REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 36099/2098

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

In the matter between:

PRAVIN JAMNADAS GORDHAN	**APPLICANT**
GEORGE NGAKANE VIRGIL MAGASHULA	**SECOND APPLICANT**
VISVANATHAN PILLAY	**THIRD APPLICANT**

and

THE OFFICE OF THE PUBLIC PROTECTOR	**FIRST RESPONDENT**
BUSISIWE MKHWEBANE	**SECOND RESPONDENT**

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**THIRD RESPONDENT**
VISVANATHAN PILLAY	**FOURTH RESPONDENT**
GEORGE NGAKANE VIRGIL MAGASHULA	**FIFTH RESPONDENT**
COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES	**SIXTH RESPONDENT**

JUDGMENT

THE COURT

INTRODUCTION

[1] On 24 May 2019 the Public Protector released a "*Report on an investigation into allegations maladministration and impropriety in the approval of Mr Ivan Pillay's early retirement with full pension benefits and subsequent retention by the South African Revenue Service* (sic)" ("the Report"). The Report is the culmination of an investigation conducted by the Public Protector on the strength of a complaint made anonymously on 18 November 2016 against the applicants and relates to matters which occurred during 2010.

[2] As the title of the Report indicates, the incident that was the subject of the complaint occurred at the South African Revenue Service ("SARS").

SARS is established in terms of section 2 of the *South African Revenue Service Act (*"*the SARS Act*"),[1] as an organ of state within the public administration, but as an institution outside the public service. The Minister of Finance is the member of Cabinet who is responsible for SARS. The Minister appoints the Commissioner as the Chief Executive Officer of SARS and in turn, the Commissioner is accountable to the Minister on all matters relating to SARS.

[3] Although employees of SARS do not fall under the *Public Service Act,* ("*the Public Service Act*") [2] and are in that regard not public servants, their pension is, however, regulated in terms of the *Public Service Act* read with the *Government Employees' Pension Law*, ("*GEP Law*").[3] Section 19 of the *SARS Act* provides that a person appointed by SARS as an employee becomes a member of the Government Employees' Pension Fund ("GEPF") mentioned in section 2 of the *GEP Law* and is entitled to pension and retirement benefits as if that person were in the service in a post classified in the division of the public service mentioned in section 8 (1) (a) of the *Public Service Act.*

THE PARTIES

[4] At the time, of the occurrence of the incident referred to in the complaint, the first applicant, Pravin Jamnadas Gordhan ("Minister Gordhan"), was the Minister of Finance in the Cabinet of President Zuma. The first and second applicants were in the employment of the South

[1] Act 34 of 1997.
[2] PROCLAMATION NO. 103 OF 1994.
[3] PROCLAMATION No. 21 of 1996.

Africa Revenue Service ("SARS"). The second applicant, Visvanathan Pillay ("Mr Pillay") was employed as a Deputy Commissioner whereas the third applicant, George Ngakane Virgil Magashula ("Mr Magashula") had just taken office as the Commissioner.

[5] Initially when the review application was launched, Messrs Pillay and Magashula were cited in the review application as the third and fourth respondents, respectively. Messrs Pillay and Magashula applied for intervention to be joined as co-applicants to the review application, which was granted. The two have now been respectively joined as the second and third applicants to the review application. Both, Messrs Pillay and Magashula have in their respective applications to intervene associated themselves with the submissions of fact and law set out by Minister Gordhan in the latter's founding affidavit and the relief sought in the review application. As such, Minister Gordhan's founding affidavit serves as the main affidavit on which the applicants rely for their case. I, shall, for convenience, in this judgment refer to Minister Gordhan and Messrs Pillay and Magashula collectively as the applicants and individually by their respective names.

[6] The first respondent is the Public Protector who is cited in her official capacity as the person responsible for the Office of the Public Protector. The second respondent is Advocate Busisiwe Mkhwebane ("Adv Mkhwebane"), the current Public Protector who is cited in the papers in her personal capacity since a punitive and personal cost order is sought against her in the review application. The Public Protector and Adv

Mkhwebane are represented by the same counsel and have filed a composite answering affidavit in response to the applicants' founding papers. I, shall for convenience refer to them herein as the Public Protector unless the context dictates otherwise.

[7] The third respondent, the President of the Republic of South Africa and the sixth respondent, the Commissioner of the South African Revenue Service, though cited as the respondents in the review application, are not taking part in the proceedings. They both did not file any papers and were as such not even represented at the hearing of the matter.

THE COMPLAINT

[8] A complaint of maladministration against the applicants, as already stated, was lodged anonymously with the Public Protector on 18 November 2016. The complaint was that Minister Gordhan, in his position as the erstwhile Minister of Finance, with the recommendation of Mr Magashula, the then Commissioner for SARS, approved the early retirement and re-employment of Mr Pillay on a fixed-term contract as Deputy Commissioner with full pension benefits as though he had retired at a statutory age. A penalty that was levied on Mr Pillay's pension benefits by the GEPF in the sum of R1 141 178.11 was paid by SARS.

[9] The essence of the complaint was that Minister Gordhan and Mr Magashula acted dishonestly in their dealing in this matter and placed Mr Pillay at an advantage. As a result, Mr Pillay has been unjustifiably enriched. Furthermore, SARS has incurred fruitless and wasteful expenditure in paying the penalty on behalf of Mr Pillay. The complaint as

such contended that Messrs Magashula and Pillay as well as Minister Gordhan's conduct, amounted to maladministration in that they failed to prevent SARS from incurring the irregular, fruitless and wasteful expenditure.

THE REPORT

[10] Pursuant to the said complaint, the Public Protector launched an investigation in terms of section 7 of the Public Protector Act. The investigation was conducted by way of correspondence and interviews, an analysis of relevant documentation as well as the consideration and application of relevant laws, related prescripts and case law.

[11] Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector made the following findings and remedial orders:

> "(a) Regarding whether Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full pension benefits and his subsequent retention at SARS in the same position:
>
> (aa) The allegation that Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full retirement benefits and his subsequent retention at SARS is substantiated.
>
> (bb) Since neither Mr Pillay's request for early retirement nor Mr Magashula's recommendation to Minister Gordhan contemplated retirement, there was no retirement in fact and in law. If there were no retirement in fact and in law, it can be concluded that Mr Pillay was not entitled to early retirement with full pension benefits under any statutory provision;

(cc) Even if retirement had been contemplated and there was in fact a retirement, Minister Gordhan was not authorised by section 16 (2A) of the PSA to approve Mr Pillay's early retirement request with full pension benefits as this section does not confer any power on the Minister to approve early retirement with full pension benefits;

(dd) Mr Pillay was not entitled to early retirement with full pension benefits under section 16 (2A) of the PSA because the section makes no provision for such full retirement benefits. Section 16 (2A) of the PSA only confers a right on an employee to retire from public service upon reaching the age of 65 years. In terms of that section, no ministerial approval need be sought;

(ee) Even if the request for Mr Pillay for early retirement had been sought in terms of section 16 (6) of the PSA, Minister Gordhan would also not have been authorised by section 16 (6) (a) read with subsection (b) of the PSA to approve Mr Pillay's full pension benefits because the benefits which an employee is entitled to on early retirement are regulated by section 16 (6) (b) of the PSA and occur by operation of law. No ministerial approval is required in such instances;

(ff) Minister Gordhan's conduct therefore amounts to improper conduct as envisaged by section 6 (4) (a) (ii) of the Public Protector Act;

(gg) When Mr Magashula made the recommendation to Minister Gordhan for the approval of Mr Pillay's early retirement without downscaling of his retirement/pension benefits, SARS, through Mr Magashula, took the "*action*" contemplated in section 17 (4) of the GEPF Law and thereby triggered the additional liability to the GEPF;

(hh) Payment of the additional liability by SARS amounted to irregular expenditure as envisaged by section 38 (c) (ii) of the PFMA and maladministration as contemplated by section 6 (4) (a) of the Public Protector Act;

(ii) Minister Gordhan also acted *ultra vires* in approving the retention of Mr Pillay as Minister Gordhan was not authorised to do so.

(xii) The appropriate remedial action according to the Public Protector, in pursuit of section 182 (1) (c), with the view of placing the complainant as close as possible to where she would have been had improper conduct or maladministration not occurred, is the following:

(a) The President of the Republic of South Africa

(aa) To take note of the findings in this report in so far as they related to the erstwhile Minister of Finance, Mr Gordhan and to take appropriate disciplinary action against him for failing to uphold the values and principles of public administration entrenched in section 195 of the Constitution, and the duty conferred on Members of the Cabinet in terms of section 92 (3) (a) of the Constitution, to act in accordance with the Constitution.

(b) The Commissioner of SARS

(aa) To set in motion steps to recover the money paid as actuarial deficit or penalty on behalf of Mr Pillay by SARS to GEPF from the erstwhile Commissioner of SARS, Mr Magashula; and

(bb) To ensure that SARS introduces as part of their recruitment processes, regulations, policies and

> practices which are clear and unambiguous relating to early retirement and staff retention."

THE SALIENT FACTS

[12] The events that led to the anonymous complaint commenced when Mr Pillay approached Mr Vlok Symington ("Mr Symington"), a senior SARS official in the Legal & Policy Division of SARS who is said to be an expert on retirement, for assistance to structure a package for early retirement.

[13] The package envisaged entailed Mr Pillay's early retirement from GEPF; the approval of the Minister of Finance to waive the early retirement penalty; and the request to be appointed on contract after his early retirement from GEPF.

[14] Mr Symington provided Mr Pillay with an answer which was contained in a Memorandum that eventually landed on the desk of Minister Gordhan, who at the time was the Commissioner for SARS.

[15] Mr Symington, in the Memorandum, commented as follows:

> "approached individually, all three elements are technically possible under the rules of the GEPF read together with the employment policies of SARS. Mr Pillay has reached the required age of early retirement, he is entitled to request the Minister to "waive" the early retirement penalty and no technicality prevents SARS from appointing him on a contract after his retirement from GEPF."

[16] And in that vein recommended that

> "Mr Pillay's application for early retirement should be considered together with his application for the Minister to approve the benefit penalty payment by SARS as well as his request for post-retirement contract employment at SARS. If this application is approved as a package the financial risks in the context of the circumstances are probably minimal. However, if the Minister is unable to approve his request, relating to the penalty or if SARS is not in a position to contract with him after retirement, then his decision to apply for early retirement should probably all together be withdrawn."

[17] Between August and November 2009 Mr Pillay, drafted about three Memoranda addressed to Mr Magashula informing him of his intention to take early retirement and requested that Mr Magashula approve his re-appointment at SARS on a contract basis; and he also considers recommending to Minister Gordhan to approve that the penalty on his pension benefits is paid to the GEPF on his behalf by SARS. The reason given for Mr Pillay's request for early retirement was that Mr Pillay wanted to gain access to his pension funds to finance the education of his children. There was also mention of Mr Pillay's ill health and intention to migrate overseas, in the other Memoranda. The final Memorandum that Mr Magashula acted upon is dated 26 November 2009.

[18] Mr Pillay's Memorandum was referred to Mr Nic Coetzee ("Mr Coetzee") for advice, by Mr Magashula. Mr Coetzee advised Mr Magashula to recommend the request of Mr Pillay to the Minister and that the Minister must approve if there are sufficient reasons to do so.

However, he cautioned Mr Magashula about the cynical nature of the transaction as it would be technically construed as SARS contributing from its budget money for the schooling of Mr Pillay's children and that the re-appointment in the same position of Mr Pillay will raise eyebrows.

[19] In a Memorandum dated 12 August 2010, Mr Magashula addressed a formal motivation to Minister Gordhan in which he was requested to approve the early retirement of Mr Pillay as the Deputy Commissioner for SARS with full retirement benefits from GEPF as contemplated in Rule 14.3.3 (b) of the *GEP Law*, read with section 19 of *SARS Act* and section 16 (2A) (a) of the *Public Service Act*. In addition, Magashula requested Minister Gordhan's approval to retain Mr Pillay as Deputy Commissioner of SARS on a three-year contract with effect from 1 September 2010. Minister Gordhan approved Mr Pillay's request on 18 October 2010.

[20] According to Minister Gordhan, he approved the proposal because he believed that it was entirely above board and because he thought it appropriate to recognise the invaluable work Mr Pillay had done in the transformation of SARS since 1999. Minister Gordhan understood that Mr Magashula had established from enquiries within the Department of Public Service and Administration that the terms of Mr Pillay's early retirement and re-employment were lawful and not unusual.

[21] Before approving the request, Minister Gordhan, himself, also consulted various other persons about the request set out in the Memorandum from Mr Magashula. These consultations are said to have been undertaken over a period of three months from receipt of the request

to its approval. All the persons consulted by Minister Gordhan are said to have advised him that Mr Pillay's request was lawful. The people he consulted with are:

21.1 Mr Symington, a pensions expert in SARS, who had already provided him with an opinion on this issue in March 2009 when Mr Gordhan was Commissioner of SARS.

21.2 He had several discussions about the matter with Mr Magashula, who recommended approval.

21.3 He sought the views of Mr Andrew Donaldson ("Mr Donaldson"), the Deputy Director- General at Treasury, who had vast experience in pension-related matters.

21.4 He asked Ms Minee Hendricks ("Ms Hendricks"), who was acting Chief of Staff in the Ministry of Finance, at the time, to discuss the matter with Ms Rebecca Tee ("Ms Tee"), a legal advisor at National Treasury.

21.5 He consulted with the Minister of Public Service and Administration, Minister Baloi, who referred him to Mr Kenny Govender ("Mr Govendor") who was the Acting Director-General for the Department of Public Service and Administration. Minister Gordhan directed Mr Magashula to consult Mr Govender for advice.

21.6 He consulted Mr Michael Oliver ("Mr Olivier"), the chair of the SARS Human Resources Remuneration Committee, whose task was to advise the Minister on remuneration matters.

After all this consultation process Minister Gordhan signed the Memorandum on 18 October 2010 approving the request.

[22] On 31 December 2010, Mr Pillay was retired in terms of section 16 of the *Public Service Act* pursuant to the applicable rules of the GEPF. On 1 January 2011 he was hired on a fixed-term basis for five years, thereby ending permanent employment at SARS. Mr Magashula left the employ of SARS in July 2013 and Mr Pillay was appointed to occupy his position in an acting position. From 1 April 2014 Mr Pillay's fixed-term contract was amended and he was hired further until 31 December 2018.

[23] The fixed-term contract of Mr Pillay stipulated that any incoming Minister may terminate the contract on one month's notice. The continuation of the contract was confirmed by a letter dated 3 October 2014, by Minister Nene, Minister of Finance who took over from Minister Gordhan.

[24] On 12 February 2018, the Public Protector informed the applicants about the complaint against them. Pursuant to such notice, the applicants were served with subpoenas to appear before the Public Protector and her investigation team. The investigation finally culminated in the Report, which is the subject matter of this review application.

THE APPLICATION

[25] Pursuant to the aforementioned Public Protector's Report, Minister Gordhan launched a review application which seeks declaratory and review relief in the form of an order mentioned hereunder:

25.1 the reviewing and setting aside, and declaring unconstitutional, unlawful, irrational and invalid, the Public Protector's decision to exercise jurisdiction over the complaint in terms of section 6 (9) of the *Public Protector Act*,[4] ("*the Public Protector Act*") alternatively, reviewing and setting aside her decision on the basis that her discretion was improperly exercised;

25.2 the reviewing and setting aside and declaring unconstitutional, unlawful, irrational and invalid, the Public Protector's Report No 24 of 2019/20, dated 24 May 2019, including its findings in paragraph 6 and remedial action in paragraph 7;

25.3 an order for costs against any respondent that opposes the relief sought, on a joint and several bases; and

25.4 an order that Adv Mkhwebane pay costs *de bonis propriis* on a punitive scale ("the review application").

[26] In resisting the review application, both the Public Protector and Adv Mkhwebane have filed a composite answering affidavit. The

[4] 23 of 1994

composite answering affidavit seeks to answer to the applicants' respective founding papers. In addition to the Public Protector's response to the applicants' founding papers, the composite answering affidavit raises a preliminary point of striking out certain paragraphs of Minister Gordhan's founding affidavit which are said to be scandalous or vexatious or irrelevant. The composite answering affidavit also contains a counter-application which seeks an order

26.1 declaring Minister Gordhan and/or Mr Pillay to be in contempt of the Public Protector;

26.2 compelling Minister Gordhan and/or Mr Pillay to show cause, why he/they should not be liable to a fine not exceeding R40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment; and

26.3 that the costs of the purported counter-application be paid on a personal basis and/or on a punitive scale.

[27] The applicants have also raised the jurisdictional aspect referred to in paragraph 25.1 above as a point *in limine.*

[28] We shall hereunder commence dealing first with the *in limine* point of jurisdiction as it is dispositive of the matter. If so required, before we deal with the merits of the review application we shall consider the striking out application of the Public Protector and immediately follow with the consideration of the counter-application as it is dependent on the striking out application.

THE PUBLIC PROTECTOR'S JURISDICTION IN TERMS OF SECTION 6 (9) OF THE *PUBLIC PROTECTOR ACT*

[29] At the time of the hearing of the application, the issue pertaining to the special circumstances envisaged in section 6 (9) of the *Public Protector Act*, appears not to have been dealt with by any of our courts. Except for *GEMS*,[5] which did not specifically deal with the issue at hand, counsel could not provide us with any authority that might have been of assistance to us in determining the issue. We could, also, not find any such authority. It appeared at the time, that this court might be the first to be seized with the issue. Subsequent to the hearing, but prior to this judgment, a Full Court of this Division, in *Gordhan,*[6] has subsequently dealt with the issue, incidentally between the principal role-players in this application.

[30] The salient provisions of the *Public Protectors Act* that deal with this issue read as follows:

> "6 (9) *(a)* 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."

[31] In their founding papers as well as the heads of argument, the applicants attack the Public Protector's jurisdiction, in terms of section 6

[5] GEMS v The Public Protector (1000/19) [2020] ZASCA 111 (29 September 2020).
[6] Gordhan v Public Protector & Others Case No. 48251/19 (7 December 2020) (as yet unreported).

(9) of the *Public Protector Act*, to entertain this complaint, on the basis that there are no special circumstances that triggered the Public Protector to exercise her discretion in favour of entertaining the complaint. They raise various grounds to support their argument namely -

31.1 The first ground they raise is that the initial notice of investigation that was sent to them by the Public Protector made no mention of any special circumstances that prompted the Public Protector to entertain the claim.

31.2 Secondly, when they requested the Public Protector to provide the special circumstances, Minister Gordhan was provided with generic factors which are present in virtually every complaint that is referred to the Public Protector's Office. The said factors were in any event, said to be descriptions of general factors and not specific facts or circumstances that required investigation in this matter.

31.3 Thirdly, the reasons the Public Protector provided, over and above the generic factors provided to Minister Gordhan, could hardly be taken as constituting special circumstances, at all. For instance:

31.3.1 the reasons advanced to Mr Pillay during his interview with the Public Protector, that, "it falls within our two-year backlog" and "it was lodged before I joined the institution" and that they "want to finalise the matter speedily";

31.3.2 the reasons that were given to Mr Symington during his interview with the Public Protector, were that this matter relates to the utilisation of public funds and questionable conduct performed by members of the executive; that the Public Protector sought to "follow the money" and wanted "to avoid continuity" and did not want all public servants to follow Mr Pillay's example; and

31.3.3 the additional factors added to the generic factors as contained in section 7 (9) notice that she sent to the applicants that

> ". . . What constitute "special circumstances" will depend on the merits of each case. In this instance this is based on the additional liability the penalty amount of R1 258 345, 99, as well as the continued payment of salary to Mr Pillay whilst earning his monthly pension, consequently being unjustly enriched at the taxpayers' expense. This would have been incurred from SARS budget thus causing a burden on the fiscus."

These factors, according to the applicants, do not constitute special circumstances because Mr Pillay received a pension pay-out, and not a continued double payment as alleged by the Public Protector

and that the pension pay-out actually saved SARS money.

31.4 Fourthly, the lawfulness of Minister Gordhan's approval of Mr Pillay's request was scrutinised by several other bodies, including the Directorate for Priority Crime Investigations, the National Director of Public Prosecutions and the Judicial Commission of Inquiry into Tax Administration and Governance by SARS, all of who found no wrongdoing.

31.5 Lastly, the fact that the Public Protector advanced, at different times, different and equally unsatisfactory answers, as appears above, for what she claims as special circumstances.

[32] Given the insufficiency of each and every one of these special circumstances, and the inconsistency between them, the contention is that it can be concluded that the Public Protector had no lawful, rational or factual basis on which to exercise jurisdiction over the complaint. The applicants contend, therefore, that based on these grounds the Public Protector has no jurisdiction over the complaint under section 6 (9) of the *Public Protector Act* and for this reason alone, the review ought not to succeed.

[33] Conversely, in arguing for the dismissal of this point, the Public Protector, in her heads of argument, contends that the purpose of the Public Protector regime and the wide investigative powers this Office holds

should be taken into account and interpreted “holistically, purposively, generously” and in accordance with giving effect to the constitutional values in terms of section 39 (2) of the *Constitution*. In that respect, so it is submitted, the alleged impoverishment of the public purse, is still in continuous process of occurring for the purposes of section 6 (9) of the *Public Protector Act* and accordingly, the objection ought to be rejected on that primary ground alone. It was further argued in the alternative on behalf of the Public Protector, that the section 6 (9) objection ought to be dismissed on the totality of the grounds raised by the applicants as none of those grounds carries water.

[34] In oral argument, Mr Mpofu, on behalf of the Public Protector, contended that the jurisdictional point must not succeed because the applicants, in their respective arguments on this issue, fail to conceptualise the issue. This he says is so because according to him the applicants take the approach as if this is a typical prescription provision, which means it is a provision that prohibits the Public Protector from entertaining complaints that are more than two years, whereas it is a time bar provision.

[35] According to Mr Mpofu, this is a permissive provision and should be given a purposive interpretation. The section as it were, falls under the heading of ‘Reporting matters to and additional powers of the Public Protector’, which indicates that the section is meant for the benefit of the Public Protector and not for the benefit of alleged transgressors. He also argued that the section is meant to protect the Public Protector from

dealing with stale cases where evidence have been lost, and witnesses have died. The operative word in the section, according to Mr Mpofu, is the permission of the Public Protector, when there are special circumstances, he said.

[36] Counsel argued further that because of the wide powers of the Public Protector and the subjective nature of her discretion in section 6 (9) of the *Public Protector Act*, the court has to defer to the Public Protector as the person able to determine the special circumstances. The section does not prevent the Public Protector, but allows her in certain circumstances to permit or not to permit the extension of her powers in her discretion subjectively, he argues.

[37] The question, according to Mr Mpofu, should be whether or not the Public Protector provided particulars of the special circumstances on which she had relied. In answer to this question, Mr Mpofu conceded that the Public Protector provided generic reasons first but contended that she also, later on, provided circumstances special to the current matter. It is in that regard that he submits that the special circumstances were provided.

[38] His contention is that the time at which the particulars of the circumstances special to this case were given, is of no moment. According to him, the fact remains that the reasons were given and that the fact that the Public Protector gave generic reasons first does not detract from the fact that the specific reasons did exist, especially since they were eventually provided when asked for.

[39] It is common cause that the complaint in question emanates from the occurrence of an incident that took place in 2010. It is also common cause that because the complaint was more than two years when the Public Protector instigated its investigation, there had to be special circumstances that triggered the decision to investigate.

[40] The applicants' contention is that there were no special circumstances whereas the Public Protector contends that the special circumstances were in existence.

[41] The issue that finally occupied our attention on this issue in the debate with counsel in court, in order to determine whether the special circumstances existed or not, revolved around the point of time at which the special circumstances must exist and must be judged to exist.

[42] There is no dispute about the requirement for the existence of special circumstances, but what the parties are at odds with is the time at which these special circumstances must be in existence and provided to the alleged transgressor(s). The applicants' proposition is that the special circumstances ought to be determined first before the complaint is entertained, whereas the Public Protector's suggestion is that timing is of no essence when it came to when the special circumstances came into existence and when they were provided. The question, therefore, is whether or not timing is important.

[43] The meaning of section 6 (9) of the *Public Protector Act* is very clear and uncomplicated. In simple terms, the section states that the Public Protector may not take up a complaint or may not investigate a

complaint unless he or she first determines that there are special circumstances and exercises his or her discretion to investigate such a complaint based on such circumstances.

[44] We were referred, in this regard, to the decision of the Supreme Court of Appeal in *GEMS,*[7] which supports the interpretation that the Public Protector has jurisdiction only if there are special circumstances and that she has to articulate those special circumstances if asked for them, which we found apposite to a certain extent. That judgment at paragraphs 34 states that –

> "[34] . . ., generally speaking, a complaint should not be entertained 'unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned' (s 6(9)). The Public Protector does have a discretion, however, where special circumstances exist, to entertain complaints that are older than two years . . ."

[45] In *Gordhan*,[8] this court held that "the Public Protector, therefore, has to establish the existence of special circumstances before embarking on an investigation of complaints where such complaints have been referred more than two years from the occurrence of the incident or matter concerned" as is contemplated in section 6(9) of the *Public Protector Act*.

[46] The two judgements support the notion that although the Public Protector has discretion, it is only where special circumstances exist, that complaints that are older than two years can be entertained and then, the

[7] GEMS v The Public Protector 2020 ZASCA 111 para 34.
[8] Referred to in paragraph 29 above at para 21.

particulars of the special circumstances must be succinctly set out, and when they are asked for, they should be provided.

[47] Mr Mpofu's argument that because of the Public Protector's wide powers and subjective nature of her discretion, deference is given to her to determine the special circumstances, is not entirely correct. He is correct that the Public Protector should determine the special circumstances – section 6 (9) of the *Public Protector Act* provides as much. The difference is only that the determination of the special circumstances must be an objective rather than a subjective fact.

[48] As argued by Mr Hutton, who appeared for Mr Pillay, section 6(9) of the *Public Protector Act*, does not say the Public Protector must determine circumstances that in her belief are special. It simply says special circumstances must exist. The special circumstances are factual, its either they are there or they are not there. Where Mr Mpofu is also correct is that the Public Protector has the sole discretion to determine whether or not the circumstances are special.

[49] It is the applicants' proposition that such special circumstances did not exist in this matter, for if they existed, they would have been provided to the applicants at the first instance when they were requested. As earlier stated, the stance of the Public Protector is that the time when such special circumstances were granted is irrelevant. It was also argued on her behalf that it does not mean that because the generic factors were provided first, the special circumstances did not exist, especially since they were eventually provided.

[50] Having listened to arguments and also deliberated on it, we are of the opinion that before the Public Protector can exercise her discretion to investigate a claim that is over two years, she must already have found the special circumstances to exist.

[51] The upshot is that the special circumstances required in section 6 (9) of the *Public Protector Act* must be in existence at the time the Public Protector exercises her power to permit the entertainment of a complaint which is more than two years old. She must use these factors when she exercises her discretion whether or not to permit. For the Public Protector to exercise her discretion properly, at the time of such exercise, she must have all the facts before her. It does not avail her to say she remembered other reasons later on.

[52] At the time the Public Protector exercises the discretion whether or not to take up the Gordhan, referred us to two judgments of the Supreme Court of Appeal that has established the principle or recognised the principle that an administrative decision must be judged on the reasons given for it at the time and that it is not open to the decision maker to add further justification for the decision after the event. Those two judgments are *National Lotteries Board* [9] and *Zuma*[10] which endorsed the principle. Based on these two judgments, it does not avail the Public Protector to argue that she provided the special circumstances after she had provided the generic reasons and/or the reasons she gave Messrs Pillay and Symington. Fact

[9] 2012 (4) SA 504 (SCA) para 27.
[10] Zuma v Democratic Alliance 2018 (1) SA 200 (SCA) para 24.

is, her decision ought to be judged by the reasons given at the time of the decision to take up the complaint.

[53] Mr Mpofu's argument that because the reasons were eventually given means that they have always been in existence is, therefore, without merit. It is indeed so, as argued by the applicants, that if the reasons had always been there, they would have been no need for the Public Protector to provide the different reasons for each request made, or provided generic factors and later augmented them with specific related circumstances.

[54] The fact that the Public Protector dealt with this issue in this haphazard manner is an indication to us that she failed to understand this fundamental jurisdictional requirement, or she simply ignored it from the very outset. It is also an indication that she does not know when to exercise her discretion in terms of this section.

[55] This leads to an inference that when the Public Protector commenced with the investigation of this complaint, there were no special circumstances in existence. Relying on *GEMS*, which binds this court and following on *Gordhan,* where there are no special circumstances the Public Protector lacks the necessary jurisdiction in terms of section 6 (9) of the *Public Protector Act*.

[56] We have to conclude, in that regard, that the Public Protector failed to cross the jurisdictional hurdle of section 6 (9) of the *Public Protector Act*. Put differently, having found that there were no special circumstances

present when the Public Protector exercised her discretion, it follows that her discretion to entertain this complaint was not rationally exercised in terms of section 6 (9) of the *Public Protector Act*. Our finding is dispositive of the entire matter axiomatically the Report, which flows from the impugned decision must be set aside.

[57] Despite having concluded as we did on this jurisdictional point, we are of the view that we should proceed with the merits of this application to show that, even if we can be found wanting in our conclusion, the grounds canvassed by the Public Protector in opposition to this application, are not strong enough to oust the relief sought by the applicants. We shall show that, regardless of the absence of jurisdiction, the Report is fatally flawed and falls to be reviewed and set aside.

[58] Before we deal with the merits of the review application, we consider the preliminary p

RULE 6 (15) APPLICATION

[59] The Public Protector launched an application for an order in terms of Uniform Rule 6 (15) as a preliminary issue. The purpose is to have certain paragraphs contained in the applicants' founding affidavit, deposed to by Minister Gordhan (“the founding affidavit”), struck out as it is contended that they constitute abuse of the court process.

[60] Uniform Rule 6 (15) provides as follows:

> “The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious, or irrelevant with an

appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted."

[61] The court in *Vaatz*,[11] gave a detailed exposition of Uniform Rule 6 (15) that –

> "The grounds for striking out as set out in the said Rule are, on a proper construction, in the alternative, viz scandalous or vexatious or irrelevant. Needless to say allegations may be irrelevant but not scandalous or vexatious. Even if the matter complained of is scandalous or vexatious or irrelevant, this Court may not strike out such matter unless the respondent would be prejudiced in its case if such matter were allowed to remain.
>
> All the words 'scandalous', vexatious, irrelevant' and 'prejudice' are words used almost every day in courts of law. The context in which they are used can lead to variations of meaning but basically they have the meaning allotted them by *The Shorter Oxford English Dictionary.*
>
> In Rule 6 (15) the meaning of these terms can be briefly stated as follows:
>
> > Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.
> >
> > Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.
> >
> > Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.
>
> The Rule has been applied and has been the subject of interpretation by Courts on many occasions . . .
>
> In some of these court cases the Court, having decided that the matter was scandalous or vexatious or irrelevant, struck out such matter without considering the question of prejudice."

[11] Vaatz v Law Society of Namibia 1991 (3) SA 563 at 566A – 567A.

[62] And at 566J of the judgment, the court dealing with prejudice remarked as follows:

> "The phrase 'prejudice to the applicant's case' clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."

[63] The relief in this application is sought mainly against Minister Gordhan and Mr Pillay, who it is said associated himself fully with what Minister Gordhan stated in the paragraphs sought to be struck out. For ease of reference I shall continue to refer to them collectively as the applicants, unless the context requires otherwise.

[64] The paragraphs that the Public Protector seeks to strike out are paragraphs 12.1.1 to 12.1.10; paragraphs 38, 39, 40 and 70; paragraphs 53, 54 and 55 of the founding affidavit.

[65] The legal grounds for striking out the allegations in the said paragraphs are that:

65.1 In regard to paragraphs 38, 39, 40 and 70, it is alleged that the language employed therein is insulting, combative, rude and condescending, and as a result, it is scandalous, vexatious and/or irrelevant. These paragraphs relate to the manner in which the Public Protector is said to have issued the Report (the haste and timing).

65.2 In respect of paragraphs 53, 54 and 55, it is averred that the inclusion of these lengthy and irrelevant passages from unrelated court decisions allegedly to demonstrate, *inter alia*, the Public Protector's stunning incompetence in the performance of her duties, are irrelevant.

65.3 Paragraphs 12.1 to 12.10 relate to the grounds of review raised by the applicants. I beg to deal separately with these paragraphs later on in this judgment.

I deal hereunder with the first two grounds in turn.

Ad Paragraphs 38, 39, 40 and 70

[66] In order to contextualise the averments complained of, in this regard, we found it necessary, in this judgment, to set out the relevant paragraphs in the applicants' founding papers that pertains to what the Public Protector considers as the conduct and language used to render the averments in the said paragraphs scandalous or vexatious or irrelevant. We start with the paragraphs preceding the paragraphs in question so as to capture the full essence thereof. The paragraphs read thus –

"30. The first respondent responded to the correspondence from my attorney on 2 April 2019 in which she provided general reasons for her investigation of this complaint and, as addressed below, failed to identify the special circumstances required in section 6 (9) of the Act for the

lawful and proper exercise of her jurisdiction. The letter is attached as annexure **"PG13."**

31. On 2 May 2019, my office received a notice from the first respondent in terms of section 7(9) of the Act. That notice is attached as annexure **"PG14".**

32. I responded to the said notice on 22 May 2019, within the 14 days as directed. A copy of my response to the notice is attached as annexure "**PG15".**

33. The notice is important for this review application since even a cursory comparison of it with the final Report demonstrates that the first and second respondents did not consider, or could not meaningfully have considered, my submissions in the available timeframe.

34. Indeed, the final Report differs from the draft that appeared in the notice only with respect to the inclusion of findings and remedial action, and the reproduction of excerpts from the submissions received in response to the notice.

35. However, the final Report reveals no sign of any meaningful consideration of or reflection on the contents of the submissions received in response to the notice on 22 May 2019.

36. It appears, as it did when I first appeared before the first and second respondents on 14 November 2018, that the outcome of the complaint, and the adverse nature of the findings were to be immune to any influence by my submissions. It was as if they were "going through the motions" and intended to find against me, and Messrs Pillay and Magashula from the outset.

37. On 23 May 2019, the day after my submissions on 22 May 2019, my attorneys received a response from the first respondent to my submissions. The said letter is attached as annexure "PG16". It fails to address the issues raised with the first and second respondents.

38. More importantly, the 23 May 2019 letter confirmed that the Report would be issued the very next day, on 24 May 2019. This timing is suspicious and indicates that the Report was politically motivated. I say this because there was no reason for the unseemly haste with which the Report was issued on Friday, 24 May 2019, a mere 48 hours following the delivery of my submissions to the Public Protector in response to the notice of the draft findings on Wednesday, 22 May 2019.

39. I can only conclude that the rush to complete and issue the Report within two days of the receipt of my submissions, and those of other implicated persons, was informed by improper and irrelevant considerations, or an ulterior purpose or motive.

39.1 By this I mean to refer to the Presidential inauguration of the third respondent, held on Saturday 25 May 2019 and the political context in which my political opponents have sought to use the complaint lodged with the Public Protector, and now her Report, to attack my integrity.

39.2 There is no other plausible explanation for why the Public Protector would have effectively ignored my submissions to her of 22 May 2019 received in response to the section 7(9) notice. The Report quotes the submissions but fails to reflect any consideration of their content or import. It also fails to demonstrate any evidence of an 'open and enquiring mind' investigating the complaint in light of the submissions made.

40. I believe that the Report was issued when it was issued, with the findings and remedial action it contained, so as to enable a renewal of the ongoing political campaign against me by proponents of "state capture" and defenders of corruption.

40.1 I believe that my political opponents—and those who are fighting back against the work underway to restore the integrity

and stability of state institutions, good governance and to continue the eradication of corruption—wish to use the Report to attack me and to undermine my integrity and good name.

40.2 The immediate reaction to the Report on Friday, 24 May 2019 from certain opposition politicians and their surrogates, was an attempt to claim that I am tainted in some way and therefore unsuitable for reappointment to a position in government to continue my life's contribution through political activism for the good of all South Africans.

40.3 Unlike other individuals who threaten legal action when they are accused of wrongdoing or even criminal conduct, yet do nothing to institute litigation, I have nothing to hide. Indeed, I bring this review application on an expedited basis precisely to show that I will place my trust in the Courts to determine that I, and others, did not contravene the law. I therefore took urgent steps to ensure the expeditious filing of this review application so as to ensure that I will "have my day in court" as soon as possible.

40.4 As set out below, in bringing this review application I join a long line of litigants who have to run to the Courts to ensure that this Public Protector and Adv. Mkhwebane in particular acts in accordance with the law and the Constitution. This track record of adverse findings against the Office of the Public Protector and Adv. Mkhwebane specifically demonstrates, in my opinion, that she is unfit for the office that she hols and appears unable to lawfully, constitutionally exercise its powers."

And

"70. This remedial action, coupled with the suspicious haste with which the Report was finalised the day before the Presidential Inauguration, is also reviewable since it may be inappropriately aimed at seeking to influence

the powers exclusively reserved to the President in selecting the members of Cabinet. This is overreach by the Public Protector's remedial action, and cannot withstand judicial scrutiny."

[67] Emanating from the afore stated paragraphs, the Public Protector, sets out the following list of material which she relies on for her claim that paragraphs 38, 39, 40 and 70 should be struck out:

"9. Examples of unacceptable conduct and language adopted by the applicant(s), which are too numerous to list exhaustively, include:

9.1. The unsubstantiated and unfounded allegation that the timing of the release of the report was *"suspicious"* and indicates that the report was politically motivated. Not a shred of evidence is produced to support this wild and dangerous assertion (Paragraph 38 of Founding affidavit).

9.2. The allegation that the report was issued with *"unseemly haste"* (Paragraph 38 of the founding affidavit).

9.3. The unsubstantiated allegation that the report was informed by improper (and ulterior) motives (Paragraph 39 of founding affidavit).

9.4. The unsubstantiated and clearly incorrect allegation that I "*ignored"* Minister Gordhan's submissions when that is clearly not the case, even from a most cursory reading of the report (Paragraph 33 to 36 and Paragraph 39.2 of founding affidavit).

9.5. The serious allegation that the report was issued "*so as to* *enable a renewal of the ongoing political campaign"* against Minister Gordhan by opponents of *"state capture"* and defenders of corruption. Again, not even a single shred of evidence is produced in support. The clear meaning of this is that the

Public Protector is a participant or accomplice in a conspiracy, together and in concert with criminal elements, to wit, proponents of state capture and defenders of corruption. If this were indeed true, then South Africa's hard-fought democracy would be irretrievably damaged and such a Public Protector would be guilty of the crime of treason, punishable by death in many countries. A bigger insult against the Public Protector is very hard to imagine (Paragraph 40 of the founding affidavit).

9.6. The related averment that I am *"seemingly in service to (sic) some other motive or agenda"* (Paragraph 40 of founding affidavit).

9.7. The inclusion of long and irrelevant passages from unrelated court decisions, allegedly to demonstrate, inter alia, my *"stunning incompetence"* in the performance of my duties (Paragraph 53 to 54 of founding affidavit).

9.8. The unwarranted, unsubstantiated and misplaced averments that I am *"unfit for (my) office", which "ought to be subject (sic) to disciplinary action"*, to the knowledge of Minister Gordhan, cannot be lightly or appropriately made or pronounced by either a member of the executive such as himself or even this Honourable Court as part of the judiciary, but only by the legislature in terms of the doctrine of separation of powers. Its making is therefore nothing short of a gratuitous insult by the wrong person in the wrong forum (Paragraph 55.2 of founding affidavit)."

[68] It appears in the heads of argument as if the Public Protector is contending for these paragraphs to be struck out due to relevancy. However, in court, her counsel, Mr Mpofu, took a different stance and in fact, emphasised the nature of the averments contained in paragraphs 38 to 40 and 70 as being scandalous. He argues that the said averments are

so worded as to be abusive and defamatory of the Public Protector, whose dignity the applicants are duty-bound to protect. The allegations are said to be abusive insofar as they are insulting. They are also said to be defamatory to the extent that the Public Protector is being, intentionally and without any legal justification, accused of criminal conduct without any substantiation or foundation, thus rendering them scandalous. The allegations are said, also, to be vexatious as they are clearly intended to harass and annoy the Public Protector and calculated to diminish her effectiveness. He submitted that due to the nature of the averments contained in these paragraphs the review application constitutes an abuse of court process.

[69] Counsel contends that whilst there is nothing wrong with any person adversely affected and accordingly aggrieved by a report of the Public Protector challenging such a report, there are legal and ethical limits within which to do so. The said legal and ethical limits, according to counsel, have been severely breached in this case. He in this regard referred us to *Economic Freedom Fighters*,[12] wherein the court remarked as follows in relation to the breach of such limits:

> "[97] This matter has garnered much public interest and criticism. It is a matter which has a political bite to it. It is thus understandable why the public would have an interest in it. However, it must at all times be remembered that courts must show fidelity to the text, values and aspirations of the Constitution. A court should not be moved to ignore the law and the Constitution, and merely make a decision that would

[12] Economic Freedom Fighters v Gordhan 2020 (8) BCLR 916 paras 97 -99.

please the public. The rule of law, as entrenched in the Constitution, enjoins the judiciary, as well as everyone within the Republic, to function and operate within the bounds of the law. This means that a court cannot make a decision that is out of step with the Constitution and the law of the Republic. It must impartially apply the law to the prevailing set of facts, without fear, favour or prejudice.

[98] With that said, courts should not be immune to reasoned criticism. In fact, in a constitutional democracy like ours, criticism of the courts and other public offices is strongly encouraged. There should be a robust debate in the public domain on pertinent issues that affect it. However, there is danger in following populist rhetoric and labelling courts as captured and corrupt, without sound reasons or evidence. This undermines one of the core tenets of our constitutional democracy.

[99] Similarly, the Public Protector is a constitutional servant, like the courts, and her Office should be afforded respect. It is an office of fundamental constitutional significance and her powers are not only desirable but also necessary for the purpose, inter alia, of holding public office bearers accountable. Her role in our constitutional democracy cannot be gainsaid. While she may be criticised, these comments should not be perceived as undermining her Office and its constitutional powers. To mount a bad faith attack on her Office would surely work to undermine the constitutional project of the Republic."

[70] The Public Protector argues that she has satisfied all three legal criteria for striking out. According to her it is sufficient if only one of them is established and thus requests striking out of the paragraphs with punitive costs.

[71] In opposition to the argument raised by the Public Protector in this regard, the applicants argue that the threshold applicable for strikeout has not been met. The applicants contend that the averments in question are neither scandalous or vexatious or irrelevant as contended for by the Public Protector. According to the applicants, in order for the Public Protector to succeed in the application to strike out, she must prove that the allegations are scandalous in that they may or may not be relevant, and are worded as to be abusive or defamatory; or are vexatious in that they convey an intention to harass or annoy; and finally, they are irrelevant in that they do not contribute to the decision of the matter as they are irrelevant to the issues before court.

[72] The contention is that the request to strike out paragraphs 38, 39, 40 and 70 of the founding affidavit is based on the misunderstanding of this application. The submissions in the said paragraphs form a material aspect of the final ground of review, which is that the Public Protector's investigation was vitiated by procedural unfairness. The argument is that within 48 hours of receiving Minister Gordhan's representations in response to the sec 7 (9) notice, the Public Protector released her Report. The contention is that it is evident that she could not have meaningfully considered the representations and incorporated them into the final Report so soon after receiving them. They submit further that the haste to finalise the report was coupled with political developments such as the Presidential Inauguration and the appointment of new Cabinet members and that she sought to influence those events by releasing the Report, for

this reason, they contend the averments are neither scandalous or vexatious or irrelevant.

[73] There are nine items in the list of material that the Public Protector relies on for her claim that paragraphs 38, 39, 40 and 70 should be struck out. Of the nine, only three were raised and argued in court as examples of averments that are scandalous or vexatious or irrelevant, namely

73.1 The first one is the averments that actually, the report was issued by the Public Protector with a political agenda due to the haste in which it was issued.

73.2 The second is the allegation that the report was issued "so as to enable a renewal of the ongoing political campaign" against Minister Gordhan by opponents of "state capture" and defenders of corruption.

73.3 The third is the allegation that the Public Protector is unfit to hold office and ought to be subjected to disciplinary action.

[74] We deal hereunder only with the defences raised by the applicants in opposition to the said allegations (examples) in order to show that the said defences are without merit.

[75] We deal first with the applicants' argument that the submissions in paragraphs 38, 39, 40 and 70 form a material aspect of the ground of review that the Public Protector's investigation was vitiated by procedural unfairness, is not supported by the evidence on record.

[76] It is indeed so that the Public Protector received Minister Gordhan's response to the section 7(9) notice on a Wednesday and on Friday morning (within 48 hours) she released the Report allegedly condemning Minister Gordhan for misconduct. Minister Gordhan wants to suggest that the Report cites reams from his submission but does not deal with them and contends further that the Public Protector could not have dealt with the representations within that short space of time of 48 hours.

[77] The premise that the Public Protector cannot deal with a representation received in the space of 48 hours is unfounded and meritless. Firstly, the evidence shows that the Report already existed in near complete form at the time the Public Protector received the representations. Secondly, the Public Protector states categorically in her answering affidavit that when she received Minister Gordhan's representation, she analysed it and found nothing therein to persuade her to change the Report. Unless of course there can be evidence to indicate that the Public Protector was lying, that she never actually analysed the response of the applicants to the section 7 (9) notice, this remains an unsubstantiated allegation and runs into the Plascon-Evans rule because of the dispute.[13]

[78] It is, also, condescending of the applicants to want to argue that the Public Protector would be unable to deal with their representations within a time period of 48 hours. The record shows that indeed the notices were dealt with. That they might not have been dealt with to the satisfaction of

[13] See paragraph [84] of this judgment.

the applicants, does not detract from the fact that the representations were dealt with in the Report. Thus, the applicant's argument that the Public Protector did not consider their response to the section 7 (9) notice, is unfounded.

[79] The further allegations that she was politically motivated and that ulterior motives informed the Report, are also unsubstantiated. There is no evidence to establish the allegation, none at all.

[80] Before us, it was argued on behalf of Minister Gordhan that the paragraphs which the Public Protector seeks to have struck out are relevant and legitimate allegations made in pursuit of a cause of action and, as such, the Public Protector acted with an ulterior purpose. [14] The submission being that Minister Gordhan, in the paragraphs to which the Public Protector objects, draws inferences from the surrounding circumstances of bad faith on her part, of an ulterior purpose. Such reasoning, according to Minister Gordhan's counsel, is perfectly legitimate and frankly persuasive and that to make the cause of action of ulterior purpose by inferential reasoning is a stock standard legal cause of action to which no objection can be taken. The averments, it is argued, were not scurrilous accusations made simply to insult. These were reasons, inferences drawn from given facts inferring that the Public Protector acts

[14] Scalabrini Centre Cape Town v Minister of Home Affairs 2018 (4) SA (SCA) at paragraph 60 where the SCA said the following.

> "It is a settled principle that a decision maker who uses a power given by statute for a purpose other than that for which it has been given acts contrary to the law."

The *dictum* has been endorsed again by Zuma v Democratic Alliance 2018 (1) SA 200 (SCA) at paragraph 29.

for an ulterior purpose and the first of those was the extraordinary haste with which she acted.

[81] The challenge however for the applicants is that the Public Protector explains in detail in her answering affidavit why she had to release the Report on the date she did. According to her evidence, the office of the Public Protector traditionally releases reports in batches or clusters of five or six unrelated reports. The present Report is said to have been scheduled for release together with other five reports, on Friday 24 May 2019, without any knowledge by the Public Protector of the date of Inauguration. The other five reports are named in her composite answering affidavit. Any haste, if there was any, is explained by the Public Protector as "purely motivated by the need to meet our self-imposed deadlines". There is nothing on record to gainsay these averments by the Public Protector.

[82] The applicants want to argue that Minister Gordhan provided inferential reasoning drawn from the surrounding circumstances, for instance the haste in which the Report was issued and timing, to support their argument that the Public Protector was politically motivated and as such the Report issued "so as to enable a renewal of the ongoing political campaign" against Minister Gordhan by opponents of "state capture" and defenders of corruption. We find however that such a proposition cannot pass muster in the circumstances of this application.

[83] It is trite that the process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The

inference that is sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn' and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities.[15] As we have stated, there is no evidence on which these allegations are founded – they are in that sense just suspicions and mere speculation.

[84] Mr Trengrove conceded in argument before us that the arguments in this regard runs into the Plascon-Evans rule due to the denial by the Public Protector, as the respondent, that she did not act with an ulterior motive. There is, thus, a dispute of fact as to whether or not the Public Protector acted with ulterior purpose. Counsel further concedes that Minister Gordhan's failure to exercise his option to refer the dispute to trial gives the Public Protector the benefit of the Plascon-Evans rule and the Minister is precluded by the rule from pursuing this cause of action. According to counsel, it just means that in accordance to the rules of evidence in applications of this kind Minister Gordhan bears the *onus* and he cannot succeed if the Public Protector denies, so against that background, the suggestion is that these allegations were perfectly proper, perfectly legitimate and there is no reason to strike them out.

[85] The above submission does not assist Mr Gordhan's case. The Public Protector is complaining about the wording of the paragraph which she says is unnecessarily insulting, combative, rude, they cannot just be ignored. Much as we appreciate the fact that like any other citizenry, the

[15] South African Post Office v De Lacy (19/08) [2009] ZASCA 45 para 35.

applicants are entitled, as already argued, to challenge the report of the Public Protector if it affects them adversely, and they are aggrieved thereby, we are, however, of the opinion that the applicants have gone overboard in this matter. More so because their averments are unsubstantiated. It is indeed so that the Public Protector like any other high ranking official is not immune to criticism, we are in a constitutional democracy, people in high office, like the Public Protector, need not be overly sensitive against criticism levelled at them. The only difference is that such criticism must be constructive and be backed by the necessary facts. It will, thus, not assist a litigant in spewing averments that are not supported by evidence. This is what the applicants have done in this matter.

[86] On the averment that the Public Protector is unfit for [her] office, she contends that these averments are unwarranted, unsubstantiated and misplaced. More so as they cannot be lightly or appropriately made or pronounced by either a member of the executive such as Minister Gordhan or even this court as part of the judiciary, but can only be articulated by the legislature in terms of the doctrine of separation of powers. The making of such averments is said to be nothing short of a gratuitous insult by the wrong person in the wrong forum. The submission is that these impugned paragraphs should be struck out on the basis that they are irrelevant as they relate to an issue which to the knowledge of the applicants, falls outside the jurisdiction of the courts.

[87] We accept that the impugned paragraphs relating to the Public Protector's fitness to hold office should be struck out on the basis that they are irrelevant as they relate to an issue which, to the knowledge of the applicants, falls outside the jurisdiction of the courts. For, as argued by the Public Protector, even if the allegations are correct, there is nothing that the court can do, because of the separation of powers. The proper approach is to refer such complaints and/or allegations to Parliament.[16]

[88] We are in agreement with and accept Ms Le Roux's argument that paragraphs 38, 39, 40 and 70 cannot be read in a way that could be held to be insulting, contemptuous or defamatory because they all inform Minister Gordhan's sincere belief. Minister Gordhan sets out in paragraphs 38 to 40 his subjective belief about why this seems suspicious to him to ground the ulterior purpose cause of action and throughout that set of paragraphs he is very clearly explaining the facts that he relies on and refers to surrounding circumstances.

[89] This, however, does not mean that the paragraphs should not be struck out. When the averments made by the applicants in paragraphs 38, 39, 40 and 70 are considered whether individually or cumulatively they can be construed as nothing else but gratuitous averments based on suspicion, the averments are therefore, vexatious and made intending to annoy the Public Protector. A similar finding, based on allegations couched in similar terms by Minister Gordhan, has been made in *Gordhan*

[16] Section 194 of the Constitution.

at paras 267 and 268. They should, similarly, be struck out in this application, for the reasons advanced above.

Ad Paragraphs 53, 54 and 55

[90] In paragraphs 53 to 55 of the founding affidavit, Minister Gordhan directly quotes portions of judgments where adverse findings were made in respect of the Public Protector. I do not intend to quote them here as they are succinctly set out in Minister Gordhan's founding affidavit. It is alleged that those paragraphs specifically reference instances of repeated admonishments that the public Protector received from the courts to comply with the Constitution and *Public Protector Act*, and where she was mulcted with personal costs as a result of her failure to do so.

[91] Relying in *National Director of Public Prosecutions*,[17] the Public Protector, in her heads of argument, submits that the allegations relating to the other court cases ought to be struck out as irrelevant as they constitute the opinions of other courts, the decision of which some are still pending.

[92] The applicants, on the other hand, submit that the judgments are directly relevant to this review and also have a bearing on the order of personal costs which Minister Gordhan seeks. They are neither scandalous, vexatious nor irrelevant. They are grounds to seek the desired costs order so as to deter the Public Protector from continuing to

[17] 2009 (2) SA 277 (SCA) paras 23 and 81.

disregard of her constitutional mandate and statutory functions, so it is argued.

[93] We are of the opinion that paragraphs 53, 54 and 55 should also be struck out as irrelevant because they do not apply to the matter at hand and do not contribute one way or the other to the decision in this matter. The contention by the applicants that these judgments are directly relevant to this review and also have a bearing on the order of personal costs which Minister Gordhan seeks, is without merit.

[94] Within the constitutional context, personal liability for costs arises where a public official is guilty of bad faith and gross negligence in connection with the litigation. The test is applied on a case by case basis. Hence, unless all the cases referred to in the impugned paragraphs are on all fours with the current case, they cannot ordinarily have a bearing on the cost order sought by the applicants. The paragraphs are, in that sense, irrelevant for purposes of this case and will not contribute one way or the other in its decision. Except to show the Public Protector's failure to execute her constitutional mandate in those cases, we were not shown how those cases would have a bearing on the proposed order of personal costs.

[95] The court in in *Institute for Accountability in Southern Africa* [18] when determining whether the *Hollington rule* applied in relations with the

[18] Institute for Accountability in Southern Africa v Public protector and Others 2020 (5) SA 179 (GP).

applicability of the findings of previous courts to subsequent civil proceedings held as follows:

> "[31] Ultimately the rationale for the *Hollington rule* is that the findings of the previous court constitute the opinions of that court and for that reason are irrelevant and inadmissible in subsequent civil proceedings. Even though such findings constitute expressions of opinion they cannot be equated with the opinions of ordinary individuals and cannot be treated as such. Those findings were made by judges and confirmed, in certain instances, by the justices of the highest court of the land. Judges have a duty to form and express opinions concerning issues raised before them (including those that are relevant in the context of this matter), and they arrived at those opinions aided by procedures (including the law of evidence) which was designed to ensure that they base those opinions on the correct information. Those opinions are also binding on all persons and those organs of state to which they apply."

For all these reasons, the impugned paragraphs must be struck out as irrelevant.

Prejudice

[96] The applicants' suggest that the application should fail because the court will not strike out offending matter where it does not prejudice the party's opponent. They contend also that this review application and the arguments made are not prejudicial to the Public Protector.

[97] In terms of Uniform Rule 6 (15), a court shall not grant the application unless it is satisfied that the applicant will be prejudices in his case if the application is not granted.

[98] As is stated in *Vaatz*,[19] in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own peril. Where a party is required to deal with scandalous or irrelevant matter the main issue could be side tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party.

[99] Similarly, in this instance, the Public Protector has been drawn into filing tedious response to the lengthy paragraphs, which is clearly prejudicial because she could not have gambled and not responded to the allegations. She would have done so at her own peril. We are, thus, satisfied that the Public Protector would suffer prejudice if the paragraphs are not struck out.

COUNTER-APPLICATION

[100] The Public Protector has brought a counterapplication in which she seeks an order that the court declares that the applicants have acted in breach of section 9 (1) of the *Public Protector Act* read with Rule 26 of the *Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto* ("the Public Protector Rules").[20] The counterapplication

[19] Page 566J – 567B.
[20] Promulgated in terms of Government Gazette No 41903 of 14 September 2018.

is based on exactly the same factual basis as the strike-out application which is based on insults.

[101] The salient provisions of the contempt framework are contained in section 9 (1) of the *Public Protector Act*, which reads that:

> "(1) No person shall:
>
> (a) insult the Public Protector or Deputy Public Protector;
>
> (b) in connection with an investigation or do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court."

[102] Rule 26 of the Public Protector Rules, on the other hand provides that –

> "(1) If the Public Protector is satisfied that a person has acted in a manner that constitutes contempt of the Public Protector as envisaged in terms of section 9(1) of the Act, he or she may report the matter to the South African Police Service or apply to the High Court, by notice of motion supported by an affidavit in terms of the Uniform Rules of Court:
>
> (a) for an order that the person(s) be declared in contempt of Court/ the Public Protector; and
>
> (b) that the Court deals with him or her in terms of section 9 (1) (b) of the Act in any manner in which it could have dealt with him or her if he or she had committed contempt in relation to the High Court.
>
> (2) The condition is that the person:

(a) has insulted the Public Protector or the Deputy Public Protector;

(b) has done an act in connection with an investigation which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court.

(3) If the Public Protector lodges an application under sub-rule (1), the proceedings shall commence by

(a) a notice in terms of the Uniform Rules of Court served upon the person(s) concerned;

(b) containing particulars of conduct alleged to constitute contempt of the Public Protector;

(c) calling on the person to appear before the court; and

(d) to show just cause why he or she should not be punished summarily for the alleged action as contempt of the Public Protector."

[103] The Public Protector's counter application is to the effect that some of the material referred to in the strike out application amounts to and must be declared as being in contravention of the contempt provisions contained in section 9 of the *Public Protector Act* read with Rule 26 of the applicable rules.

[104] It is the Public Protector's contention that the vast majority of the identified remarks made by Minister Gordhan, and fully adopted by Mr Pillay, constitute criminal contempt in terms of section 9 (1) of the *Public Protector Act*. The test according to the Public Protector is that the court will be requested to postulate that the identified remarks would have

been in respect of a Judge in respect of her or his judgment in the form of the Report. Using that test, the Public Protector established that Minister Gordhan and by extension Mr Pillay, in using the averments contained in the paragraphs sought to be struck out, acted in a manner that constitutes contempt of the Public Protector as envisaged in section 9 (1) of *Public Protector Act*.

[105] Mr Mpofu, counsel for the Public Protector urged us to adopt an approach that treats contempt of the Public Protector as closely related and akin to contempt of court in respect of judges. This he says should be so as such approach would be intended to protect not the individual incumbent but the respect and independence of that office. Counsel, in turn, prays for the relief sought in the counterapplication to be granted with punitive costs.

[106] Ms Le Roux argued this application on behalf of Minister Gordhan. In her argument she succinctly, and correctly so, explained the contempt framework under section 9 of the Public Protector as constituted by two components. The first component she referred to as the idea of insult, that is, the defamation component. The second component is where contempt powers are used to ensure enforcement or compliance with the Public Protector's powers. The second leg becomes more relevant when interpreting the section and the procedure that has been set out in rule 26.

[107] Therefore, in order for the Public Protector to succeed in a claim of this nature she must establish the two components. She must first establish the first component of insult or defamation if you like. Once that

is established, the second component comes in, that is, which procedure ought to be followed.

[108] The case before us is essentially focused on the first component, the insult component. The question being whether the averments complained about as contained in the impugned paragraphs constitute insult. Has the Public Protector been insulted by those averments?

[109] The Public Protector's case for this contempt application is said to be based on the same factual basis she contended for in the strike out application which is based on scandalous averments which were argued to be abusive and/or defamatory. We have already made a finding in that strike out application that those averments cannot be construed as scandalous but are merely vexatious and are intended to annoy the Public Protector. Having found as such, it follows that the first component of the relief the Public Protector is contending for in this counter application cannot stand.

[110] Although we are tempted to do so, we however, find it not necessary to deal with the second component of the contempt claim. We shall, however, as a result, dismiss the counterapplication.

GROUNDS OF REVIEW

[111] Minister Gordhan in his founding affidavit advances two grounds of review in the alternative. The first is a review based on a number of grounds on the provisions of the Promotion of Administrative Justice Act

("*PAJA*"),[21] and the alternative ground based on the principle of legality, on the grounds of irrationality and unlawfulness as envisaged in section 1 (c) of the *Constitution*. Before us, however, Mr Trengrove, for Minister Gordhan, argued that the *PAJA* grounds are pleaded in the alternative making the legality grounds the main grounds on which Minister Gordhan relies for his review application.

[112] The *PAJA* grounds are contained in paragraphs 12.1.1 until 12.1.10 of Minister Gordhan's founding affidavit. The ground of irrationality or legality is contained in paragraph 12.1.11 thereof.

[113] In the rule 6 (15) application by the Public Protector, she moves for the striking out of all the paragraphs in Minister Gordhan's founding affidavit which pertains to *PAJA*, that is, paragraphs 12.1.1 to paragraph 12.1.10 of the founding affidavit, on the ground that the averments therein are irrelevant. In the alternative, Mr Mpofu argued for the dismissal of the grounds of reviews contained in these paragraphs, on the basis that they do not disclose a cause of action alternatively that they do not found the required jurisdiction.

[114] Mr Trengrove, relying on the decision of the Supreme Court of Appeal in *Minister of Home Affairs*,[22] conceded that these paragraphs should be ignored as this court is bound by that decision not to consider the grounds of review, contained therein. The contention being that the said grounds were included in the papers simply because this case may

[21] Act 3 of 2000.
[22] Minister of Home Affairs v The Public Protector (308/2017) [2018] ZASCA 15 (15 March 2018).

one day end up in the Supreme Court of Appeal or even the Constitutional Court where those courts might decide this issue differently.

[115] The Supreme Court of Appeal in *Minister of Home Affairs*[23] held that the Public Protector's findings in a report of this kind do not constitute administrative action for purposes of *PAJA*, but constitutes an exercise of public power. That means that the principle of legality applies to the review of the decisions of the Public Protector. This court is, obviously, on the basis of the *stare decisis* doctrine, bound by that decision.

[116] This court, as it is bound by the decision in *Minister of Home Affairs,* cannot consider the grounds of review based on *PAJA*. The allegations made in support of an argument for a review based on PAJA should be ignored as legally irrelevant. The only relevant grounds of review for purposes of the application before us, as already stated, is that of legality and/or rationality. In that regard, Minister Gordhan submits that the requirements of substantive and procedural rationality and fairness have not been met.

[117] The question, therefore, is whether the findings of the Public Protector and remedial orders are rationally connected to the empowering provisions of the legislation used by Minister Gordhan when he approved Mr Pillay's early retirement with full pension benefits. The rational connection requires that there must be a rational objective basis justifying

[23] Para 39.

the connection the Public Protector made between such legislation and the conclusions she reached.[24]

[118] The answer to that question is to be found in the manner in which the Public Protector interpreted and/or applied the salient provisions of the said legislation to reach her findings, as is discussed hereunder.

[119] It is argued on behalf of Minister Gordhan that the Public Protector's case against him, the finding she made against him that he was guilty of errors of law and, therefore, of a breach of the Constitution and therefore guilty of improper conduct, is entirely irrational.

[120] Minister Gordhan, in this respect, attacks the six findings of the Public Protector and submits, in that regard, that the Public Protector's decision is irrational because the decision is based on errors of law; namely, the findings that

120.1 there was no retirement in fact and in law;

120.2 Minister Gordhan was not authorised by section 16 (2A) of the *Public Service Act* to approve Mr Pillay's early retirement with full pension benefits;

120.3 Minister Gordhan was not authorised by section 16 (6) of the *Public Service Act* to approve Mr Pillay's full pension benefit;

120.4 Minister Gordhan's conduct amounts to improper conduct as envisaged by section 6 (4) (a) of the *Public Protector Act*;

[24] Carephone v Marcus NO & Others 1999 (3) SA 304 LAC para 37.

120.5 Mr Gordhan acted *ultra vires* as he was not authorised by law to approve the retention of Mr Pillay; and

120.6 Payment of the additional liability by SARS amounted to irregular expenditure and maladministration.

[121] Mr Trengrove, on behalf of Minister Gordhan, argues that the Public Protector's findings as set out above are themselves errors of law which rendered her decision irrational. For this submission counsel relied for support in *Airports Company,*[25] a decision of the Supreme Court of Appeal where it was held in paragraph 32 that –

> "This court has also emphasised that in order to be rational, a decision must be based on accurate findings of fact and correct application of the law. A wrong or mistaken interpretation of a provision in a statute constitutes an error of law that is reviewable under section 6 (2) (d) of *PAJA*. It is also reviewable under the principle of legality [because it renders the decision irrational] . . ." (my emphasis)

[122] Conversely, Mr Mpofu argues that since this is an application to review the decision of the Public Protector, a mere error of law on her part does not constitute a reviewable ground. He contends that for an error of law to be reviewable it must be material. He referred us in this regard to the Constitutional Court judgment in *Genesis*,[26] whereat the court held that ' the *Constitution* bestows on courts the power to review every error of law, provided of course it is material'.

[25] Airports Company South Africa v Imperial Group Ltd 2020 (4) SA 17 (SCA).
[26] Genesis Medical Scheme v Registrar of Medical Schemes and Another 2017 (6) SA 1 (CC).

[123] We are of the view that the errors of law committed by the Public Protector in coming to her decision and/or findings is material, as we shall hereunder show. We, accordingly, deal hereunder with the said findings in detail. We will show that the Public Protector was wrong in law and that Minister Gordhan's decision was perfectly lawful. She was the one who made a mistake of law. That mistake of law is material and renders her findings irrational.

[124] Before we continue to address the said findings, we find it apposite to pause here and address the approach adopted by the Public Protector's counsel during argument in court, which cut across most of their arguments. It is worth noting that the three elements that Mr Pillay wanted Minister Gordhan to approve, namely, the early retirement, the full pension benefits and the subsequent retention, were referred to as a 'package', at times as a 'tripartite package' and/or a 'package deal', during argument in court.

[125] It came to our notice that counsel for the Public Protector projected the phrase of the tripartite package as one deal, that is, the three elements taken together as a package. Hence, it was repeatedly argued that the Minister was not authorised by either the *Public Service Act* or the *GEP Law* to approve the package, meaning to approve the three elements of the package together at the same time.

[126] It, however, does not appear in the Report that the Public Protector considered the three elements as a package in the manner in which counsel for the Public Protector argued in court. The Report indicates that

the three elements were dealt with individually by the Public Protector. The findings, as well as the reasoning for such findings, refer specifically to each element individually. There is nowhere in the Report where the Public Protector finds that either section 16 (2A) or section 16 (6) of the *Public Service Act*, does not authorise the approval of the package, that is, the approval of the three elements taken together as a package, as her counsel sought to argue. The arguments of her counsel, in this respect, are out of turn and contrived.

[127] Having said that, we turn now to address the Public Protector's findings in the light of the argument of errors of law, raised by Mr Trengrove, which Messrs Pillay and Magashula associate themselves with.

> Minister Gordhan was not authorised by section 16 (2A) of the *Public Service Act* to approve Mr Pillay's early retirement with full pension benefits.

[128] According to Minister Gordhan, the first ground upon which the Public Protector holds that the Minister acted unlawfully, is that Minister Gordhan relied on the wrong section, that is, he relied on section 16 (2A) instead of section 16 (6) of the *Public Service Act*, when approving Mr Pillay's request for early retirement with full pension benefits. The contention is that it was wrong for the Public Protector to have found that Minister Gordhan acted under the wrong section because he, in fact, acted under the correct section, that is, section 16 (6) of the *Public Service Act*.

[129] The reason why the Public Protector found Minister Gordhan to have acted under the wrong section is simply because Mr Magashula referred to section 16 (2A) instead of section 16 (6) of the *Public Service Act*, in the Memorandum he submitted to Minister Gordhan for the approval of Mr Pillay's early retirement request.

[130] Counsel for Minister Gordhan argues, correctly so, that even though a wrong section was quoted in the Memorandum submitted by Mr Magashula, that wrong section does not invalidates Minister Gordhan's decision. The contention is that the citation of the wrong section does not invalidate the Minister's decision because he, in any event, had the power to do what he did under section 16 (6) of the *Public Service Act*.

[131] Counsel, supports his argument, in this regard, in terms of the so called *Latib* principle which states that the citation of a wrong section does not invalidate the decision of a decision-maker for as long as such decision-maker was authorised in law to make such a decision. In opposing this argument, Mr Mpofu for the Public Protector contends that the *Latib* principle does not find application in the circumstances of this case merely on the basis that neither section 16 (2A) nor section 16 (6) of the *Public Service Act* authorises Minister Gordhan to approve what he referred to as 'the tripartite package' meaning the three elements of Mr Pillay's application, that is the early retirement, the full pension benefits and Mr Pillay's retention is SARS. We have, already addressed this approach of argument in paragraphs [124] to [126] of this judgment.

[132] The *Latib* principle was affirmed by the Supreme Court of Appeal in *Howick*,[27] and cited with approval in the same court in *Shaik*.[28] The court in *Howick* stating that –

> "[19] Under the doctrine in *Latib's* case,[29] where an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act."

In emphasising the legality of the *Latib* principle, *Howick* states in paragraph 20 that –

> "[20] . . . *Latib* does not license unauthorised legislative or administrative acts. It licenses acts when authority for them exists, and when the failure expressly or accurately to invoke their source is immaterial to their due exercise. As *Baxter* puts it:
>
> > 'If the authority is stated incorrectly, the action is not thereby invalidated so long as authority for the action does exist and the conditions for its exercise have been observed.'[30]

[133] The principle in *Howick* applies equally to the present case. The insertion of a wrong section by Mr Magashula in the Memorandum, does not invalidate the action of the Minister of approving Mr Pillay's request. To that extent, the Public Protector does not challenge the validity of the Minister's powers. It has become common cause that Minister Gordhan

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[27] Howick District Landowners Association v Umngeni Municipality 2007 (1) SA 206 (SCA) para 19.
[28] Shaik v Standard Bank of SA 2008 (2) SA 622 (SCA) para 17 – 18.
[29] Latib v The Administrator, Transvaal 1969 (3) SA 186 (T) at 190 - 1.
[30] Lawrence Baxter *Administrative Law* (1984) p366.

did not use section 16 (2A) of the *Public Service Act* when he considered and approved Mr Pillay's request. The Public Protector has conceded as much in her heads of argument and in oral argument in court. Once such concession is made, it follows that the Public Protector admits that she made an error of law. In the wake of such concession, the decision in the *Airports Company* that a wrong interpretation of a provision in a statute constitutes an error of law which is reviewable under the principle of legality, comes into play.

[134] Nevertheless, the Public Protector appears to want to downplay the effect of her findings in this regard. She seems to want this court to accept that her reliance in the Report on this finding is an error which does not have consequences. Her counsel in argument before us explained it as 'a process of reasoning, a jurisprudential way of reasoning' and that it does not mean that the Public Protector is basing her outcome of her Report on that 'basic mistake'. For the reasons I state hereunder, this explanation is farfetched and untenable.

[135] The finding the Public Protector makes against Minister Gordhan, in this regard, is material and requires some serious consideration. It is the Public Protector's finding that Minister Gordhan irregularly approved the early retirement of Pillay with full benefits by application of the wrong section. Her reasons for coming to the conclusion that Minister Gordhan used a wrong section, is stated succinctly in her Report. The Report is replete with her reasoning why it is that she made a finding that Minister

Gordhan used the wrong section.[31] Important illustrations that permeate her findings are as follows:

> "(cc) Even if retirement had been contemplated and there was in fact a retirement, Minister Gordhan was not authorised by section 16 (2A) of the PSA to approve Mr Pillay's early retirement request with full pension benefits as this section does not confer any power on the Minister to approve early retirement with full pension benefits;
>
> (dd) Mr Pillay was not entitled to early retirement with full pension benefits under section 16 (2A) of the PSA because the section makes no provision for such full retirement benefits. Section 16 (2A) of the PSA only confers a right on an employee to retire from public service upon reaching the age of 65 years. In terms of that section, no ministerial approval need be sought; . . ." (our emphasis)

[136] Having made such a finding which is emphatically backed by the reasons she gave, the Public Protector cannot now say that she did not rely on it for her finding that Minister Gordhan irregularly approved Mr Pillay's request for early retirement with full benefits and his retention on contract.

[137] The applicants submitted further that once it is found that the decision is irregular, the *Westinghouse* principle kicks in with the effect that if the Public Protector's decision on this ground alone is invalid, it renders the whole Report reviewable.

[31] See paragraphs 5.1.154 – 5.1.160 of the Report.

[138] The principle relied on was initially laid down in *Patel*,[32] but has more recently been endorsed by the Supreme Court of Appeal in a unanimous judgment, in *Westinghouse.*[33] In that judgment the court articulated the principle as follows:

> **"Taking a decision for a reason that is irrelevant or bad**
>
> [44] It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated. In *Patel v Witbank Town Council* 1931 TPD 284 Tindall J said (at 290):
>
> > '[W]hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision . . . This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it.'
>
> [45] This passage was approved by this court in *Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 34 where Cameron JA said:
>
> > 'This dimension of rationality in decision-making predates its constitutional formulation.' Once a bad reason plays a significant

[32] 1931 TPD 284.

[33] Westinghouse Electric Belgium SA v Eskom Holdings 2016 (3) SA 1 (SCA) para 44 - 45.

> role in the outcome it is not possible to say that the reasons given for it provide a rational connection to it. (The decision of this court was reversed by the Constitutional Court but this principle was not questioned: *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24; [2007] ZACC 22 (CC))'.

[139] The *Westinghouse* principle is apposite, in this instance, and as explained by Mr Trengrove, in argument before us, the principle is clear and unambiguous. It says if a public body takes a decision for multiple reasons and one of them is found to be invalid, even if there are other good reasons which are valid, then the decision is also invalid. The reason for it as explained in the judgment, is that it would not be known after the event whether the decision maker would have taken the same decision if she or he had realised that one of the three or five or six reasons was invalid, and for that reason the decision falls because it cannot be said whether the same decision would have been taken if the decision maker had appreciated that that one reason was invalid.

[140] The *Westinghouse* principle would, thus, be applicable in this case in the sense that the Public Protector's findings of improper conduct against Minister Gordhan is said to be based on six grounds, that is, six errors of law. In applying the *Westinghouse* principle, if this court finds any one of those six grounds or errors of law invalid, then, irrespective of whether the other grounds are valid, the Public Protector's decision and/or findings of misconduct are invalid and must, therefore, fall.

[141] Mr Mpofu's submission that it is not in every case that a bad reason results in a fatal review, is correct. The requirement, it seems, for this principle to apply, the ground which is found to be invalid or the bad reason, must be of importance and must have substantially influenced the decision maker. As it was stated in *Rustenburg Platinum Mines*,[34] the bad reason must play a significant role in the outcome.

[142] Where we do not agree with Mr Mpofu's argument is that in every such case, where a bad reason is found to have substantially influenced the decision maker, the relief would not be to set aside the report, but to remit the decision back to the decision maker. Mr Mpofu argues this point on the basis of the facts that were involved in *Westinghouse*. There the court dealt with the review of a tender award where it was found that material facts which did not form part of the bid specification were taken into account. The court *per* Lewis JA then said, if that fact that they took into account in giving the tender to the wrong person was material then, obviously, the entire award must be set aside and remitted to the decision maker. The facts in the present case are not the same as those in *Westinghouse* where the finding of invalidity would result in the remittal of the matter to the Public Protector. In this matter once it is found that the principle is applicable, it is the end of the matter. The finding of invalidity will set aside the Report. There is no question of remittal to the Public Protector.

[143] Now, the fact that the finding of the irregularity of the approval of Mr Pillay's early retirement with full pension benefits was the first to be

[34] Rustenburg Platinum Mines v CCMA [2006] SCA 115 (RSA) para 34.

made by the Public Protector after her investigations, indicates that she was substantially influenced by her reasoning that Minister Gordhan used the wrong section. This ground, we find, played a significant role in her decision making but does not provide a rational connection to the decision she finally makes.

[144] We, in that sense, hold that if this court were to conclude that any one of the reasons upon which the Public Protector based her decision is an invalid reason, then her Report is reviewable and should be set aside. This ground appears to have substantially influenced the decision of the Public Protector. It follows that the Public Protector allowed her decision to be influenced by a consideration which ought not to have weighed with her.

[145] We accordingly, find that the Public Protector's decision was an irrational one, because she held in the first place that that Minister Gordhan's decision was irregular, and therefore, unlawful because it was based on the wrong section. That was a material error of law, and the error of law rendered her decision irrational. Her decision, consequently her Report, is invalid and ought to be reviewed and set aside.

[146] Even if we are wrong in concluding that the Public Protector's Report is reviewable in accordance with the *Westinghouse* doctrine, we are still of the opinion that her other findings will, in any event, not pass muster.

Minister Gordhan was not authorised by section 16 (6) of the *Public Service Act* to approve Mr Pillay's full pension benefit

[147] The Public Protector, found also that even if Minister Gordhan had acted under the correct section, that is section 16 (6) of the *Public Service Act*, he would, in any event, have not been entitled to approve Mr Pillay's full pension benefits in terms of that section, because the benefits to which an employee is entitled to, on early retirement, are regulated by section 16 (6) (b) of the *Public Service Act* and occur by operation of the law. No Ministerial approval is required.

[148] As already stated in paragraph [2] of this judgment, although SARS is not a government department falling under the *Public Service Act*, its employees are, however, subject to the *GEP Law*, which regulates the retirement of public service employees.

[149] Section 19 of the *SARS* Act stipulates the pension rights of SARS's employees as follows:

> "(1) Subject to the Government Employees' Pension Law, 1996 (Proclamation 21 of 1996), a person appointed by SARS as an employee –
>
> (a) becomes a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996; and
>
> (b) is entitled to pension and retirement benefits as if that person were in the service in a post classified in a division of the public service mentioned in section 8 (1) (a) (i) of the Public Service Act."

[150] The result is that the pension rights of employees of SARS are in essence regulated in terms of the *Public Service Act*. The dispensation for

the retirement of the public service employees is, be extension the employees of SARS, set out in section 16 of the *Public Service Act*. The salient provisions of which read as follows:

> "16 Retirement and retention of services
>
> (1) (a) Subject to the provisions of this section, and officer, . . . shall have the right to retire from the public service, and shall be so retired, on the date when he or she attains the age of 65 years. . .
>
> (4) An officer, . . . who has reached the age of 60 years may, subject in every case to the approval of the relevant executive authority, be retired from the public service. . .
>
> (6) (a) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, . . . if sufficient reason exists for the retirement.
>
> (b) If an employee is allowed so to retire, he or she shall, notwithstanding anything to the contrary contained in subsection (4), be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection. . ."

[151] The general rule is that all permanent employees in the public service have the right to retire at the age of 65 years, but any employee can retire at any time before that age, that is, before reaching the age of 65 years. The difference is that an employee who retires before reaching the age of 65 years would not be entitled to the full pension benefits.

There are exceptions to this rule in that an employee who retires before the age of 65 years, is allowed to apply to the Minister for such early retirement with full pension benefits. Such early retirement may be applied for by the following employees:

151.1 An employee who has reached the age of 60 years on full pension benefits of an employee of 60 years.[35]

151.2 An employee who has not reached the age of 60 years with full pension benefits of a 60-year-old.[36]

[152] When an employee is allowed to go on early retirement with full pension benefits in terms of section 16 (6) of the *Public Service Act*, there are financial implications for the GEPF. This is so, because, for instance, an employee who is allowed to retire at the age of 55 years with the approval of the Minister, is deemed to have retired at the age of 60 years and is, thus, entitled to such pension benefits as she or he would have been entitled to if she or he had retired from the public service at the age of 60 years.[37] It means that she or he receives the pension benefits of a 60-year-old instead of the pension benefits of a 55-year-old. Such pension pay-out will obviously, attract a shortfall for the GEPF.

[153] The shortfall is provided for in section 17 (4) of the *GEP Law*, which stipulates that "If any action taken by the employer or if any legislation adopted by Parliament places additional financial obligation on the Fund, the employer or the Government as the case may be, shall pay to the Fund an amount which is required to

[35] Section 16 (4) of the Public Service Act.
[36] Section 16 (6) of the Public Service Act.
[37] Section 16 (b) read with section 16 (4) of the Public Service Act.

meet the obligation." It follows that the shortfall occasioned by the approval of the early retirement will be paid over to the GEPF by the employer.

[154] When the provisions of section 16 (6) (a) and (b) of the *Public Service Act* are considered, it is undoubtedly clear that there is nothing for the Minister to approve in as far as the approval of the full pension benefits is concerned. As such, whether or not Minister Gordhan approved Mr Pillay's early retirement with full pension benefits, as the Public Protector seems to have found, is inconsequential. For, once Minister Gordhan approved Mr Pillay's early retirement in terms of section 16 (6) (a) of the *Public Service Act*, subsection (b) thereof automatically, by operation of the law, kicked in. It follows that the approved early retirement automatically, by operation of the law, resulted in the retirement with full pension benefits. Minister Gordhan had, only, to approve the early retirement in terms of section 16 (6) (a) of the *Public Service Act*, which has been conceded by the Public Protector, for subsection (b) to come into operation. And, once it is so conceded, that, Mr Pillay's early retirement resulted in retirement with full pension benefits, cannot be gainsaid.

[155] In that vein, Minister Gordhan's argument that this finding by the Public Protector is irrational and not connected to the relevant prescripts is supported. The finding by the Public Protector that Minister Gordhan approved the full pension benefits when no Ministerial approval was required is indeed irrational.

There was no retirement in fact and in law

[156] The finding of the Public Protector in this respect states that since neither Mr Pillay's request for early retirement nor Mr Magashula's recommendation to Minister Gordhan contemplated retirement, there was no retirement in fact and law.

[157] The Public Protector in coming to this finding used the dictionary meaning of the word "retire" or "retirement". She used that meaning because the word is not defined in either the *GEP Law* or the *Public Service Act*. The Public Protector contends that the issue herein is not whether or not such interpretation was correct but whether her finding based on such interpretation was irrational.

[158] It is correct that the interpretation afforded by the Public Protector to the word "retire" or "retirement" might or might not be the correct interpretation. What, however, the Public Protector was called to do, was to interpret that word within the realm and context of the provisions of the relevant statute.

[159] Section 19 provides that subject to the *GEP Law* a person appointed by SARS as an employee, becomes a member of the GEPF mentioned in section 2 of the *GEP Law*, and is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of a public service mentioned in section 8.

[160] As already stated, the retirement of members of the public service and by extension members of SARS is regulated by section 16 of the *Public Service Act*. Mr Pillay's retirement was applied for and approved in

terms of section 16 (6) (a) of the *Public Service Act*. The subsection provides that an employee may be allowed to retire from the public service upon approval by the Minister. Mr Pillay having procured the approval of the Minister in terms of this subsection means that he was allowed to retire.

[161] Factually Mr Pillay was employed as a permanent employee at SARS and was informed of Minister Gordhan's decision in a letter dated 7 January 2011, that the Minister has allowed him to retire. On 31 December 2010 he in fact stopped working for SARS in a permanent position. He was re-employed at SARS on 1 January 2011 on a fixed term contract. It meant that he was no longer a permanent employee of SARS.

[162] Although it was said that Mr Pillay was employed in the same position, factually, it was not so. He was assigned different responsibilities and he no longer carried the same load of work and his staff was reduced. His terms and conditions of employed had changed. Mr Magashula's Memorandum to Minister Gordhan indicated that Mr Pillay would be retained on the same costs to the company. The difference, however, was that as a contracted employee he was no longer a member of GEPF in terms of section 5 of the *GEP Law* and SARS no longer contributed to his medical aid. His status had also changed, his contract stipulated that his employment could be summarily terminated on a month's notice.

[163] Thus if the word "retire" or "retirement" is read within the context of the aforementioned realm, it can be construed no other way than that Mr Pillay had retired from his employment with SARS on 31 December

2010. Retirement in this sense is confined to the termination of the status of a permanent employee. The Public Protector's complaint of what she refers to as a seamless transition from permanent employment to fixed-term employment does not necessarily mean that there was no retirement in fact and law. The facts speak for themselves.

[164] It follows, therefore, that the Public Protector incorrectly interpreted the word "retire" or "retirement" as contained in section 16 of the *Public Service Act* and in that sense committed an error of law that rendered her finding that Mr Pillay did not retire in law and in fact, irrational.

Minister Gordhan's conduct amounts to improper conduct as envisaged by section 6 (4) (a) of the Public Protector Act

[165] The Report makes adverse findings against the applicants. Specifically, it finds Minister Gordhan guilty of improper conduct for what is said to be the irregular approval of Mr Pillay's request for early retirement from SARS with full pension benefits and his subsequent retention by SARS on a fixed-term contract.

[166] It is argued on behalf of Minister Gordhan that the Public Protector's decision, in this regard, was irrational for two reasons. Firstly, because to take account of the process by which the decision taken was made and brand it as improper conduct because of an error of law, is in itself irrational. Secondly, the Public Protector did not even consider whether the manner in which Minister Gordhan's decision was taken was

improper at all. The contention is that she failed to take a crucial feature of the matter, into account.

Ad the Process by which the Decision was taken

[167] Mr Trengrove, arguing on behalf of Minister Gordhan, submits that Minister Gordhan's decision was a model of executive decision making. Counsel contends that Minister Gordhan took the decision to approve Mr Pillay's request in good faith and based on the unqualified advice of several independent best available experts, with extensive experience in the retirement and pension environment, all of whom advised him that the request and subsequent approval were above board and lawful. According to counsel, Minister Gordhan went into an extensive consultation process[38] that took him more than two months to complete before he could sign the Memorandum recommending Mr Pillay's early retirement with full pension benefits and subsequent retention at SARS. Counsel, submits as a result, that this diligent approach cannot be regarded as improper conduct by a person performing a public function, as the Public Protector found in her investigations.

[168] When it comes to the *bona fides* or good faith of the process followed by Minister Gordhan in approving Mr Pillay's request, we are in agreement with the Public Protector's counsel that defences of honesty and good faith have no place in this matter. Counsel's argument in this regard is supported by the judgment of the Constitutional Court to which

[38] See paragraph [21] of this judgment.

they referred us, in *Mazibuko NO*[39] wherein that court endorsing the principle as set out in *Speaker of the National Assembly*,[40] stated the following:

> "147. In *Speaker of the National Assembly v De Lille and Another*, [41] Mahomed CJ stated the principle thus:
>
> "This enquiry must crucially rest on the Constitution of the Republic of South Africa. . .. *It* is Supreme ─ not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution."

[169] On the other hand, the consultation with the so-called experts who are said to have advised Minister Gordhan, much cannot be really said about them if considered in the light of the argument by the Public Protector that the consultation process Minister Gordhan seeks to rely on, does not assist his case. Minister Gordhan's submission that he consulted with the best available experts, with extensive experience in the retirement and pension environment when considered against the hereunder arguments of the Public Protector, is not sustainable:

169.1 Firstly, the consultation with Mr Symington took place some 17 months before Minister Gordhan considered Mr Pillay's

[39] Mazibulo NO v Sesulu and Others 2013 (6) SA 249 CC para 147.
[40] Speaker of National Assembly v De Lille and Another 1999 (4) SA 863 SCA.
[41] Speaker of National Assembly v De Lille and Another 1999(4) SA 863 SCA para 14.

request for early retirement with full pension benefits and subsequent retention at SARS. There is no indication on the record that Minister Gordhan consulted with Mr Symington after he received Mr Magashula's Memorandum.

169.2 Secondly, Mr Magashula cannot be taken as an expert for purposes of the advice Minister Gordhan was looking for. Mr Magashula concedes as much in his affidavit to the Public Protector that he is not a lawyer and was acutely aware of the prescripts pertaining to employee retirement.

169.3 Thirdly, there is nothing presented to the court as evidence of when Mr Donaldson was consulted or what his advice was. In *Heg Consulting Enterprises Pty Ltd,*[42] the court said there:

> "The defence of legal advice, this defence requires a proper setting out of the circumstar

So similarly, in this case, where it is motion proceedings, it was incumbent upon Minister Gordhan to set out exactly what advice he requested and the nature of the advice he received. As a result, we do not know the remit of their discussion and what facts Mr Donaldson considered, even more importantly, what advice he gave Minister Gordhan.

169.4 Fourthly, nothing contained in Mrs Hendricks' affidavit amounts to independent legal advice by her or any other

[42] Heg Consulting Enterprise Pty Ltd v Siegwart 2000 (1) SA 507 at 507C and 522B.

person which could be relied upon to make the approval, at best what is contained in her affidavit is hearsay.

169.5 Fifthly, Minister Gordhan never had any direct contact with Mr Govender. Whatever advice, if any he received from Mr Govender is also hearsay.

169.6 Lastly, in the conversation Minister Gordhan had with Mr Olivier, what we are privy to is that they were discussing, amongst others, the importance of retaining the services of Mr Pillay. Except for the retention of Mr Pillay at SARS, this conversation would not have assisted Minister Gordhan about the early retirement of Mr Pillay.

[170] Having said that, it must, nevertheless, be borne in mind that Mr Magashula's Memorandum is a submission made to Minister Gordhan by Mr Magashula as the Commissioner of SARS. It is not merely Mr Pillay's application directly to Minister Gordhan. Mr Pillay applied to Mr Magashula, and this Memorandum to Minister Gordhan was Mr Magashula submitting a Memorandum to him in which he, Mr Magashula, asked and recommended for the approval sought by Mr Pillay to be granted. So, Mr Pillay's application came to Minister Gordhan with the endorsement and recommendation of Mr Magashula, as the Commissioner, the ultimate employer responsible for the administration of SARS. It can be said that Mr Pillay's application came to Minister Gordhan with high recommendation and commendation.

[171] In the Memorandum, Mr Magashula gives the motivation for retirement with full benefits. He motivates for the reappointment of Mr Pillay on a fixed three-year term contract. He further informs Minister Gordhan that this decision will have financial implications but he reassures him that those financial implications, will have to be approved by the appropriate organs within SARS, that is, the SARS Human Resources Committee and the SARS Executive Committee. Mr Magashula, also, tells Minister Gordhan that, firstly there is ample precedent for this type of application; secondly that the request has been blessed by the Acting Director-General of the Public Service Department.

[172] Therefore, judging the conduct of Minister Gordhan against this backdrop, he was entitled to proceed on the information given to him. It should be remembered that when he responded to Mr Magashula's Memorandum, he was responding to the reasons set out therein and the motivation of the Memorandum.

[173] The duty, in essence, fell on Mr Magashula as the ultimate employer at SARS, responsible for the administration of SARS, to investigate and research matters such as these before submitting same to the Minister. There was no reason, none was proffered, for Minister Gordhan not to believe what was stated in Mr Magashula's Memorandum. Mr Magashula, as he also argues, researched the viability and/or feasibility of Mr Pillay's request before he could recommend for approval by the Minister.

[174] It is common cause that when Mr Magashula received the request from Mr Pillay, he did not just pass it to the Minister without considering it. He took the time to consider it. Evidence on record shows that Mr Magashula received Mr Pillay's request in November 2009 and only submitted it to the Minister in August 2010. He referred the request to Mr Coetzee for advice. Although Mr Coetzee cautioned Mr Magashula about the cynical nature of the transaction, he still advised him to recommend it to the Minister. In his advice to Mr Magashula, Mr Coetzee never said that the request was unlawful and that it should be rejected.

[175] The Public Protector's proposition that Mr Coetzee's advice was ignored is, thus, not correct. It is clear from the evidence that Mr Magashula did consider the advice and acted upon it. There is also no evidence on record, none was furnished, that Minister Gordhan was aware of this communication between Messrs Magashula and Coetzee. It, can, therefore, not be said that he ignored the advice given to Mr Magashula by Mr Coetzee. The opinion of Adv Brassey, SC, which the Public Protector seeks to rely on as some other advice that was ignored does not assist her case as it is clearly evident that such opinion was obtained only after the fact.

[176] The Public Protector also forgot the evidence of Mr Coetzee that he provided to her during the investigation. Mr Coetzee informed the Public Protector that

> "Minister met the legal requirements, he did not do anything wrong in terms of the provisions of the Public Service Act and the GEPF Act

> (GEPF Law) there was no problem with that because I was responsible to make sure that he didn't transgress any provision of any act. I made very sure that doesn't, so I said go ahead, you must now decide if the reasons given for the retirement are sufficient."

[177] It is trite that errors of law can be the product of improper conduct, if it was an irrational error of law or if it was an error made due to a lack of care and diligence, or if it was an error deliberately made. The aforementioned is an indication that if ever Minister Gordhan committed an error of law, such error was not due to lack of care and diligence or was deliberately made.

[178] We have to hold, therefore, that the decision by the Public Protector that Minister Gordhan's conduct when he approved the early retirement of Mr Pillay with full benefits and his subsequent retention in SARS, amounts to improper conduct envisaged in section 6 (4) (a) (ii) of the *Public Protector Act* is not rationally connected to the information that was before her when she made that finding. Consequently, this finding must also fall because Minister Gordhan's decision, even if it was wrong in law, cannot possibly rationally be characterised as unlawful.

Ad the manner in which Minister Gordhan's decision was taken was never considered by the Public Protector

[179] When arguing against the Public Protector's finding that Minister Gordhan's conduct amounts to improper conduct in terms of section 6 (4) (a) of the *Public Protector's Act*, Mr Trengrove contends that the Public Protector in coming to this decision failed to consider a crucial feature of

the matter by not considering the manner in which Minister Gordhan's decision was taken.

[180] Minister Gordhan's decision to approve the early retirement of Mr Pillay was taken in terms of section 16 (6) (a) of the *Public Service Act*. The section reads

> "(6) (a) An executive authority may, at the request of an employee, allow him or her to retire from the public service [SARS] before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17 (2), if sufficient reason exists for the retirement."

[181] The subsection, as stated above, provides that approval for early retirement may be granted only if 'sufficient reason exists for the retirement'.[43] This means that before the Minister approves the early retirement, he must satisfy himself that there is sufficient reason for the retirement.

[182] On behalf of the Public Protector it was argued that the Public Protector did consider the manner in which Minister Gordhan's decision was taken and found that sufficient reason for the retirement did not exist when he took the decision.

[183] It is common cause that the crux of the approval of the early retirement of Mr Pillay is whether or not Minister Gordhan had sufficient reason for the retirement as required in section 16 6 (a) of the *Public Service Act*. Ms Mohlonya on behalf of the Public Protector, referred to it as 'the heart of this matter'. Mr Trengrove referred to it as 'a crucial feature

[43] Section 16 (6) (a) of the Public Service Act.

of the matter'. We are also in agreement, because, once it can be shown that Minister Gordhan did not have sufficient reason for the retirement when he approved Mr Pillay's early retirement, it is the end of the whole matter. Without the 'sufficient reason for the retirement' Minister Gordhan would not have been authorised to approve 'the early retirement' and without the early retirement the provisions of section 16 (6) (b) of the *Public Service Act* would not have come into operation and Mr Pillay would not be entitled to 'the full pension benefits'.

[184] The best place to start should be the Report. It should be remembered that what this court seeks to determine is not the lawfulness of the request but the lawfulness of the approval, and the lawfulness of the approval can be tested only against whether 'sufficient reason for the retirement' existed when the approval for Mr Pillay's early retirement was made. Sight should also not be lost that what is being reviewed here, is not the decision of Minister Gordhan but the decision of the Public Protector, hence the Report should be our first point of reference.

[185] Ms Mohlonya in argument, correctly, states that the existence of sufficient reason for the retirement is a jurisdictional fact and that the sufficient reason for the retirement must exist in the eyes of this court. She in that regard proposed to demonstrate to us that there was no sufficient reason for the retirement that existed when Minister Gordhan approved the early retirement of Mr Pillay. The problem for us, however, is the manner she goes about to show this. She wants to argue this point without reference to what is contained in the Report.

[186] Our major concern is that this point of lack of sufficient reason for the retirement that Ms Mohlonya seeks to canvass to establish that Minister Gordhan was not authorised to approve the early retirement of Mr Pillay, does not feature in the findings of the Public Protector that are in her Report. The issue of the insufficiency of the reason is raised in the Report by the Public Protector only as '*a concern of the effect that such an arrangement would have on the fiscus if every public servant could access their full pension money and still remain on the payroll of the department until their actual retirement*'.[44] That is where the Public Protector left it. In the Report, the issue is not treated as a reason that affected the authority of Minister Gordhan to approve the early retirement of Mr Pillay or that affected the lawfulness of the approval of Mr Pillay's early retirement, hence, it was not even mentioned as one of the findings of the Public Protector in the Report.

[187] In the Report, having concluded that the retirement of Mr Pillay was not contemplated, the Public Protector raises the question of whether 'sufficient reason exists' for the early retirement of Mr Pillay and actually finds none to have existed. She bases such conclusion on the different reasons proffered by Mr Pillay as to why he wanted to go on early retirement, in the first place, and Minister Gordhan's failure to consider the 'cautionary observations' of Mr Coetzee to Mr Magashula, in an email dated 8 and 9 October 2009. Consequently, she then states that she was not 'persuaded that there was a rational connect between the Minister's approval of the early retirement and the reasons provided by Mr Pillay for

[44] See paragraph 5.1.153 of the Report.

that approval [the early retirement approval], when considering the facts and what subsequently transpired'.

[188] Having concluded as such, she goes further to consider the opinion of Advocate Brassey SC which states that the motivation being approved by Minister Gordhan *"had the effect of deeming Mr Pillay to be a contributing member (of the GEPF) but absolving him of the need to make the contribution. This benefit that was considerable augmented his remuneration in the circumstances*."; and Minister Gordhan's relationship with Mr Pillay [the longstanding political kinship] and draws the conclusion that the 'elaborate arrangement was designed to retain Mr Pillay on preferential terms.' She finally concludes on this point by mentioning her concerns as articulated in paragraph [186] of this judgment.

[189] Our view, as such is that the issue of the insufficiency of the reason in the Report does not get elevated to the heights that Ms Mohlonya seeks to elevate it in her oral argument, as being one of the findings of the Public Protector. She is clearly wrong. Our view in this regard is supported by the fact that the Public Protector ends up conceding in the Report that the early retirement of Mr Pillay was lawfully approved by Minister Gordhan which concession Ms Mohlonya cannot counter by oral argument from the bar.

[190] The high watermark of the Public Protector's complaint as appears in the Report, is not the approval of the early retirement but, actually, the payout and/or the entitlement of Mr Pillay to the full pension benefits. She seems to be at peace with Minister Gordhan's approval of the early

retirement itself. She points it out in the Report that even though Minister Gordhan approved the retirement in terms of section 16 (6) (a) of the *Public Service Act*, Mr Pillay was not entitled to the full pension benefits because the retirement was not contemplated and Minister Gordhan had no authority in terms of section 16 (6) (b) of the Public Service Act to approve the full pension benefits and also that because the retirement was not contemplated.

[191] The issue of the sufficient reason for the retirement as a jurisdictional fact to found the approval of the early retirement, seems to recede in the background when the Public Protector considers Mr Pillay's entitlement to the full pension benefits in terms of section 16 (6) (b) of the *Public Service Act*. Hence, she makes a finding that section 16 (2A) of the *Public Service Act*, does not authorise the Minister to approve the early retirement and in the same breath, concedes that the approval of the early retirement was, in any event, lawful because the approval was authorised in terms of section 16 (6) (a) of the *Public Service Act*.

[192] A further point that supports our view is that in the Report, the Public Protector makes no finding relating to the approval of the early retirement itself. It is nowhere stated in the Report that the entitlement of Mr Pillay to the full pension benefit was unlawful because there was no approval. What is stated is that Mr Pillay's entitlement to the full pension benefits was unlawful because, even though there was approval of the early retirement, no retirement was contemplated and Minister Gordhan

was not authorised in terms of section 16 (6) (b) of the *Public Service Act* to approve the full pension benefits.

[193] Even if we were to accept that the issue of sufficient reason for retirement is included in the findings and reasoning of the Public Protector, the challenge that will face this court is the reasons which the Public Protector contends, they do not persuade her that the sufficient reason for retirement exists. The first reasons she relies on in her conclusion is that Mr Pillay provided different reasons why he wanted to go on early retirement. The question that immediately arises is what were the reasons that served before Minister Gordhan to enable him to determine whether sufficient reason for retirement exists. The record shows that the reason referred to by the Public Protector in the Report were provided in the Memoranda that were penned by Mr Pillay – three of such Memorandums form part of the record. There is no indication on record whether the first two Memorandums were ever submitted either to Mr Magashula or Minister Gordhan. What can be established from the record is that the last of those three Memorandums was indeed submitted to Mr Magashula in November 2019. But whether that Memorandum served before Minister Gordhan cannot be gleaned from the record, itself.

[194] According to Mr Magashula, in an affidavit presented to the Public Protector, a Memorandum of Mr Pillay was attached to his (Mr Magashula's) Memorandum that he submitted to Minister Gordhan. Fact is, that Memorandum of Mr Pillay that is supposed to have been attached to the Memorandum Mr Magashula submitted to Minister Gordhan, does

not form part of the record. Save to assume that Mr Pillay's Memorandum of November 2019 is the one that might have been attached, it is uncertain which one of Mr Pillay's Memoranda was so attached and whether or not such Memorandum ever served before Minister Gordhan. Ms Mohlonya was at pains in trying to explain to us which of Mr Pillay's Memoranda was attached to Mr Magashula's Memorandum to Minister Gordhan and whether Minister Gordhan relied on the reasons set out in that Memorandum when he determined if sufficient reason for the retirement exists.

[195] The Public Protector seems to have missed this Memorandum that Mr Magashula says he attached to his Memorandum that was submitted to Minister Gordhan. It does not even appear as if she was aware of it. There is nothing in the Report that shows that she queried Minister Gordhan about it.

[196] It is common cause that the Memorandum submitted by Mr Magashula to Minister Gordhan indicates the reason for Mr Pillay's early retirement as 'personal reasons' and no explanation of those personal reasons is provided. Minister Gordhan when asked by the Public Protector indicated that he considered Mr Pillay's health problems (back problems) and financial challenges (funds for his children's schooling). From the bar, Mr Trengrove provided the reason as the financial challenges for Mr Pillay's children's schooling. Thus, whatever it is that Ms Mohlonya argued in court on this point, which mostly was based on speculations, it will be difficult for this court to can decide on whether or

not sufficient reason for the retirement existed at the time Minister Gordhan approved the early retirement of Mr Pillay.

[197] From what we can glean from the record there appears to have been nothing else, except what was on Mr Magashula's Memorandum, that Minister Gordhan used in order to determine the sufficient reason for the retirement. And if, indeed Minister Gordhan considered only Mr Magashula's submission then, sufficient reason for the retirement did not exist, and on that basis Minister Gordhan would not have been authorised to approve the early retirement of Mr Pillay. But then, as already stated, this is not for this court to decide because the decision of Minister Gordhan is not before us.

[198] The failure by Minister Gordhan to consider the 'cautionary observations' of Mr Coetzee to Mr Magashula can be taken in the same vein because there is nothing in the Report that indicates that Minister Gordhan was asked to explain whether he was aware of those emails, and if so, why he failed to consider Mr Coetzee's 'cautionary observations'.

[199] In the end Mr Mpofu argued that the Public Protector harboured a suspicion that the elaborate arrangement was designed to give an undue advantage to Mr Pillay, which would possibly not have extended to another employee in the same circumstances. Ms Mohlonya, on the other hand, argues that the issue of the requirement of sufficient reason for the retirement was argued on the strength of trying to show that the approval of Mr Pillay's early retirement was a scheme to benefit Mr Pillay.

[200] There are no facts in the Report upon which these allegations are based. The Public Protector, concludes in the Report that when these circumstances [the various reasons provided by Mr Pillay for his early retirement, the failure by Minister Gordhan to consider the 'cautionary observations' of Mr Coetzee and Adv Brassey's opinion] are considered together with the fact that Minister Gordhan and Mr Pillay have a long-standing political kinship, the conclusion is that this was simply an elaborate arrangement designed to retain Mr Pillay on preferential terms.

[201] We say there are no facts to support these allegations because there is nothing in the Report to establish how the Public Protector came to such an elaborate conclusion. We have already dealt somewhere in this judgment with the 'cautionary observations' of Mr Coetzee;[45] Adv Brassey's opinion was obtained after the fact and how the alleged kinship between Minister Gordhan and Mr Pillay affects the approval of Mr Pillay's early retirement is not disclosed in the Report.

[202] The Public Protector, in coming to the finding she made in this regard, failed to consider the evidence of Mr Pillay that he would never have taken early retirement if it did not come with the two other conditions, namely the full pension benefits and retention at SARS. She also failed to consider the evidence of Mr Symington that he is the one who advised Mr Pillay to accept the early retirement only if the other two elements of the package are in place, if it was to be to his benefit.

[45] See paragraph [198] of this judgment.

[203] We have to hold, therefore, that the Public Protector made findings against Minister Gordhan based on six errors of law (this is common cause) and 'sufficient reason for the retirement' or a scheme to benefit Mr Pillay, are not one of those errors. It is, thus, irrelevant for purposes of this case whether Minister Gordhan had sufficient reason for the retirement or there was a scheme to benefit Mr Pillay because that was not the basis on which the Public Protector held against him. In the final analysis, the Public Protector failed to consider this crucial feature which was dispositive of the whole matter.

The Retention of Pillay on a fixed term contract – Did Minister Gordhan act *ultra vires?*

[204] The finding of the Public Protector in this regard is that Minister Gordhan acted *ultra vires* in approving the retention of Mr Pillay, as Minister Gordhan was not authorised by law to do so.

[205] It is the Public Protector's submission that Minister Gordhan exceeded his power in approving what her counsel referred to as the tripartite package deal. It was conceded on behalf of the Public Protector that Minister Gordhan was empowered to approve the first aspect of the package deal, namely, the early retirement of Mr Pillay. A dispute according to counsel arises in respect of the two other legs of the package deal, that is, the approval of the retirement with full pension benefits and the retention of Mr Pillay in the same position on a fixed-term contract at SARS.

[206] This argument by Mr Mpofu, on behalf of the Public Protector, is slightly nuanced in that the *ultra vires* finding of the Public Protector against Minister Gordhan does not state that Minister Gordhan's action was *ultra vires* because he was not empowered to approve the tripartite package deal, as Mr Mpofu wants to argue. The finding is simply stated as not being authorised to approve the retention of Mr Pillay. Mr Mpofu's argument in this regard is, as a result, out of turn.

[207] Section 18 of the *SARS Act* provides as follows:

> "SARS employees, other than employees contemplated in subsection (3) are employed subject to terms and conditions of employment determined by SARS. The Minister must approve the terms and conditions of employment for any class of employee in the management structure of SARS."

[208] In terms of section 18 of the *SARS Act*, SARS employees, other than employees contemplated in subsection (3) are employed subject to the terms and conditions of employment determined by SARS. The Minister, on the other hand, must approve the terms and conditions of employment for any class of employee in the management structure of SARS.

[209] Mr Pillay's fixed-term contract after retirement was entirely competent under section 18 of the *SARS Act*. Sections 18 of the *SARS Act* makes it clear that SARS is empowered to employ people and to determine their terms and conditions of employment. The only limitation is that the management structure and senior management's terms and conditions of employment have to be approved by the Minister. This, in our understanding, does not mean that the management structure is not

employed by SARS. SARS employs persons in the management structure but subject to the terms and conditions approved by the Minister.

[210] It is said that the Minister makes a general determination that would apply to a class of senior management in terms of s 18 (3) of the *SARS Act*. Mr Pillay as a senior manager, fell within this structure and therefore, his terms and conditions would have already been determined and approved by the Minister.

[211] Minister Gordhan's role in relation to the approval of the Memorandum that served before him, was limited. His role was confined to section 16 (6) of the *Public Service Act*, and that is to permit the early retirement of Mr Pillay. In respect of the re-employment of Mr Pillay he did not have any role to play if the Memorandum he received from Mr Magashula were to be considered.

[212] In addition to the early retirement of Mr Pillay, Mr Magashula's recommendation to Minister Gordhan in the Memorandum, was for Minister Gordhan to approve "the retention of Mr Pillay as Deputy Commissioner of SARS on a three-year contract with effect from 1 August 2010" at the same cost to company level". These terms and conditions had already been approved. By attaching his signature to the Memorandum as approval, Minister Gordhan approved, in addition to the early retirement, the retention of Mr Pillay as Deputy Commissioner of SARS.

[213] Under these circumstances, we have to conclude that the Public Protector's finding that Minister Gordhan acted *ultra vires* in approving the retention of Mr Pillay, was rational.

Payment of the additional liability by SARS amounted to irregular expenditure and maladministration.

[214] On this aspect, the Public Protector's finding is that the payment by SARS of the actuarial shortfall to the GEPF triggered by Mr Pillay's early retirement without loss of pension benefits amounts to irregular expenditure. She also made a finding that Mr Pillay has been benefitted to the extent of that payment. And that SARS, by extension the taxpayer, has been prejudiced in the amount of R1.258-million. The finding is that because SARS paid R1.258-million as the penalty on behalf of Mr Pillay, such payment amounted to irregular expenditure.

[215] The Public Protector's finding in this regard was based on her finding that Minister Gordhan had acted unlawfully in approving the full pension benefits for the early retirement of Mr Pillay because he was not authorised in terms of section 16 (6) (b) of the Public Service Act and that Mr Pillay was not entitled to the full pension benefits because no retirement was contemplated.

[216] We have already earlier in this judgment found the Public Protector's decision on this finding to be irrational and that Mr Pillay was entitled to the full pension benefits on his early retirement as the full pension benefits came into effect by operation of the law and required no

approval from Minister Gordhan. We also found the Public Protector's finding that there was no retirement in fact and in law to be irrational.

[217] Ms Mohlonya's submission when arguing on behalf of the Public Protector, that the penalty was paid under the circumstances where SARS should not have paid, does not hold water because our finding is that the full pension benefits on the early retirement of Mr Pillay, were lawfully paid.

Having found as such, we have, therefore, to conclude that the finding of the Public Protector that the payment by SARS of the actuarial shortfall within the GEPF triggered by Mr Pillay's early retirement without loss of pension benefits, amounts to irregular expenditure and that Mr Pillay has been benefitted to the extent of that payment, is a material error of law rendering the Public Protector's finding irrational.

REMEDIAL ACTION

[218] Having found that Minister Gordhan acted lawfully when he approved the early retirement of Mr Pillay with full pension benefits, the Public Protector's remedial orders affecting Minister Gordhan and Mr Magashula have no force and effect and are, thus, irrational.

[219] Besides, the Public Protector's remedial order, in relation to Minister Gordhan, that President Ramaphosa ('the President") take note of her findings in the Report and take appropriate disciplinary action against Minister Gordhan for failing to uphold the values and principles of public administration entrenched in section 195 of the Constitution, and the duty conferred on Members of Cabinet in terms of section 92 (3) (a) of the

Constitution, to act in accordance with the Constitution, is in itself a material error of law which renders the remedial order irrational.

[220] Although in court the debate centred on whether or not the President had the authority to discipline Members of Cabinet, in our opinion, before we even come to that debate, we find the remedial order to be irrational as the conduct of Minister Gordhan set out in the Report, cannot be rationally characterised as unlawful and in breach of either section 195 or section 92 (3) of the *Constitution*, or for that matter, any other provision of the *Constitution*.

[221] Section 195 of the *Constitution* stipulates the basic values and principles governing public administration. Section 92 (3) (a) of the *Constitution*, on the other hand, enjoins Members of Cabinet to act in accordance with the *Constitution*. There is nothing in the Report that establishes that Minister Gordhan, as Member of Cabinet or otherwise, contravened any of the basic values and principles governing public administration or that he acted contrary to any of the duties of Members of Cabinet provided for in the *Constitution*.

[222] It is, therefore, irrational of the Public Protector to make a remedial order enjoining the President to take appropriate disciplinary action against Minister Gordhan based on the contravention of the *Constitution*.

[223] The remedial order in respect of Mr Magashula that the Commissioner of SARS set in r to irregular expenditure as envisaged by section 38 (c) (ii) of the *Public*

Finance Management Act.[46] Mr Magashula is found to have acted unlawfully by recommending that Minister Gordhan approve Mr Pillay's early retirement "without downscaling his retirement/pension benefits", SARS, through Mr Magashula as the then Commissioner, took the "action" contemplated in section 17 (4) of the *GEP Law*, thereby triggering additional liability to the GEPF.

[224] As is correctly pointed out by SARS in their own founding papers in this matter, Mr Magashula took no decision and did not purport to take any decision. It was the lawful decision in terms of section 16 of the *Public Service Act* taken by Minister Gordhan which in law set the process of the payment to the GEPF in motion, and ultimately cause the money to be paid over to the GEPF. Mr Magashula merely recommended that Mr Pillay's request be granted which, as argued by Mr De Jager, can never sustain any cause of action of whatever nature against Mr Magashula.

FAILURE TO AFFORD A HEARING ABOUT THE REMEDIAL ACTION

[225] Minister Gordhan raises a complainant that the Public Protector did not allow him an opportunity to make representations to her on the remedial action she ordered against him.

[226] It is common cause that the Public Protector did not afford Minister Gordhan a hearing on the remedial order she made against him. In the section 7 (9) notice that the Public Protector sent to Minister Gordhan only the adverse findings that the Public Protector proposed to make against Minister Gordhan were canvassed. The notice did not give any indication

[46] Act 1 of 1999.

of the remedial orders that she might make against Minister Gordhan. Thus, the notice merely afforded Minister Gordhan a hearing in respect of the envisaged adverse findings against him.

[227] It is also common cause that Minister Gordhan, in his response to the section 7 (9) notice, requested the Public Protector for an opportunity to address her on the remedy before she made any remedial orders, and the Public Protector expressly refused to allow him such an opportunity. This, according to Minister Gordhan, was an unlawful breach of the *audi alteram partem* rule. In support of his argument, counsel for Minister Gordhan referred us to the decision taken by the Full Court of this Division in *The President of the Republic of South Africa,*[47] where the issue of the requirement of *audi* on the remedies to be imposed by the Public Protector was specifically considered and decided in favour of the Public Protector affording such *audi*.

[228] Section 7 (9) (a) of the *Public Protector Act* obliges the Public Protector to afford a hearing to persons implicated in any investigation. The section provides that

> 'If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, the Public Protector shall afford such person an opportunity to be heard in connection therewith by way of the giving of evidence, and such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public

[47] The President of the Republic of South Africa & the Speaker v The Public Protector & Others 2020 (6) BCLR 513 (GP) para 162 and 206.

Protector, who have appeared before the Public Protector in terms of this section.'

[229] Mr Mpofu, on behalf of the Public Protector, submits that section 7 (9) (a) of the *Public Protector Act* only obliges the Public Protector to afford a person implicated in her investigation a hearing in relation to her findings and not in relation to the contemplated remedial action. He contends that although in *The President of the Republic of South Africa* the court held that the hearing might be extended depending on the facts of each case, that does not mean that the Public Protector is obligated to do so.

[230] This issue to be determined by this court of whether the Public Protector is obliged to afford a person implicated in her investigation a hearing in relation to the contemplated remedial action, was canvassed and decided by a Full Court of this Division in *President of the Republic of South Africa.*[48] That court held that:

"157. In addition, the right to be afforded a reasonable opportunity to make representations on matters that may detrimentally affect one's interests is a well-established principle of natural justice and of our common law. It is an important component of the right to just administrative justice and is expressly recognised as such in the Constitution. Whether or not a decision-maker has complied with this obligation or not will depend on the facts of the particular case. . .

159. Section 7(9)(a) does not expressly require the Public Protector to include her contemplated remedial action in the notice to a party

[48] President of the Republic of South Africa & Another v The Public Protector & Others 2020 (6) BCLR 513 (GP) para 157 to 159.

> under investigation. However, that does not mean that the Public Protector may not be obliged to do so. The facts may be such that in order to constitute compliance with a person's constitutional right to just administrative action, she should afford them this opportunity."

[231] From the afore quoted passages, it is clear that in certain circumstances, where the facts of the case are such that compliance with a person's constitutional right to just administrative action is required, the Public Protector may be obliged to afford a person under investigation a hearing in relation to the contemplated remedial action.

[232] We were informed during argument that this matter is to be considered by the Constitutional Court. However, at the time of writing this judgment that court had as yet not given its judgment. Without the decision of the Constitutional Court on this issue, the decision in *President of the Republic of South Africa* is still the authority. We find that judgment to be persuasive and are, therefore, inclined to align ourselves with it.

[233] In the present matter, Mr Mpofu's argument is that the circumstances of this matter do not oblige the Public Protector to afford Minister Gordhan a hearing about the contemplated remedial action. We are, however, of the view that having been asked to be afforded a hearing by Minister Gordhan, the Public Protector was obligated to have afforded Minister Gordhan that hearing. It cannot be disputed that the interests of Minister Gordhan were going to be detrimentally affected by the contemplated remedial action, hence a hearing should have been afforded to him.

[234] Similarly, with Mr Magashula, Mr Mpofu's argument that he is none suited in this court as his right of hearing will be afforded to him by the person who has been directed to take action against him is threadbare and without substance. The remedial action against Mr Magashula, even though it is not directed at him but his interests are going to be detrimentally affected by the contemplated remedial action to be ordered by the Public Protector.

[235] We hold, therefore, that the Public Protector's decision not to afford Minister Gordhan a hearing about the contemplated remedial action she ordered against Minister Gordhan, is irrational.

COSTS

[236] We discuss the issue of costs under the following headings:

Personal Cost Order against Adv Mkhwebane

[237] Minister Gordhan, in his papers and in argument in court is contending for a personal costs order against Adv Mkhwebane. The Constitutional Court when dealing with the awarding of a personal cost order, remarked as follows:

> "[89] Our jurisprudence on personal costs orders is clear. On numerous occasions, this Court has affirmed that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in particular instances. The power of courts to make and impose

personal costs against public officials is sourced from the Constitution. Recently, this Court in SASSA held:

> "It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation."

[90] The common law rules in relation to the ordering of personal costs orders are well-established, and, as Black Sash tells us, are buttressed by the Constitution. Thus, the Constitution must inform and permeate the long-established common law tests of bad faith and gross negligence.

[91] Personal costs orders against a public official are primarily aimed at vindicating the Constitution. They protect the Constitution, its values and its vision. They ensure that public officials who impermissibly flout the Constitution are held accountable. It is a constitutional demand that public officials are held accountable and observe heightened standards in litigation and in the execution of their duties. Recognising this, Froneman J stated that:

> "Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order."

[92] It cannot be gainsaid that personal costs orders are punitive in nature and a court must be satisfied that the conduct of a particular incumbent, in the execution of their duties or conduct in litigation, warrants the ordering of a personal costs order. This cannot be done in the abstract

> and the facts must plainly support an order of this nature. A court would be derelict in its duties if it imposed a personal costs order where the facts do not justify that. Similarly, a court would be derelict in its duties if it failed to furnish the reasoning for imposing a personal costs order." (footnotes removed)

[238] In the light of what is stated in the above passages, we are of the opinion that the circumstances of this application do not warrant the ordering of a personal costs order against Adv Mkhwebane. The test set out is that of bad faith and gross negligence. It does not appear in the papers before us that Adv Mkhwebane conducted these proceedings in bad faith and was grossly negligent. The facts of this matter do not support such an order, and we are, accordingly, not inclined to grant such an order.

Application of the *Biowatch* principle

[239] Counsel for the applicants argued for the application of the *Biowatch* principle where the applicants have been unsuccessful in the matter, which is opposed by the Public Protector. The contention by the applicants is that they instituted the review application to promote constitutional justice and to exercise their rights as litigants and they should, as such, not face an adverse cost order in the event they lose.

[240] The *Biowatch* judgment[49] dealt with the proper approach that courts should adopt when making costs orders in constitutional litigation. The general rule is that in constitutional litigation the unsuccessful litigant in

[49] Biowatch Trust v Registrar Genetic Resources and 69 -79 Others 2009 (6) SA 232 (CC).

proceedings against the state ought not to be ordered to pay the state's costs.

[241] We do not think that the *Biowatch* principle applies in the circumstances of this review application. This a pure review application and not a constitutional matter. The applicants will, therefore, have to pay the Public Protector's costs where they have not been successful.

Punitive Costs Order

[242] Both parties claim punitive costs orders against each other. The award of such costs is within the discretion of the court, this is trite. The Constitutional Court in *Public Protector*[50] has succinctly set out the principles of the court's discretion to order costs on a punitive scale. The court in doing so stated the following:

> "[221] This Court has endorsed the principle that a personal costs order may also be granted on a punitive scale. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this Court in *Eskom*,[51] the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.

[50] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) paras 221 to 222.
[51] Limpopo Legal Solutions v Eskom Holdings Soc Limited [2017] ZACC 34.

[222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome." (footnotes removed)

[243] The general principle is that an attorney and client scale is awarded when a court wishes to mark its disapproval of the conduct of a litigant. Courts have awarded this scale of costs to mark their disapproval of dishonest or *mala fide* conduct, vexatious conduct, conduct that amounts to an abuse of the process of the court, or conduct that is extraordinary and worthy of a court's rebuke. As costs lie at the discretion of the court, this is not a closed list.[52] The operative principle in determining whether to award punitive costs is, whether a litigant's conduct is frivolous, vexatious or manifestly inappropriate.[53]

[244] The Public Protector asks for a punitive costs order against both Minister Gordhan and Mr Pillay, in relation to the two preliminary applications, namely, the strikeout application and the counter application on the basis of the words and abuse used by Minister Gordhan in the averments that were sought to be struck out and the resultant insult. We have already dismissed the counter application and the Public Protector is entitled only to the costs for the strike out application. Having struck out the averments on the basis that they are vexatious,[54] we are of the view that such striking out warrants a punitive cost order. Both Minister

[52] The President of the Republic of South Africa & Another v The Public Protector & Others
[53] Helen Suzman Foundation v President of the Republic of South Africa 2015 (2) SA 1 CC para 18; Public Protector v South African Reserve Bank [2019] ZACC 29 para 97.
[54] Helen Suzman Foundation v President of the Republic of South Africa 2015 (2) SA 1 CC para 18; Public Protector v South African Reserve Bank [2019] ZACC 29 para 97.

Gordhan and Mr Pillay, who associated himself with the contentions raised by Minister Gordhan, should be mulcted with a cost order in this regard.

[245] In regard to the *PAJA* grounds of review, as the Public Protector is the successful party on that score, the applicants must be ordered to pay the costs thereof on a punitive scale. The decision in *Minister of Home Affairs* was decided as far back as 2017, the applicants ought to have known about it. Thus, bringing the review application on the basis of such grounds is an abuse of court process, entitling the Public Protector to a punitive cost order. Importantly so because the *PAJA* grounds of review were actually the main grounds on which Minister Gordhan relied on for his review application. The grounds raised were substantial, thus caused the Public Protector to respond to them at great costs, for which they should be reimbursed.

[246] Minister Gordhan and Mr Pillay, as the successful parties in the review application and the counter application, are entitled to the costs thereof. As regards the counter application, although Minister Gordhan and Mr Pillay prayed for a punitive cost order, our view is that the costs to be awarded should be on a party and party scale.

[247] As regards the review application, the contention for a punitive cost order that is opposed by the Public Protector should, in our view, be granted in favour of the applicants. Our view in this regard is fortified by the remarks of the court in *The President of the Republic of South Africa,* that:

> "203. We have discussed the Public Protector's broad powers and the particular mandate given to her under the Constitution. Her broad powers come with important obligations. In using them she must act independently, impartially and she must approach each investigation with an open mind. It is not surprising that, given the weight of the constitutional burden she carries, and the breadth of her powers, she is required to be a highly skilled professional in her relevant field of expertise. She must be expected to understand and correctly apply legal prescripts that may be relevant to her investigations. She should consider all the evidence before her and weigh it appropriately and fairly before making an adverse finding. She should be conscious of the impact that an adverse conclusion may have on the rights of those she is investigating. She should not hesitate to make adverse findings when the evidence reasonably and rationally supports such a finding. Equally however, she should not rush to conclusions and should tread carefully before making findings that may have serious implications for people within the scope of her investigations."

[248] We align ourselves with these remarks. Equally so, in this matter, the Public Protector could have easily and without hesitation made lawful findings against Minister Gordhan if she had the full grasp of the law. As discussed earlier in this judgment the crux of the whole matter rested on the interpretation of section 16 (6) (a) of the *Public Service Act* which requires sufficient reason for the retirement to exist. To our mind that is the cardinal issue that the Public Protector had to investigate. If during her investigation, she found sufficient reason for the retirement to exist, then, that would have been the end of the matter. If she did not find sufficient reason to exists, then she, should have been able to make a finding of

unlawfulness against Minister Gordhan. As appears from her Report, this she did not do, and it resulted in her making irrational findings against the applicants, as we have found in this judgment.

[249] We have, also, found that she failed to understand the fundamental jurisdictional requirement of section 6 (9) of the *Public Protector Act*. We, as a result, find this conduct of the Public Protector to be an abuse of process warranting a punitive cost order on an attorney and client scale.

[250] We conclude, as a result, that costs should follow the event. As *per* our decision, the Public Protector should pay the costs of the applicants in the review application on an attorney and client scale; as well as the costs to Minister Gordhan and Mr Pillay in the counter application, on a party and party scale. On the other hand, Minister Gordhan and Mr Pillay should pay the Public Protector costs pertaining to the strike out application, on an attorney and client scale. The applicants must also pay the Public Protector costs pertaining to the *PAJA* grounds of review on an attorney and client scale.

[251] The Public Protector and Adv Mkhwebane approached this review application together and litigated as if there is only one litigant, as such, costs due to the Public Protector should also not be for Adv Mkhwebane but for the Office of the Public Protector.

CONCLUSION

[252] The court in *Rustenburg Platinum Mines*,[55] had this to say about a review application:

> "31. In a review, the question is not whether the decision is capable of being justified . . . but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion. This is not to lose sight of the fact that the line between review and appeal is notoriously difficult to draw. This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under *PAJA* the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision."

Although this was said in the context of a *PAJA* review, the principle is, nevertheless, applicable in a legality review such as the present.

[253] What the court is required and permitted to do in the application of this nature, is merely to ask itself whether the decision-maker acted rationally in making the decision she or he made, and for that purpose one looks at the reasons given by the decision maker for the decision she or he made and it is not required or permitted for the court to enquire into the question whether there might be other reasons for the same conclusion.

[55] Para 31.

[254] It is in that respect that we finally conclude that the Public Protector's decision (findings) and by extension her Report, should be reviewed and set aside.

ORDER

[255] Consequently, the following order is granted:

1. The Public Protector's decision to exercise jurisdiction over the complaint in terms of section 6 (9) of the *Public Protector Act* is declared unlawful and invalid, and is thereby reviewed, and set aside.
2. The Public Protector's Report No 24 of 2019/20, dated 24 May 2019, including the findings in paragraph 6 and the remedial action in paragraph 7, is declared unlawful and invalid and is thereby reviewed and set aside.
3. The striking out application in terms of 6(15) application is granted in respect of paragraphs 38, 39, 40, 53, 54, 55 and 70 of Minister Gordhan's founding affidavit.
4. The counter application is dismissed.
5. The first respondent and second respondents are ordered, jointly and severally, to pay the costs of the review application including the costs of two counsel, on the scale as between attorney and client.
6. The first and third applicants are ordered jointly and severally, to pay the costs of the rule 6(15) application, including the costs of two counsel, on the scale as between attorney and client.

7. The first and second respondents are ordered, jointly and severally, to pay the costs of the counter application, including the costs of two counsel.
8. The first, second and third applicants are ordered, jointly and severally, to pay the costs of the *PAJA* grounds of review, including the costs of two counsel, on a scale as between attorney and client.
9. No costs order is made against the third and the sixth respondent.

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E.M KUBUSHI

JUDGE OF THE HIGH COURT

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M L TWALA

JUDGE OF THE HIGH COURT

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N. DAVIS

JUDGE OF THE HIGH COURT

Appearance:

First Applicant's Counsel	: Adv. W. Trengrove SC Adv. M. Le Roux Adv. O. Motlhasedi
First Applicant's Attorneys	: **Malatji & Co Attorneys**
Second Applicant's Counsel	: Adv. P. de Jager SC
Second Applicant's Attorneys	: **Savage Jooste & Adams Inc.**
Third Applicant's Counsel	: Adv. R. Hutton SC Adv. C. Van Castricum
Third Applicant's Attorneys	: **Werksmans Attorneys.**
First & Second Respondents' Counsel	: Adv. D. Mpofu SC Adv. T. Motloenya
First & Second Respondents' Attorneys	: **Seanego Attorneys.**
Date of hearing	: 30 September & 02 October 2020
Date of judgment	: 17 December 2020