CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 63/20

In the matter between:

PUBLIC PROTECTOR	Applicant
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MMUSI MAIMANE	Third Respondent
ROYAL SECURITY CC	Fourth Respondent

Neutral citation:	*Public Protector v Commissioner for the South African Revenue Service and Others* [2020] ZACC 28
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgment:	Madlanga J (unanimous)
Heard on:	3 September 2020
Decided on:	15 December 2020

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. Leave to appeal against the declarator by the High Court of South Africa, Gauteng Division, Pretoria that a South African Revenue Service official is entitled to withhold taxpayer information in terms of section 11(3) of the Public Protector Act 23 of 1994 read with section 69(1) of the Tax Administration Act 28 of 2011 is refused.
2. Leave to appeal against the High Court's dismissal of the Public Protector's counter-application is refused.
3. Leave to appeal against the High Court order that the Public Protector must pay *de bonis propriis* 15% of the taxed costs of the Commissioner of the South African Revenue Service is granted.
4. The appeal is upheld and the High Court order referred to in paragraph 3 is set aside.
5. Each party must pay her or his costs in this Court.

JUDGMENT

MADLANGA J (Mogoeng CJ, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] Does the power to subpoena under the Public Protector Act[1] trump the proscription under the Tax Administration Act[2] of the disclosure of confidential taxpayer information? That is the question. It arises in an application by the Public Protector for leave to appeal directly to this Court against a judgment of the High Court of South Africa, Gauteng Division, Pretoria.[3]

Background

[2] In 2017 a journalist published a book in which he alleged that former President Jacob Gedleyihlekisa Zuma, the second respondent, was on the payroll of, and received a salary from, an entity called Royal Security CC, the fourth respondent, for at least four months after becoming President in 2009. The former President allegedly failed to pay income tax on this salary. Mr Mmusi Maimane, the third respondent and then leader of the opposition in the National Assembly, laid a complaint with the Public Protector, requesting her office to investigate the alleged payments. In 2018, in the course of the investigation, the Public Protector issued a subpoena for the Commissioner for the South African Revenue Service (Commissioner), the first respondent, to appear before her and bring the former President's taxpayer information. The Commissioner objected to the disclosure of the taxpayer information on the basis that disclosure was prohibited by the secrecy and confidentiality regime under the Tax Administration Act. The Public Protector took the view that this regime was no bar to her subpoena powers.

[3] During discussions at a meeting, the Commissioner suggested that the High Court be approached for a declarator on the divergent views. The Public Protector advised that, due to financial constraints, she could not afford litigation. The parties agreed to jointly seek senior counsel's opinion, which would be paid for by the South African Revenue Service (SARS). The solo funding too was as a result of the Public

[1] 23 of 1994.

[2] 28 of 2011.

[3] *Commissioner, South African Revenue Service v Public Protector* 2020 (4) SA 133 (GP).

Protector's lack of funds. Advocate Maenetje SC subsequently gave an opinion (first opinion) to the effect that there is no conflict between the Public Protector's subpoena powers and the Tax Administration Act, and that the Public Protector's subpoena powers do not include the power to compel the disclosure of taxpayer information.

[4] The Public Protector felt that this opinion did not engage sufficiently with the Constitution and she was, therefore, not happy with it. She informed the Commissioner that she would seek a second opinion. She briefed Advocate Sikhakhane SC to provide a second opinion. She did not provide him with a copy of the first opinion. She explains that she wanted to get an objective second opinion uninfluenced by the earlier opinion. When the second opinion came, it stated that the Public Protector's subpoena powers are constitutional powers that cannot be trammelled by the secrecy and confidentiality regime of the Tax Administration Act. Therefore, the Public Protector was entitled to subpoena taxpayer information. On the basis of this opinion, the Public Protector issued a second subpoena, still requiring production of former President Zuma's taxpayer information. This she did without sharing with the Commissioner the fact that she now had a second opinion whose conclusion differed from that of the first. She says her failure to share the opinion was purely due to inadvertence.

[5] The Commissioner approached the High Court for a declarator that SARS officials are permitted under the proviso of "just cause" in section 11(3)[4] of the Public Protector Act read with section 69(1) of the Tax Administration Act to withhold taxpayer information, and that the Public Protector's subpoena powers do not extend to taxpayer information. He further sought an order that the Public Protector pay 15% of the costs of the application *de bonis propriis* (in her personal capacity). The Public Protector opposed the application. Stating her argument briefly,[5] she contended that her subpoena power is implied in the power to investigate contained in section 182(1) of the Constitution. She also argued that the subpoena power under the

[4] See [7] below.

[5] I will substantiate on the argument later.

Public Protector Act is an additional power envisaged in section 182(2) of the Constitution. As such, it is a power that is "umbilically linked to the Constitution".[6] As a conditional counter-application, she asked the High Court to order the Commissioner in terms of section 69(2)(c) of the Tax Administration Act to disclose former President Zuma's taxpayer information.

[6] Let me interpose this to the narrative. The Public Protector's subpoena powers are contained in section 7(4)(a) of the Public Protector Act. The section provides:

> "For the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

[7] Section 11(3) of the Public Protector Act criminalises failure to comply with a subpoena in these terms:

> "Any person who, without just cause, refuses or fails to comply with a direction or request under section 7(4) or refuses to answer any question put to him or her under that section or gives to such question an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of section 7(6), shall be guilty of an offence."

[8] Section 69 of the Tax Administration Act provides:

> "(1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.
>
> (2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official—

[6] On this the Public Protector uses Moseneke DCJ's words in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

. . .

(c) by order of a High Court;

. . .

(6) Subsection (1) does not prohibit the disclosure of information—

(a) to the taxpayer; or

(b) with the written consent of the taxpayer, to another person."

Section 236 of the same Act criminalises a contravention of section 69(1).

[9] Reverting to the narrative, the High Court accepted that the prohibition of disclosure of taxpayer information under section 69(1) constitutes just cause for purposes of section 11(3) of the Public Protector Act. The High Court appeared to accept that this interpretation commends itself as it is consonant with a taxpayer's constitutional right to privacy.[7] Also, held the Court, confidentiality of taxpayer information serves the important purpose of encouraging voluntary disclosure by taxpayers.[8] It dismissed the conditional counter-application on a variety of grounds, one procedural and others substantive. I need say nothing more about those grounds.

[10] Using a number of epithets that – in paraphrasing – I would say adjudged the conduct of the Public Protector as having been most reprehensible, the High Court ordered her to pay 15% of the Commissioner's costs *de bonis propriis*. She was to pay the remaining 85% in her official capacity.

[11] The Public Protector is now before us seeking leave to appeal directly to this Court against the High Court judgment on the questions of her subpoena power and costs, and the dismissal of her conditional counter-application. Only the Commissioner opposes the application.

[7] High Court judgment above n 3 at para 29. Section 14 of the Constitution provides that "[e]veryone has the right to privacy".

[8] High Court judgment at para 3.4.3.

Jurisdiction and leave to appeal

Conditional counter-application

[12] Both on the procedural and substantive grounds of dismissal of the counter-application, the Public Protector says nothing more than that the High Court erred in its application of well-established legal principles. It is trite that an application that simply demands the reconsideration of the application of an uncontroversial legal question does not engage this Court's jurisdiction.[9] The application raises neither a constitutional issue nor an arguable point of law of general public importance which ought to be considered by this Court.[10]

[13] Thus leave to appeal the decision of the High Court regarding the counter-application is refused for lack of jurisdiction.

Power to subpoena taxpayer information

[14] As indicated, the Public Protector's contention that her subpoena power trumps the prohibition of disclosure provided for in section 69(1) of the Tax Administration Act is based on section 182(1) and (2) of the Constitution. The argument entails the interpretation of section 182 of the Constitution. That interpretative exercise also involves the power of subpoena under the Public Protector Act and its relationship with section 182 of the Constitution. And the Public Protector Act is itself legislation envisaged in section 182 of the Constitution. Axiomatically, all of this does engage our constitutional jurisdiction.

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[9] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33.

[10] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
>
> …
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court . . ."

[15] Also, the interpretation advocated by the Public Protector implicates the right to privacy of taxpayers. Thus this too raises a constitutional issue.

[16] As has been said a few times before, that a matter raises constitutional issues is not enough; leave to appeal is granted only if it is in the interests of justice to do so.[11] And in an application for leave to appeal directly to this Court, the interests of justice enquiry requires proof of exceptional circumstances. As Mogoeng CJ held in *United Democratic Movement*, a "direct appeal is certainly not available for the asking. Proof of exceptional circumstances . . . must demonstrably be established."[12] Although the nature of exceptional circumstances will depend on the facts of each case, they often include urgency, prospects of success on appeal, the public interest and the saving in time and costs.[13] The reasons advanced by an applicant must be persuasive enough to compel this Court to deviate from the normal procedure and appellate hierarchy.[14]

[17] The Public Protector's argument for a direct appeal rests, firstly, on urgency. The alleged urgency is grounded in the need to finalise the investigation with expedition. The Public Protector contends that an appeal to the Full Court of the High Court or Supreme Court of Appeal before approaching this Court will take years. She contends thus without reference to the possibility of seeking leave to appeal to the Full Court or Supreme Court of Appeal by way of urgency.

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[11] In *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12 Langa DP held:

> "A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court and in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry."

See also *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) (*EFF v Gordhan*) at paras 45-6.

[12] *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 23.

[13] *EFF v Gordhan* above n 11 at para 46 and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) (*MEC for Development Planning and Local Government, Gauteng*) at para 32.

[14] *EFF v Gordhan* at para 74.

[18] If acting expeditiously was any consideration, the Public Protector would not have gone on a power-testing expedition which could potentially – and actually turned out to be – protracted. She could have done the simple thing of obtaining the taxpayer's written consent in terms of section 69(6)(b) of the Tax Administration Act. In its judgment, the High Court deals with the admissibility of an affidavit that former President Zuma sought to file late and out of turn in that Court. That Court refused to accept the affidavit. Of importance for our purposes is that – even though we did not have sight of that affidavit – the parties gave us to understand that it appeared from it that the former President was not averse to the disclosure of his information. It is for this reason that I say the simple thing to do was for the Public Protector to approach former President Zuma for the written consent. In the unlikely event of consent being withheld, an alternative was to seek a High Court order in terms of section 69(2)(c). Like the option of seeking the taxpayer's written consent, this too would have been more direct. If the Public Protector's reasons for needing the information were cogent enough, this alternative would have been better suited to delivering the desired results. And it cannot possibly lie in the Public Protector's mouth that she did not believe in the cogency of the reasons for which she needed the taxpayer information.[15] An approach to the High Court is a legal vehicle that exists, whereas testing whether courts will agree that the mooted power does exist is unknown, uncertain terrain. So, the urgency argument is contrived and – as it is the most important point for the direct appeal – that detracts significantly from the Public Protector's entitlement to a direct appeal.

[19] The Public Protector further contends that she has strong prospects of success. Does she? First, she argues that her power to subpoena under section 7(4) of the Public Protector Act provides a mechanism to give effect to her power to investigate

[15] Whether the reasons were, in fact, cogent is something else altogether.

under section 182(1) of the Constitution.[16] Relying on *EFF v Speaker*,[17] she contends that this power flows directly from the Constitution. The power, she contends, is thus not a statutory power, but is part and parcel of the constitutional power to investigate. Putting it differently, she submits that the section 7(4) power is implied in section 182(1). This *constitutional* power, therefore, cannot be limited by the *statutory* proscription of disclosure contained in the Tax Administration Act. The argument concludes that the constitutional power must take precedence over the statutory proscription contained in section 69(1) of the Tax Administration Act.

[20] Second, the Public Protector relies on section 182(2) of the Constitution, which provides that "[t]he Public Protector has the additional powers and functions prescribed by national legislation". According to her, the subpoena power under the Public Protector Act is an additional power envisaged in this section. As such, it is a power that is inextricably linked to the Constitution.

[21] Third, section 181(3) of the Constitution compels all organs of state to assist and protect Chapter 9 institutions, of which the Public Protector is one, "to ensure [their] independence, impartiality, dignity and effectiveness". Interpreting section 69(1) of the Tax Administration Act in the manner contended for by the Commissioner is inconsonant with this obligation. The argument continues that there is, therefore, no legal basis to exclude SARS from the expansive reach of section 181(3).

[22] The upshot of these three arguments is that the constitutional provisions relied upon entitle the Public Protector as of right to taxpayer information upon the issue of a

[16] Section 182(1) of the Constitution provides, in part:

> "The Public Protector has the power, as regulated by national legislation—
>
> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice . . ."

[17] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*EFF v Speaker*).

subpoena. The effect is that section 69(1) of the Tax Administration Act is as good as non-existent.

[23] Fourth and lastly, relying on a *Hyundai*-type interpretation,[18] the Public Protector submits that section 69(1) does not constitute an absolute prohibition of the disclosure of taxpayer information. If it did, it would be unconstitutional. The prohibition is not absolute because it admits of many exceptions.[19] The Public Protector suggests that it cannot be that – whilst the importance of her office is constitutionally elevated in comparison to other Chapter 9 institutions – the Auditor-General, a Chapter 9 institution, enjoys an exemption that is not enjoyed by the Public Protector. She argues that the prohibition on disclosure should thus be interpreted not to apply to the Public Protector. This interpretation, concludes the contention, would render section 69(1) constitutionally compliant, as it would not conflict with the Public Protector's constitutional powers under section 182(1) and (2). I think it apposite to deal with this argument before dealing with the first three.

[24] Let me first make it clear that I will not grapple with the submission that there is some constitutional hierarchy within Chapter 9 institutions. That is not necessary for present purposes. Section 69(1) of the Tax Administration Act provides that SARS

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[18] In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 22 Langa DP held:

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

[19] See, for example, the following exceptions provided for in the Tax Administration Act:

(a) Section 69(2)(c) allows disclosure pursuant to a High Court order.

(b) Section 70(2) provides that "[a] senior SARS official may disclose to the Statistician-General the taxpayer information as may be required for the purpose of carrying out the Statistician-General's duties".

(c) In terms of section 70(3) "[a] senior SARS official may disclose to the Governor of the South African Reserve Bank . . . the information as may be required to exercise a power or perform a function or duty under the South African Reserve Bank Act, 1989".

(d) Section 70(6) provides that "SARS must allow the Auditor-General to have access to information in the possession of SARS that relates to the performance of the Auditor-General's duties under section 4 of the Public Audit Act, 2004".

officials "must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official". Thereafter, the Act creates narrow exceptions to this prohibition. The disclosure of taxpayer information in compliance with a subpoena issued by the Public Protector is not one of the exceptions. SARS officials are thus enjoined to withhold taxpayer information even in the face of such subpoena. Any other interpretation is at odds with the clear wording of section 69(1). *Hyundai* is about an interpretation that not only conforms with the Constitution, but is also viable. The interpretation advocated by the Public Protector is not viable. If that be so, we are left with the question whether the Public Protector is entitled as of right to taxpayer information based on her remaining interpretation of the Constitution. That question arises from the first three arguments, which I next deal with.

[25] The effect of the Public Protector's argument is that – in the face of the constitutional power she is asserting – section 69(1) is constitutionally invalid. I use "effect" because she does not argue that the section is invalid. According to her, she is entitled as of right to taxpayer information upon the issue of a subpoena. Her case is fundamentally flawed. Section 69(1) can only not have its force – which is to deny the Public Protector access to taxpayer information – if it is invalid. But – according to *MEC of the Executive Council for Development Planning and Local Government, Gauteng* – she is not entitled to any relief that effectively flows from the unconstitutionality of an Act which has not been declared by a Court.[20] Yacoob J held:

> "[T]he Council and the appellant did not apply for an order declaring section 16(5) invalid. Instead, they relied on the invalidity of the section as the foundation for the relief claimed. It was submitted on behalf of the appellant in support of the procedure followed that an applicant who was not really interested in the declaration of invalidity of a provision of an Act of Parliament, but who sought relief consequent upon that invalidity, ought not to be put to the inconvenience, delay and expense necessarily occasioned by the additional requirement of confirmation . . .

[20] *MEC for Development Planning and Local Government, Gauteng* above n 13 at paras 61-2.

> It is sufficient to point out here that considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision."[21]

[26] Even though the Public Protector does not expressly argue that section 69(1) is constitutionally invalid, the effect is the same. Thus the authority I have just referred to stands in her way. She cannot wish section 69(1) away. She should have brought a direct frontal challenge to the constitutionality of the section for including her office within its sweep, or to the Tax Administration Act for failing to include the office in the exceptions it creates. The Public Protector's reliance on *EFF v Speaker* is misplaced. That case never suggested that there should not be a constitutional challenge where one is necessary. The course of proceeding from unconstitutionality that has not been declared proposed by the Public Protector "appears to be incompatible with . . . [s]ection 172(1) [of the Constitution which] obliges a court to declare a statutory provision which is inconsistent with the Constitution invalid to the extent of the inconsistency".[22] This course could also give rise to uncertainty about the status of section 69(1).[23]

[27] As a result, absent a direct frontal challenge to the validity of section 69(1), there are no reasonable prospects of success.

[28] In the circumstances, other reasons for seeking leave to appeal directly to this Court, like a saving in costs and time, the absence of disputes of fact, the inevitability of the matter reaching this Court and the fact that this Court is well-placed to consider the application, pale into insignificance. Leave to appeal directly to this Court falls to be refused.

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[21] Id at paras 60-1.

[22] Id at para 62.

[23] Id at paras 63.

Costs

[29] The office of the Public Protector is a constitutional creation. It and other Chapter 9 institutions exist for the purpose of "supporting constitutional democracy".[24] Its independence and proper, unhindered functioning are at the core of our constitutional democracy.[25] Unwarranted costs orders against the Public Protector in her personal capacity in work-related litigation may have a chilling and deleterious effect on the exercise of her powers. Because of this likely impact on the exercise of constitutional powers, unwarranted – not just any – costs orders engage this Court's constitutional jurisdiction. Also, costs orders against organs of state serve the constitutional function of holding organs of state to account.[26]

[30] For the reasons that follow, there are reasonable prospects of success on the issue of costs. As was done recently by this Court in *EFF v Gordhan*,[27] it is in the interests of justice to grant leave to appeal on this limited issue.

[31] As is well-known, a court of appeal interferes with the exercise of a true discretion[28] – including in costs orders – only in circumscribed circumstances.[29] Moseneke DCJ explained thus in *Florence*:

> "Where a court is granted wide decision making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court

[24] Heading of Chapter 9 of the Constitution.

[25] See *EFF v Gordhan* above n 11 at para 99.

[26] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) (*SARB*) at para 157.

[27] See *EFF v Gordhan* above n 11, where this Court dismissed the application for direct leave to appeal the merits, but granted leave to appeal the costs order on the basis of prospects of success on that limited issue.

[28] On what this is see *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 85 where Khampepe J held:

> "A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible."

[29] *SARB* above n 26 at para 144.

> has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision making."[30]

[32] More specifically on costs, in *SARB* Khampepe J and Theron J said that "[i]t is not sufficient, on appeal against a costs order, simply to show that the lower court's order was wrong".[31]

[33] Personal costs orders against public officials, even if on the party and party scale, are by nature punitive; punitive because ordinarily public officials get mulcted in costs in their official capacity. So, the very idea of costs attaching to them personally is out of the ordinary and punitive in that sense.[32] Such punitive costs orders are justified if the conduct of public officials "showed a gross disregard for their professional responsibilities, and where they acted inappropriately and in an egregious manner".[33] As to the first, i.e. conduct showing a gross disregard of professional responsibilities, it is to the prescripts – be they imposed by the Constitution, statutes, ethical rules or code of conduct – governing the conduct of the office, the exercise of powers and performance of functions of the office that we must look. What constitutes inappropriate or egregious conduct depends on the circumstances of each case and is something to be determined by the court on an objective basis.[34] Thus there is no closed list. I will not derogate from this expansiveness by giving examples. It is for each court in the exercise of its discretion to decide what meets this standard.

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[30] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 113. See also *Giddey N.O. v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 22.

[31] *SARB* above n 26 at para 144.

[32] Id at paras 37 and 220.

[33] Id at para 146.

[34] Id.

[34] I must now decide whether the High Court exercised its discretion judicially in ordering the Public Protector to pay 15% of the Commissioner's costs *de bonis propriis*. What led to this order were the following: in issuing the subpoena the Public Protector acted *in fraudem legis* (literally, in fraud of the law);[35] in first saying she had no funds for the first opinion but later seeking and paying for a second opinion, the Public Protector's conduct was mala fide; other facts that evinced mala fides were the Public Protector's failure to invite the Commissioner to participate in briefing Advocate Sikhakhane SC and not sharing the opinion obtained from him with the Commissioner; the Public Protector was adjudged to have acted unreasonably, arbitrarily and in bad faith because she had a "proclivity" to operate outside of the law, and a "deep rooted recalcitrance to accept advice from senior and junior counsel"; and it was expected of the Public Protector to act with a "high degree of perfection". I deal with these in turn.

Subpoena issued in fraudem legis

[35] The Public Protector's view that she was entitled to issue the subpoena regardless of the prohibition in section 69(1) is misguided. But it appears to have been a genuinely held view. Based on that genuinely held view, there is no cogent basis for suggesting that the subpoena was issued for any purpose other than the investigation the Public Protector was conducting. The High Court's conclusion that it was issued *in fraudem legis* is without factual foundation and constitutes a misdirection on the facts.

Mala fides re lack of funds

[36] The Public Protector explains that the first opinion was sought and obtained in one financial year and the second opinion was sought and obtained in the ensuing financial year. She did not have funds in the first financial year and she had them in the following financial year. That sounds like a perfectly sensible explanation. The High Court's conclusion of bad faith is thus a leap in logic and yet another misdirection.

[35] The concept refers to something done to circumvent or evade the law.

Mala fides re not inviting Commissioner to participate in second opinion and not sharing that opinion with him

[37] An incontrovertible (or even common cause) fact is that the Public Protector did advise the Commissioner beforehand that she would seek a second opinion; she was not cagey about it. She was not required to involve the Commissioner in seeking that second opinion. And she was entitled to obtain it if she was not satisfied with the first opinion. In those circumstances, failure to share the second opinion hardly justifies a conclusion of mala fides. Had she been acting mala fide in this regard, she would not even have shared with the Commissioner the fact that she was going to seek a second opinion. Also, as the Commissioner was aware that the Public Protector was to seek a second opinion, he could have asked for it. Or, at the very least, he could have asked if the Public Protector eventually got the second opinion she was to seek. Nothing suggests that she might have withheld it; not when she had volunteered information that she was to seek it.

Proclivity to operate outside of the law, and a deep rooted recalcitrance to accept advice from counsel

[38] According to the High Court, a "proclivity" to operate outside of the law, and a "deep rooted recalcitrance to accept advice from senior and junior counsel" were proof of unreasonable, arbitrary and mala fide conduct.[36] A dictionary meaning of "proclivity" is: "a tendency to do something regularly; an inclination";[37] "an inclination or predisposition toward something".[38] What we have on the facts of this case is only the one instance of not being happy with the first opinion and, as a result, seeking a second opinion. How that becomes a proclivity escapes me. As they say, one swallow does not a summer make. Also mind-boggling is the holding that the Public Protector acted outside the law in seeking a second opinion, when she was perfectly entitled to

[36] High Court judgment above n 3 at para 24.

[37] Compact Oxford Dictionary.

[38] Merriam-Webster, available at https://www.merriam-webster.com/dictionary/proclivity.

seek it. In fact, in addition to being entitled to seek the second opinion, the Public Protector acted on the basis of it. Strangely, the High Court regards the opinion of the one senior counsel as gospel and that of the other not. The reality is that the Public Protector had two conflicting opinions and she preferred one: the correct legal position could have been what was stated in the one or the other, or in neither. The conclusion that – by picking the one opinion – she acted unreasonably, arbitrarily and in bad faith thus beggars belief and is gratuitous. In fact, it was wrong of the High Court to assume that the Public Protector was *obliged* to take the advice of senior counsel and to conclude that failure to take it is per se reckless or mala fide.

Expectation that the Public Protector must act with a "high degree of perfection"

[39] As stated before, the High Court held that it was expected of the Public Protector to "always act with a high degree of perfection".[39] It is one thing to expect the highest possible standard of performance from a public official within whatever set parameters at the workplace. But it is quite another to hold that the slightest deviation from that standard must result in a personal costs order in the event that the deviation leads to litigation. If the latter were true, all litigation in which public officials came second best would result in personal costs orders against them. And that would be because the slight deviation does not meet the standard of "perfection". This has never been our law. It is not any deviation from the set norm that results in personal costs orders. To attract such order, the deviation must be reprehensible or egregious[40] or it must constitute a gross disregard of professional responsibilities.[41] That is a far cry from ordering costs *de bonis propriis* as a result of a dip even by a slight margin from perfection.

[39] High Court judgment above n 3 at para 50.

[40] *SARB* above n 26 at para 146.

[41] Id.

[40] If the conduct of a public official has fallen short of the required standard and given rise to litigation, it may attract a costs order against her or him in her or his official capacity. It is only where there is reprehensibility in whatever form[42] that the punitive[43] step of ordering costs *de bonis propriis* may then be taken. So, the High Court's standard of "a high degree of perfection" was yet again a misdirection.

Concluding remarks

[41] There was simply no basis for the High Court's award of costs *de bonis propriis*. The award must be set aside. And this conclusion cannot be affected by an issue I deal with when I deal with costs in this Court.[44]

[42] When a *de bonis propriis* costs award against the Public Protector is warranted, it is certainly within a court's remit to order it. After all, as Froneman J said in *Black Sash II*, personal costs orders against public officials serve to vindicate the Constitution.[45] However, courts should grant personal costs orders against the Public Protector only when that is warranted. There appears to be a developing trend of seeking personal costs orders in most if not all matters involving the Public Protector.[46] Of these a total of four, including this one, have reached us.[47] And in three, the High Court granted personal costs orders against the Public Protector.[48]

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[42] See *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash II*) at paras 8-9; *SARB* above n 26 at para 207; *EFF v Gordhan* above n 11 at para 91.

[43] I explained earlier that in this sense "punitive" does not denote the attorney and client scale. I say "punitive" because the public official is being mulcted in costs *de bonis propriis* when ordinarily she or he would bear them in her or his official capacity. See *SARB* above n 26 at paras 37 and 220.

[44] That is an issue concerning a charge by the Commissioner that the Public Protector litigated in bad faith before this Court.

[45] *Black Sash II* above n 42 at para 8.

[46] See, for example, *Gordhan v Public Protector* [2020] JOL 49105 (GP); *Institute for Accountability in Southern Africa v Public Protector* 2020 (5) SA 179 (GP); *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 (7) BCLR (GP); and *Absa Bank Limited v Public Protector* [2018] 2 All SA 1 (GP).

[47] The other three were *Baloyi v Public Protector* [2020] ZACC 27; 2020 JDR 2618 (CC); *EFF v Gordhan* above n 11 and *SARB* above n 26.

[48] In *Baloyi*, which is one of the four cases in which personal costs orders were sought against the Public Protector and which have reached this Court, the High Court did not grant a personal costs order. The applicant persisted in seeking a personal costs order in this Court. This Court, too, did not grant that order.

What made one of those cases stand out was that a personal costs order was granted based on the "usual rule" that costs follow the result, with no consideration whatsoever of special circumstances that justified the order.[49] This is a far cry from the stringent test for the award of personal costs orders. And in the instant matter the High Court – in its conclusions – has carefully selected and used epithets and particular nouns that are suited to awards of personal costs orders, but there is not a scintilla of evidence to support those epithets and particular nouns and, therefore, the conclusions. Thus the conclusions simply cannot stand up to scrutiny.

[43] Out of the four applications that have landed here, it is only in one that this Court has sanctioned a personal costs order.[50] Of course, that does not mean litigants who – on cogent grounds – believe they are entitled to the award of personal costs against the Public Protector must not push for such awards and that – where such costs are warranted – courts should not grant them. But it does mean that courts must be wary not to fall into the trap of thinking that the Public Protector is fair game for automatic personal costs awards. Whether inadvertently or otherwise, the High Court judgments in the *EFF v Gordhan* matter and in the instant matter are instances where the High Court fell into that trap.

[44] Personal costs orders may have a chilling effect on the exercise of the Public Protector's powers, including litigating where necessary. Hers, an office specially created together with others under Chapter 9 of the Constitution, is an important cog in our constitutionalism as it and the others were created to "strengthen constitutional democracy".[51] Axiomatically, the Public Protector's office is more important than any incumbent. The impact of certain types of conduct that shake its operations at the foundations may outlive the terms of office of a number of incumbents. Needless to say, as the Judiciary, we must not be guilty of contributing to the weakening of that office. You weaken it, you weaken our constitutional democracy. Its potency,

[49] *EFF v Gordhan* above n 11 at para 93.

[50] *SARB* above n 26.

[51] Section 181(1) of the Constitution.

its attractiveness to those it must serve, its effectiveness to deliver on the constitutional mandate, must be preserved for posterity.

[45] I voice these words of caution because of the disturbing frequency and regularity of applications for, and awards of, personal costs orders against the Public Protector. What is particularly disturbing is that it is clear that the applications and awards are not always justified. That much is apparent from the fact that two out of the three personal costs awards that have come before us, including this one, have been set aside. Crucially, these two typify the worst examples of personal costs awards. And in the fourth matter where there was no personal costs order by the High Court but there was an insistence that this Court should make such an award, we declined that invitation.[52]

[46] Surely, this does demonstrate that the words of caution have not been necessitated by maudlin sympathy for the Public Protector. Not at all. I am not even saying personal costs orders against the Public Protector must be made sparingly. That is not the law. I am saying courts must apply the existing law properly and not make personal costs awards where there are no bases to do so. But where the awards are warranted, courts must not hesitate to make them. And the frequency of such awards should not be a curb. In each case the question is: is the award warranted?

Costs in this Court

[47] The Commissioner submitted that even before this Court the Public Protector litigated in bad faith and that this has a bearing on the question of costs. In substantiation, he pointed out that in her founding affidavit in this Court the Public Protector alleged that she had not received notice that a personal costs order would be sought against her. According to the Commissioner this was an untruth. Indeed, the true position is that both in the notice of motion and founding affidavit filed at the High Court the Commissioner did indicate that he was seeking a personal costs order against the Public Protector. What was not done was to have her mentioned by

[52] *Baloyi* above n 47.

her name, Ms Busisiwe Mkhwebane, as a party. But saying that she had not received notice that a personal costs order would be sought against her was simply not true. The truth is that in her answering affidavit in the High Court she stated under oath that she had read the founding affidavit in which the Commissioner sought a personal costs order against her. On the face of it, therefore, her assertion before us that there was no notice in this regard is astounding and warrants censure and perhaps more. But we must look at the full picture.

[48] In her High Court answering affidavit the Public Protector protested her liability for a personal costs order by saying:

> "I deny that my conduct does not accord with the standard as set out by the Constitutional Court and costs *de bonis propriis* are not justified under the circumstances. The prayer for costs is illogical and contradictory to the [Commissioner's] own position that it is in the public interest to obtain certainty in respect of the issues raised in the application."

[49] The claim that she did not get notice that a personal costs order would be sought against her surfaced for the first time, not in her affidavit filed in this Court, but in a memorandum prepared by her senior and junior counsel. This memorandum was in response to a request by the High Court to both sets of counsel for substantiation on their respective positions on the question whether the Public Protector must pay costs *de bonis propriis*. Here is what counsel said in the memorandum:

> "[A]s it was pointed out by counsel at the end of his oral submissions, it is trite that this Court is not permitted to order a personal costs order, such as the one issued in the *Reserve Bank* case, when the applicant neglected to cite her in her personal capacity. She has not been brought before the Court in her personal capacity, as it is done when personal costs are to be brought. [C]ourts do not issue personal costs orders [against] non-parties, more so when they are public officials acting in good faith and in the execution of their duties, such as the Commissioner of SARS or the Public Protector."

Crucially, this quotation appears under the heading "*Non-citation of Ms Busisiwe Mkhwebane*".

[50] This sets the scene for how the Public Protector came to make the contentious assertion in the founding affidavit filed in this Court that she was not given notice that a personal costs order would be sought against her. In oral argument as well, her counsel owned up to the fact that it was his idea that the Public Protector must adopt this stance, an idea he wisely abandoned and did not pursue in oral argument as it was legally indefensible.[53] So, outlandish though the Public Protector's assertion appears to be, it would be ignoring all this reality if we were to take it at face value. What is crucial here is that the assertion was counsel's, not the Public Protector's, idea. We may criticise the Public Protector for failing to realise that the legal point she was obviously advised to advance was a non-starter. But can we really go far with that criticism? I think not. She got that advice from *senior counsel*. Of importance, we do not know whether the Public Protector has any experience in civil legal practice. And the Commissioner did not suggest that she does. That for me is the end of the matter.

[51] The Public Protector has failed in the application in which she was claiming that her powers trump the prohibition of disclosure contained in section 69(1) of the Tax Administration Act and in her conditional counter-application. But she has succeeded in the appeal to set aside the personal costs order. If there was clarity that – in pursuing this appeal – she engaged legal representation in her personal capacity and, therefore, has been or will be personally set back for legal costs in respect of the appeal, she would be entitled to an award of costs in her personal capacity. There is no such clarity. Of importance, she did not seek to *intervene* in her personal capacity in the

[53] It is true that this idea is legally indefensible. For a personal costs order to be made against a non-party, she or he must have been given notice of the possibility of the order being made. Here is how this Court articulated this in *Black Sash II* above n 42 at para 4:

> "If the possibility of a personal costs order against a state official exists, it stands to good reason that she must be made aware of the risk and should be given an opportunity to advance reasons why the order should not be granted. Joinder as a formal party to the proceedings and knowledge of the basis from which the risk of the personal costs order may arise is one way – and the safest – to achieve this."

The Commissioner had given the requisite notice to the Public Protector.

proceedings before this Court. So, for all we know, the Public Protector in her official capacity has been financing the litigation. In the circumstances, we do not have enough material for us to make a costs order favourable to the Public Protector in her personal capacity. It seems to me a just costs order is that each party must pay her or his costs.

Order

[52] The following order is made:

1. Leave to appeal against the declarator by the High Court of South Africa, Gauteng Division, Pretoria that a South African Revenue Service official is entitled to withhold taxpayer information in terms of section 11(3) of the Public Protector Act 23 of 1994 read with section 69(1) of the Tax Administration Act 28 of 2011 is refused.
2. Leave to appeal against the High Court's dismissal of the Public Protector's counter-application is refused.
3. Leave to appeal against the High Court order that the Public Protector must pay *de bonis propriis* 15% of the taxed costs of the Commissioner of the South African Revenue Service is granted.
4. The appeal is upheld and the High Court order referred to in paragraph 3 is set aside.
5. Each party must pay her or his costs in this Court.

For the Applicants:	D C Mpofu SC and T Motloenya Modise instructed by Seanego Incorporated
For the First Respondent:	J J Gauntlett SC QC and F B Pelser instructed by Da Silva Attorneys