



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

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

CASE NO. 82779-2019

DATE
27/08/2026

SIGNATURE
N V KHUMALO J

MARENZA CIVILS CC

1ST APPLICANT

BEX TRADING AND LABOUR SOLUTIONS

t/a BEX CONSTRUCTION

2ND APPLICANT

BATHLOKI PROJECTS CC

3RD APPLICANT

KEMOA CIVILS CC

4TH APPLICANT

TUMILID TRADING ENTERPRISE

5TH APPLICANT

MALAPANE PROPERTY SERVICES AND DEVELOPMENT CC

6TH APPLICANT

SELEMELA GENERAL DISTRIBUTORS SUPPLY CC

7TH APPLICANT

MKMG TRADING ENTERPRISE CC

8TH APPLICANT

GEREMANE BUILDING CONSTRUCTION

9TH APPLICANT

MIRACLE FITTING GLASS & PROJECTS CC

10TH APPLICANT

And

THE PUBLIC PROTECTOR

1ST RESPONDENT

MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE

2ND RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL

FOR THE NORTH WEST, DEPT OF PUBLIC WORKS,

ROADS & TRANSPORT

3RD RESPONDENT

THE REMAINING COMPLAINANTS

4TH TO 47TH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 27 August 2026.

The remedial action of the Public Protector can be challenged

*The Public Protector's remedial action should be appropriate, effective and address the complaint in a meaningful way. The term "appropriate remedial action" is as envisaged in s 182 (1) (c) of the Constitution¹ defined in *Economic Freedom Fighters v The Speakers of the National Assembly* **2016 (3) SA 580 CC**.² Ultimately the Public Protector's role is to observe the constitutional values necessary to ensure a responsive remedial action, which in the true sense, addresses the complaint.*

¹ The Constitution of the Republic of South Africa, 1996.

² 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 CC (31 March 2016)

The Public Protector's s 8 (4) (1) conciliated and mediated remedial action agreed upon between the disputing parties and the PP in a settlement agreement recorded and endorsed by the Public Protector to constitute the PP's findings and remedial actions in terms of s 182 (1) is binding to the parties and the Public Protector unless set aside by agreement or court order.

JUDGMENT

N V KHUMALO J

Introduction

[1] This is a review application in terms of Rule 53 of the Uniform Rules of Court instituted by the Applicants against the Public Protector (PP), the 1st Respondent seeking a relief in the following order:

- 1.1. Reviewing and setting aside the decision of the Public Protector to impose the remedial action on paragraph 7.3.3 of her report dated 6 May 2019;
- 1.2. Remitting the matter to the Public Protector to take a fresh decision in respect of the appropriate remedial action to be imposed in order to compensate the Applicants for the prejudice they have suffered.
- 1.3. Directing the Public Protector that when taking the fresh decision in respect of the appropriate remedial action as above, may only impose a remedial action in respect of the prejudice suffered by the Applicants that accords with clause 2.4 of the settlement agreement concluded on 23 July 2018.
- 1.4. Directing any Respondents who opposes the relief sought herein to pay the costs of this Application on a joint and several basis, the one paying the others to be absolved.

Factual Background

[2] The Applicants are contractors in the construction industry and part of the 67 contractors who participated in a learnership programme (learner contractors) called the Vukuphile Learnership Programme (“the Vukuphile”) referred to by the PP in her report as the Contractor Development Programme. Vukuphile was offered to learner contractors as a joint initiative by the Department of Public Works, Roads and Infrastructure, North-West, (“the Department”), whose Minister in the Executive Council is in his capacity as the administrative head of the Department cited as the 3rd Respondent and the Public Works and Infrastructure Ministry citing its political head, as the 2nd Respondent.

[3] The Vukuphile programme offered the learner contractors academic instruction and practical training on construction. The practical training was to be completed over the course of a three (3) year programme. Each learner contractor was offered an educational training to a fully-fledged contractor and a contract per calendar year. They individually concluded their contracts with the Department during 2013, in terms of which they were each awarded a 12-month contract to supervise, monitor and transport expanded public works programme (EPWP) beneficiaries.

[4] The Department appointed Aurecon as the project manager to provide consultancy services and training to the learner contractors. Six (6) months after the Vukuphile commenced, a fall out between Aurecon and the Department led to an unresolved impasse and the Vukuphile halted. The programme was later cancelled on 14 November 2014. The cancellation was premature, as a result regarded to be improper.

[5] The Applicants allege that as learner contractors they had costs that they expended to start the construction project that was allocated to them and were also owed various amounts by the Department. The Department as a result promised to compensate the learner contractors for damages and the prejudice they may have suffered due to the cancellation and that those damages plus any related costs incurred would be compensated separately.

[6] On failure by the Department to act as promised, 64 of the learner contractors lodged a complaint with the PP in July 2016. On 23 July 2018, following the PP's determination in terms of s 7 (1) (b) (i)³ of the Public Protector Act 23 of 1994 (PPA) to resolve the complaint through mediation and reconciliation in accordance with s 6 (4) (b) (i)⁴ of the PPA, a settlement agreement endorsed by the PP was concluded between the Department and the Applicants being part of the learner contractors that lodged the complaint. In terms of the settlement agreement the Vukuphile programme was to be resuscitated. Each of the learner contractors was to be assigned a project by the Administrator after being assisted with statutory compliance such as the Construction Industry Development Board (CIDB) grading and tax compliance as compensation for loss of work. In relation to the additional prejudice suffered, if any, it was decided that payments would be made to compensate the learner contractors, in the form of *ex gratia payments* which shall be effected within 30 days of determination.

[7] In relation to the ex-gratia payments, the Applicants' complaint was that they suffered additional prejudice which ranged from inter alia, health, relationship problems and a reduced ability to conduct business and provide for their families. Quantification of the ex-gratia payments was a challenge. In terms of Clause 2.4 of the settlement agreement, the Administrator-Provincial Government was going to meet with each of the learner contractors and based on the evidence provided to him by each contractor determine the extent of the prejudice suffered individually.

[8] In Clause 3 of the settlement agreement, both parties and the PP agreed that the agreement constitutes the PP's findings and remedial actions in terms of s 182 (1)⁵

³ Section 7 Investigation by Public Protector

(b)(i) The format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

⁴Section 6 (4) (b) (i) reads:

(4) The Public Protector shall, be competent:

(b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by-
(i) mediation, conciliation or negotiation; or

4 Functions of Public Protector

182. (1) The Public Protector has the power, as regulated by national legislation—

(a) 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;

of the Constitution that are binding on the parties. Clause 4 provides that the agreement did not affect the PP's discretion to investigate the conduct of any person responsible for the termination of the projects.

[9] On 6 May 2019 the PP issued a report, setting out the remedial actions as per settlement agreement and the steps that was to be taken in the implementation thereof. On paragraph 7.1 the PP reiterated that the settlement agreement constitutes her findings and remedial actions and therefore legally binding on all the parties to the settlement agreement. She, however, in paragraph 7.3.3 of her report stated, in relation to the ex gratia compensation for the prejudice suffered, that "the appropriate remedial action she is taking in accordance with the settlement agreement is that the Administrator *"is to assign projects, meant for ex-gratia consideration to contractors; ie, payment of ex-gratia in the form of allocation of an additional project to a maximum of R4 Million to all 64 contractors based on their CIDB grading, within 15 days of completion of the currently allocated Vukuphile projects."* This was not in accordance with but a deviation from the agreed remedial action in the settlement agreement therefore contradictory.

[10] The Applicants contend that the mechanism specified in 7.3.3 of the PP's report and the decision to impose it as a remedial action is unlawful as:

[10.1] It is contrary to the dictates of s 217⁶ of the Constitution of the Republic of South Africa, 1996 (Constitution) therefore inconsistent with the law as it purports to direct the department to take a procurement decision in a way other than to follow the procedure applicable in state procurement.

(b) to report on that conduct; and to

(c) take appropriate remedial action.

5 s 217 Procurement. (1) the Auditor-General must report to Parliament; and the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[10.2] It is inconsistent with Clause 2.4⁷ of the settlement agreement which the parties and the PP agreed constituted the binding remedial action of the PP. 7.3.3 purports instead to amend/alter the remedial action in clause 2.4 when in essence once the PP has exercised her right to impose the remedial action, she cannot alter or amend such remedial action. To the extent that 7.3.3 intends to amend the remedial action the PP had already made, it is unlawful.

[10.3] They furthermore contend that the remedial action in 7.3.3. is not an appropriate remedial action within the meaning of s 182 (1) (c) as it is not a sufficient and effective remedy to compensate the Applicants for the prejudice they have suffered.

[10.4] The remedial measure in 7.3.3 was imposed without warning or giving them an opportunity to be heard prior to being imposed, even though procedural rationality required them to be heard and be allowed to make submissions before a final decision is taken. The PP's conduct therefore procedurally irrational and unfair.

[11] They accordingly allege not to challenge the PP's report for awarding them compensation for the prejudice they suffered but the particular mechanism or the manner in which the ex- gratia compensation is to be awarded is unlawful. The Applicants contends that the PP's impugned decision to impose the 7.3.3 remedial action and the remedial action is therefore reviewable, either under PAJA or alternatively can be accommodated under the principle of legality in that every exercise of power must comply with the law.

[12] In clarification, the Applicants point out that their challenge on the PP's decision in clause 7.3.3 is only as far as it states that such compensation should be consideration for future projects. It submits that it would be just and equitable for the

⁷ Clause 2.4 reads:

"2.4 the Administrator must, within 30 days of signing this agreement, meet with each Complainant and determine the Quantum of the prejudices suffered, based on the evidence provided to him by the Complainant. Payment of prejudices, if any, either in the form of ex gratia shall be effected within 30 days of the determination."

matter to be referred back to the PP for a fresh session for consideration of the appropriate remedial action to be imposed which must be consistent with clause 2.4. of the settlement agreement.

[13] In its Supplementary Affidavit the Applicants highlighted that the record confirms that the deviation from the settlement agreement and the PP's remedial action was without consultation or hearing the Applicants. As a result, justified that the implementation of the *ex-gratia* compensation quantification process be started afresh with the determination of new remedial action measures. They lambast the Molefe report by Molefe from Molefe Attorneys who was mandated on behalf of the Administrator to oversee the quantification process.

[14] The Molefe report was submitted on 31 January 2019, after having supposedly gone through the necessary process of hearing Applicants' evidence on the prejudice to determine the amounts for *ex-gratia* compensation. It concluded that nil was to be paid to the Applicants on the basis that "*Did not find any legal justification compelling the Department to pay any of the claims submitted and for that reason ex-gratia is not payable.*" The reasons proffered briefly were that:

[14.1] The process created or invited a floodgate of claims;

[14.2] Serious allegations were made "in an attempt to claim money from the Department"

[14.3] The PP must guard itself against being used as a vehicle to unjustifiably enrich the Complainants by lodging claims that are over inflated, false and misleading.

[15] The Molefe report was viewed by the Applicants to be dismissive of the legitimate harms and personal hardships allegedly endured by the learner contractors due to the premature termination of the Vukuphile Programme. Whilst there was no doubt and not in dispute that in all interactions they had suffered prejudice and entitled to financial compensation for same. They talk about compensation by the Department giving them money, arguing that the PP herself said that "there is monies that they are

entitled to and Public Works (the Department) is willing to settle as far as that is concerned.”

[16] The Molefe report was said on the other hand not to understand that the *ex-gratia* payment is made from a sense of moral obligation rather than a strict legal entitlement. The method or the approach used to determine the prejudice suffered by the contractors was not set out in the report. The report instead suggested that the contractors were wholly responsible for the losses they suffered and there was no legal justification for their claims or for holding the Department liable to compensate them. The questions asked in the report were geared towards the project allocation and not pertinent to determining the issue of the prejudice suffered, failing to appreciate the distinction between the concept of “contractual damages” and “prejudice. The learner contractors were not asked the right questions or given an opportunity to substantiate their claims in full, rendering the process procedurally unfair and irrational. They allege Molefe to have clearly misunderstood the nature of the exercise he was required to conduct.

[17] The PP is alleged to have had no sight of the documents and evidence submitted by the learner contractors or the contentions raised in relation thereto when she prepared her report. As such she did not apply her mind to the *ex gratia* prejudice issue, rendering the remedial action as reported irrational. Instead, it appears to them that the PP by not adopting the report, recognised the flaws in the process of the Molefe report in the determination of the quantum of the contractors’ *ex gratia* prejudice. She rather than start the process afresh, decided on an entirely new remedial action instead of the one contemplated in the settlement agreement, directing the awarding of contracts to cure the prejudice. However, failed to take into account relevant considerations, (that is what was submitted) her decision reviewable.

[18] They point out that there is no proof that the PP contacted any of the contractors before her decision to impose the new remedial action, hence their argument that the PP’s decision or action to impose the new relief in that context was procedurally unfair and invalid, therefore reviewable.

[19] They reiterate the challenge of the remedial action's recommendation of future projects as compensation for the ex- gratia injury or loss and persist to advocate for the remittal of the matter to the PP to take a fresh decision on the manner in which the additional prejudice compensation is to be quantified. The decision or remedial action should be consistent with paragraph 2.4 of the settlement agreement.

The Department's Explanatory Affidavit

[20] The Department's Administrator, being the one that was directed to establish the deserving contractors and the quantum of the ex-gratia compensation to be paid to the Applicants, deposed to what it characterised as the 3rd Respondent's explanatory affidavit, with the purpose of clarifying its role in facilitating compliance with the PP's remedial action. The application for condonation for the late filing of the Affidavit, which was on behalf of both the Department and the Minister was in the interest of justice, granted.

[21] The Department accordingly noted that the Applicants were seeking an order directing the PP to impose a fresh remedial action that accords with the provisions of clause 2.4 for the monetary payment as the ex-gratia compensation. Further that In clause 3 of the settlement agreement the parties agreed that the settlement agreement constituted the findings of the PP as per s 182 (1)⁸ of the Constitution and had a binding effect on the parties. The parties also agreed that the agreement will not prevent the PP from investigating the conduct of any person concerning the termination of the programme. It alleges that the PP accordingly proceeded on that basis to publish the report with the remedial action, part of which was indeed that the Department should assign contracts to the value of R4 000 000.00 *ex gratia* to the deserving complainants in lieu of the prejudice that they may have suffered.

[22] The Department's viewpoint in that regard is that, even though the PP's remedial action directing the Department to award the contracts *in lieu* of ex gratia compensation, a departure from the settlement agreement and also offends against

⁸ See footnote 4 .

the procurements prescripts applicable in the public sector, it would still not be just and equitable if the remedial action of the PP is set aside or to have the matter determined anew, since the department has already complied with 7.3.3. It should therefore be up to the court to determine what is just and equitable in the peculiar circumstances of this matter. Submitting also that the grounds can also be accommodated under the principle of legality.

[23] According to the Department the cancellation of Vukuphile in June 2014 was due to lack of funding. The recommendation published in the PP's report were still in line with the settlement agreement between the parties orchestrated by the PP. The method of implementation and determination of the compensation to be paid for the *ex-gratia* prejudice including timelines were agreed upon.

[24] The Department says it then began with the implementation. It kept on reporting to the PP on the progress made. It confirmed to the PP when 60 of the initial 64 learner contractors including the 1st Applicant were marked to be granted contracts, whilst the remaining 4 were deregistered. Also, on finalisation of the Quantity Surveyor's report on determination of payments that were owing to the contractors at the time of cancellation of their contracts, and the PP acknowledged receipt thereof. She undertook to also allocate the contracts for the *ex-gratia* compensation based on the various CIDB grading, following the PP's remedial action at 7.3.3.

[25] Subsequent thereto, the Department provided update reports to, inter alia, the PP in respect of a list of contractors that have been allocated work under the resuscitated programme and a table of those that still had to be paid. The list included amongst others the Applicants. It also provided a report consisting of a table containing payment dates, a program and a table on handover of the projects showing compliance with the remedial action that has been recommended and confirmation that it has been able to allocate contracts to all the 60 eligible contractors.

[26] The Department contends that what the Applicants are asking for is self-defeating as they have already benefited from the work/contracts allocated for the purposes of the *ex-gratia* compensation in compliance with the impugned remedial

action recommended by the PP. The review Application has been overtaken by the incidence of the Department complying with the impugned decision.

[27] Furthermore, the Department concedes that it might be argued that the Department should not have complied with the impugned remedial action in the light of contentions raised by the Applicants. The court is implored to take into consideration that some considerable time has passed and a lot has been done in consideration of compliance. Undoing all that will not benefit anybody.

Applicants' reply

[28] The Applicants in their reply deny that they have been awarded projects which constitute compensation for the *ex-gratia* prejudice suffered due to cancellation of the Vukuphile Programme. They also dispute that the Vukuphile Programme has been properly resuscitated, saying that many of the aspects of the projects have not been resuscitated or properly resuscitated.

[29] According to the Applicants the classroom component was not implemented and the practical component not properly resuscitated. They allege to have filed a Replying Affidavit because the Department's explanatory Affidavit deserved a response. However new evidence that seeks to cover incidence that go beyond the explanation to the issues raised by the Department or their case as made in the Founding Affidavit is to be curtailed. It is however not to be ignored that the Applicants' Application was anchored on the preservation of the settlement agreement.

[30] The shortcomings of the programme's practical component is alleged to be as a result of failure to allocate mentors to guide and assist the learner contractors throughout the projects. The main aim being that the contractor must at the end or exit of the programme have a higher CIBD rating, be competent and be able to competitively tender for private and state tenders. For that reason some of the Applicants are alleged to have not signed the new contracts.

[31] They however indicate that in this Application the Department's failure to properly resuscitate the programme is mentioned as a background and not

challenged. They instead have an issue with the Departments' explanatory affidavit since the assignment of the contracts does not satisfy the Department's obligation to provide compensation for the contractor's *ex gratia* prejudice (as is required by the settlement agreement) which was made the official remedial action by the Public Protector. The *ex-gratia* compensation was to be in addition to the ordinary damages that the contractors would be entitled to as a result of the breach of contract. The projects were therefore not and could not constitute compensation for the *ex-gratia* prejudice, since:

[31.1] The projects require significant capital input and expenses, the value of which is the amount at which the contract project is prized and not the amount that the contractor is expected to profit from the project. The projects also took significant time and resources, in many instances underpriced, with contractors experiencing multiple delays, disruptions and other obstacles. All that drove the prices up resulting in contractors in some instances breaking even and others suffering a significant loss on the projects and additional costs resulting in indebtedness. The additional costs were explained to the Department on 20 May 2022. They allege to have also contributed a significant amount to the projects whilst they received no value in return or instead suffered losses. They argue therefore that the award of the construction projects cannot constitute compensation for the *ex-gratia* prejudice...

[32] In illustration of the losses suffered and costs incurred on contracts alleged to have been granted for *ex gratia* compensation purposes, they refer to the school projects granted to the 2nd Applicant beset by delays and ballooning costs. One is the Pelonomi project scheduled for 4 months but still to date not completed, after 4 years, due to absence of a geological assessment when the foundation for the ablution was done. Large rocks and boulders found below the surface and a water table hit that increased the contractor's costs and that of labour. The 2nd is the Kediemetsi one completed after 20 months. No mentor was allocated. The challenges were documented in minutes of meeting held by the 2nd Applicant and the Department on September 2022.

[33] The 2nd Applicant was also in March 2022 awarded the rehabilitation of the road project worth R17 Million granted to and scheduled for 12 months. It was cancelled in March 2023 because the Auditor General found that the contract constituted irregular expenditure. At termination it was 90% complete and R16 Million had been paid to the 2nd Applicant. The 2nd Applicant suffered significant losses due to the delay in completion caused by the fact that the design of the end point had to be changed three times. The consultant involved was not involved in the designing of the bridge and hired at a higher rate, declining those they suggested at lower rate. The costs increased when the contractors also engaged their own consultants, who then instructed an engineer to do a third design which held back the project as it took six months for the new design to be produced, contributing to the losses and indebtedness incurred.

[34] With all other mishaps with the Bill of Quantities delaying the projects and increasing the costs. The Department's chosen consultant seemed to be the overall overseer of all the Vukuphile projects. The 2nd Applicant is said to have ultimately suffered a loss of R5 529 928 Million Rands, a claim the Department is alleged to have refused to settle.

[35] They point out further delays due to a community unrest and interference by the business forum caused by the failure of the Department to appoint a CLO or a steering committee, an Occupational Health and Safety Consultant and a Social Facilitator. There was also a need for additional local Security. The amendment of the Bill of Quantities which initially only covered 6 months when the contracts were for 1 year.

[36] The Appellants argue that in the light of the loss suffered and the costs incurred in these projects, the contracts granted do not constitute the *ex-gratia* compensation. Instead, the challenges as indicated on behalf of the 2nd Applicant is that there was no tender or contract data or contract price adjustment fettered in and no contingencies in the Bill of Quantities. These challenges are said to have been communicated to the Department in June and September 2021. The additional costs incurred and to be incurred were communicated in May 2022.

[37] As far as the 1st Applicant is concerned it is alleged that he did not make any profit from the two contracts that were allocated in May 2019 and July 2020 to the combined value of R2 769 155.00.86. He had to use his personal savings of R400 000 as he was advised by the Administrator not to exceed the contract value otherwise he will not be awarded the contract as a learner contractor. The advise led to a loss. He had no mentor to assist him with the pricing and guidance on site even though he was awarded a project he had no experience on and of no relevance to the type of projects the 1st Applicant was supposed to be allocated within the learnership, that is the construction of roads. The 1st Applicant was as a result unable to upgrade his CIBD grading. The contracts as a result cannot be regarded as compensation for the *ex-gratia prejudice*.

[38] _They argue that the Department was aware when it granted the projects to the contractors that it was in reference to the delay in the project, and to have been aware from the date that the review was launched that the PP's report was under challenge on the two inconsistent sets of remedial action promulgated by the PP in respect of compensation for the ex-gratia prejudice suffered by the Applicants. Therefore, it acted knowingly and took the risk that the 7.3.3 remedial action would be set aside.

[39] The Applicants also argue contrariwise that in any event it is not clear if the projects were allocated by the Department pursuant to its purported resuscitation of the Vukuphile programme (as the PP directed it to do) or to paragraph 7.3.3 of the PP's report. They reckon (it appears) it was in pursuant to the resuscitation of the Vukuphile programme as the PP directed, given that the value of the projects allocated varied considerably and did not each amount to R4 Million Rand. The allocations were also very skewed, arbitrary and biased to specific learner contractors which compromised or completely undermined or defeated the developmental objective of the programme and caused damages and prejudices suffered by the contractors.

[40] The Applicants also agree with the Department in so far as what is stated is consistent with what is in the settlement agreement and the PP's report on the work in which the participating contractor was accepted to the programme. They however contend that the allocation of work was not consummate with what the learner contractors signed for and their geographical location. They for example indicate that

the nature of work allocated to the 1st Applicant was cutting of grass, whereas he signed for civil engineering work. The work did not have the effect of contractor development, growth and would not have translated into an increase in the CIDB grading level of the 1st Applicant. All this time the 1st Applicant was told that the allocation was temporary and allocation of proper projects would be in due course and it never happened. The management plan for the Vukuphile learnership programme was said to be lacking.

[41] They continue to argue that the resuscitation of the programme was not done in accordance with the aims, objectives and guidelines of the programme. There was no theoretical training, financial support that was provided even though the management plan for Vukuphile provides that the Department concluded an agreement with the financial institution to provide learner contractors with access to credit and financial services to enable the purchase of hand tools, vehicles, construction equipment needed to carry out the work and to have access to the necessary working capital. Late payments by the Provincial Department resulted in employees not being paid and having no money for transport to get to the site causing slow progress and delay in the finalisation of the projects.

[42] The reappointment letters were issued to the contractors only in 2022, three years after the PP's report, signed by some and not all of the learner contractors. Those who have not signed continue to suffer further prejudice as they are being allocated smaller projects to the value of R1 166 836.00, below their CIDB rating. The Department has also lately resolved not to further allocate any contracts to those who have instituted legal proceedings aimed at setting aside the settlement agreement as it is confirmed in paragraph 33 in a letter dated 13 February 2020.

[43] They further complain about favouritism in the allocation of projects, a few contractors getting between R47 Million and R139 Million and the rest who have been allocated only one project each ranging from only R368 000 to R10.2 Million, which cannot constitute ex gratia compensation as they have in many instances left the contractors financially worse off. They deny that by the completion of a R10 Million projects a contractor has benefitted, broken even or profited to that extent or at all, but

indicate the amount at which the project is priced to exclude the costly resources required to complete the project.

[44] They deny that a consultative meeting was held with all the contractors between 10-12 February 2018. They allege that the notice for the meeting was sent by sms from an unknown number and as they could not identify the sender only a few attended, approximately 12 of the 60. Whilst the Administrator ignored multiple emails sent to him by the learner contractors requesting a meeting. They deny the statement that all the 29 contractors by 4 February 2019 were furnished with appointment letters.

[45] In conclusion the Applicants dispute that the Department ought to have complied with the impugned 7.3.3, remedial action in light of the numerous challenges that have been brought to light in the allocation of the contract projects in resuscitation of the programme.

[46] They as a result persist to seek an order to review and set aside the impugned decision and the 7.3.3 remedial action, either under PAJA or alternatively the common law principle of legality and insists on the substitution of the settlement remedial action initially recommended.

Issues to be determined

[47] The issues arising from, the various contestations raised by the parties are:

[47.1] Whether the PPs impugned decision on the remedial action reviewable under PAJA and or the principle of legality;

[47.2] Whether the PP's decision to issue the remedial action in paragraph 7.3.3 of her report ultra vires her Constitutional and statutory powers therefore invalid and reviewable? If reviewable;

[47.3] Whether compliance with the impugned decision notwithstanding it being reviewable, a factor to be considered in deciding on the appropriate

order. (whether it would be just and equitable to set aside the remedial action of the PP and decide on the matter or to have it determined anew by the PP?

[47.4] Whether in remitting the matter to the PP for a fresh decision a directory order (to take a particular decision), appropriate.

Legal framework

Whether the PP's remedial action an administrative decision reviewable under s 1 of PAJA and or under the principle of legality;

[48] In *Minister of Home Affairs v The Public Protector*,⁹ the PP's remedial action was confirmed to have been long-established not to constitute an administrative action with the court holding that:

*"The Public Protector's office is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and hence constituting administrative action. That being so, the PAJA does not apply to the review of exercises of power by the Public Protector in terms of s 182 of the Constitution and s 6 of the *Public Protector Act*. That means that the common law principle of legality applies to the review of the decisions in issue in this case."*

[49] The principle of legality *per se* symbolizes the notion of a public authority that cannot exercise its power arbitrarily but within the limits of the law. So even if an action/decision of a public authority does not constitute an administrative action as

⁹ (308/2017) [2018] ZASCA 15 (15 March 2018)

contemplated in s 33 of the Constitution, the constraints of the principle of legality remain, and implicit in the Constitution that the authority must be exercised in good faith and not to be misconstrued.¹⁰ Courts can therefore, even when formal administrative law mechanisms do not apply, review actions of public authorities to ensure compliance with legality, enforcing the fundamental principles of natural justice. Furthermore ensure that legislative power is exercised fairly and transparently and individual rights are protected against unintended encroachment.

[50] In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of South Africa and Others*¹¹ the court held as per Chaskalson J that:

'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 with this requirement. It follows that in order to pass constitutional scrutiny the public power by the executive and other functionaries must, at least, comply with this requirement'.

[51] The test applied in the principle of legality reviews is rationality, that is whether the means applied to reach a decision are rationally related to the end (decision). The means applied will include the process, evidence considered, regulation applicable and the reasoning. Chaskalson J also confirmed that rationality can be regarded as the minimum threshold requirement to the exercise of all public power by public functionaries including members of the executive.¹² The exercise of all public power must consequently comply with the Constitutional and legal standard of rationality.

Overview on the powers of the PP

[52] In terms of s 182(1) of the Constitution¹³ the PP is empowered, as regulated by national legislation to investigate any conduct in state affairs or

¹⁰ *Law Society of South Africa v The President of RSA* 2019 (3) A 30 (CC) at para 47 and 48.

¹¹ (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674 (CC) at para 85; 2000 (3) BCLR 241 (CC) (25 February 2000)

¹² *Supra* Ibid at 86 and 90

¹³¹³

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 PP's powers as prescribed by the Constitution are set out and described in elaborate terms in sections 6 (4) (a) (i) and (ii) of the PPA, which deals with the legal status or effect of the totality of the Public Protector's remedial powers.

[53] Section 6 (4) (a) (i) and (ii) of the PPA reads:
the Public Protector shall, be competent:

4(a) to investigate, on his or her own initiative or on 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, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money; [Sub-para. (iii) substituted by s. 36 (1) of Act 12 of 2004.]

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

(v) act or omission 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 person

(b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by

(i) mediation, conciliation or negotiation;

(ii) advising, where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances; and

(c) at a time prior to, during or after an investigation;

(i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority; and charged with prosecutions; or

(ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority; and affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority

[54] The extent of the mandate of the PP as expressly outlined (summarised concisely) in the Constitution¹⁴ and the PPA is appropriately and fairly delineated as follows in *Economic Freedom Fighters*,¹⁵

“Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the “efficient, economic and effective use of resources [is] promoted”, [64] that accountability finds expression, but also that high standards of professional ethics are promoted and maintained. It was held that “to achieve this requires a difference-making and responsive remedial action. Since one cannot really talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.”

[55] It is of importance that the PP’s remedial action is responsive and address a complaint in a meaningful way. This is achieved by making an appropriate recommendation to the affected public body or authority, on the correction of impropriety found or regarding the redress of the prejudice resultant therefrom or any other appropriate recommendation the PP deems expedient, whilst still maintaining accountability and promoting the effective use of resources.

[56] An appropriate remedial action connotes a suitable, proper, fitting, and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate.¹⁶ However sensitive, embarrassing and far-reaching the

¹⁴ Section 195 (1) (b) of the Constitution

¹⁵ Supra at para 74

¹⁶ *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69

implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint. Remedial action must therefore be suitable and effective, and remedial measures still capable of enforcement would be fully complied with.¹⁷

[57] The extent of depth of the PP's remedial powers and the potential intrusiveness of her investigative powers are highlighted explicitly by the court in *EFF v Speaker*,¹⁸ more so, that *her office was accordingly created to "strengthen constitutional democracy in the Republic". And that "one cannot really talk about a remedial action unless it in the true sense is provided to address a complaint in a meaningful way or any other means that may be expedient in the circumstances."*

[58] The remedial action must therefore be expedient in the circumstances, meaning practical, measurable and beneficially address a complaint in a meaningful way. The PP is required to be impartial, exercise her powers and perform her functions without fear, favour or prejudice, independent of any influence. To realise this enormous and crucial objective, the PP is accordingly in terms of the Constitution¹⁹ independent and subject only to the Constitution and the law.

[59] Hence in *EFF v Speaker* the court further opined that:

"[49] I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made."

Whether the PP's decision to issue the remedial action in paragraph 7.3.3 of her report ultra vires her Constitutional and statutory powers therefore invalid and reviewable?

[60] As in terms of s 6 (4) (b) (1) of the applicable legislation, the PP facilitated through conciliation and mediation a consensual remedial action to the Applicants' complaint. Of importance is that in terms of clause 3 of the settlement agreement, both

¹⁷ See *Fose Supra*

¹⁸ See footnote 1

¹⁹ Section 181 (1) (a) and (2) of the Constitution.

parties and the PP agreed that the agreement constitute the PP's findings and remedial actions in terms of s 182 (1) of the Constitution and that it is binding on the parties. Both parties and the PP do not dispute the legal effect thereof that it remained binding.

[61] The PP decision to amend or deviate in his report from the settled remedial action was in essence ultra vires her powers, which is a Constitutional impasse. Once the PP has decided on the remedial action, the Applicants argue that she became *functus officio*. She indeed could not unilaterally and arbitrarily withdraw, revoke or revisit the decision, due to its binding nature, more so that it was agreed upon by all parties in settlement. The Department acquiesced to that contention.

[62] It is clarified in EFF that this is so, because our constitutional order hinges on the rule of law. A decision grounded on the Constitution or law may not be disregarded without recourse to a court of law. To do otherwise would “amount to a licence to self-help”. It is further set out in EFF²⁰ with reference to *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* that:

“Whether the Public Protector’s decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained. This was aptly summed up by Cameron J in Kirland²¹ as follows:

The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in Welkom. . . ‘(t)he rule of law obliges an organ of state to use

²⁰ EFF v Speaker of the National Assembly & Others Supra at para 74

²¹ MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (Kirland)

the correct legal process.’ For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality.”

[63] The fact that the process for establishing and quantifying the ex-gratia compensation for the prejudice suffered as per the settlement agreement was unsuccessful, did not mean that the PP on her own or together with the Department could arbitrarily decide to impose a remedial action, revoking or deviating from the binding remedial action. The remedial action remains binding to all the affected parties, even though they might now hold a contrary view.

[64] In terms of *Oudekraal Estate (Pty) Ltd v City of Cape Town*²² administrative decisions remain legally effective until properly set aside, even though in casu the context is different as we are not dealing with an administrative decision, the premise however is the same as far as the exercise of public power is concerned. The PP could not disregard the legally binding effect of his remedial action in the settlement agreement, which was final. The remedial action could not be revoked, revisited, withdrawn or substituted except by consensus of all the parties concerned, failing which by order of court, not even by the PP who also had to do it by court order.²³

[65] The PP had in fact also in her report confirmed in paragraph 5.3.9 that clause 2.4 of the settlement agreement constitutes the PP’s findings and a conciliated and mediated remedial action that is binding. The remedial action was final so as to be binding, which finality can only be on publication. In the report issued by the PP on 6 May 2019, in as much as she had confirmed that clause 2.4 remedial action is binding, she also arbitrarily purported to impose the 7.3.3 remedial action and to publicise it in terms of s 8 (2A) (a) of the PPA. It was misleading as the s 6 (4) (b) (1) facilitated settlement agreement that outlined and confirmed her findings was already presented to and agreed upon by the parties on 23 July 2018. It culminated into a decision and publication thereof, therefore final

²² (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 22 (SCA) (28 May 2004)

²³ EFF v National Speaker of the Assembly [2016] ZACC 11; 2016 (3) SA 580 CC at par 75

[66] In terms of s 8²⁴ of the PPA, for publication, the PP shall make her findings of an investigation available to the complainant and to any person implicated thereby when she deems it fit but as soon as possible, including when in a manner she deems fit makes known to any person her findings, point of view or recommendation in respect of a matter she has investigated. The remedial action in *casu* was published when the PP's facilitated and recorded settlement agreement was presented and agreed to by the disputing parties, upon which it became final and binding. The PP in the settlement agreement did not only determine the remedy but also directed its implementation and confirmed its binding effect²⁵ in line with s 182 (1) (c).

[67] . Her subsequent decision to include paragraph 7.3.3 in her s 182 (1) (b) report, that tended to revoke the binding remedial action as per settlement agreement, substituting it with the ex-gratia project contracts was as a result irregular, inappropriate, ultra vires her powers, and of no force or effect, her action invalid as was argued by the Applicant. The remedial action recommended in the settlement agreement remains binding and could not be altered or substituted without the consent of the parties or order of court. The preservation in the settlement agreement of the PP's discretion to further investigate the conduct of any person responsible for the termination of the Vukuphile does not validate the decision the PP later purported to make in paragraph 7.3.3 without such investigation.

[68] The PP's power to make findings and recommendations as per s 182 (1) of the Constitution and s 6 of PPA is limited to matters she has investigated. When all the

²⁴ Section 8 reads:

Publication of findings

(1) The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

(2) ...

(3) The findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.

²⁵ *SABC v DA* note 46 above at para 52.

essential requirements for the proper exercise of her power are met, if no consensus is reached on her findings regarding the changes she found necessary to be effected, she had to get the court's consent to alter her recommendations. Absent the court order the settled remedial action remains binding. The arbitrary imposition of the amended remedial action supposedly to provide an alternative remedy to resolve the Applicants' complaint on that basis, is contrary to the basic tenets of the law from which the PP derives her powers. Her decision therefore is to be set aside.

[69] In addition, the contractors were not consulted or afforded a hearing, neither was there a consideration of their evidence or documents or at least an investigation on their perspective on the viability of the substituted mode of compensation. The PP therefore failed to adhere to her Constitutional mandate and statutory obligations to investigate and make proper findings prior to making the recommended remedial action. The decision was arbitrary and tainted by procedural irregularities. In the meanwhile there was a proliferate of complains about the Department's failure to co-ordinate meetings that were requested by the Applicants and in the implementation of contract work projects.

[70] Furthermore, the method specified in 7.3.3 as the recommended remedial action for the ex -gratia compensation, that "an additional contractual project of equal value of R4 Million be assigned to each of the 64 learner contractors that were involved in the program," practically circumvents the process of establishing and verifying the prejudice suffered by each contractor, if any and the extent thereof. It is obvious that the contractors could not have all suffered prejudice and of equal proportion. As indicated by the Applicants, it is not discernible how the PP arrived at the decision to recommend the substitution of contract projects for the ex-gratia compensation and the value thereof without the benefit of evidence by all the parties. It means the extent of the State Department's liability is thumb sucked. The decision was clearly insufficiently informed, devoid of any sense or rationality.

[71] Moreover, the parties also agreed that the imposed mode of the ex-gratia compensation in 7.3.3 is improper as it affronts the applicable legislation on procurement as the PP purports to direct the Department to effect procurement in a

way that is contrary to s 217²⁶ of the Constitution, the Public Finance Management Act²⁷ and the Preferential Procurement Policy Framework Act, (Act 5 of 2000) as repealed by the Public Procurement Act.²⁸ She likewise acted in violation of her mandate in terms of the PPA to promote accountability, ensure effective use of state resources and of her constitutional obligations to uphold the law.

[72] The decision therefore lacks rationality. It not only being procedurally fatally flawed and unlawful, but also Constitutionally invalid and to be set aside.

Whether compliance with the reviewable decision by a party or parties, a factor to be considered in determining a proper order, including whether or not it would be just and equitable to set aside the invalid decision.

[73] It is the Department's argument that the review application overtaken by the events of compliance with the impugned decision. The Applicants have already benefitted, in that, on receipt of the report, the Department commenced with the allocation of the work projects for the ex- gratia compensation of the Applicants' prejudice in compliance with the impugned remedial action. In addition, a considerable time has passed therefore undoing all that will be of no benefit to no one but self-defeating to the Applicants.

[74] The Department's viewpoint in that regard is that, even though the PP's remedial action directing the Department to award contracts in lieu of the *ex gratia* compensation to the deserving complainant contractors for prejudices they may have suffered, is a departure from the settlement agreement and offends against the procurements prescripts applicable in the public sector, it would not be just and equitable to set it aside or to have the matter determined anew. It placed on record that since the department has already complied, as a result, it should be up to the

²⁶ Procurement s 217. (1) the Auditor-General must report to Parliament; and the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

²⁷ 1 of 1991

²⁸ Act 28 of 2024

court to determine what is just and equitable in the peculiar circumstances of this matter.

[75] In essence the Department seeks the court to condone the unlawful and arbitrary decision of the PP, notwithstanding conceding to the illegality of the decision being contrary to the Constitution and imposed procurement prescripts as a just and equitable order. More so that there was already in existence a binding remedial action.

[76] The PP's decision is invalid and therefore of no force or effect. The court cannot perpetuate judicial delinquency by condoning and sanctioning illegal/invalid decisions. In such instance what would be just and equitable is not to validate an invalid act. Compliance therewith could not render it legal, The decision was unlawful. Moreover, it was made whilst there was an existing and binding remedial action on the ex gratia compensation.

[77] It further should be clear and emphasised that the power of the court to grant a just and equitable remedy may not be exercised to withhold the declaration of invalidity. It cannot be invoked as justification for declaring invalid an administrative action that is inconsistent with the Constitution and PAJA, in this instance the principle of legality. This is so because section 172(1) of the Constitution compels every court to declare invalid any conduct that is inconsistent with the Constitution. As mentioned earlier, the performance of this function is not discretionary. But the granting of a just and equitable order is discretionary.²⁹

[78] In Kirland it was further enunciated that:

“Just like any discretionary power, this power too must be exercised judicially. This means that there must be circumstances that convince a court to exercise it one way or the other. It is apparent from Bengwenyama Minerals that prejudice is one of the factors which may influence a court to grant a just and equitable order in addition to declaring an administrative decision invalid”.

²⁹ Kirland Supra at para 54

[79] In *Bengwenyama Minerals* referred to in *Kirland* the following was also held that:

“It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the ‘desirability of certainty’ needs to be justified against the fundamental importance of the principle of legality.”

[80] Even though the Department had indicated that the cancellation of Vukuphile in June 2014 was due to lack of funding, it nevertheless agreed in the settlement agreement as facilitated by the PP to the method of implementation and establishing the *ex-gratia* prejudice suffered, the extent of compensation to be paid to each contractor plus timelines. The Department argues that it was bound to abide by the latter decision as it is required by law until it has been set aside by the court. It as a result undertook to allocate the contracts for the *ex-gratia* compensation based on the various CIDB grading, in line with the PP’s remedial action at 7.3.3.

[81] The Applicants have illustrated how the contractors involved are finding it difficult to fulfil their contractor project duties as a result of a variety of issues involved. Moreover, the lack of cashflow, facilities and equipment required to realise the intended compensation for the resuscitated contracts. Therefore, the allocation of further contracts when some contractors are still struggling with proper grading plus the stated systematic challenges is alleged to have not effectively compensated the prejudice suffered but created further problems. There are also allegation of skewed

allocations with some projects being way over or way lower than the R4 Million threshold imposed by the PP.

[82] Taking into consideration that 7.3.3 remedial action was never investigated as a viable option and also due to its invalidity and illegality and the manner in which it was implemented, it cannot be considered to be a just, equitable and sustainable solution to retain as it stands even if part allocation is alleged to have taken place. An incident of irregular expenditure involving the ex-gratia projects has already arisen.

[83] Basically it is also not reconcilable with the Applicants unique situation since prejudice suffered, if any, and its extent still has to be identified and proven first prior to any ex-gratia compensation considered. This is another way to make sure that public funds are not misused or wasted as a result of unintended enrichment.

[84] The PPA makes it clear that while the functions of the Public Protector include those that are ordinarily associated with an ombudsman they also go much beyond that. The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances.³⁰

[85] In my view it is of no consequence that an undertaking was made to comply with a remedial action conceded to have been made improperly and contrary to the dictates of the principle of legality. Moreover, the alleged allocations of ex gratia contracts were made post this Application challenging the validity of the related decision. It would not be in the interest of justice to validate the impugned decision and such compliance without proper investigation. More so as the equity and sustainability thereof is questionable. It cannot be that each of the contractors had suffered the ex- gratia prejudice and of equal proportion. If the intention was to alter the remedial action as per settlement agreement, then a vigorous, separate investigation with proper findings and recommendation could not be circumvented. Seeing all that has occurred, remission of the matter back to the PP is unpreventable.

³⁰ *The Public Protector v Mail and Guardian Ltd & Others* SA 2011 (4) SA 420 (SCA)) [2011] ZASCA 108; 422/10 (1 June 2011) at para 9

[86] The Department has mentioned the question of delay to be considered. It can be ameliorated by managing timelines of the investigation and consideration of outcomes. Besides delay, no other prejudice has been mentioned.

Whether a directory order to the PP would be appropriate

[87] The decision to be made involves not only the consideration of fairness to all implicated parties but an investigation that requires assessment and evaluation of all evidence and circumstances, accounting for all relevant facts and surrounding circumstances for the PP to be in a good position to exercise her discretion to make a proper recommendation. She needs to have all the pertinent information before her to make the appropriate remedial action. A directory order would therefore not be appropriate.

[88] A directory order prescriptive on the recommendation to be made risks prejudicing the PP's decision making process and undermining its integrity, especially when the outcomes of an investigation and probable findings cannot be predicted. The court might be considered to have exceeded its jurisdiction.

[89] In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*, the court in response to a proposition of a directory order stated that:

A foregone conclusion cannot be circumscribed to the PP where in the exercise of her discretion she is directed to only one outcome regarded as proper when there are still other considerations to be made and it would merely be a waste of time to order the [administrator] to reconsider the matter'. Indubitably, where the PP has not adequately investigated the matter, it may be difficult for a court should have reached a particular decision and that the decision is a foregone conclusion.

Even where the administrator has applied its skills and expertise and a court has the relevant information before it, the nature of the decision may dictate that a court defer to the administrator”.³¹ (my emphasis)

[90] Ancillary orders directing the Public Protector to investigate afresh, and in doing so to take certain matters into account, were, however, set aside in *The Public Protector v Mail and Guardian Ltd & Others SA*³², the SCA implored that “a court should not make an order unless the order is clear as to what is required. The court could not direct the Public Protector as to the manner in which any further investigation should be made and for that reason it set aside those orders stating as follows:

“But I do not think that a court should make an order, thereby exposing the litigant to the penalties for contempt if it is not obeyed, unless the order is clear and unambiguous as to what is required. There was no suggestion on behalf of the Public Protector that the investigation will not be opened afresh and the views expressed by Adv Mushwana himself of the enormity and importance of the matter give every reason to think that that will indeed occur. It is not open to us to supplant the Public Protector by directing with precision what is required for a proper investigation. That will inevitably be dictated by the exigencies that might arise. In those circumstances I do not think those orders should stand and the Public Protector must be left to determine what is required in order to fulfil his or her duty.”

Costs

[91] In litigation, the general principle for costs is that costs follow the event. In that regard the losing party is to pay the costs of the winning party.

[92] It is also the basic principle that the award of costs is in the discretion of the court and the successful party should, as a general rule, have his or her costs.³³ The Department and the National Ministry has not been successful in

³¹ 2015 (5) SA 245 (CC) para 47-50. [2015] ZACC 22; 2015 (10) BCLR 1199 (CC) (26 June 2015)

³² at para 145

³³ *Ferreira v Levin NO and Others*

their counter proposition to stay the decision of the PP notwithstanding conceding its illegality and inappropriateness on the merits. It would therefore be just for both to carry the costs.

It is therefore ordered that:

1. The remedial action in paragraph 7.3.3 of the Public Protector's Report dated 09 May 2019 is reviewed and set aside;
2. The matter is remitted to the Public Protector who is directed to within 60 days of receipt of notice of the grant of this order, to investigate, consider and decide on a fresh decision in respect of the appropriate remedial action to be imposed for the ex gratia compensation of the Applicants for the prejudice proven to have been suffered which decision and method of implementation thereof is to be communicated to the Applicants and the 2nd and 3rd Respondents within 30 days of it being taken.
3. The 2nd and 3rd Respondent to pay the costs of this Application on scale B.



N V Khumalo
Judge of the High Court
Gauteng Division, Pretoria

For the Applicants:

E Webber

loxton@counsel.co.za / pjd@counsel.co.za

Instructed by:

VAN VELDEN DUFFY INC

weslevk@vvd.co.za

For 1 st Respondent:	N/A Public Protector Office
For 2 nd & 3 rd Respondents:	M Makotl advgumbi@gmail.com / kunene@counsel.co.za
Instructed by:	MOLEFE ATTORNEYS thapelo@lawyer.com