(c) of the Constitution was defined in Economic Freedom Fighters v The Speakers of the National Assembly 2016 (3) SA 560 CC. Ultimately the Public Protector’s role is to observe the constitutional values necessary to ensure that a responsive remedial action, which in the true sense, addresses the complaint.

ORDER

It is ordered:-

1. The application for review is dismissed with costs.

JUDGMENT

KOOVERJIE J

THE REVIEW APPLICATION

- [1] In this review application the applicant, Greater Taung Municipality (the Municipality) sought to set aside the Public Protector’s findings and the remedial

action contained in Report Nr. 17 of 2018/2019 (the Report) on the basis that it is unlawful, irrational and unreasonable. Hence it challenged the Report on the principle of legality.

- [2] It is settled law that the Public Protector's exercise of her core powers and functions may be reviewable on the principle of legality that stems from the founding constitutional value of the rule of law.¹ Hence the remedial action she directs cannot be ignored. If a party is aggrieved with her findings, it may challenge same by way of review, as in this case.

THE PARTIES

- [3] This review application remains opposed by the third respondent Mr Bloem. Although the first and second respondents (the Public Protector and her office) filed their answering papers, they later withdrew from these proceedings. Mr Bloem filed his response only after learning of the Public Protector's withdrawal from this application. He thus seeks condonation for the lateness of his response to the review.

THE MAIN CONTENTIONS BY THE MUNICIPALITY

- [4] The main contentions raised by the Municipality in respect of the Report are that:

¹ SABS Soc Ltd and Others v Democratic Alliance and Others 2016 (2) SA 522 SCA at 552H – 553H

- 4.1 Mr Bloem's complaint of being victimized for making the protected disclosure was an afterthought and raised for the first time after his labour court application was dismissed;
- 4.2 the Public Protector misdirected herself in entertaining Mr Bloem's complaint as only the labour court had jurisdiction to do so;
- 4.3 the Public Protector erred in her remedial action as it was not in compliance with the Labour Relations Act 66 of 1995 (Labour Relations Act).

THE ISSUES FOR DETERMINATION

[5] The crisp issues for determination before me are the following:

- 5.1 whether Mr Bloem's answering affidavit should be condoned;
- 5.2 whether the Public Protector had entertained Mr Bloem's complaint within the stipulated time period as set out in Section 6(9) of the Public Protector Act 23 of 1994 (Public Protector Act);
- 5.3 whether Mr Bloem's complaint of being victimized for making protected disclosures was an afterthought;
- 5.4 whether the Public Protector had jurisdiction to entertain Mr Bloem's complaint;
- 5.5 whether the Public Protector's decision to order the reinstatement of Mr Bloem with full backpay together with the interest was lawful and rational.

[6] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are

in effect arbitrary and inconsistent. It follows that in order to pass constitutional scrutiny, the exercise of public power by the executive and other functionaries must comply with this requirement. If it does not, it falls short of the standard demanded by the Constitution for such action².

BACKGROUND

- [7] It is necessary to sketch the salient background that led Mr Bloem to the door of the Public Protector. Mr Bloem was in the employment of the Municipality since 2003 commencing as a legal clerk and eventually a senior administration clerk. He was also the shop steward of the South African Municipal Workers Union ("SAMWU"). In March 2011 Mr Bloem and SAMWU lodged a complaint of corruption and fraud against the then Acting Municipal Manager, Mr Mofokeng. The complaints included Mr Mofokeng's abuse of the Municipality funds, irregularly awarding a tender and hiring a motor vehicle for his personal use at the expense of the Municipality.
- [8] This complaint was reported to the Municipal Council, who then took steps to suspend Mr Mofokeng. Mr Mofokeng vehemently challenged his suspension and continued with his duties as Acting Municipal Manager. In this time Mr Mofokeng took steps to suspend Mr Bloem and eventually his employment was terminated after a disciplinary enquiry. Mr Bloem approached the Labour Court for his reinstatement. The Labour Court dismissed his application on a jurisdictional point.

² Hoexer; Administrative Law in South Africa 2nd Edition, p. 158

Thereafter Mr Bloem did not proceed within his complaint in terms of the Labour Relations Act. Instead he approached the office of the Public Protector on the premises that he was subjected to occupational detriment due to the protected disclosure made against Mr Mofokeng.

- [9] Notably Mr Bloem was suspended by Mr Mofokeng for breaching certain provisions of the Local Government Collective Bargaining Agreement ("Agreement"). The allegations levelled against him were *inter alia* that he made unauthorized use of the municipality vehicle, he was absent from duty without leave or consent, he was found in possession of a stolen computer, he disrupted the operations of the Municipality by disturbing a meeting that was held by the Municipal Manager and he disclosed false privileged information to a local community radio station.

CONDONATION

- [10] The first issue for determination is whether the belated answering affidavit of Mr Bloem should be condoned. The nub of Mr Bloem's explanation was that he relied on the Public Protector to oppose this matter due to his own financial constraints. However, when he learnt that the Public Protector withdrew from this review, he immediately took steps to obtain legal representation in order to oppose same. Obtaining legal representation was a challenge since he did not have the financial resources to do so. He explained that eventually the Platform to Protect Whistleblowers in Africa ("PPLAFF") agreed to take his matter on but only did so on 19 September 2024. Thereafter, on 27 September 2024 the instructing attorney filed a notice of intention to oppose on his behalf.

[11] The Municipality had, shortly before this hearing, filed legal submissions opposing the condonation sought by Mr Bloem. However, such submissions are not aligned to its response in its replying affidavit, which constitute mere denials. In my view, the Municipality's attempt to oppose the condonation through submissions was improper. It is settled law that the legal submissions can be advanced provided that they are supported by the facts which are alleged on the papers.³

[12] In any event, Mr Bloem has to show good cause for the indulgence he seeks. Hence a full and reasonable explanation for the delay must be forthcoming.

[13] The settled principles echoed by our courts when determining if good cause exists includes the following:

13.1 the court's discretion is to be exercised judicially upon a consideration of all the facts;

13.2 it is a matter of fairness to both sides;

13.3 the factors to consider would include the degree of lateness, the explanation therefore, the prospects of success and the importance of the case;

13.4 these factors are not individually decisive, but are interrelated and must be weighed against each other;⁴

13.5 a slight delay and a good explanation therefore may help to compensate for prospects of success which are not strong, conversely very good prospects

³ Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 SCA at 200 B-D

⁴ Melane v Santam Insurance Co Ltd 1962 (4) SA 531 A at 532 C-F

of success on appeal may compensate for the inadequate explanation for the delay;⁵

13.6 without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial. No matter how good the explanation for the delay, an application for condonation should be refused.⁶

[14] The “interest of justice” factor may also be taken into account. In **SA Post Office Ltd v CCMA [2012] 1 BLLR 20 LAC at par 23** the court stated: *“In my view each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible, but the flexibility is already linked to and apportioned in accordance with the interests of justice, prejudice, prospects of success and finally the degree of delay and the explanation thereof ...”*

[15] The concept “interest of justice” is elastic and thus not capable of a precise definition. The ultimate determination for what is in the “interest of justice” would be to consider all the relevant factors and the particular circumstances of each case will determine which facts are relevant.⁷

[16] The Municipality argued that the explanation for the delay was unreasonable. Its main contention was that Mr Bloem was required to oppose this matter from the

⁵ Foster v Stewart Scott (1997) 18 ILJ 367 LAC at paragraph 369

⁶ National Union for Mineworkers v Council for Mineral Technology 1998 ZALAC 22 at paragraph 10

⁷ Steenkamp & Others v Edcon Ltd 2019 11 BLLR 1189 (CC) and paragraph 36

onset of the review proceedings. He was a cited party at all relevant times and could not merely piggyback on the Public Protector's response.

[17] Prior to Mr Bloem's involvement, it was evident that this matter had dragged on between the Municipality and the Public Protector. Although the replying affidavit was filed in July 2019, the matter was not set down for hearing. It is evident that when the Public Protector withdrew its defence on 22 October 2022, Mr Bloem had no hand to play in this delay.

[18] Mr Bloem further explained that in this time he had approached various state bodies to have his matter resolved. He communicated with not only the Municipality, but the Department of Cooperative Governance, Human Settlement and Traditional Affairs, Northwest Provincial MEC, Portfolio Committee on Cooperative Governance Traditional Affairs and even Parliament.

[19] In the circumstances, I find that a sufficient and reasonable explanation was furnished. Moreover, Mr Bloem's prospects of success are promising in this review. His request for condonation is thus granted.

NON-COMPLIANCE WITH SECTION 6(9) OF THE PUBLIC PROTECTOR ACT

[20] The point raised was that Mr Bloem's complaint was not lodged timeously with the Public Protector. Although this defence was not raised in the papers, I deem it appropriate under the circumstances to pronounce on this issue.

[21] Section 6(9) of the Public Protector Act stipulates:

“(9) Except where the Public Protector in special circumstances within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.”

This provision requires that a complaint must be lodged with the Public Protector within the stipulated two-year period. The Public Protector may, however, entertain complaints if exceptional circumstances exist.⁸

[22] It is the Municipality's view that Mr Bloem's complaint was lodged with the Public Protector (more than two years after he was dismissed), that is 13 April 2015. He was dismissed on 9 November 2012.

[23] Mr Bloem contended that this was not the case. The Public Protector received Mr Bloem's complaint prior to the expiry of the two-year period. In fact, reference was made to the Public Protector's Report wherein it was indicated that the Public Protector had consulted with Mr Bloem in April 2014. Paragraph 4.4.3.1 records: *“A meeting with the complainant on 7 April 2014 regarding the issues raised”*. It was also recorded that Mr Bloem received his notice of dismissal on 23 September 2012. Paragraph 4.4.3.2 of the Report further records that after the meeting of 7 April 2014 *“a follow-up meeting was held with Mr Bloem on 26 September 2014 to clarify issues raised by him”*. In light of the established facts, this contention is devoid of merit.

⁸ Minister of Home affairs and Another v Public Protector of the Republic of South Africa 2018 (3) SA 380 (SCA) paragraph 24 (SCA matter)

PROTECTED DISCLOSURE COMPLAINT - AN AFTERTHOUGHT

- [24] The further contention raised by the Municipality was that the protected disclosure complaint was only raised before the Public Protector and not prior thereto. In essence there was no link between the disclosure made and the occupational detriment. Hence the misconduct charges which led to his dismissal, had nothing to do with the protected disclosure made.
- [25] It was explained that in the proceedings that led to Mr Bloem's suspension, via the disciplinary hearing, and later the Labour Court, Mr Bloem did not complain that the charges of misconduct levelled against him and his subsequent dismissal amounted to occupational detriment in terms of the Protected Disclosure Act. His case was never that he was improperly suspended and dismissed in retaliation of the protected disclosure made against Mr Mofokeng.
- [26] Mr Bloem refuted this point. He referred to his statement of claim before the Labour Court, where he pointed out that he addressed the issues with various government institutions⁹; Prior to the institution of the proceedings in the Labour Court. Mr Bloem (as part of the SAMWU delegation) was consulted with on the issue of the protected disclosure made against Mr Mofokeng. Mr Bloem specifically alleged that he and other SAMWU members were suspended due to the protected disclosure

⁹ It was alleged on or during the beginning of 2019, SAMWU under the leadership on Mr Bloem laid a complaint with Council of the Region and other various governmental institutions such as the Department of Local Government and Traditional Affairs, The Public Protector and the South African Police Services, of amongst others , corruption malpractice and non-compliance with Supply Chain Policy

made against Mr Mofokeng; Mr Bloem in fact presented such correspondence to the Public Protector.

- [27] The Public Protector was well aware of the said issue raised by the Municipality. She concluded that the Municipality was indeed aware of the protected disclosure made. At paragraph 5.1.9 she noted:

"The complainant argued that the information about Mr Mofokeng's unlawful and irregular conduct was brought to the municipal's attention before any action was taken out against him by Mr Mofokeng. Such information was therefore disclosed to the employer in good faith". Furthermore, Mr Mofokeng became aware of the disclosure of the information upon receipt of intention to suspend notice date 11 May 2011.

- [28] At para 5.1.17 she expressed:

"The Municipality, in essence, never disputed that the Complainant made a protected disclosure, but that he should have raised the issue of whistleblowing with a court of law. Nowhere in the response does the Municipality touch on the alleged corrupt activities by Mr Mofokeng... The Municipality was aware of the allegation levelled against Mr Mofokeng and nothing seems to have been done about that.

- [29] Having considered the evidence placed before her, the Public Protector confirmed the link between the disclosures made and the dismissal of Mr Bloem. At paragraph 5.1.29 she concluded: *" As a result of the above, having taken into account the timing of the charge or the occupational detriment, the reasons given by the*

employer, the nature of the disclosure and the person responsible for taking the decision to institute the charges, it is evident that the Complainant's disclosure of such information to the Council falls under the definition of a protected disclosure as envisaged in Section 1 of the Protected Disclosure Act.

[30] Her findings were that: the Municipality was expected to ensure that the complainant did not suffer any occupational detriment; Mr Bloem was suspended after Mr Mofokeng learnt of the protected disclosure made. His dismissal was in violation of Section 3 of the Protected Disclosure Act. The Municipality was required to comply with the provisions of the Protected Disclosure Act by ensuring that the complainant was not subjected to any occupational detriment by his employer on account of having made such protected disclosure.

[31] Consequently this point is also meritless.

JURISDICTION OF THE PUBLIC PROTECTOR

[32] It is not in dispute that the complaint lodged with the Public Protector was one that fell within the purview of Section 3 of the Protected Disclosure Act 26 of 2000 (Protected Disclosure Act). Mr Bloem complained that the Municipality had improperly suspended and later dismissed him in retaliation of the protected disclosure regarding suspected corruption, conflict of interest, maladministration and related procurement irregularities within the Municipality by the former Municipal Manager; Mr Mofokeng, which amounted to occupational detriment as envisaged in the said Protected Disclosure Act.

[33] Hence in her Report the Public Protector defined the specific issue for determination to be: whether the complainant suffered prejudice as a result of the conduct of the Municipality in the circumstances¹⁰. She acknowledged that the conduct of the Municipality amounted to a contravention of Section 3 and therefore the Section 4 remedies of the Protected Disclosure Act were applicable. She further expressed that the remedial action would be imposed in terms of Section 182(1) of the Constitution.

[34] The parties however part ways regarding the processes that had to be followed to resolve Mr Bloem's dispute and further the Municipality submitted that the remedial action imposed was unlawful.

[35] The Municipality's main gripe was that although the Public Protector was empowered to investigate the matter in terms of her wide powers as contemplated in Section 182 of the Constitution, she could not ignore the application of the Labour Relations Act which was designed to appropriately deal with Mr Bloem's complaint.

[36] On this issue, the Municipality's main contentions were that:

- 36.1 the Protected Disclosure Act made provision for Mr Bloem's complaint to be dealt with in terms of the processes set out in the Labour Relations Act;
- 36.2 Mr Bloem was bound to Section 4(2)(a) of the Protected Disclosure Act. The dismissal constituted an automatically unfair dismissal as contemplated in

¹⁰ Par 4.3.1 and 4.3.2 of the Report

Section 187 of the Labour Relations Act¹¹ which required that the dispute be resolved in terms of Sections 181 to 191 of the Labour Relations Act.

36.3 More specifically in terms of Section 191(4) of the Labour Relations Act, once a dispute of unfair dismissal has been referred to the Bargaining Council, an attempt must be made to resolve the dispute through conciliation. In the event that conciliation is not successful, the dispute should then be referred to the Labour Court;

36.4 Furthermore the specific time limits set out in the Labour Relations Act had to be adhered to. In Mr Bloem's case, it was pointed out that his opportunity to timeously place the dispute before the Bargaining Council had lapsed. The Public Protector should have taken cognisance of this fact.

[37] In my view, the appropriate starting point would be to understand the wide ambit of the Public Protector's powers as envisaged in Section 182(1) of the Constitution, and the Public Protector Act. In **Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 (EFF matter)**¹² at paragraph 66 the court expressed: *"the language, context and purpose of Section 181 and 182 of the Constitution give reliable pointers to the legal status or effect of the Public Protector's power to take remedial action that the Public Protector is required to be independent and subject only to the Constitution and the law, to be impartial and exercise her*

¹¹ Section 187(1)(b) of the Labour Relations Act stipulates that the dismissal of an employee is automatically unfair if the dismissal was due to a contravention of the Protected Disclosure Act.

Section 3 of the Protected Disclosure Act stipulates: "No employee may be subjected to any occupational detriment by his/her employer on account or partly on account of having made a protected disclosure".

¹² 2016(3) SA 580 CC (EFF matter)

powers and perform without fear, favour or prejudice is quite telling that the Constitution requires the Public Protector to be effective and identifies the need for her to be assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness shows just how potentially intrusive her investigation powers are and how deep the remedial powers are expected to cut”.

[38] Section 182(1) of the Constitution vests the Public Protector with wide powers as regulated by national legislation to:

- “(a) 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 result in any impropriety or prejudice;*
- (b) report on that conduct; and*
- (c) take appropriate remedial action”.*

[39] The Public Protector is further endowed with additional powers in terms of Section 6(4) of the Public Protector Act, namely

- “(a) to investigate on his or her own initiative on or receipt of a complaint, any alleged-*
 - (i) maladministration in connection with the affairs of Government at any level;*
 - (ii) abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay by a person performing a public function;*
 - (iii) ...*

- (iv) ...
- (v) act or omission by a person by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person¹³

[39] The office of the Public Protector is a unique institution designed to strengthen our constitutional democracy. Her wide powers must further be considered in context of Section 4(1) of the Protected Disclosure Act which stipulates:

"Any employee who is subjected or may be subjected, to an occupational detriment in breach of Section 3, or anyone acting on behalf of an employee who is not able to act in his or her own name may:

(a) approach any court having jurisdiction, including the Labour Court established by Section 151 of the Labour Relations Act, 1995 (66 of 1995) for an appropriate relief; or

*(b) **pursue any other process allowed or prescribed by any law***".¹⁴

[40] I am in agreement with Mr Bloem's argument that he was not bound to have his dispute resolved in accordance with the labour legislation and the processes set out therein. By approaching the Office of the Public Protector, Mr Bloem sought an alternative process as envisaged in Section 4(1)(b) of the Protected Disclosure Act, namely (b) "pursue any other process allowed or prescribed by any law".

¹³ My emphasis

¹⁴ My emphasis

[41] Consequently, I am of the view that Section 4(2) of the Protected Disclosure Act would only find application if Mr Bloem sought to have his dispute resolved in terms of Section 4(1)(a), that is *"approach any court having jurisdiction, including the Labour Court established by Section 151 of the Labour Relations Act 1995 (Act 66 of 1995) for appropriate relief"*.

[42] Section 4(2)(a) stipulates:

"(2) For the purposes of the Labour Relations Act 1995, including the consideration of any matter emanating from this Act by the Labour Court:

(a) any dismissal in breach of Section 3 is deemed to be an automatically unfair dismissal as contemplated in Section 187 of that Act and the dispute about such a dismissal may follow the procedure set out in Chapter VIII of that Act or any other process to recover damages in a competent court ...

(b) any other occupational detriment in breach of Section 3 is deemed to be an unfair labour practice in Section 186(2) of that Act, and the dispute about such an unfair labour practice must follow the procedure set out in Section 191: Provided that if the matter falls to be resolved through conciliation, it may be referred to the Labour Court for adjudication."

[43] In my view, the wide context of Section 4(1)(b) of the Protected Disclosure Act, does not oust the Public Protector's jurisdiction to consider the complaint. His complaint was defined by the Public Protector to be - that he had been prejudiced

by the improper conduct of the Municipality. This was well within the purview of her powers in terms of Section 182(1)(a) and Section 6(4)(v) of the Public Protector Act.

- [44] The nature of her wide powers was succinctly outlined by the Supreme Court of Appeal in ***Minister of Home Affairs v Public Protector***.¹⁵ In particular that the Public Protector is not ousted from dealing with complaints relating to unfair labour practice. It expressed:

*"This attack has two legs. The first is that because Marimi's complaint was that he was the victim of an unfair labour practice, he had to seek his remedy in the Labour Relations Act 66 of 1995: in the same way as the Labour Court had exclusive jurisdiction in labour matter at the expense of the High Courts, so too the Public Protector's jurisdiction was ousted in this case. There is no merit in the argument. The Public Protector is not a court, does not exercise judicial power and cannot be equated with the court. Her role is completely different to that of a court and the jurisdictional arrangements of the courts are entirely irrelevant to the determination of the Public Protector's jurisdiction. It is necessary to look to Section 182 of the Constitution and the Public Protector Act to ascertain the bounds of the Public Protector's jurisdiction. Neither excludes labour matters from her jurisdiction."*¹⁶

¹⁵ 2018 (3) SA 380 (SCA) at par 44 (Home Affairs SCA matter)

¹⁶ My emphasis

- [45] The court *a quo*'s¹⁷ similarly articulated that there is no provision in the Constitution or the Public Protector Act that circumscribed the jurisdiction of the Public Protector. The court expressed:

*"The powers of the Public Protector are extremely wide and she is competent to investigate any conduct in state affairs, or in the public administration in any sphere of government (emphasis added). The powers are extended even further in terms of Section 6 of the Public Protector Act. There is no provision in the Constitution or the Public Protector Act to the effect that the Public Protector's powers, as circumscribed, fall to be excluded in certain instances, such as where the Labour Court has exclusive jurisdiction when compared to the jurisdiction of the High Court. To argue otherwise would lead to a situation where the powers of the Public Protector are severely curtailed and arguments that particularly alleged maladministration or misconduct fall within the jurisdiction of a certain court rather than that of the Public Protector despite the wide powers ordained by the Constitution."*¹⁸

- [46] The Supreme Court of Appeal in **Home Affairs**, emphasized that the Public Protector Act widens the Public Protector's mandate even more, extending the Public Protector's remit in investigation of maladministration and similar maladies in respect *inter alia* the affairs of government at any level.¹⁹

¹⁷ Minister of Home Affairs v the Public Protector case number 76554/2013, Gauteng Division 20/10/16 at paragraph 57 page 39, (High Court matter)

¹⁸ My emphasis

¹⁹ Home Affairs (SCA matter) paragraph 45

- [47] I reiterate that the complaint was one of prejudice due to the protected disclosure made against the Municipal Manager which eventually resulted in his dismissal. Similarly, in the *Home Affairs* matter, Marimi's complaint was that he had been prejudiced by the Department's maladministration which resulted in him not receiving his living benefits.
- [48] In this instance the Public Protector found that the Municipality had subjected the complainant to occupational detriment which was in violation of Section 3 of the Protected Disclosure and such conduct constituted unfair labour practice and unfair dismissal.
- [49] In fact the Public Protector was well versed with the extent of her powers and set them out in her Report. No doubt, her jurisdiction is extremely wide and her mandate is clear. Her core role is to seek out maladministration, through directing appropriate remedial steps so as to ensure good governance. She therefore holds a wide discretion to enable her to carry out her functions.²⁰
- [50] The Public Protectors discretion in terms of Section 6(3) of the Public Protector Act was also clarified. The fact that the Public Protector has a discretion not to entertain matters, particularly if she is of the view that internal remedies as contemplated in Section 6(3) were not exhausted. In this regard, she again has a wide discretion. She may decline to consider a complaint if she has reason to do so. The acceptance of a complaint is however the default position.²¹

²⁰ Home Affairs (SCA matter) paragraph 46

²¹ Home Affairs (SCA matter) at paragraph 46

- [51] Aligned with the principles established in the **Home Affairs** matter, there can be no doubt that the Public Protector had jurisdiction to consider Mr Bloem's complaint.

THE REMEDIAL ACTION

- [52] The final contention was in respect of the Public Protector's overreach when she imposed the remedial action. The following remedial action was imposed on the Municipality Manager and the Municipality:

"7.1 The Municipal Manager

7.1.1 The Municipal Manager must, within 30 days from the date of this report, ensure that the complainant is reinstated to the same position or similar position he held prior to his dismissal.

7.1.2 The Municipal Manager must, within 60 days from date of this report, ensure that that Complainant is paid all remuneration that would have accrued to him had he not been dismissed, having taken into account the annual increase together with the interest calculated at the applicable rate as prescribed by the Minister of Justice and Constitutional Development in terms of section 1 (2) of the Prescribed Rate of Interest Act No.55 of 1975.

7.1.3 The Municipal Manager must, within 30 working days from the date of this report, write a letter of apology to the Complainant for the prejudice caused to him and his family.

7.1.4 *The Municipal Manager must, within 15 working days from the date of publication of this report, ensure that this report is tabled before the Municipal Council.*

7.2 *The Greater Taung Local Municipal Council*

7.2.1 *The Municipal Council must, within 60 days of publication of this report, ensure that it has measures in place to deal with employees' disclosures. These procedures should be set out in a Municipal Policy which should be made available to all its employees. The purpose of the said whistleblowing policy should ultimately be to create a culture of openness and accountability without fear of reprisals or occupational detriment to ensure that employees report knowledge of any irregularities so that management can take the necessary steps to investigate and/or deal with those irregularities identified.*

7.2.2 *The Municipal Council must, within 60 working days of publication of this report, institute civil action against all municipal officials, whether still in the employ of the Municipality or not, to claim this wasteful expenditure to be incurred by the State in reimbursing the Complainant."*

[53] The Public Protector found that the Municipality was guilty of unfair labour practice and unfair dismissal and ordered it to reinstate Bloem in his position or in a similar position that he was in prior to his dismissal, together with full backpay plus interest

for the entire period that he was not in employment. In her reasons she explained that Mr Bloem suffered not only financial prejudice, but emotional prejudice as well.

[54] The Municipality took specific issue with the portion of the remedial action that directed the Municipality to reinstate Mr Bloem to the same position or similar position he held prior to his dismissal. The Municipality argued that these findings were not only irrational but unlawful. The Public Protector could not ignore the provision of Section 193 of the Labour Relations Act which prescribed the processes available to Mr Bloem and the Municipality. It further argued that ordering reinstatement of an employee with the inclusion backpay, was unlawful. Moreover, the backpay could not be subject to interest in terms of the Prescribed Rate of Interest Act 55 of 1975 as it does not constitute a judgment debt.

[55] Section 193(1)(a) to (c) of the Labour Relations Act stipulates:

"If a labour court or arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may:

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee."

- [56] It was further highlighted that Section 193(2) of the LRA made provision for just and equitable relief.²² It weighs the option of reinstatement or re-employment. In this instance the employer is required to re-employ the employee unless the employee does not wish to be reinstated or re-employed. If circumstances around the dismissal are such that a continued employment relationship would be intolerable then it would not be reasonably practicable for the employer to reinstate or re-employ the employee. And so it was argued that the Public Protector was required to ventilate the issue of reinstatement with the parties.
- [57] To bolster its point, I was referred to the **South African Revenue Service v the CCMA** matter²³ where the court held that the arbitrator should have followed the provisions in Section 193(2)²⁴ when considering reinstatement.
- [58] In my view, the analogy drawn against the powers of the arbitrator and the processes set out in S193(2) of the Labour Relations Act are flawed. It is settled law that the Public Protector is not a court of law and cannot be compared to an

²² Section 193(2) stipulates:

“ The labour court or the arbitrator must require the employer to reinstate or re-employ the employee unless the

(a) employee does not wish to be reinstated or re-employed

(b) ..the continued employment relationship would be untenable

(c) it is not reasonably practical for the employer to reinstate or re-employ the employee or

(d) the dismissal is unfair only because the employer did not follow fair procedure

²³ *South African Revenue Service v Commission for Conciliation Mediation and Arbitration and Others* 2017 (1) SA 549 (CC)

²⁴ “44. After concluding that Mr Kruger’s dismissal was unfair, the arbitrator immediately ordered his reinstatement without taking into account the provisions of Section 193(2). She was supposed to consider specifically the provisions of Section 193(2) to determine whether this was perhaps a case where reinstatement is precluded. She was also obliged to give reasons for ordering SARS to reinstate Mr Kruger despite its contention and evidence that its continued employment would be intolerable. She be required to say whether she consider Mr Kruger’s continued employment to be tolerable and if so, on what basis. This was not done. She does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement appropriate ...”

arbitrator who was subjected to apply Section 193 of the Labour Relations Act. Her role is completely different and she is only bound by the Constitution and the Public Protector Act. By virtue of Section 182 (1)(c) of the Constitution she is required to take appropriate remedial action.

[59] The concept "appropriate remedial action" as envisaged in Section 182(1)(c) of the Constitution was articulated by the Constitutional Court in the **EFF** matter.²⁵ where the court expressed:

"The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered... It is also not inflexible in this application but situational. What remedial action to take in a particular case will be informed by the subject matter of the investigation and the type of findings made. Of cardinal significance about nature, exercise and legal effect of the remedial power are the following:

- (a) The primary source of the power to take appropriate remedial action is a supreme law itself whereas the Public Protector Act is but a secondary source...*
- (c) Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And action presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial actions to other institutions or that it is the power that is by its nature of no consequence.*

²⁵ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) at paragraph 71

- (d) *She has the power to determine the appropriate remedy and prescribe the manner of its implementation.*
- (e) *"Appropriate" means nothing less than an effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case."*²⁶

[60] It is evident that the aforesaid reasoning endorses the proposition that the remedial powers of the Public Protector are not constrained by the processes set out in the Labour Relations Act.

[61] The Municipality further attempted to contest the Public Protector's powers by referring to the **SARS** matter.²⁷ The issue before the court was whether SARS or its officials were by law permitted and required, in terms of Section 11(3) of the Public Protector Act read with Section 69(1) of the Tax Administration Act 28 of 2011, to withhold taxpayer information or whether the Public Protector's subpoena powers in terms of the Public Protector Act was superior to the Tax Administration Act.

[62] Again said matter is clearly distinguishable in that the court was seized with having to consider the Public Protector's powers in terms of the Public Protector Act (more specifically Section 11(3)) thereof against the provisions of the Tax Administration Act. The court criticized the Public Protector for demanding the taxpayer's confidential information which was contrary to the Tax Administration Act. The

²⁶ My emphasis

²⁷ Commissioner of South African Revenue Service v Public Protector and Others 2020 (4) SA 133 GP

court expressed that her request in the subpoena was unlawful in terms of the tax legislation.

[63] That court therein expressed that in terms of the Public Protector Act, the Public Protector was required to comply with the provisions of Section 2 of the Constitution. The Public Protector had a constitutional obligation to ensure that her conduct does not offend the Constitution and the law. She does not have more powers than what the Constitution and national legislation conferred on her, in that case, the Tax Administration Act.

[64] On the facts before me, the specific issue is whether the Public Protector had jurisdiction to consider the complaint and ultimately whether the remedial action imposed by the Public Protector was appropriate and effective.

[65] In the *EFF* matter²⁸ It was emphasized that “take appropriate remedial action” and “effectiveness” are operative words essential for the fulfilment of the Public Protector’s constitutional mandate. It upheld the sentiments expressed in *Fose*²⁹ where the court expressed:

“(A)n appropriate remedy must mean an effective remedy for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts. It is

²⁸ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 CC at par 67 (*EFF* matter)

²⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at par 69 (my emphasis)

essential that on those occasions where the legal process does establish that an infringement of an entrenched right has occurred, it be effectively indicated.”

[66] I reiterate that complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government institutions. The Public Protector’s role is to observe the constitutional values necessary to ensure that the efficient economic and effective use of resources are promoted, to hold those accountable and maintain the ethical standards. To achieve this requires a difference making and “responsive remedial action”. The remedy must in the true sense, address the complaint in a meaningful way³⁰.

[67] In her Report, the Public Protector acknowledged the extent of the remedy she could impose when she expressed “*where a complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the state institution complied with the regulatory framework setting the applicable standard for good administration*”

[68] It cannot be gainsaid that the Public Protector considered all the relevant factors including the fact that the Municipality was aware of the protected disclosure made. She also noted that the Municipality failed to act on Mr Bloem’s complaint pertaining to his dismissal as a consequence of the protected disclosure. She also consulted with the Municipality before she made her findings³¹. In conclusion, I therefore find

³⁰ EFF matter at paragraph 65

³¹ Section 7(9)(a) of the Protected Disclosure Act obliges the Public Protector to afford a hearing to persons implicated in the investigation. It provides that if it appears to the Public Protector during the course of an investigation that any person implicated in the matter and that such implication may be to the detriment of that

that the exercise of her power and the remedial action she ordered were both rational and lawful.

[69] In **Simelane**³² the court held that not only the decision itself but also the process by which it is made must be rational, this bringing in the idea of procedural as well as substantive rationality. As the court put it:

"We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and if not, whether the absence of a connection between a particular step is so unrelated to the end as to taint the whole process with irrationality."

COSTS

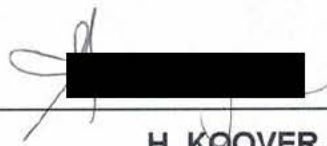
[70] The applicant submitted that in the event that it is successful, the Public Protector should be ordered to pay the costs of this application. The third respondent, Mr Bloem, also sought costs in the event of him being the successful party.

[71] In exercising my judicial discretion there is no reason why the general principle: that costs should follow the result, should not be applied. Since Mr Bloem has been successful in this review. I find that the Municipality should bear the costs of this application.

person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such the person an opportunity to respond in correction thereof...

³² Democratic Alliance V President of the Republic of South Africa 2013 (1) 248 CC at paragraph 37 (Simelane matter)

[72] In conclusion, this review application is dismissed with costs.



H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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Adv. TJ Machaba SC

Adv. BD Tshabalala

Instructed by:

Kgomo Attorneys

Counsel for the third respondent:

Adv. Matthew Chaskalson SC

Instructed by:

Mbuyisa Moleele Attorneys

Date heard:

3 June 2025

Date of Judgment:

1 August 2025