

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO. 91139/16

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Applicant

and

THE OFFICE OF THE PUBLIC PROTECTOR

First Respondent

PUBLIC PROTECTOR OF SOUTH AFRICA

Second Respondent

ECONOMIC FREEDOM FIGHTERS

Third Respondent

THE UNITED DEMOCRATIC MOVEMENT

Fourth Respondent

THE CONGRESS OF THE PEOPLE

Fifth Respondent

THE DEMOCRATIC ALLIANCE

Sixth Respondent

MABEL PETRONELLA MENTOR

Seventh Respondent

**COUNCIL FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN CONSTITUTION**

Eighth Respondent

SIXTH RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

(IN TERMS OF THE JUDGE PRESIDENT'S DIRECTIVE OF 25 OCTOBER 2017)

THE LEGAL EFFECT OF THE WITHDRAWAL OF THE REMITTAL RELIEF

- 1 The President has instructed his legal team to persist in seeking to set aside the relevant remedial action of the Public Protector, but not to seek any remittal to the Public Protector.
- 2 This means that, if the President's application is upheld, the extraordinarily serious matters raised in the Public Protector's report would be dealt with as follows:
 - 2.1 There would be no investigation at all of these issues by the Public Protector or a Commission; or
 - 2.2 Alternatively, the issues would be investigated by a Commission hand-picked by the President and with its terms of reference crafted by him.
- 3 This reveals that the President's purpose in bringing this application is to ensure that the issues raised in the Public Protector's Report, which implicate him, "his friends" and his family, are not investigated at all – unless he gets to pick both the person¹ to do the investigating and the terms of reference for the investigation. This is despite the patent conflict of interest and lack of perceived independence that would be involved.
- 4 The President's purpose in bringing this application is impermissible and unconstitutional. It violates sections 83(b), 83(c), 96(2) and 181(3) of the Constitution.
- 5 Once this is so, we submit that this Court is entitled and obliged to dismiss the application in its entirety, on this basis alone. This is because, as the Constitutional Court has held:

*"When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse."*²

¹ We note that neither the Constitution nor the Commissions Act requires a Commission to be headed by a judge and that some Commissions have in the past been headed by persons who were not judges. Thus, it appears that if the Public Protector's report were set aside, the President could pick any person to head the Commission.

² *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (1) SA 645 (CC) at para 20, quoting *Hudson v Hudson and Another* 1927 AD 259 at 268

6 The President's abandonment of the remittal relief is also destructive of his argument that the Public Protector had to make "factual findings" before engaging in remedial action. The relief he now seeks would prevent this from happening. A fundamental³ and general⁴ principle of our law is that a party is not entitled to blow hot and cold, or to approbate and reprobate. On this basis too, the application falls to be dismissed.

THE ORDER TO BE GRANTED

7 The application falls to be dismissed, both on the bases set out above and those submissions advanced previously. The President's counsel expressly conceded during argument that once this is so, the remedial action is binding and must be implemented.

8 In view of that concession, the extensive delays caused by this application and the massive public interest, this Court should not merely dismiss the application, but should also make an order in terms of section 172(1)(b) of the Constitution, directing the President to implement the Public Protector's remedial action forthwith. We cannot conceive of any objection the President could have to such an order, which is plainly just and equitable.

9 In relation to costs, when the matter was argued the Sixth Respondent gave the President the benefit of the doubt and sought only an ordinary order for costs. However, the President's subsequent abandonment of the remittal relief establishes that the application has been brought for an improper and unconstitutional purpose. There is therefore no reason that the public purse should bear the costs. The President should be directed to pay the costs personally, on an attorney-client scale, including the costs of two counsel.

STEVEN BUDLENDER
MICHAEL BISHOP
YANELA. S. NTLOKO
Counsel for the Sixth Respondent

³ *Equity Aviation Services (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC) at para 54

⁴ *Chamber of Mines of South Africa v National Union of Mineworkers* 1987 (1) SA 668 (A) at 690D–G