

[29] The EFF strongly submits that SARS was spying on citizens without warrants, correct channels and no proper oversight. This submission seemingly relates to interception of communications. Nowhere did the PP find that the investigative unit was a spying unit and this *ex post facto* justification on behalf of the PP, it was argued, is to be rejected.

[30] There was no evidence that this was the purpose of this unit and that is in fact what occurred.

I am satisfied that on these grounds raised there is a *prima facie* right established on behalf of Gordhan.

Mr. Pillay's qualifications

[31] The PP finds that Pillay was not qualified for appointment as Deputy Commissioner. Pillay's appointment was thus irregular and in violation of s195 of the Constitution.

[32] On behalf of Pillay and Gordhan it was submitted that it is common cause that there is no prescribed requirements in law or policies for appointment as Deputy Commissioner of SARS. On this basis the fact that Pillay has no tertiary education

does not offend any law or policy. Pillay's experience in the public service from January 1995 was the basis for his appointment and his appointment was accordingly proper, regular and lawful.

[33] Pillay under oath stated that the finding that he has no matric certificate is malicious and fatally flawed. Pillay will, on return from overseas, launch review proceedings in his own name or asked to be joined in these review proceedings. Pillay associated himself with the contentions raised by Gordhan. It was submitted there is in law or fact no reason for the PP and the EFF to oppose the interim relief sought by Gordhan.

This ground raised by Gordhan, supported by Pillay establishes a further *prima facie* right for the interim relief.

The PP did not afford Gordhan an opportunity to be heard by making representations before meting out the remedial orders

[34] As Gordhan has already established a *prima facie* right I cursorily address this issue. I do not do so as it is unimportant, or has no prospects of success, but simply in urgent matters time is a luxury and to belabour further *prima facie* rights is essentially redundant.

[35] For this reason I do not address the ground on review pertaining to recruitment of personnel for the SARS' investigative unit.

[36] Gordhan relies on s7(9)(a) of the PP Act which renders it mandatory for the PP to afford any person an opportunity to respond to adverse findings. It is argued that even on a narrow interpretation this would include an opportunity to submissions prior to a penalty. An analogy was drawn with making submissions in a criminal trial prior to sentencing.

[37] Gordhan also relies on the common law principle of *audi alteram partem* as endorsed in *Masethla v President of the RSA 2008 (1) SA 566 (CC)* at paras 74 and 75. In support of this ground a further argument raised and relied on is the rule of law itself; one must be heard when it is rationally required. This principle was enunciated in the matter of *MERSA v PG Group [2019] ZACC 28* (15 July 2019) paras 47 -51, 64 and 114-119.

[38] Gordhan has once again set out a *prima facie* right for an interim interdict to be granted.

The PP's bias and ulterior purpose

[39] Gordhan in no uncertain terms avers that the PP is incompetent, irrational and negligent in the performance of her duties.

[40] In this application however, these averments have no influence on the judgment and no cognisance is taken of these averments, simply because these averments are not relied on for the interim order. Mr. Trengrove on behalf of Gordhan did not argue this issue because this debate is not relevant to the determination of Part A.

Adv. Masuku (SC) for the PP however argued that these averments are the foundation for the opposition of the PP and her office; i.e. to preserve the dignity of the PP and the office of the PP. This is crucial because for the PP to fulfil her functions she must have the cooperation of all the organs of state. If this court were to grant the suspension order it would weaken her office and suspension would prevent accountability. The allegations made by Gordhan in unacceptable court language undermines the dignity, independence, impartiality and effectiveness of the Public Protector.

[41] The argument on behalf of the PP is to be rejected. The bias and ulterior purpose, if proven, constitute grounds for the review of the PP's decision. These allegations do not form a basis for the interim interdict and accordingly has no role to play. It would be premature for this court to strike out any allegations not relevant to Part A of the application. Gordhan relies on this ground of review as a breach of the PP's duty in terms of s1(1) and 181(2) of the Constitution as well as s3(13)(a) of the PP Act.

[42] The suspension of the order of the PP does not weaken her office; as she herself has set out suspension of her orders are granted pending review. Much criticism was levelled at the President in not supporting the PP as is required from him in terms of the Constitution. The President cannot be criticised for awaiting a court's decision on suspension of the remedial orders before acting. The President is acting in accordance with the law of the land before he implements any remedial action. In any event, the PP has conceded that the President is uncertain about his power to discipline members of the Executive given that they do not fall within the classical definition of employees, but serve at his pleasure. In contrast, the EFF argued that there is no bar to the President taking disciplinary steps, like shouting, at Gordhan. The mere fact that the opposing parties differ on this question renders the review application apposite.

[43] In summary thus: this court need not and did not rely on the review grounds that the PP acted with ulterior purpose and bias when finding as the PP did and ordered as she did. This is a debate for the review application.

[44] Gordhan has thus established a *prima facie* right for the interim relief sought.

Irreparable harm

[45] The harm to Gordhan in that he must be *inter alia* disciplined by the President, appear before the Parliamentary Ethics Committee, be criminally investigated seemingly by the Commissioner of Police himself, has serious consequences for him. The report maligns him as being untruthful and a spy and would impact his political career and his personal circumstances.

[46] Before I address the above-mentioned argument on behalf of Gordhan it would be remiss of this court not to remark on the remedial orders of the PP. This court had to study the report and remedial orders in order to ascertain whether in fact there is irreparable harm to Gordhan. Much of the orders are vague, contradictory and/or nonsensical. The President is ordered in paragraph 8.1.1 of the report to take note of the PP's findings and to take appropriate disciplinary action against Gordhan. The

expiry date attached to this order is the 4<sup>th</sup> of August 2019. In para 9.1 it is ordered that the President must within 30 days of the issuing of the report submit an Implementation Plan to the PP for her approval, *"indicating how the remedial action referred to in paragraph 7.1 of her report will be implemented."* There is no remedial order in paragraph 7.1; the order is thus nonsensical. Furthermore the order to within 30 days submit a plan for approval detailing the disciplinary action and at the same time ordering that the disciplinary action be taken within 30 days is inexplicable.

[47] The remedial action ordered against the Speaker has the same contradiction; the Speaker must within 14 days refer the findings against Gordhan to the Joint Commission on Ethics and be implemented. Paragraph 7.4 has no remedial action set out therein.

[48] In paragraph 8.5 the PP orders the Commissioner of Police to investigate the criminal conduct of Messrs Gordhan "and others" for violation of s209 of the Constitution and s3 of the NSI Act. Both sections do not create criminal offences.

[49] On behalf of the PP and EFF it was argued that if the remedial orders are suspended then Parliament would be prevented from performing its oversight functions and frustrate the oversight role of Parliament. An interdict would interfere with the Minister

of State Security's executive and legislative functions. An order interdicting the NDPP from performing constitutional functions is incompetent. Furthermore an interdict preventing the Commissioner of the Police to exercise his duty would be unconstitutional.

[50] When assessing irreparable harm the court must also carefully probe whether and to which extent the restraining order will probably interfere into the exclusive terrain of another branch of Government. *"The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm."*<sup>6</sup>

[51] The harm to Gordhan speaks for itself. The harm would be irreparable if the interdict is not granted. Being prosecuted, disciplined and investigated most certainly constitutes harm and the harm may be irreparable and irreversible by the time the review application is heard, especially so if the review application is successful. There is no harm to the PP or her office if the remedial action is suspended pending review. This is not a final order and if the review is to be unsuccessful the remedial actions are to commence. This matter constitutes a clear case where judicial interference is warranted. The PP and her office can fulfil their constitutional duties in her office with the suspension order not interfering with her constitutional duties at all. Suspension

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<sup>6</sup> OUTA decision para 47



of her orders has most certainly not interfered with her constitutional duties in other matters. The mere fact that parties have abided to the court's decision is not an acquiescence to the remedial orders of the PP.

#### Balance of convenience

[52] *"The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government."*<sup>7</sup>

[53] The EFF and the PP placed must reliance on this factor as a bar to granting the interim interdict. It was argued that the PP is the constitutional last line of defence and interim relief at the behest of the Executive, the branch of Government the PP is meant to supervise would be blurred to a mere Maginot line. The PP acted within her statutory powers and a court cannot interfere therewith. If the interdict is granted the judiciary will be intruding with the legislative and constitutional terrain of the constitutional institutions tasked with executing the remedial actions. These arguments are askew simply because the *ratio* and test set out in the *OUTA* decision favours Gordhan in these circumstances. This is so, because it is the PP who seeks to interfere with the exercise of statutory powers by directing the President, the

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<sup>7</sup> *OUTA* decision para [47]

Speaker, the Minister of State Security, the NDPP and the Commissioner of Police how to exercise their powers and perform their functions.

[54] The balance of convenience favours Gordhan as the incidents complained of happened a decade ago, there is no urgency thus in awaiting a determination on the review application.

[55] There is no harm to the PP in awaiting the outcome of the review decision versus the harm that will befall Gordhan if the interdict is not granted. The balance of convenience thus favours the granting of the interdict.

No other satisfactory remedy

[56] There is simply no suitable alternative remedy available to Gordhan in view of the binding nature of the remedial action. No serious argument on behalf of the EFF and the PP was in any event raised pertaining to this requirement. Gordhan accordingly also satisfies this requisite for an interim interdict.

Magashula's opposition

[57] Magashula also abides the court's decision, but supports Gordhan in this application as well as in the review application. I do not find it necessary to deal in this application with any further submissions made by Magashula, except that in the remedial action the Commissioner of Police is to within 60 days investigate Magashula's "*conduct of lying under oath.*" This averred perjury is placed in dispute.

Costs

[58] The costs would generally follow the result. It was however argued that the EFF and PP and the PP's office should not pay the costs on the *Biowatch* principle.<sup>8</sup>

[59] The *Biowatch* principle is however to be distinguished from the matter at hand. This principle can be summarised as follows:

*"It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken*

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<sup>8</sup> *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC)

*to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken.”<sup>9</sup>*

Thus in the words of Sachs J: “

*“What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.”<sup>10</sup>*

[60] Part A of the application before this court does not constitute constitutional litigation.

It is an interim interdict to suspend remedial orders pending a review. The EFF and PP has attempted to label the litigation as constitutional, but the character of the litigation before me is not of parties claiming their constitutional rights, but rights to prevent a harm flowing from a report that is challenged. It is conceded on behalf of the PP and her office that this is normal practice; to now assert that suspension threatens the office of the PP as a Chapter 9 institution is far-fetched, ingenious nor substantive and does not raise truly constitutional considerations relevant to the adjudication of Part A.

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<sup>9</sup> *Biowatch* matter para [20]

<sup>10</sup> *Biowatch* matter para [17]

[61] It would be incorrect to start the costs enquiry with a characterisation of the parties, it matters not that it is a Minister of the Executive versus a Chapter 9 institution. It matters not that the EFF is averdly opposing the interim interdict in the public interest. The EFF should not get a privileged status simply because it is acting in the public interest.<sup>11</sup> Equal protection under the law requires that the costs award not be dependent on whether the parties are acting in their own interests or in the public interest.<sup>12</sup> Suspension of a remedial order does not threaten the entrenched rights of the PP. The separation of powers harm on the balance of convenience favours Gordhan. Gordhan will, if the suspension is not granted and the review is subsequently upheld, be seriously prejudiced. It defies all logic to proceed with the execution of the remedial action when the report as the basis for remedial action, is the subject of judicial review. A mere suspension of a remedial order does not weaken the PP's office. Every person under the Constitution has a right to review a report, this includes a Minister. The mere fact that the Minister does so, does not weaken the PP's powers. The fact that the President is abiding the decision and also raises an issue to be decided in the review application pertaining to what disciplinary steps a President can take against a Minister is a valid point and in fact will serve as guidance to the PP, if and when, another Minister is the subject of a PP report. Thus opposing the suspension in Part A, was baseless, with both the EFF and the PP and

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<sup>11</sup> *Biowatch* matter para [18]

<sup>12</sup> *Biowatch* matter para [16]

her office not seriously attacking the requirements necessary for an interim interdict and accordingly as unsuccessful litigants should carry the costs.

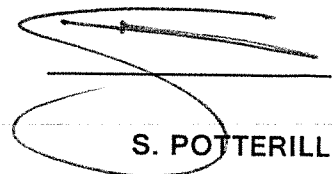
[62] I accordingly make the following order:

62.1 Part A of this application is dealt with as one of urgency. The applicant's failure to comply with the Rules of this Court is condoned.

62.2 The remedial orders in paragraph 8 of the Public Protector's report 36 of 2019/20 of 5 July 2019 are suspended pending the final determination of Part B of this application.

62.3 The Public Protector or the office of the Public Protector are interdicted from enforcing the remedial orders pending the final determination of Part B.

62.4 The first, second and tenth respondents are ordered, jointly and severally, to pay the applicant's, eighth respondent's and ninth respondent's costs, which costs will include the costs consequent upon the employment of two counsel.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 48521/19

HEARD ON: 23 July 2019

FOR THE APPLICANT: ADV. W. TRENGROVE SC

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ADV. O. MOTLHASEDI

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ADV. P.J. DANIELL

DATE OF JUDGMENT: 29 July 2019