IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

CASE NO: 44020/2018

Reportable

Of Interest to Other Judges

In the matter between:

DAVID DOUGLAS DES VAN ROOYEN	Applicant
And	
THE OFFICE OF THE PUBLIC PROTECTOR	First Respondent
THE PUBLIC PROTECTOR	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
JOHN HENRY STEENHUISEN, MP	Fourth Respondent
KEVIN MILEHAM, MP	Fifth Respondent

JUDGMENT

HUGHES J

Introduction

[1] The issue in this opposed review is whether the Public Protector's findings that the applicant, Davis Douglas Des Van Rooyen, deliberately misled parliament when he responded to question number 927 during 2016. Pertinent to the aforesaid is the rationality of the Public Protector's findings.

[2] In these proceedings, the Public Protector's Office is the first respondent and the Public Protector is cited in her official capacity as the second respondent. Both respondents have opted to abide this court's decision. The President of the Republic of South Africa is cited as the third respondent and does not oppose this application. He also chose to abide.

[3] The fourth and fifth respondents, John Henry Steenhuisen and Kevin Mileham are Members of Parliament (MP) and members of the Democratic Alliance (DA), oppose this review application. In the judgment where reference is made to respondents, it is the fourth and fifth respondent that I refer to.

Relief

[4] The relief sought by the applicant as amended is set out for easy reference below:

'1. It is hereby declared that the findings and remedial action contained in The Public Protector Report No: 11 of 2017/2018, entitled "Report on an investigation into the allegations of a violation of the executive ethics code by the minister of co-operative governance and traditional affairs, Mr David Douglas van Rooyen, MP" (" The Public Protector Report") are factually unfounded, irrational and unlawful.

2. It is declared that the Applicant did not deliberately mislead Parliament when he replied Parliamentary Question No. 927 in 2016.

3. The Public Protector Report is accordingly reviewed and set aside.

4. The fourth and fifth respondents are ordered to pay the costs, inclusive of costs consequent to the employment of two counsel.'

Grounds of review

[5] The review is directed at the lawfulness and rationality of the Public Protector's findings and remedial action. In broad terms the grounds of review are as follows:

(a) The complaint of the fourth and fifth respondents was not related to the parliamentary question posed;

(b) The Public Protector relied on irrelevant evidence in reaching her decision that the applicant deliberately misled parliament;

(c) There exist apparent contradictions in the Public Protector's report having made two findings, that being, the applicant evaded the parliamentary question and he deliberately misled parliament; and

(d) The contradictory stance taken by the fourth and fifth respondents who aver that the applicant evaded the parliamentary question, and in the same breath state that he refused to answer the parliamentary question.

Background

[6] On 9 December 2015 the applicant was appointed as Minister of Finance by former President Jacob Zuma. He was removed as such, and on 13 December 2015 he was appointed as Minister of Cooperate Governance and Traditional Affairs. On 11 April 2016 and during the course of a National Assembly sitting, the fourth respondent asked the applicant the following parliamentary question, noted as Question No. 927: 'Has (*a*) he and/or (*b*) his Deputy Minister ever (i) met with any (*aa*) member, (*bb*) employee and/or (*cc*) close associate of the Gupta family and/or (ii) attended any meeting with the specified persons (*aa)* at the Gupta's Saxonwold Estate in Johannesburg or (*bb*) anywhere else since taking office; if not, what is the position in this regard; if so, in each specified case, (*aaa*) what are the names of the persons who were present at each meeting, (*bbb*)(*aaaa*) when and (*bbbb)* where did each of such meetings take place and (*ccc*) what was the purpose of each specified meeting?'

[7] Subsequently, the applicant responded as follows:

'(*a*)(*aa*)(*cc*)(*b*)

The Minister and his Deputy Ministers have never met with members, employee and/or close associates of the Gupta family in their official capacities.
(*aa)*(*bb*)(*aaa*)(*bbb*)(*aaaa*)(*bbbb*)(*ccc*) Not applicable.'

[8] The applicant's response precipitated the fifth respondent lodging a complaint to the Public Protector on 31 October 2016. The fifth respondent took issue with the manner in which the applicant answered the parliamentary question, stating that he did so in violation of the Executive Ethics Code. This was the basis upon which they lodged the complaint. The complaint was articulated as follows:
'It has recently been reported in several media outlets that Minister Des Van Rooyen visited the Gupta family residence in Saxonwold several times in the run up to his short lived tenure as Finance Minister. The reports claim that the Minister visited the Gupta home on consecutive days between 2 December and 8 December 2015. In contract, in reply to a Democratic Alliance Parliamentary question the Minister had denied ever visiting the residence of the Gupta family. It is thus clear that the Minister lied and intentionally misled parliament; in so doing he has contravened the Executive Ethics Code to which all Cabinet Ministers are bound.'

[9] In terms of section 4 of the Executive Members' Ethics Act 82 of 1998, the Public Protector is obliged to investigate a possible violation of the Executive Ethics Code. To this end, the Public Protector dispatched correspondence dated 6 February 2017 to the applicant drawing his attention to the complaint lodged by the fifth respondent. The correspondence from the Public Protector summarised the complaint as reflected below:
'2 In summary the complainant is as follows; that
2.1 It has been reported in several news outlets that you visited the Gupta family residence in Saxonwold several times in the run up to your tenure as Finance Minister and also visited their home on consecutive days between 02 December 2015 and 08 December 2015.
2.2 In response to a DA parliamentary question, during a National Assembly sitting, you denied ever visiting the residence of the Gupta family.
3. It is the contention of the Complainant that you lied and deliberately misled Parliament and in doing so, contravened Section 2.3(a) of the Executive Members' Ethics Code.'
The applicant was to respond within 10 days from the date of this correspondence.

[10] The applicant only received the letter from the Public Protector on 10 March 2017, and on 24 March 2017 he submitted his response, wherein he explains that

between 4 December 2015 and 11 December 2015 he was in Durban with his family. In substantiation, of the aforesaid, he tenders confirmation in respect of his reservations for accommodation and flights.

[11] Significantly, the applicant stated that:
'[o]n the 7th December 2015 I flew from Durban to Johannesburg at 13h55 for Umkhonto We Sizwe Military Veterans Association (MKMVA) meetings, where we also met with the Gupta family'
He explains that these meetings were in his capacity as Treasurer General of MKMVA, and as such, from time to time he would meet business people 'to enlist support' for MKMVA programmes. The Gupta family were such business people.

[12] On 21 August 2017, the Public Protector issued a notice in terms of section 7(9)(a) of the Public Protector Act 23 of 1994 to the applicant. This informed him that she was in the process of finalising her investigations with regards to the complaint. She further advised, that she had obtained evidence from the State of Capture Report relating to his cellphone records. These records confirmed that his cellphone was within the area of Saxonwold on 8 December 2015. She emphasised that the records illustrated that this was the day prior to him being appointed as the Minister of Finance. In light of this evidence she invited him to respond by no later than 4 September 2017, alternatively, he was encouraged to engage with the investigating team as regards to this evidence before 4 September 2017. He was requested to advance any evidence to the contrary as a matter of urgency.

[13] The applicant responded by way of correspondence dated 31 August 2017, and further, 2 October 2017. In essence, these dealt with his role and position as Treasurer of the MKMVA since September 2015. He explained that his responsibility is to raise funds and that the MKMVA's relationship with the Gupta's was akin to a relationship between sponsor and benefactor. After proffering this explanation the Public Protector sought further details from the applicant. She pointed out that he ought to bear in mind that the relevant period concerned, in the parliamentary question, was 'since he took office' as Finance Minister.

[14] The applicant's response was as follows:

'With regard to more details required in terms of the engagement as Treasurer General of MKMVA mentioned in the background of the response letter dated the 31st August 2017 where I stated that I have been (am still) a Treasurer General of Umkhonto we Sizwe Military Veterans (MKMVA), a position I held prior to becoming a Minister in December 2015.'

…

Since my appointment as Treasurer General in September 2015 there has been engagement with the Gupta solely in my capacity as Treasurer General MKMVA.

…

As Treasurer General of the MKMVA my responsibilities include constant engagement with other shareholders to protect the MKMVA's interest and obtain regular updates on financial and operational performance.'

The Public Protector's Findings

[15] In terms of section 182(1)(b) of the Constitution of the Republic of South Africa 1996 (the Constitution), section 8(1) of the Public Protector Act read with section 3(2) of the Executive Members' Ethics Act, having completed her investigations the Public Protector penned her report dated 9 February 2018. Her report was submitted to the President calling on him to implement the remedial action recommended in her report.

[16] In her report the Public Protector recorded that the key issues for consideration were:

'4.3.1. Whether Minister Van Rooyen deliberately or inadvertently made a misleading statement to the National Assembly when he replied to the question of ever having met with and visited the residence of the Gupta family since taking office, and if so;

4.3.2. Whether Minister Van Rooyen's conduct violated the provisions of paragraph 2.3(a) of the Executive Ethics Code.' [Emphasis]

[17] In her report, the Public Protector acknowledged that the applicant had admitted that he had met with the Gupta family albeit that he states that it was in his capacity as Treasurer General of the MKMVA. She noted that the applicant 'emphasized that he confined his response to Mr Steenhuisen's question to meetings in his capacity as Minister of Finance' and she went on to quote his reply:

'"*If the question was phrased to include whether I visited the said family in my official capacity as a Minister OR in any other capacity, the answer would have been YES."*
… He denied having misled the National Assembly.'

[18] She pointed out that his meeting with the Gupta family was in the public domain and this clearly precipitated Steenhuisen's question, as it was likely to be inferred that his meeting with the Gupta family was linked to his appointment as Minister of Finance.

[19] The Public Protector placed emphasis on the fact that the cellphone records in her possession pertaining to the State of Capture Report dated 14 October 2016 had no influence on her findings. Even though she refers to these records as being evidence in her possession, for which she sought a further explanation from the applicant. In dealing with the issue of the cellphone records it is relevant to set out how this was approached by the Public Protector:

'5.1.9 Referring to Minister Van Rooyen's written reply to Mr Steenhuisen's question, the Public Protector stated as follows:

"This assertion was not consistent with the investigation done in the State of Capture report in which your cell phone records were reviewed and confirmed that your cell phone was in the Saxonwold area on 8 December 2015, the day prior to your appointment as Minister of Finance. The records further show that calls were further made from your cellular phone from within the Saxonwold area in the weeks post your appointment as Minister of Finance."

5.1.10 Minister Van Rooyen responded on 3 September 2017 submitting, inter alia that the Public Protector could not use *"the said cell phone records as evidence contained in the State of Capture report which is under judicial review until the conclusion of a judicial process".*'

[20] She identified that when the applicant answered the parliamentary question he had an opportunity to inform and explain his meeting with the Gupta family to the National Assembly, but instead 'he opted not to do so and deliberately made a misleading statement to the National Assembly'. It is this conduct which led her to conclude that he contravened the Executive Members' Ethics Code as per section 2.3(a), which reads:

'Members may not deliberately or inadvertently mislead the President, or the Premier or, as the case may be; the Legislature.'

[21] Noticeably, she then concluded that the parliamentary question related to the applicant having met the Gupta family in his official capacity since taking office as Minister of Finance. She reasoned that the pertinent period sought by the parliamentary question was 'since taking office' as Minister of Finance.

[22] The aforesaid culminated in the remedial action sanctioned by the Public Protector in her report which reads as follows:

'8.1.1 The President must, within thirty (30) days of publication of this report, take the appropriate action against Minister Van Rooyen for violating the Executive Ethics Code and the Constitution.

8.1.2 The President must within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly.'

Condonation and amended notice of motion

[23] In October 2018 the Supreme Court of Appeal (SCA) in *Minister of Home Affairs and Another v The Public Protector of South Africa*[1] held that the findings and remedial action of the Public Protector could not be reviewed in terms of Promotion of Administration of Justice Act 3 of 2000(PAJA), but instead on the principle of legality. The applicant sought condonation to amend his papers accordingly and this was not opposed.

[24] The applicant submits that he only became aware of the SCA decision around December 2018, thus he filed his supplementary affidavit on 16 January 2019, with his amended notice of motion on 29 May 2019.

[25] The delay is not inordinate and there is no opposition for the condonation sought. I am guided by the dicta in *Brummer v Golfil Brothers Investments (Pty) Ltd and Others*:

'…It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it

[1] *Minister of Home Affairs and Another v The Public Protector of South Africa* 2018 (3) SA 380 9SCA) at para's [36], [37] and [56].

is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'[2]

[26] In my view, it would be in the interest of justice to grant condonation as the SCA determination was after this review application was launched.

Analysis

[27] An investigation by the Public Protector is initiated by a complaint being lodged. In this instance the fifth respondent lodged a complaint pertaining to the applicant's conduct. The conduct complained of is central to the parliamentary question and the applicant's manner in responding thereto.

[28] It is trite that no court can prescribe how the Public Protector conducts her investigations, save that same ought to be conducted in a fair and rational manner.[3] In addition, it ought to be conducted with an open and enquiring mind, if not, it amounts to no investigation at all. This was aptly pointed out in *Public Protector v Mail and Guardian* by Nugent JA:

'[20] The second important observation I need to make is that we are not called upon to direct the Public Protector as to the manner in which an investigation is to be conducted and I do not purport to do so in this judgment. A proper investigation might take as many forms as there are proper investigators. It is for the Public Protector to decide what is appropriate to each case and not for this court to supplant that function. To the extent that I have suggested what might have been done in this case it is only to assess what might be expected in the proper performance of the functions of the Public Protector so as to determine the adequacy or otherwise of his investigation.

[21] There is no dispute in this case that an investigation and report of the Public Protector is subject to review by a court. I do not find it necessary to pronounce upon the threshold that will need to be overcome before the work of the Public Protector will be set aside on review.

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[2] *Brummer v Golfil Brothers Investments (Pty) Ltd and others* 2000 (2) SA 837 (CC) at para [3].
[3] *South African Bureau of Standards v The Public Protector and Another* (34290/15A) [2019] ZAGPPHC 101 (27 March 2019) at para [12].

It would be invidious for a court to mark the work of the Public Protector as if it was marking an academic essay. But I think there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in this case.' [4]

[29] There are various interpretations of the parliamentary question before this court, that being the applicant's interpretation, the Public Protector's interpretation and respondent's interpretation. In my view it is best to commence by examining the Public Protector's interpretation of the parliamentary question.

[30] Apparent from her report is that she inferred that she ought to investigate whether the applicant 'deliberately or inadvertently' made a misleading statement to the National Assembly when he answered the parliamentary question.

[31] According to the Public Protector the parliamentary question sought that the applicant answers whether he met with the Gupta family 'since he took office' as a Minister. She was adamant that the parliamentary question made no reference to 'in his capacity as a Minister.' Thus, it was pertinent 'when' he met them and not in which 'capacity' he met them. This was the Public Protector's understanding of the parliamentary question raised.

[32] The Public Protector concluded that there was a time bar in the question, being 'since taking office' as Minister. To this the respondents concedes that the Public Protector got the parliamentary question wrong. However, they assert that her answer to the parliamentary question was correct.

[33] She states that it was the applicant who ascribed a 'distorted interpretation to the phrase 'since taking office' to mean only in his official capacity.' Thus, she made

[4] *Public Protector v Mail and Guardian* 2011 (4) SA 420 (SCA) at para [20] and [21].

the supposition that his response advanced was in violation of section 2.3(a) of the Executive Members' Ethics Code.

[34] The respondents argue that the parliamentary question was not time barred as was incorrectly interpreted by the Public Protector. Their interpretation of the question is, that it sought to establish whether the applicant 'ever' had 'any' meetings with the Gupta family. Therefore, they were referring to meetings held before and after the applicant's appointment as Minister of Finance.

[35] The respondents acknowledge that the Public Protector misunderstood the parliamentary question in respect of the time bar and relevant period inferred in the parliamentary question. Interestingly, the respondents argue that she ultimately came to the correct conclusion.

[36] To cure the time bar placed by the Public Protector, the respondents argue that there may have been a typographical error or an attempt on the part of the Public Protector to rectify her erroneous view. They attribute the aforesaid contention to the fact that she later states in her report that the question was not limited to the applicant's official capacity. This is why the respondents are adamant that the parliamentary question does not relate to the applicant's official capacity.

[37] I have already set out the applicant's interpretation of the parliamentary question above. He avers that the question refers to his official capacity. That being so, the question could only be referring to the period when he had taken office as the Minister of Finance.

[38] This being a rationality review I refer to *Motau* which eloquently explains what constitutes a rationality review. Khampepe J states that:

'the principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard, it must be rationally

related to the purpose for which the power was given. It is established that the test for rationality is objective and distinct from that of reasonableness.' [5]

Simply put there has to be a 'sufficient connection between the means chosen and the objective sought to be achieved'.

[39] On an examination of the complaint specific reference is had to the period 2 to 8 December 2015, which amounted to 'the run-up' to the applicant's appointment as Minister of Finance. Thus, the period referred to in the complaint is clearly stated. Confirmation of that specific period is also found in the Public Protector's referral to the media reports which were in the public domain. These media reports allude to an inference being drawn, linking the meetings held between the applicant and the Gupta family to his appointment, so claims the respondent. This in my view is indicative that the complaint refers to the period 2 to 8 December 2015, before the applicant's appointment as the Minister of Finance.

[40] Looking at the parliamentary question the period referred, in my view, is to be found in the phrase 'since taking office'. This is so, even on the respondent's version. If one takes into consideration the words 'ever' and 'any' as suggested by the respondent, one cannot wish away the phrase 'since taking office' in the parliamentary question. Thus, in my view, the period referred to in the question would be after the applicant took office, from 9 December 2015.

[41] Clearly the applicant's response of, not in his 'official capacity', is relative to the time period when he took office on 9 December 2015. His interpretation with regards to the period when did his 'official capacity' commence, ties in with when he took office as the Minister of Finance.

[42] Both the Public Protector and the applicant were *ad idem* as regards to the period of time relevant to the parliamentary question. It is the period in the complaint that caused confusion for the Public Protector. This is so, as the latter refers to a

[5] *Minister of Defence and Military Veterans v Motau and Others* 2014(5) SA 69 at para 69.

different period, that being ‘the run up to his [the applicant’s] short lived tenure as Finance Minister’. This clearly refers to the period before the applicant was appointed.

[43] In the circumstances, the applicant is correct when he states that the complaint should not have been entertained in the first place as it was not related to any alleged breach on the part of the applicant. Thus, I agree with the applicant’s argument that the Public Protector should have rejected the complaint on the grounds of relevance. The complaint not being relevant to the parliamentary question asked and answered by the applicant. I am fortified in my view that the parliamentary question and the complaint are not in sync with each other as they pertain to two different periods.

[44] It is against this backdrop, that I have come to the conclusion that the Public Protector commenced her investigations from an incorrect premise. Consequently, the investigation could not have been conducted with the relevant enquiring mind and in a fair and rational manner. This is so as the focus of the enquiry and investigations were for a period not relevant to the parliamentary question posed to the applicant.

[45] It must be pointed out that the applicant did respond to the parliamentary question posed by the respondents. From his answer, it is clear that his response is within the confines of the question posed. Therefore, his response amounts to the following: that when he assumed office as Minister of Finance from 9 December 2015, in his official capacity, he did not meet with the Gupta family. In the circumstances, it cannot be said that the applicant was evasive or that he sought to ‘dodge’ the question. He did not deny that he met with the Gupta family but as explained this was in his capacity as Treasurer General of the MKMVA.

[46] The Public Protector having not differentiated between the two periods is undoubtedly telling of the investigation conducted and points to it being disjointed. Accordingly, the applicant’s response to the parliamentary question could not amount to deliberately or inadvertently misleading the National Assembly. Hence, the finding of the Public Protector that this complaint had been substantiated cannot be correct. It stands to reason that her findings cannot be correct and the remedial action suggested cannot be implemented.

[47] Consequently, the applicant has made out a case that the investigations, findings and remedial action proposed by the Public Protector are not rationally connected to the parliamentary question posed and answered to. The complaint was not relevant to the parliamentary question and accordingly the Public Protectors report is irrational and falls to be set aside.

Remedy

[48] Section 172 of the Constitution directs this court to exercise a wide discretion to issue an order that is just and equitable. I am also mindful of the fact that the Public Protector exercises her powers in terms of section 182 of the Constitution and the Public Protectors Act, in investigating, making findings and proposing remedial action.

[49] I am guided by the *dicta* in *Economic Freedom Fighters and Others v The Speaker of the National Assembly and Another* as sets out below:

'[210] However, this Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1) (b) empowers courts to make any order that is just and equitable. In *Hoërskool Ermelo* the Court said about a just and equitable remedy: "The power to make such an order derives from section 172(1) (b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1) (b) of the Constitution provides that when this Court decides a constitutional matter within its power it 'may make any order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words, the order must be fair and just within the context of a particular dispute."

[211] The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution....'[6]

[6] *Economic Freedom Fighters and Others v The Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 210-211.

[50] In proposing the relevant remedy to be implemented the applicant placed emphasis on the fact that the Public Protector did not oppose the proceedings and choose rather to abide by this court's decision. It was further pointed out that her findings took into consideration what she constitutes to be 'admissions' made by the applicant. Lastly, the facts are common cause and there is nothing in dispute.

[51] The applicant having made out a case that investigations, findings and remedial action are factually unfounded, irrational and unlawful renders the Public Protector's conduct inconsistent with the Constitution. Thus, the report must be declared invalid.

[52] The fourth and fifth respondent seek, that the report be set aside and the matter be remitted to the Public Protector for reconsideration, if it is found that her conduct is not consistent with the Constitution.

[53] The applicant argues that on the facts of the case, no further value could be added by way of further investigations, if the matter is remitted. It is further pointed out, by the applicant, that any remedial action recommended would not be relevant, as the applicant is no longer a Member of Parliament nor a member of the National Executive. The applicant avers that these are exceptional reasons which warrant that the matter not to be remitted.

[54] The relief sought by the applicant is extraordinary in comparison to the usual order of remittal to the Public Protector. In exercising my discretion, I especially took into account that the parliamentary question was answered and such answer was substantiated during the course of the Public Protector's investigations. I also took into account that, by way of the cellphone records, it was established that the meetings held with the Gupta's were prior to the applicant taking office as Minister. Thus, falling outside of the scope of the parliamentary question.

[55] The circumstances, thus dictate that an extraordinary remedy be implemented, for even if remitted to the Public Protector, further investigations would be fruitless.

Hence, it is a foregone conclusion that the outcome will not be different if the matter is remitted.[7]

Costs

[56] The respondents argue that the costs ought to be granted in the usual manner against the decision maker, being the Public Protector. They further contend that, though the Public Protector did not oppose this application, the State ought to bear the costs in line with the principles set out in *Biowatch Trust v Registrar Genetic Resources and others.* [8]

[57] The applicant avers that the respondents who chose to oppose the application bear the costs. He argues, that their opposition was not justified, especially as the decision maker sought to abide.

[58] I have considered the argument and the case of *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO and others* [9] referred to by the respondents. In my view, the fourth and fifth respondents were within their rights to defend their parliamentary question and complaint. *Magnificent Mile* referred to by the respondents is distinguishable to this matter. In that in *Magnificent Mile*, it was the government as respondents who created the debacle. Thus, *Magnificent Mile* took the stance that it did, which the Constitutional Court found to be understandable.

[59] In this matter, the debacle in my view was caused by the fourth and fifth respondents. This is so, as the complaint raised was not in respect of or even relevant to the parliamentary question. Thus, the resultant investigations and report of the Public Protector emanates from the irrelevant complaint raised to the parliamentary question. The initiators are the fourth and fifth respondents.

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[7] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at paras [42] and [47].
[8] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at paras [26] – [28].
[9] *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO and others* 2020 (4) SA 375 (CC).

[60] In the result, the costs are to follow the result.

Order

[61] Accordingly, the following order is made:

1. The late filing of the applicant's supplementary affidavit is condoned.

2. It is hereby declared that the findings and remedial action contained in the Public Protector Report No: 11 of 2017/2018, titled 'Report on an investigation into the allegations of a violation of the executive ethics code by the Minister of Co-operative Governance and Traditional affairs, Mr David Douglas van Rooyen, MP' (The Public Protector Report) are factually unfounded, irrational and unlawful.

3. It is declared that the applicant did not deliberately mislead parliament when he replied to parliamentary question No. 927 in 2016.

4. The Public Protector report is accordingly reviewed and set aside.

5. The fourth and fifth respondents are ordered to pay the costs of the applicant, jointly and severally, such costs to include the costs of two counsel where so employed.

W Hughes
Judge of the Gauteng High
Court, Pretoria

Virtual Hearing: 11 November 2021
Electronically Delivered: 29 March 2021

Appearances:
For the Applicant: Adv. Masuku SC
Adv. Mathipa
Instructed by: Lucky Thekisho Attorneys

For the Respondent: Adv. Bishop

Instructed by: Minde, Schapiro & Smith