IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

29/7/2019

DATE SIGNATURE

Case Number: 48521/19

In the matter between:

PRAVIN JAMNADAS GORDHAN	Applicant
and	
THE PUBLIC PROTECTOR	First Respondent
BUSISIWE MKHWEBANE	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
THE MINISTER OF STATE SECURITY	Fifth Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Sixth Respondent

THE NATIONAL COMMISSIONER OF POLICE	Seventh Respondent
VISVANATHAN PILLAY	Eight Respondent
GEORGE NGAKANE VIRGIL MAGASHULA	Ninth Respondent
ECONOMIC FREEDOM FIGHTERS	Tenth Respondent

JUDGMENT

POTTERILL J

[1] The applicant, Pravin Jamnadas Gordhan ["Gordhan"] is on an urgent basis seeking that the remedial orders in paragraph 8 of the Public Protector's report No 36 of 2019/20 ["the Report"] of 5 July 2019 be suspended pending the final determination of Part B of this application. The first respondent, the Public Protector ["the PP"], and the second respondent, Busisiwe Mkhwebane ["Mkhwebane"] are to be interdicted from enforcing the remedial order pending the determination of Part B of this application. [For ease of reference I refer to the PP and Mkhwebane as the PP]. In Part B Gordhan is seeking the review and setting aside of the PP's report from which the remedial action flows.

[2] The third respondent, the President of the Republic of South Africa ["the President"], the eight respondent, Visvanathan Pillay ["Pillay"] and the ninth respondent, George

Ngakane Virgil Magashula ["Magashula"] abided and supported the application of Gordhan. The sixth respondent, the National Director of Public Prosecutions ["the NDPP"] and the seventh respondent, the National Commissioner of Police ["the Commissioner"] abided the court's decision. The Economic Freedom Fighters ["EFF"] brought an application to intervene in the application, it was unopposed and I accordingly ordered that the EFF is to intervene as the 10th respondent.

[3] The fifth respondent, the Minister of State Security, informed this court that they were to serve and file an application to strike a report attached to the EFF's opposing affidavit from the record. The EFF had not seen the application and had instructions to oppose same. By agreement between the EFF and the Minister of State Security the EFF would not, in opposition to this application, refer to that report and the Minister of State Security would approach the Deputy Judge-President for an urgent date to hear this interlocutory application before Part B is to be heard. Counsel for the Minister of State Security was excused from the proceedings.

Urgency

[4] On the papers the EFF and the PP opposed the urgency of the matter. Urgency was however correctly conceded in argument; the matter being inherently urgent.

Issue to be decided

Can this court grant an interim interdict to suspend the operation of the PP's remedial orders pending the final determination of the review?

Remedial orders of the PP

[5] The order of the PP is set out in paragraph 8 of the report and reads as follows:

> *"8. REMEDIAL ACTION*
>
> *The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following:-*
>
> *8.1 The President of the Republic of South Africa*
>
> *8.1.1 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 his violation of the Constitution and the Executive Ethics Code within 30 days of issuing of this report.*
>
> *8.2 The Speaker of the National Assembly:*
>
> *8.2.1 Within 14 working days of receipt of this Report, refer Mr Gordhan's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the Joint*

Committee on Ethics and Members' interests for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics.

8.3 The Minister of State Security to:

8.3.1 Within 60 days of the issuing of this Report, acting in line with Intelligence Services Amendment Act, implement, in totality the OIGI report dated 31 October 2014.

8.3.2 Within 30 days ensure that all intelligence equipment utilised by the SARS intelligence unit is returned, audited and placed into the custodian of the State Security Agency.

8.3.3 Within 14 days of the issuing of this report avail a declassified copy of the OIGI report dated 31 October 2014

8.4 The National Director of Public Prosecutions to note:

8.4.1 That I am aware that there are currently criminal proceedings underway against implicated former SARS officials and that therefore effective steps should be taken to finalise the court process as the matter has been remanded several times.

8.5 The Commissioner of the South African Police Service to:

8.5.1 Within 60 days, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, for violation

of section 209 of the Constitution and section 3 of the National Intelligence Act including Mr Magashule's conduct of lying under oath."

[6] Paragraph 9 of the report is also relevant and reads as follows:

"9. MONITORING

9.1 The President of the Republic of South Africa must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.1 of this Report will be implemented.

9.2 The Speaker of the National Assembly must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.2 of this Report will be implemented.

9.3 The Minister of State Security must, within thirty (30) days from the date of the issuing of this Report and for approval by the Public

Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.3 of this Report will be implemented.

9.4 *The Inspector-General of Intelligence must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.4 of this Report will be implemented.*

9.5 *The National Commissioner of the South African Police Service must, within sixty (60) days from the issuing of this Report, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, including Mr Magashula's conduct of lying under oath.*

9.5 *The National Commissioner of the South African Police Service must, within sixty (60) days from the issuing of this Report, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, including Mr Mgashula's conduct of lying under oath.*

9.6 In line with the Constitutional Court decision in Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the President of the Republic of South Africa, unless a court order directs otherwise."

Will the granting of an interim interdict fail to promote the objects, spirit and purport of the Constitution?

[7] An interlocutory interdict is granted *pendent lite* and designed to protect the rights of the complaining party pending an application to establish the respective rights of the parties. It is aimed at ensuring, as far as reasonably possible, that the party that is ultimately successful will receive adequate and effective relief. Already in ***Pikoli v President*** **2010 (1) SA (GNP)** at p404B-C Du Plessis J found that:

"... the court considering whether to grant or refuse an interim interdict must also bear in mind that the courts have a constitutional obligation to uphold the Constitution and to 'declare that any ... conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'"[1]

[1] s172(1) of the Constitution

[8] This test is formulated thus in ***National Treasury v Opposition to Urban Tolling Alliance*** **2012 (6) SA 223 (CC)** at paragraph [45]: [The *OUTA*-decision]

> *"It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Consitution."*

The ***Setlogelo*** test, requires an applicant to establish:

(a) a *prima facie* right though open to some doubt;

(b) a reasonable apprehension of irreparable and imminent harm to the right;

(c) the balance of convenience; and

(d) the applicant must have no other remedy.

[9] Applications for suspensions of mandatory orders, pending reviews befit interim interdicts, and are granted daily in busier High Courts and Magistrates' Courts. In fact, quite often, the PP's remedial action has been suspended with interim orders pending reviews of the PP's reports. It was thus correctly conceded by counsel for the PP that normally these interim orders are not opposed by the PP. In accordance with this "normal practice" the President applied and expressed this practice in a letter to the PP dated 19 June 2019 and is set out as follows:

> *"6. In relation to your direction to submit my Implementation Plan, I reply as follows:*
>
> *6.1 I have noted the findings against Minister Gordhan in your report;*
>
> *6.2 I have noted, too, the assertions made by Minister Gordhan in his review application that your report falls to be reviewed and set aside because it is allegedly ultra vires section 6(9) of the Public Protector Act, issued by means of an unfair procedure and tainted by misdirections of law and fact.*
>
> *6.3 One of the legal complains raised by Minister Gordhan is that the direction that I take appropriate disciplinary action against him is 'vague*

and impossible to implement in the absence of an employment relationship between the President and myself.'

6.4 *Having considered the findings against Minister Gordhan in your report and his challenges to those findings in his review application, I have concluded that it would be inappropriate to take disciplinary action against Minister Gordhan at a time when*

6.4.1 *not only is there a dispute pending before the High Court over the legality of the findings on which to base such disciplinary action, but also*

6.4.2 *my alleged power to exercise such disciplinary action is, itself, legally contested by Minister Gordhan in that dispute pending before the High Court.*

7. *In the circumstances, my Implementation Plan in respect of the remedial action set out in paragraph 7.1 of your report is the following:*

7.1 *I have complied with the order to take note of the findings against Minister Gordhan in your report;*

7.2 *I have concluded that the process of taking appropriate disciplinary action against Minister Gordhan would best be*

served by waiting until the legal processes of his review proceedings have clarified

7.2.1 what disciplinary powers, if any, the Constitution allows me to exercise over Minister Gordhan beyond removing him from the Cabinet; and

7.2.2 whether there are lawful grounds for the exercise of any such disciplinary powers.

7.3 I intend, accordingly, to defer my decision on what disciplinary action if any to take against Minister Gordhan until final determination of his review application.

8. I trust that you are satisfied with this Implementation Plan. If you are not so satisfied, and require me to exercise any disciplinary powers I may have over Minister Gordhan before his review proceedings have been finally determined, I invite you to approach the High Court for an order compelling me forthwith to do so."

[10] In the PP's response dated 26 June 2019 she replies as follows:

"3. ... It is clear from the above that any advice to the effect that a review application stays the implementation of the remedial action is incorrect

and is a sheer display of cluelessness on the person giving such advice.

4. *To this end, the President's letter is not only based on the wrong understanding of the law but on a mere assurance by a third party that the President should not comply with my remedial action.*

5. *The President's refusal to act on my remedial action is a failure on the President's part to uphold the Constitution.*

7. *The Public Protector will therefore persist with the enforcement of the implementation of the remedial action to the parties directed against, until such time that an interim order interdicting same is obtained."*

[11] The President reacts to this letter on the 3rd of July 2019 setting out that he fears that the PP has misunderstood his letter of 19 June 2019 in that he has not refused to act on the PP's remedial action. He, *inter alia,* also states:

"I believe that, applying the principle of the SCA judgment to the present situation, it is perfectly in keeping with public and legal policy for me not to undermine the legal process by determining that which the High Court has been called upon to decide in the dispute between Minister Gordhan and yourself.

As proceedings in the review applications unfold, the state of affairs in relation to appropriate action may well change. Should this happen I will promptly notify you of any resultant changes to my implementation plan."

In her further response the PP in paragraph 9 of a letter dated 9 July 2019 sets out as follows:

"9. I fear that the Honourable President's persistence on wilful non-compliance with my remedial action, which is based on the Honourable President's incorrect interpretation of the law, is not only ostensibly contemptuous of my office by also borders on a breach of the Honourable President's constitutional duties, as spelt out in the Constitution.

12. I therefore plead with the Honourable President to avert the constitutional crisis alluded to above by taking head of my advice and implementing the remedial action as set out in the Report or obtaining a court interdict to stay the implementation pending the outcome of the review proceedings or even causing the implicated and/or affected public officials to do so. Such orders are sought and obtained daily in our courts in respect of review applications targeted at ordinary

administrative action, let alone the remedial action of the Public Protector, which almost ranks as a court order in its binding effect."

[12] The question thus is why does the PP not follow the "normal practice" as confirmed in her correspondence in this application, but labels it as extra-ordinary? It was submitted that the PP is opposing the granting of the application because of her duty to defend the independence, impartiality and dignity of the Office of the PP as well as her person. This flows from the averred vexatious, scandalous and irrelevant matter set out in the founding affidavit of Gordhan.

[13] It is also opposed on the basis that in terms of the ***OUTA***-decision this court will intrude in entering the exclusive terrain of another branch of government, will negate the separation of powers and is not the clearest of cases wherein an interim order should be granted. The EFF expanded hereon in that this application does not warrant judicial intrusion into the exclusive terrain of a Chapter 9 institution.

Does Gordhan, as supported by the President, Pillay and Magashula, make out a *prima facie* right even if it is open to some doubt?

[14] The first ground of review is that the PP has no jurisdiction in that she is barred to entertain the complaints under s6(9). S6(9) of the PP Act reads as follows:

> *"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 of the occurrence of the incident or matter concerned."*

As the complaints relating to Gordhan flows from a meeting in 2010 and the establishment of an investigative unit in 2007 the Public Protector was not entitled to entertain these complaints.

[15] In the report, para 3.5 the Public Protector regurgitates the factors setting out that could constitute special circumstances. Surprisingly, no factors are set out as to what she considered, and why, *in casu* it constitutes special circumstances. In view of the provisions of this section and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this claim. It is thus argued that on the report itself, without establishing jurisdiction, Gordhan has a *prima facie* right on review.

[16] In the Public Protector's answering affidavit she baldly avers that all the review grounds are without merit and are denied.[2]

[17] In argument counsel for the PP did not address the jurisdiction issue at all.

[18] The EFF in the papers justify the jurisdiction of the PP in that Gordhan testified before the Nugent and Zondo Commissions about the "Rogue Unit" without a complaint about the events occurring many years ago. It was argued that this argument is unmeritorious and is rejected. The Commissions had terms of reference whereas the PP has to execute her duty in terms of the PP Act. In terms of s6(9) the PP shall not *"entertain complaints after two years unless per special circumstances exist"*. It is trite that the PP would have to identify the special circumstances, not the EFF.

[19] Gordhan in a letter dated 27 March 2019 requested identification of the special circumstances, however the PP never responded thereto. On 16 April 2019 Gordhan again requested the special circumstances to be identified. In the PP's response she submitted that the special circumstances related to illegally acquired surveillance equipment which was acquired at an astronomical cost, which is still being utilised to intercept communications and therefore it constituted a special interest as public funds

[2] Paragraph 32 of the answering affidavit

were still being used for illegal purposes. Even if this could constitute special circumstances, this is not forwarded as a special circumstance in the report and can in any event not sustain a special circumstance about the averred misleading of the Parliament by Gordhan.

[20] The EFF then proffers a special circumstance, not proffered by the PP, i.e. the public interest to an unlawful unit at SARS. The PP, not the EFF, must exercise a discretion; the PP has not forwarded the public interest as a special circumstance.

[21] On these submissions and arguments Gordhan has established a *prima facie* right for the interdict to be granted.

The finding that Gordhan violated the Executive Ethics Code in deliberately misleading the National Assembly

[22] Paragraph 2.3(a) of the Executive Ethics Code reads as follows:

> *"Members of the Executive may not ... wilfully mislead the Legislature to which they are accountable."*

The review grounds set up by Gordhan is that he did not wilfully mislead the National Assembly. The PP found that Gordhan dishonestly concealed the fact that at the "Ambani meeting" there was a Gupta present. Gordhan sets out that until today he cannot recall that a Gupta was present, but his Chief of Staff informed him in preparation for his evidence at the Zondo Commission that there was a Gupta present at that meeting; he without an independent recollection thereof disclosed this fact to the Commission.

[23] The EFF submitted that it matters not that Gordhan may not wilfully have misled the Legislature, an innocent mistake is sufficient. This is of course *contra* the wording of paragraph 2.3(a) of the Code specifying that it must be done wilfully.

[24] On these facts Gordhan has established a *prima facie* right.

The establishment of the SARS Investigative Unit

[25] In this ground of review Gordhan submits the decision of the PP is irrational and fundamentally flawed. SARS has as its objective the efficient and effective collection of revenue and control over the import, export, manufacture, movement, storage or

use of certain goods.[3] SARS has always had investigative and enforcement units that investigated *inter alia* tax evasion and elicit trade. It had a mandate to minimise the importation, exportation and manufacturing of drugs, as well as the illegal harvesting of abalone and its supply, the illegal importation of second-hand vehicles and the importation of counterfeit goods. It also had a mandate to curb the smuggling of cigarettes. Sections 4A to 4D of the Customs Act clothes SARS with wide investigative powers.

[26] To crack down on elicit trade and to combat organised crime SARS needed to enhance its intelligence gathering. To this end SARS and the National Intelligence Agency ("NIA") entered into discussions to develop within NIA a capacity to support SARS in investigating economic crimes with tax implications. An unsigned MOA followed, due to the NIA losing its appetite to proceed with such a unit within the NIA.

[27] On 8 February 2007 Pillay recommended that SARS create a specialist internal capacity to focus on the elicit economy. On 13 February 2007 this proposal was approved by the Chief Officer for Corporate Services, Magashula. A unit to investigate and clamp down was thus established lawfully in terms of SARS' objectives, mandate and legislation.

[3] s3 of SARS Act 34 of 1997

The PP relies on the Sikhakhane panel's finding that the SARS investigative unit was unlawful because it contravened section 3 of the National Strategic Intelligence Act 39 of 1994 ["NSI Act"]. S3(1) of the NSI Act prior to its amendment in 2013 reads as follows:

> *"If any law expressly or by implication requires any department of State, other than (the NIA) or (SASS), to perform any function with regard to the security of the Republic or the combatting of any threat to the security of the Republic, such law shall be deemed to empower such department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function; provided that such department of State –*
>
> *(a) ...*
>
> *(b) ...*
>
> *shall not gather departmental intelligence within the Republic in a covert manner ..."*

Gordhan submits that this section was not contravened because it applied only to

those departments of state that were by law required to perform functions *"with regard to the security of the Republic or the combatting of any threat to the security of the Republic."*[4] SARS was clearly not such a department. Furthermore s3(1) did not prohibit all covert intelligence gathering, only covert *"departmental intelligence"*. *"Departmental intelligence"* is defined in the NSI Act as: *"intelligence about any threat or potential threat to the national security and stability of the Republic."*

[28] The PP found that the establishment of the SARS' unit *"was in breach of section 209 of the Constitution in terms of which only the President may establish such covert information gathering unit."*[5] Section 209(1) reads: *"any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation."* It was submitted that SARS is not an intelligence service and the definition of *"intelligence"* in the Act is in fact: *"for purposes of informing any government decision or policy-making process carried out in order to protect or advance the national security."* SARS is thus not affected by s209 as its application is confined to the establishment of intelligence services dedicated to the protection of national security.

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[4] Section 3(1)
[5] Paragraph 7.2.5 of the report