CONSTITUTIONAL COURT OF SOUTH AFRICA

Public Protector v Commissioner for the South African Revenue Service and Others

CCT 63/20

Date of Hearing: 3 September 2020
Date of Judgment: 15 December 2020

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 15 December 2020 at 10h00 the Constitutional Court handed down judgment in an application concerning the Public Protector's power to subpoena taxpayer information under section 7(4) of the Public Protector Act 23 of 1994, and the entitlement of the Commissioner for the South African Revenue Service (Commissioner) to withhold such information in terms of section 11(3) of the Public Protector Act read with section 69(1) of the Tax Administration Act 28 of 2011. Also before the Court for determination was whether an order that the Public Protector must pay *de bonis propriis* (in her personal capacity) 15% of the costs of the Commissioner ought to stand. These questions arose in an application by the Public Protector for leave to appeal directly to the Court against a judgment of the High Court of South Africa, Gauteng Division, Pretoria.

Based on allegations that former President Jacob Zuma was briefly on the payroll of Royal Security CC and failed to pay income tax on the salary allegedly received, Mr Mmusi Maimane, the then leader of the opposition in the National Assembly, laid a complaint with the Public Protector. In the course of her investigations, the Public Protector issued a subpoena for the Commissioner to appear before her and produce certain documentary information and evidence. The Commissioner argued that he was barred from doing so by the secrecy and confidentiality regime in the Tax Administration Act. The Public Protector disagreed. The parties agreed to brief senior counsel to provide an opinion, which would be funded by SARS due to the Public Protector's financial constraints. Advocate Maenetje SC was briefed, and provided an opinion, which stated that there is no conflict between the Public Protector Act and Tax Administration Act, and that the Public Protector's subpoena powers do not include the power to compel disclosure of SARS confidential and taxpayer information.

The Public Protector did not agree with this opinion and sought a second opinion from Advocate Sikhakhane SC, who opined that the Public Protector's subpoena powers are constitutional powers that cannot be trammelled by the Tax Administration Act. On the basis of this second opinion, which she did not share with the Commissioner, the Public Protector issued a second subpoena.

The Commissioner then approached the High Court for an order that SARS officials are entitled to withhold taxpayer information from the Public Protector. The Commissioner further sought a personal costs order against the Public Protector. The Public Protector opposed the application, and brought a conditional counter application for a court order requiring disclosure of the taxpayer information, under section 69(2)(c) of the Tax Administration Act. She further argued that certain tweets that appeared to have been posted by former President Zuma constituted written consent to the disclosure of his taxpayer information, under section 69(6)(b).

The High Court held that SARS officials are required – under 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. It dismissed the conditional counter application, holding that it was both procedurally and substantively deficient. And the tweets were found to be inadmissible, as their authenticity had not been established. The High Court further held that the Public Protector had acted improperly, grossly negligently, in bad faith and with a flagrant disregard for constitutional norms and ordered her to pay 15% of the Commissioner's costs *de bonis propriis*.

The Public Protector applied directly to the Constitutional Court for leave to appeal. She argued that there were exceptional circumstances warranting a direct appeal, including the urgent need to finalise an ongoing investigation, strong prospects of success and the fact that the Court is best placed to deal with the growing tendency to grant personal costs orders against the Public Protector. The Public Protector's power to subpoena, she argued, is part of the power to investigate, under section 182(1) of the Constitution, and thus could not be limited by the Tax Administration Act. It is also an additional power granted under section 182(2) of the Constitution. Additionally, argued the Public Protector, section 181(3) of the Constitution obliges organs of state, including SARS, to support the Public Protector in fulfilling her obligations. The Public Protector further argued that section 69(1) of the Tax Administration Act does not impose an absolute prohibition, and should be interpreted not to apply to the Public Protector. The Public Protector urged the Court to reconsider the conditional counter-application. Finally, the Public Protector argued that there was no basis for the personal costs order against her.

The Commissioner opposed the application. He contended that the Public Protector's attempt to bypass the constitutional hierarchy of courts of appeal was not in the interests of justice. In all other material respects, the Commissioner aligned himself with the reasoning of the High Court.

In a unanimous judgment penned by Madlanga J (concurred in by Mogoeng CJ, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ), the Constitutional Court held that the appeal against the High Court's dismissal of the counter application did not engage the Constitutional Court's jurisdiction, as it simply demanded the reconsideration of the application of uncontroversial legal principles. The Court thus dismissed the application for leave to appeal the High Court's dismissal of the counter application.

The Court further refused direct leave to appeal in relation to the Public Protector's power to subpoena taxpayer information. Although the questions regarding the Public Protector's subpoena powers raised constitutional issues – thus engaging the Court's jurisdiction – the Public Protector had failed to show exceptional circumstances warranting the bypassing of the ordinary hierarchy of courts. On the Public Protector's first argument, regarding urgency, the Court held that if acting expeditiously was a consideration, the Public Protector would not have gone on a power-testing expedition, venturing into unknown, uncertain terrain. She could have simply requested the taxpayer's consent, which it appeared he was willing to provide. Alternatively, she could have sought a High Court order requiring disclosure. The urgency argument was thus found to have been contrived. On the second argument for a direct appeal – that the Public Protector had strong prospects of success – the Court held that section 69(1) clearly prohibits disclosure of taxpayer information, and the Public Protector is not listed as an exception to this prohibition. Any other interpretation would have been at odds with the clear wording of section 69(1). Although the Public Protector did not argue that section 69(1) is constitutionally invalid, the effect of her argument was the same. Absent a direct frontal challenge to section 69(1), the Court held that there were no reasonable prospects of success.

Without urgency or prospects of success, the other reasons for seeking leave to appeal were held to pale into insignificance. The Court thus refused the application for direct leave to appeal on this issue.

The Court granted leave and upheld the appeal against the High Court's order that the Public Protector pay 15% of the taxed costs of the Commissioner *de bonis propriis* (out of her own pocket). The Court held that the Public Protector had not acted *in fraudem legis* (a concept that refers to something done to circumvent or evade the law) by issuing the second subpoena. Her view that she was entitled to issue the subpoena was misguided, but appeared to be genuinely held. The fact that the Public Protector could not make a financial contribution towards sourcing the first opinion in one financial year and could pay for the second opinion in the ensuing financial year did not establish that she acted mala fide. And the Public Protector's failure to share the second opinion also did not constitute bad faith – she was not secretive about the fact that she would seek a second opinion. The High Court had further erred in finding that the Public Protector had displayed a "proclivity" to act outside the law, or a "deep rooted recalcitrance" to accept advice from counsel. She was entitled to seek a second opinion, and acted on the basis of it. Finally, in stating that a "high standard of perfection" is expected from the Public Protector, the High Court had applied an unduly high and legally non-existent standard. The Constitutional Court concluded that there was simply no basis for the High Court to have made a personal costs

order, as the Public Protector had not displayed egregious, reprehensible conduct or a gross disregard for her professional duties. As a result, the High Court had not exercised its discretion judicially, and had misdirected itself in material respects. The personal costs order in the High Court was thus set aside.

The Court pointed out that the office of the Public Protector is a constitutional creation that supports constitutional democracy, and that unwarranted costs orders against the Public Protector in her personal capacity in work-related litigation could have a chilling and deleterious effect on the exercise of her powers. The Court cautioned against the growing trend of seeking personal costs orders in most, if not all, cases against the Public Protector. It urged courts not to fall into the trap of thinking that the Public Protector is fair game for automatic personal costs awards. The Court emphasised the fact that out of four matters that had come before it and in which costs *de bonis propriis* against the Public Protector were at issue, it sanctioned a personal costs order only in one. It cautioned that the Judiciary must not be guilty of contributing to the weakening of an important constitutional office, regardless of the incumbent. You weaken that office, you weaken our constitutional democracy. Its potency, its attractiveness to those it must serve, its effectiveness to deliver on the constitutional mandate, must be preserved for posterity.