IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

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

(3) REVISED

1 JUNE 2022 [signature]

DATE SIGNATURE

CASE NO: 74427/19

DATE: 1 June 2022

In the matter between:-

MATTHEWS SESOKO	First Applicant
ROBERT MCBRIDE	Second Applicant
NOMKHOSI NETSIANDA	Third Applicant
MARIANNE MOROASUI	Fourth Applicant
BAATSEBA MOTLHALE	Fifth Applicant
INNOCENT KHUBA	Sixth Applicant
DAVID DE BRUIN	Seventh Applicant
THEREZA BOTHA	Eighth Applicant

V

THE OFFICE OF THE PUBLIC PROTECTOR	First Respondent
BUSISIWE MKHWEBANE	Second Respondent
INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	Third Respondent
FIDELITY SECURITY SERVICES (PTY) LTD	Fourth Respondent
MINISTER OF POLICE	Fifth Respondent

JUDGMENT

KOOVERJIE J

A REVIEW APPLICATION

[1] The applicants seek to review and set aside the findings as well the remedial action imposed by the Public Protector in her final report titled **"Report No. 41 of 2019/2020 – Report on an investigation into allegations of procurement irregularities, irregular appointment and maladministration relating to the appointment of Ms TH Botha as Deputy Director: National Specialized Investigation Team"** dated 16 September 2019 ("the Report").

[2] In addition, the applicants sought a punitive cost order against the Public Protector.

B THE PARTIES

[3] The main role players in these proceedings are set out below. The eight applicants held official positions at the time with the Independent Police Investigative Directorate ("IPID") and were implicated in the Public Protector's report. More specifically, the first applicant, Mr Sesoko, held the position as National Head of Investigation at IPID and the second applicant, Mr Robert McBride, held the position as the Executive Director of IPID. The eighth applicant, Ms Thereza Botha, was appointed as Deputy Director, National Specialized Investigation Team ("NSIT") in IPID.

[4] The Office of the Public Protector, and Ms Mkwebane are cited as the first and second respondents. She is cited in her official capacity as the person appointed in terms of Section 1A of the Public Protector Act 23 of 1994 ("the PPA") read with Section 193 of the Constitution ("the Constitution"). The first and second respondents will be referred to as the respondents or the "Public Protector" in this judgment.

[5] The third respondent is the Independent Police Investigative Directorate ("IPID"), established in terms of Section 3 of the Independent Police Investigative Directorate Act 1 of 2011.

[6] The complainant is Mr Nkabinde, a previous IPID employee.

C GROUNDS FOR REVIEW

[7] On the papers, the decision of the Public Protector, the findings and the remedial action imposed were broadly challenged on the following basis, namely:

(a) Irrational process

The Public Protector followed an irrational process that prevented her from making impartial and informed decisions.

(b) The failure to give reasons

The Public Protector failed to disclose reasons for rejecting large portions of the applicants' representations, together with material evidence challenging the preliminary findings. The absence of reasons created an inference of irrationality.

(c) The findings are irrational

The report findings were arbitrary as they were not rationally connected to the evidence disclosed in the report and other evidence that the applicants presented to the Public Protector during the investigation (which evidence was not considered in the report).

(d) The remedial action was based on irrational findings and is unlawful as the Public Protector was not authorized to direct IPID to take remedial steps that are vague, legally impermissible and violate the separation of powers.

D LEGALITY REVIEW

[8] The Public Protector's core powers and functions are derived from the Constitution and the rule of law and is reviewable on the principle of legality[1]. The principle of legality requires that the exercise of public power and the performance of a public function must be rational.

[9] Although this review was initially premised on both procedural and substantive aspects, during the hearing the applicants have, in the main, persisted only with a procedural review of the Public Protector's decision. It has been argued that the process in arriving at the decision was irrational. Procedural rationality requires that there be a rational connection between the exercise of power in relation to both the process of arriving at the decision as well as the purpose sought to be achieved through the exercise of such public power[2].

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[1] Minister of Home Affairs and Another v Public Protector 2018 (3) SA 380 SCA at para 37 and 64
[2] Public Protector v President of the Republic of South Africa 2021 (6) SA 37 CC

[10] The applicant submitted that the said procedural rationality issue should be deliberated separately from the substantive issues. Consequently, if the court finds procedural irregularities then it would not be necessary to make a finding on the substantive issues.

[11] It is worth noting and as the respondents correctly pointed that this court may review findings if they are material and affects the outcome of the decision. A mere mistake does not constitute an irregularity. In this regard, reference was made to **Johannesburg Municipality v Gauteng Development Tribunal 2010 (6) SA 182 CC par 91** the court held:

"However a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of the Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is materially influenced by an "error of law". An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision maker would have reached the same decision, despite the error of law."

E CONDONATION

[12] On the papers, both parties have sought condonation for the late filing of their respective answering and replying affidavits. At the hearing the parties submitted that they would not be opposing each other's condonation applications. Having considered both condonation applications, I am satisfied that good cause has been shown by virtue of the explanations set out in the respective affidavits. Furthermore, I find that it is in the interests of justice that condonation be granted. For the purposes of this judgment I do not find it necessary to further extrapolate on this aspect.

F THE BACKGROUND

[13] It is necessary to sketch the salient facts in order to understand the Public Protector's findings and the basis on which the Report was challenged. The issues between the parties arose from an emergency procurement which led to the appointment of Ms Botha. Mr Nkabinde, the complainant alleged that Ms Botha's appointment was irregular and that there was maladministration on the part of IPID officials.

[14] The Public Protector's findings emanated from three investigations, namely:

(i) the external contractor investigation where the Public Protector found that IPID did not comply with the procurement laws and policies when it appointed an external contractor;

(ii) the employment investigation where it was found that IPID did not comply with the employment laws and policies which led to appointment of Ms Botha was advertised; and

(iii) the Protected Disclosure Investigation. The Public Protector found that IPID suspended and instituted disciplinary charges against a complainant in order to penalize him for reporting IPID's officials' the unlawful conduct to the Minister of Police. Such conduct contravened the Public Protector Disclosures Act.

(a) Services rendered without an SLA being in place

[15] Prior to Ms Botha's appointment, IPID sought services from Fidelity Security Services (Pty) Ltd (fourth respondent "Fidelity"). During December 2016, discussions with Fidelity on the possibility of procuring a cell phone and data specialist from Fidelity ensued.

[16] On 9 December 2016 IPID obtained the quotation from Fidelity. Around 22 December 2016 it was recommended that Fidelity be appointed to provide services of a "cellular data interpretation specialist" for three months at R57,000 per month, totaling to R171,000.00.

[17] A memorandum ("deviation memorandum") was prepared to this effect recommending a deviation from the normal procurement process on the basis that the procurement was considered to be an emergency. Clause 8.1 of the National Treasury Instruction Note 3 of 2016-2017 defines "emergency" as *"a serious and unexpected situation that possesses immediate risk to health, life, property or environment that calls an agency to action ..."* In this case it was alleged that procurement was necessary, as IPID's investigators were subject to threats due to the cases they were investigating at the time. Such threats placed their lives at risk.

[18] It is common cause that no other service provider was invited to provide a quotation for these services and that the aforesaid memorandum was not signed by the chief financial officer. The respondents, however, pointed out that clause 19(d) of IPID Supply Chain Management Policy ("the SCM Policy") prescribed that emergency purchases should be approved by the executive through the CFO. This provision was contravened[3].

[19] The appointment of Fidelity was approved on the same date as the "deviation memorandum". Ms Botha was formally appointed by Fidelity to provide the services to IPID from 9 January 2017.

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[3] Clause 19(d) stipulates:

"All emergency purchases will be approved by the executive through the CFO."

[20] The Public Protector's report however revealed that prior to December 2016, Ms Botha had rendered services to IPID, without a written agreement concluded between IPID, Fidelity and Ms Botha. Furthermore, there was no written agreement concluded between 9 January to June 2017. The agreement was only signed in June 2017. IPID paid R171,000.00 to Fidelity for services rendered for the period 1 January to 31 March 2017.

(b) The Service Level Agreement (SLA)

[21] The Service Level Agreement ("SLA") was prepared together with an Addendum for the signature of Mr McBride (the Executive Director of IPID). The respondents contended that the SLA should have been signed in accordance with the SCM Policy provisions.

[22] The applicants contested this finding and particularly proffered an explanation to the Public Protector that the SLA had been signed by Mr McBride and submitted to Fidelity for its signature. Since Fidelity misplaced such signed agreement, it signed a second agreement and forwarded it to the applicants. Due to an administrative oversight in Mr McBride's office, the second SLA was not furnished to Mr McBride for his signature.

[23] It was further pointed out that Fidelity only signed the SLA on 6 June 2017. This portrayed an irregularity as the SLA stated that the commencement date was 9 December 2016. Fidelity further signed the Addendum to the SLA. The Addendum recorded that the agreement would commence on 31 March 2017 and be terminated on 30 June 2017.

[24] On 4 August 2017, IPID gave Fidelity written notice of intention to terminate the SLA and Addendum. This meant that the contract period was extended to 6 September 2017.

[25] On 20 February 2019 Mr McBride approved a further payment of R342,000.00 to Fidelity for services rendered between April 2017 to September 2017. The respondents again pointed out that the payment was made for a period outside of the stipulated termination date. By virtue of the SLA and Addendum, Ms Botha should only have been entitled to payment until 30 June 2017.

[26] In addition, IPID also paid R102,123.15 to Fidelity for Ms Botha's travel and accommodation. It was argued that these expenses were not included in the quotation which was submitted with the deviation memorandum and that such memorandum was approved without the inclusion of the said expenses.

[27] The respondents also argued that IPID in extending the SLA to September 2017, exceeded the threshold for contract extensions under National Treasury Regulations and the variation of the contract period should have been approved by National Treasury.

(c) **Advertisement of post – Deputy Director NSIT**

[28] During this time, more particularly on 21 April 2017, IPID advertised the post of Deputy Director NSIT on the Department of Public Service and Administrations (DPSA's website) with reference no. **QS/2017/25**. An annual salary of R657,558.00 was offered. The qualification and experience requirements for the position was advertised as follows:

"Relevant NQF6 undergraduate or equivalent qualification involved or law enforcement as recognized by SAQA; a minimum of four (4) years' experience in a Criminal Justice System is required of which at least three (3) years' should have been in a supervisory position…"

[29] Another post under reference no. **QA/2017/29** was also advertised, offering an annual salary of R612,822.00 was advertised shortly thereafter. The qualification and experience requirements for this position were:

"Relevant Bachelor's Degree or equivalent qualification in law or law enforcement as recognized by SAQA; A minimum of four (4) years' experience in a Criminal Justice System is required and/or ten (10) years' experience as an Investigation Analyst…"

Ms Botha's application was successful and she was appointed in the post as Deputy Director NSIT.

[30] The report went at length in illustrating that Ms Botha not only did not qualify but that there were blatant irregularities in her appointment. In relation to her qualifications, it was argued, *inter alia*, that she had not met the requirements for the post, in that:

(i) she held only a matric certificate and not a degree;

(ii) she was an administrative clerk and not as she described herself as a "director: private priority crimes investigations";

(iii) the panel recommended her to be appointed on the annual salary of R612,822.00. It was later established that she was in fact appointed on a higher salary of R657,558.00.

(d) The complaints

[31] The appointment of Ms Botha caused the complainant, Mr Nkabinde, to firstly lodge a grievance with the office of the President. An investigation ensued where it was found that Ms Botha's appointment was irregular and the recommendations for corrective action was issued against the applicants and the panel members involved in the shortlisting of Ms Botha. Despite IPID and Mr McBride being directed to approach the Labour Court to review and set aside the appointment of Ms Botha., such corrective actions were not adhered to.

[32] The complainant thereafter lodged a second complaint (grievance) with IPID regarding the appointment of Ms Botha. On 28 April 2018, the complainant further lodged a third complaint of unethical conduct with the Minister against Mr McBride. Such complaint contained allegations of improper conduct on the part of Mr McBride which included, *inter alia*, the irregular appointment of Ms Botha and Mr McBride's involvement in an investigation to tarnish the images of specific officials and particularly to bring down the National Commissioner.

[33] On 4 June 2018 IPID placed the complainant on suspension. A disciplinary process against Mr Nkabinde was due to commence in September 2018. The charges levelled against him, included, *inter alia*, that he was responsible for; compromising the investigations conducted by IPID; leakage of information to external people and media; bringing IPID, its executive director and other senior managers into disrepute. His conduct prejudiced the administration of IPID.

(e) Public Protector's involvement and Report

[34] On 14 May 2019 the Public Protector issued notices in terms of section 7(9)(a) of the Public Protector Act inviting implicated officials of IPID to respond to the allegations against them. The applicants, through their legal representative, submitted representations in writing on 12 June 2019.

[35] On the substantive issues, the Public Protector found that IPID failed to follow proper procurement processes. The findings, in the main, illustrated non-compliance with IPID's SCM policy. In particular, that:

(i) the chief financial officer was not involved in the deviation of the procurement process;

(ii) there was no confirmation that the expenditure was in accordance with the vote of the finance division;

(iii) the SLA between IPID and Fidelity was not signed by the Executive Officer, Mr McBride, as required by the SCM Policy;

(iv) the extension or variation of the SLA exceeded the 15% threshold of the original contract value and furthermore was not considered by the BSC, BEC and BAC as required by the SCM Policy;

(v) the payment of R513,000.00 to Fidelity was made without a valid and signed contract in place;

(vi) the expense of R102,123.15 for Ms Botha's travel and accommodation was neither included in the deviation memorandum nor was it approved separately.

[36] The Public Protector consequently found that Mr McBride and Ms Moroasui, the fourth applicant, contravened various provisions of the Constitution, more particularly section 195 and section 217 of the Constitution, Section 38 and 39 of the PFMA, National Treasury Regulations, the IPID Act and the SCM Policy. The Public Protector concluded that such conduct amounted to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

G IRRATIONAL PROCESS

[37] The main thrust of the applicants' case was that the Public Protector's process in arriving at its findings was irrational. The applicants highlighted that the Public Protector could not have arrived at an impartial and informed decision due to the pertinent irregularities identified, namely:

(i) the investigator, Mr Dlamini, was biased and should have been removed from the investigation;

(ii) the Public Protector failed to record the material evidence it relied upon;

(iii) the Public Protector failed to disclose Mr Nkabinde's complaint. Such disclosure was only made in the answering papers in these proceedings;

(iv) no opportunity was furnished to IPID to make representations on the proposed remedial action imposed by the Public Protector;

(v) the Public Protector failed to consider the matter with an "open and enquiring mind". More particularly, evidence which the applicants furnished was material and not taken into consideration.

[38] During the hearing, the applicants only persisted with the following grounds on review (as set out aforesaid in) **(i)** – biasness, **(ii)** - recordal of material evidence and **(v)** - failure to apply an open and enquiring mind. On the issue in **(iv)** – the respondents conceded at no "audi" was afforded to the applicants regarding the remedial action imposed.

[39] The respondents raised the contention that since the applicants failed to plead the respective grounds of review in their papers, their argument in terms of Section 3 of the Public Protector Act is misplaced.

[40] Consequently, at the hearing, I tasked the applicants to identify the portions it relied upon in their papers which supported their grounds, particularly the aforesaid three said grounds they persisted with. I have been satisfied that the applicants have raised the necessary facts in their answering and replying affidavits which supported the said grounds[4].

[41] It was also argued that certain of the grounds were raised for the first time in the replying papers. I have perused the papers and am further satisfied that due to the respondents

[4] On issue of bias: founding affidavit p01-60, para 103, 104, 105, replying affidavit p 07-04, para 7.3.1., supplementary founding affidavit 3-9, 3-24 issue of the recordal of evidence: supplementary founding affidavit- P3-7 to 3-11

raising certain aspects, only in their answering papers, the applicants were entitled to respond thereto in the replying affidavit.

H BIASNESS

[42] On the issue of bias, it was pointed out that Mr Dlamini's role in the investigation compromised the findings in the Report. Mr Dlamini was conflicted in various ways. Not only had he and the complainant previously worked together as colleagues but they were in imminent contact with each other shortly before the complaint was lodged and thereafter. In fact, they met on various occasions. Furthermore, the content and nature of their discussions pertaining to the investigation were not recorded.

[43] The Public Protector, although alerted to the said conflict, failed to remove Dlamini from the investigation. It was argued that reasonable apprehension of bias was prevalent and consequently had an effect on the findings in the Report.

[44] The biasness was further extenuated by the following circumstances, namely:

(i) Mr Dlamini's failure to disclose his relationship with the complainant prior to the inception of the investigation.

(ii) Despite being aware that this had become a contentious issue, Mr Dlamini failed to address the extent of his relationship with the complainant in his affidavit.

(iii) In the letter of 20 November 2018, the Public Protector conceded that there was regular communication between Mr Dlamini and the complainant but she claimed that discussions were only regarding the progress of the case. It was contended that this could not have been the situation as numerous telephonic conversations and discussions had taken place pertaining to the investigation.

(iv) The Public Protector's contradictory responses were also pointed out. In correspondence it was illustrated that Mr Dlamini was merely assisting in the investigation[5]. Subsequently, in her affidavit, it was conceded that Mr Dlamini was an oversight investigator. However, Mr Dlamini's version under oath was that he in fact was the investigator[6].

[45] I have noted that Ms Manyatella, in correspondence dated 18 November 2018, advised that Mr Dlamini will be replaced as an investigator[7]. However, a week later, on 26 November 2018, the Public Protector confirmed that Mr Dlamini would remain in the investigation.

[46] It is the applicants' case that the Public Protector's conduct was contrary to her constitutional obligations as contemplated in Section 181(2) of the Constitution read with Section 3 of the PPA.

[47] The respondents argued the contrary. On their version it was argued that there are no facts as per the Report that demonstrated that the Public Protector was in any way biased against any of the applicants. More particularly, it was argued that:

(i) The prior association of Mr Dlamini in itself was not a reasonable basis for an apprehension of bias. There was no factual or legal basis that disqualified Mr Dlamini.

(ii) More importantly, the biasness of Mr Dlamini could not be attributed to the Public Protector[8]. It could not be assumed that by virtue of Mr Dlamini's alleged bias, the respondents were also biased and as such the Report is tainted with bias.

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[5] Report p 01-132
[6] Answering Affidavit p 06-58, para 7
[7] Annexure PP8
[8] The respondents relied on Staufen Investments v Minister of Public Works 2020 (4) SA 78 SCA par 73

(iii) The mere fact that he previously worked with the complainant at IPID and spoke with him during the investigation was not sufficient to find actual reasonable suspicion of bias. A direct connection with the investigation was necessary to establish bias.

(iv) The transcripts of the various interviews did not reflect any bias on his part.

(v) It was pointed out that with regard to the allegations against Ms Hlalele, Ms Phalatsi and Ms Hlongwane, the Public Protector was satisfied with their evidence and therefore there was no reason to implicate them. For instance:

(a) Ms Hlalele indicated that her conduct was a mistake and she was not evasive about the issue;

(b) Ms Phalatsi was pressured by Mr Sesoko into authorizing the advertisement of the post. She explained in her interview why she never escalated the matter beyond her immediate superior[9];

(c) Ms Hlongwane in fact had pointed out to the short listing panel that Ms Botha did not qualify for the post but was simply ignored[10].

(vi) The evidence on which the Public Protector relied for her decisions was set out in the Report. Hence the non-recorded interviews with the complainant were immaterial. The Public Protector would have availed such evidence if considered to be material.

I ANALYSIS

[48] Section 181 (2) of the Constitution mandated the Public Protector to conduct independent and impartial investigations in state affairs and public administration. Section 181(2) provides:

[9] Page-8-385 of the record
[10] Page 1-157 of the record

"These institutions are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."

The said characteristics of impartiality, fairness and independence was endorsed in Section 3 of the Public Protector Act ("the PPA")[11].

[49] Section 3(13)(a) of the PPA requires of investigators to perform their functions impartially , independently, in good faith, without fear, favour and prejudice. Section 3(13)(a) reads:

"A member of the office of the Public Protector, shall:

(a) serve impartially and independently and perform his or her functions in good faith, and without fear, favour, bias or prejudice."

[50] Section 3(14) of the PPA is the enacting provision that empowers the Public Protector to disqualify persons from participating in any investigation if he/she has any interest that "might" prevent them from performing their investigative functions in a fair, unbiased and proper manner[12].

[51] The applicants submitted that the word "might" demonstrates that all that is required is a possibility of unfairness, bias or impropriety. If these elements are present, then an element of bias is established.

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[11] S182 (1) reads, 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;
(b) To report on that conduct; and
(c) To take appropriate remedial action.

[12] Section 3(14) reads: "No person …, shall conduct an investigation … in respect of a matter in which he or she has any pecuniary interest or any other interest which might preclude him or her from performing his or her functions in a fair unbiased and proper manner."

[52] The respondents persisted with their argument that even if Section 3(14) is found to be applicable, the applicants have not shown that Mr Dlamini had an "interest". It was argued that the quality assurance processes the Public Protector adopted ruled out any suspicion of bias. With such check and balances in place, Mr Dlamini could not have influenced the outcome of the investigation.

[54] The Public Protector's obligations by virtue of the Constitution is premised on two fundamental tenets", namely that the Public Protector is expected not only to do justice but justice must be seen to be done. Secondly, Section 3(14) of the PPA gives the Public Protector additional powers to be proactive and ensure that the office conducts itself with the highest level of fairness and impartiality.

[53] Furthermore, Section 3(15) required the Public Protector to proactively take all steps necessary to ensure a fair, unbiased and proper investigation[13].

[55] It is not disputed that the onus is on the applicants to prove bias. Our authorities have considered and approved the reasonable apprehension of bias approach to be the appropriate test. The test would be: whether a reasonable objective or informed person would on the facts reasonably comprehend that the decision maker would not bring an impartial mind to bear on the adjudication of the case[14]. All that is required is a reasonable apprehension of bias[15]. Due to the extensive responsibility placed on the Public Protector, the said test, in my view, is the appropriate standard.

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[13] S3(15) reads: "If any person fails to disclose an interest contemplated in subsection (14) and conducts on renders assistance with regard to an investigation contemplated in Section 7, while having an interest in the matter being investigated, the Public Protector may take such steps … to ensure a fair, unbiased and proper investigation."
[14] President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 CC at par. 148 (SARFU matter)
[15] BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673 A at 691 E-F and 694 G-J

[56] The landmark and far reaching dictum in ***R v Sussex Justices ex parte McCarthy***[16], enshrined the aforesaid approach, and more specifically principle that the mere appearance of bias is sufficient. This dictum brought into common parlance the apprehension "not only must justice be done; it must also be seen to be done. At 259 the court held:

"... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should be manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case, the deputy clerk made any observation or offered any criterion which he might not have properly made or offered; the question is whether he was so related to the case in its civil aspects as to be unfit to act as a clerk to the justices in the criminal matter. The answer to the question depends not upon what actually was done but what might appear to be done which creates even a suspicion that there has been an improper interference with the court of justice ...". (My emphasis).

[57] This approach was adopted by our authorities over time and referred to as the "reasonable apprehension of bias" principle. In ***BTR Industries*** matter[17] upon a review of authorities stated:

"I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias. The test is that of a reasonable person."

[58] In my view, fair and administrative conduct is premised on two core principles namely:

(i) the decisions are more likely to be sound when the decision-maker is unbiased; and

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[16] [1923] All ER 233 (Sussex Justices matter)
[17] BTR Industries matter at p 693 I-J

(ii) the affected persons and the public will have more faith in the administrative process when justice is not only done but seen to be done.

The latter principle is attributed to public confidence. Decision makers must therefore be prevented from making or being seen to be making decisions that are biased.

[59] The Public Protector holds a onerous responsibility in serving the public. As part of her duties she is required to demonstrate that justice is being served. Such outward act of transparency exudes confidence in not only the public but in the administration of justice.

[60] In the SARFU matter, the court endorsed the reasonable person test applied in the BTR matter[18]. It stated:

"An unfounded or unreasonable apprehension of bias is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in light of the true facts as they emerge at the hearing of the application …."

[61] The court in the SACCAWU matter[19], further upheld the SARFU test. The court held:

> *"Not only must the person apprehending bias be a reasonable person, but the apprehension must in the circumstances be reasonable …. The double reasonableness requirement also highlights the fact that mere apprehension on the part of the litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable …";*

The court further expressed that[20]:

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[18] SARFU matter at p 175
[19] South African Commercial Catering and Allied Workers Union v I&J Ltd 2000 (3) SA 705 CC (SACCAWU matter
[20] SACCAWU matter at par 56-58, dissenting judgment

"... A Judge is called upon to decide whether or not a disqualifying apprehension of bias exists, however should consider the apprehension of a lay litigant alleging bias and the reasonableness of that apprehension based on actual circumstances of the case. As Cameron AJ points out, the lay litigant is assumed to be well informed and equipped with the correct facts. But the litigant should not be expected to have the understanding of a trained lawyer ... It will be the Judges who decide and who must have an open mind. In all circumstances, the test emphasizes reasonableness in light of the true facts ..." (my emphasis).

[62] I find it apt, at this point, to summarize the requirements set out by our authorities in order to meet the reasonable apprehension of bias standard which are the following:

(i) real likelihood of bias is not a prerequisite for disqualifying bias. If suspicion is reasonably apprehended, then it is sufficient to establish bias;

(ii) the test to be applied is a reasonable test. Here the person apprehending the bias must be seen from a reasonable person's perspective;

(iii) it is an objective test and must be considered against the backdrop of the facts and circumstances in each case;

(iv) by virtue of the reasonable apprehension of bias a relationship, friendly or personal does attract a personal interest[21].

[63] Time and again we have been reminded that the proper and effective performance of the functions of the Public Protector is of particular importance, given her constitutional mandate and the extraordinary powers that are vested in her office. When the Public Protector fails to discharge such mandate, the strength of South Africa's constitutional democracy is

[21] Liebenberg v Brakpan Liquor Licensing Board 1944 WLD

compromised. It is for these reasons that the Public Protector is subject to a higher duty and higher standards than ordinary administrators[22].

[64] In applying the aforesaid approach and having regard to the facts and circumstances in this matter, I find that the reasonable apprehension of bias test has been met for the reasons set out below.

[65] It cannot be gainsaid that Mr Dlamini, as the investigator, played an integral role in the investigation and which had an impact on the findings of the Report. The Public Protector relied. On the respondent's own version, it was submitted that the Public Protector relied on functionaries in her office for their investigations and findings including the collation and recordal of evidence, hence the detail in the Report.

[66] Mr Dlamini confirmed that in fact he was the investigator[23].

[67] The following facts, namely that: the complainant and Mr Dlamini were reasonably acquainted, they had met prior to the complaint being lodged and several unrecorded interviews with the complainant took place, also remain common cause.

[68] It was further not disputed that Mr Dlamini and the complainant were previously work colleagues at IPID and the complainant contacted Mr Dlamini a week before the complaint was lodged. Mr Dlamini, by virtue of Section 3(13), had an obligation to disclose the nature and the extent of his relationship with the complainant.

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[22] Democratic Alliance v Public Protector and Another [2019] 3 All SA 127 GP at par 30 to 31
[23] Annexure PP8

[69] The Public Protector was advised, prior to the investigation being completed, on at least two occasions in letters dated 14 November 2018 and 28 January 2019, of the probable conflict of interest. Hence it was sufficiently brought to the notice of the Public Protector that a reasonable apprehension of bias became evident. In my view, the Public Protector should have erred on the side of caution and taken the necessary steps in terms of Section 3(15) of the PPA. This would have ensured an impartial and unbiased investigation.

[70] Furthermore, upon reviewing the Report I have also taken cognisance of the various "key sources of information" relied upon by the Public Protector. More particularly, I have noted that no mention is made that recordals of the interviews with the complainant exist. Surely, the complainant's evidence was material. The investigation was initiated due to the complaint being lodged with the Public Protector.

[71] The Report itself endorsed a fair and impartial approach. It was recorded that the investigation was conducted *"through a factual enquiry relying on the recordal of the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination was made on what happened on a balance of probabilities"*[24].
This statement in itself demonstrates that reliance was placed on the recordal of the evidence.

[72] It was further recorded that *"the investigation was conducted in terms of Section 182(1)(a)(b)(c) of the Constitution"*.

(ii) <u>Failure to record material evidence and disclosure thereof</u>

[24] P 1-95 of the record

[73] Rule 45(1) of the "Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto" (the Rules) provides that: *"Any proceedings in terms of this Act and any discussions held, oral submissions made or evidence given as part of any investigation, whether before the Public Protector or any staff member of the Public Protector, shall be recorded by the Public Protector in any manner he or she deems fit"*[25].

[74] It was submitted that the said Rule made provision for the recordal of all evidence, discussions and oral submissions forming part of the investigation. In this investigation it is common cause that various telephonic interviews and conversations were not recorded.

[75] More concerning is that the interviews between Mr Dlamini and the complainant pertaining to the investigation were not recorded. It was necessary that all such interviews and discussions pertaining specifically to the investigation be recorded.

[76] At this stage, the circumstances are such that both the applicants and the office of the Public Protector remain in the dark as to the nature and contents of various discussions, interviews and telephonic conversations between Dlamini and the complainant. Mere allegations that such evidence was not material to the investigation could only be made if the office of the Public Protector had the recordals and could appropriately advise this court thereon.

[77] During the course of argument, the respondents attempted an explanation that all material information and documents pertaining to the main subject matter being investigated, was made available. In my view, such explanation does not remedy their non-compliance with Rule 45(1). The provision for the recordal of evidence is a peremptory requirement. Once

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[25] GN 945 in GG 41903 14 September 2018 and amended in GN 1047 in GG 43758 on 2 October 2020

again, the materiality of the evidence could only have been assessed if the recordals were considered. The said non-compliance compounds the bias issue.

[78] In my view, the consultations, interviews and discussions should have been recorded by Dlamini in whatever form, he deemed appropriate, at the time. As the investigator, there is no doubt that he duly consulted on the subject matter of the investigation.

[79] The Public Protector's explanation that Mr Dlamini's interaction with the complainant was limited to processes involved in instituting a complaint, cannot be convincing. The Report itself recorded that there were numerous meetings with the complainant pertaining to the subject matter of the investigation. As the investigator, Mr Dlamini required to keep records of such consultations.

[80] A rational process can be attained if the process by which the decision is made and the decision itself must be rational[26]:

"Rationality review covers the process by which the decision is taken… If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose."

(iii) <u>Responding to proposed remedial action</u>

[81] The Public Protector is required to afford the affected persons a hearing when it appears that a particular remedial action, which adversely affects such persons, may be taken. Reliance was

[26] Zuma v Democratic Alliance; Acting Director of Public Prosecutions v Democratic Alliance 2018 (1) SA 200 SCA par. 82

placed on ***President of the Republic of South Africa v Public Protector 2021 (6) SA 371 at paragraph 126*** where the full court held that:

"... when the Public Protector contemplates taking remedial action on the subject of an investigation, this subject is entitled to an opportunity to make representations on the envisaged remedial action in question to enable the affected person to make meaningful representations."

[82] In this instance the Public Protector failed to invite the applicants to make representations on the proposed remedial action. The respondents conceded this point. The Public Protector was obliged by virtue of S 7(9)(a) of the PPA to afford parties, who are adversely affected, to be given a hearing on the remedial action proposed.

[83] The respondents further conceded that this omission constituted a material error of law. On this point it was argued that such remedial action stands to be reviewed and set aside and further submitted that the remedial action should be remitted to the Public Protector for reconsideration and that the applicants be afforded a hearing before a final decision is made on the remedial action.

[84] On this issue alone, I find that the remedial action should be set aside on the basis of procedural unfairness[27].

(iv) <u>Open and enquiring mind</u>

[27] The Law Society of South Africa v President of the Republic of South Africa2019 (3) SA 30 CC at par 64 where the court distinguished between procedural fairness and procedural rationality.
Procedural fairness has to do with affording an opportunity to be heard before an adverse decision is rendered

[85] This brings us to the substantive challenges raised in the Report. It has not been disputed that the Public Protector is required to approach an investigation with an open and enquiring mind.

[86] The applicants attempted to illustrate various instances where the Public Protector failed to conduct the investigation "impartially and with an open mind". It was argued that the respondents ignored the evidence and failed to investigate the matter further when IPID furnished the office with substantial and material evidence.

[87] Once again, it is apposite to refer to ***Public Protector v Mail and Guardian 2011 (4) SA 420 SCA at par 22*** where it was that the Public Protector must approach the investigation with a state of mind that is not static[28]. The investigation therefore must meet the basic benchmark of a proper investigation that is conducted with an open and enquiring mind.

[88] It has time and again been emphasized by our authorities that the Public Protector is not a passive adjudicator between citizens and the State. Her mandate is an investigatory one, which requires proactiveness on her part. The Public Protector's therefore does not merely adjudicate, sit back and wait for proof whether there are allegations of malfeasance but she is enjoined to actively discover the truth[29].

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[28] *"The state of mind is one open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. It at first they do then it asks questions and seeks out information until they do. It is also not a state of mind that remains static ... It must always start and is one that is open and enquiring".*

[29] The Public Protector v Mail And Guardian matter par 19

[89] The Public Protector's function is to weigh the importance of the information and if appropriate, take steps that are necessary to determine the truth. The Public Protector must not only discover the truth but must also inspire confidence in the public that the investigation was conducted fairly and the truth has been discovered. Section 3(14) and 3(15) of the PPA places such additional responsibility on the Public Protector.

[90] I do not deem it necessary to extrapolate on the substantive contentions raised at this point, as I have found that the Public Protector's conduct is wanting in terms of procedural fairness and procedural rationality. It would be appropriate in this matter that the merits be addressed separately. Consequently, I make no findings on the substantive aspects.

J COSTS

[91] The applicants sought a personal costs order against the Public Protector. It was argued that this was not merely a case where there are few factual errors. There was a blatant breach of her fundamental obligations, namely Section 3 of the Public Protector Act and Section 45(1) of the "Rules".

[92] It was further contended that the Public Protector failed to exercise her powers in terms of Section 3(15) of the PPA, despite being advised that the investigation would be compromised if Mr Dlamini remained the investigator. The contradictory responses further aggravated the circumstances. Furthermore, the fact that the Public Protector failed to adhere to the imposed constitutional obligations, a punitive costs order was justified.

[93] I am mindful that the issue of costs is within the discretion of the court and must be exercised in a judicial manner. Consequently, a court would not merely grant a personal order for costs where a litigant is acting in a representative capacity[30].

[94] Punitive costs are warranted in circumstances where there is gross disregard of one's obligations. The court in ***Public Protector v Commissioner for the South African Revenue Service and Others 2022 (1) SA 340 CC*** held:

"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. 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."

[95] It must however be recognized that the Public Protector and her office are not perfect constitutional beings. Sometimes the office is prone to make elementary mistakes. The court in ***Public Protector v The South African Reserve Bank*** matter[31], acknowledged that the Public Protector, like all of us, is fallible and mistakes are to be expected in the course of the exercise of her powers. It requires to take much more than ignorance and limited competence in one's area of responsibility and poor judgment in order to be burdened with such a costs order.

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[30] Erasmus - Superior Court Practice, D\5-5 to 6
[31] At par 46

[96] Even though I have found the Public Protector wanting of fair procedure and rational process, there has been no evidence placed before me which illustrates gross negligence or recklessness or even dishonesty on their part.

[98] Personal costs orders are also imposed on litigants who act in bad faith or those who are grossly negligent. The meaning of bad faith or malicious intent extends to fraudulent, dishonest and perverse conduct. In order to establish bad faith, one has to at least recognize that the office bearer acted with the specific intent to deceive, harm or prejudice another person or establish serious or gross recklessness[32].

[99] It cannot be overstated that a personal costs order against a party is a very serious matter. Not only must there be a wrongdoing on the part of such litigant but the seriousness must be a reflection of the real harm or prejudice likely or reasonably anticipated to be suffered as a result of the unacceptable conduct.

[97] I have, however, emphasized that the Public Protector should have been mindful of the more onerous obligations placed on the office and with particular regard to the aforesaid legislative prescripts and the Constitution.

[100] Hence ordering the Public Protector to pay costs on a party and party scale, in my opinion, would be appropriate. Such an order, in any event, is punitive.

[101] I consequently make the following order:

(1) The Public Protector's findings made in Report no 41 of 2019/2020 noted:

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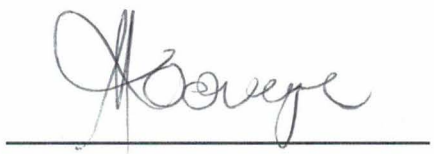
[32] Public Protector v South African Reserve Bank 2019 (6) SA 253 CC

"Report on an Investigation into Allegations of Procurement Irregularities, Irregular Appointment and Maladministration Relating to the Appointment of Ms TH Botha dated 16 September 2019" (Report) is set aside in its entirety.

(2) The remedial action set out in paragraph 7 of the Report is set aside in its entirety.

(3) The respondents are ordered to pay the costs of this application.



H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:	Adv S Budlender (SC)
	Adv M Dafel
Instructed by:	Adams & Adams Attorneys
Counsel for the First & Second Respondents:	Adv S Baloyi (SC)
	Adv V Mabuza
Instructed by:	Diale Mogoashoa Attorneys
Date heard:	22 April 2022
Date of Judgment:	1 June 2022