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FLOUTING CONSTITUTIONAL DUTIES WILL NOT BE TOLERATED - CONSTITUTIONAL COURT UPHOLDS PUNITIVE COST ORDER AGAINST PUBLIC PROTECTOR: *PUBLIC PROTECTOR V SOUTH AFRICAN RESERVE BANK*

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On Monday 22 July, the majority of the Constitutional Court, in a decisive judgment, upheld the personal cost order made against the Public Protector by the Pretoria High Court in *ABSA Bank and Others v the Public Protector and Others* (Bankorp High Court judgment). According to the Bankorp High Court judgment, the Public Protector was to be held personally liable for 15% of the legal costs of the South African Reserve Bank (SARB), on a punitive scale. This was because she did not *"fully understand her constitutional duty to be impartial and to perform her functions without fear, favour and prejudice*". Further, there was a "*reasonable apprehension*" that she was *"biased"* in her investigations.

To appreciate the Constitutional Court's findings, a short analysis of the litigation process in the Pretoria High Court is required. The matter involved the review application of the Public Protector's Report into "*allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank*" (the PP's Bankorp Report). The PP's Bankorp Report essentially found that:

- the State had failed to implement the CIEX Report;
- the State and SARB had failed to recover R3.4 billion from Bankorp Limited (ABSA);
- the aforesaid prejudiced the South African public.

The remedial action proposed by the PP's Bankorp Report was viewed as controversial and contained radical measures, such as directing Parliament to amend section 224 of the Constitution relating to the core function of SARB. This radical remedial action was, however, immediately set aside in an urgent application brought by SARB.

Following their urgent application, ABSA and SARB then challenged the remaining remedial action proposed in the PP's Bankorp Report (second review application). It was in this second review application that the Pretoria High Court made critical findings relating to the Public Protector's manner of investigation and the way she conducted herself during the litigation.

The Pretoria High Court specifically criticised the Public Protector's failure to disclose two meetings with the former President, held prior to her releasing the final report. Ms Mkhwebane did not afford the same opportunity to the implicated parties. This was further aggravated by the fact that she only admitted to the first meeting with the former President in her answering affidavit to the High Court. Ms Mkhwebane was silent on the second meeting with the former President, which, according to the High Court, was "veiled in secrecy", as no transcripts of the meeting were provided.

The Constitutional Court agreed with the Pretoria High Court in that not only did the Public Protector fail to disclose meetings with the former President, but she also failed to explain why she had discussed the vulnerability of SARB with the State Security Agency. Further, there were no transcripts of the second meeting with the former President - which is contrary to the standard practice of the Public Protector's Office. The Pretoria High Court also critically held that in her answering affidavit, the Public Protector "pretended" that she had relied on the advice of an economic expert during her investigations (this advice was central to the Report's findings).

However, it became apparent that the economic advice was only given *after* the Report was finalised. SARB held that her answering affidavit should not have included statements by this economic expert, as he was not consulted during the investigation.

The Constitutional Court also found that the Public Protector's "*explanation of her conduct was contradictory*" in the Constitutional Court proceedings, and that she failed to include important documents. Before the Constitutional Court, the Public Protector argued that the personal cost order, in terms of the Bankorp High Court judgment, would:

- erode the constitutional independence of her Office;
- inhibit future investigations due to the feared risk of a personal cost order; and
- open the floodgates of similar litigation against her.

The SARB, however, argued that a personal cost order in this instance - considering how Ms Mkhwebane had conducted her investigation, and the fact that she was not truthful with the Court - would indeed "*vindicate the Constitution*", as public officials cannot "flout" their constitutional duties.

The Constitutional Court rejected the Public Protector's argument that a personal cost order would open the floodgates for similar litigation. On the contrary, the Court maintained that personal cost orders always relied on the facts of each specific case.

It is worth mentioning that in response to the Public Protector's appeal to the Constitutional Court, SARB asked for leave to cross-appeal. SARB specifically requested that the Constitutional Court declare that the "*Public Protector abused her office during the investigation*". A similar request by SARB for such an order during the High Court proceedings was previously dismissed, due to a procedural aspect. The majority of the Constitutional Court, although critical of the Public Protector's manner of investigation, agreed with the High Court's procedural findings in this instance.

It is important to keep in mind that the Constitutional Court's judgment will directly impact the determination of legal costs in *DA v the Public Protector and CASAC v the Public Protector* (Estina High Court judgment). This joint matter dealt with the Public Protector's Report on the controversial Estina Dairy project. The High Court was very critical of the manner in which the Public Protector investigated the project. The High Court therefore decided to postpone their

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determination on the issue of a cost order against the Public Protector, pending the outcome of the appeal of the Bankorp High Court judgment.

These critical Constitutional Court findings will also have a direct bearing on the inquiry of the Justice and Correctional Services Portfolio Committee. This Committee must determine whether the Public Protector should be removed from Office on the grounds of "*misconduct, incapacity or incompetence*", as set out in section 194(1)(a) of the Constitution. The Portfolio Committee cannot ignore Constitutional Court's findings, which directly relate to Ms Mkhwebane's integrity. Her actions cannot simply be condoned under good faith.

In light of the above, the Constitutional Court's judgment could not have come at a more apt time, amidst well-grounded fears that the Public Protector is not upholding her duty to act "*without fear, favour or prejudice*" in investigating public maladministration.