CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 232/19 and CCT 233/19

Case CCT 232/19

In the matter between:

ECONOMIC FREEDOM FIGHTERS	Applicant
and	
PRAVIN JAMNADAS GORDHAN	First Respondent
PUBLIC PROTECTOR	Second Respondent
BUSISIWE MKHWEBANE	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fifth Respondent
MINISTER OF STATE SECURITY	Sixth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Seventh Respondent
NATIONAL COMMISSIONER OF POLICE	Eighth Respondent
VISVANATHAN PILLAY	Ninth Respondent
GEORGE NGAKANE VIRGIL MAGASHULA	Tenth Respondent

Case CCT 233/19

In the matter between:

PUBLIC PROTECTOR	First Applicant
BUSISIWE MKHWEBANE	Second Applicant
and	
PRAVIN JAMNADAS GORDHAN	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Third Respondent
MINISTER OF STATE SECURITY	Fourth Respondent
DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
NATIONAL COMMISSIONER OF POLICE	Sixth Respondent
VISVANATHAN PILLAY	Seventh Respondent
GEORGE NGAKANE VIRGIL MAGASHULA	Eighth Respondent
ECONOMIC FREEDOM FIGHTERS	Ninth Respondent

Neutral citation:	*Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* [2020] ZACC 10
Coram:	Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Khampepe ADCJ (unanimous): [1] to [102] Jafta J (concurring): [103] to [117]
Heard on:	28 November 2019
Decided on:	29 May 2020
Summary:	Interim interdict — remedial action of Public Protector — separation of powers — appealability of interim interdicts — prospects of success — costs orders — applicability of *Biowatch* principle — personal costs orders — appealability of costs orders

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. In CCT 232/19 *Economic Freedom Fighters v Gordhan and Others*:
    a. The application for leave to appeal against the merits is dismissed.
    b. Leave is granted against the costs orders.
    c. To the extent that the High Court of South Africa, Gauteng Division, Pretoria, ordered costs against the Economic Freedom Fighters, that costs order is set aside and replaced with:
    "The Public Protector is ordered to pay Mr Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs, including the costs consequent upon the employment of two counsel."
    d. Each party is to pay its own costs in this Court.

2. In CCT 233/19 *Public Protector and Another v Gordhan and Others*:
    a. The application for leave to appeal against the merits is dismissed.
    b. Leave is granted against the costs orders.
    c. To the extent that the High Court of South Africa, Gauteng Division, Pretoria, ordered personal costs against Ms Busisiwe Mkhwebane, that costs order is set aside and replaced with:
    "The Public Protector is ordered to pay Mr Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs, including the costs consequent upon the employment of two counsel."
    d. Each party is to pay its own costs in this Court.

JUDGMENT

KHAMPEPE ADCJ (Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This matter concerns two applications for direct leave to appeal against the whole judgment and order of Potterill J in the High Court of South Africa, Gauteng Division, Pretoria (High Court).[1] It is common cause that both applications seek the same relief and challenge the order, albeit for slightly different reasons. As a matter of convenience, the cases were set down for hearing simultaneously. Although the matters were heard together, they were not consolidated and were treated as separate applications.

[2] The adjudication of this matter is of national importance as it concerns the granting of interim orders against the Public Protector – a State institution that is constitutionally mandated to strengthen constitutional democracy in the Republic.[2] To this end, the legal question that this Court is called to answer can be summarised as follows: how should a High Court approach an application for interim relief to suspend the implementation of remedial action that the Public Protector directs against a member of the Executive when that same member of the Executive challenges the legality of the remedial action? In other words, the question relates to the appropriate test to be employed when the High Court is called upon to grant an interim interdict against the Public Protector's remedial action and report.

[1] *Gordhan v Public Protector* 2019 JDR 1328 (High Court judgment).

[2] Section 181(1)(a) of the Constitution.

[3] The applicant in CCT 232/19, the Economic Freedom Fighters (EFF), posits a new test for granting interim interdicts against the Public Protector; one which is stricter than the 'extraordinary circumstances' test set by this Court in *OUTA*.[3] I deal with the contentions of the applicants in CCT 233/19, the Public Protector and Ms Busisiwe Mkhwebane, later. At the core of the EFF's arguments is that the Public Protector is a Chapter 9 Institution which has been constitutionally mandated to protect the public from any conduct in state affairs or other sphere of government that could result in impropriety or prejudice. Thus, the powers conferred on the Office of the Public Protector ensure that the Public Protector is a strut for our constitutional democracy. As the EFF's argument goes, the starting point is that there ought to be disapprobation to the granting of interim interdicts as they have the effect of undermining the accessibility and effectiveness of the Public Protector. Only 'extraordinary circumstances' would suffice to cause a court to deviate from this starting point. I deal with these contentions in more detail later.

[4] The respondents, comprising Mr Pravin Jamnadas Gordhan, the President of the Republic of South Africa, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula, vehemently disagree and contend that the applicants' arguments are misplaced and fundamentally flawed in law. In short, the respondents argue that the proposition of a stricter test was neither canvassed nor argued in the High Court. Instead, this proposition was first suggested in the papers before this Court. Mr Gordhan, in particular, argues that there is nothing that justifies a direct appeal to this Court – the applicants should have appealed to the Full Court or the Supreme Court of Appeal before approaching this Court. An absence of extraordinary circumstances that justify a direct appeal to this Court is fatal and leave to appeal in these circumstances should not be granted. The respondents further submit that the High Court properly applied the applicable test, and correctly relied on *OUTA*. Before delving into these submissions, I shall canvass the facts which gave rise to this litigation.

[3] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*).

[5] I interpose at this juncture to emphasise what this matter is not about. This matter is not about whether interim interdicts can be granted against the Public Protector. This much is accepted by all the parties. What is in dispute is the appropriate test to be applied. Neither is this matter about the reviewability of the Public Protector's reports. Our law is perspicuous in this regard. Lastly, this matter is certainly not about the pending review application against any report of the Public Protector. It would usurp the function of the review court if this Court were to make pronouncements about the review application.

Background facts

[6] On 24 May 2019, the Public Protector issued a report which dealt with allegations of maladministration and impropriety concerning the approval of Mr Pillay's early retirement from the South African Revenue Service (SARS) (Pillay Report).[4] This report dealt with allegations of maladministration and impropriety against Mr Gordhan, in his capacity as the erstwhile Minister of Finance, for his approval of Mr Pillay's early retirement with full pension benefits and subsequent retention at SARS on the recommendation of Mr Magashula.

[7] Subsequent to an investigation, the Public Protector found in her report that Mr Pillay was not entitled to early retirement with full pension benefits and that Mr Gordhan thus did not have the necessary authority to approve Mr Pillay's pension benefits. Accordingly, the Public Protector found that Mr Gordhan's conduct in approving the purported pension benefits constituted improper conduct. Furthermore, the Public Protector found that Mr Gordhan had acted *ultra vires* (beyond the limits of his authority) when he approved the retention of Mr Pillay.

[8] The remedial action set out in the Pillay Report directed the President, *inter alia*, to take "appropriate disciplinary action" against Mr Gordhan for his role in the approval

[4] Report on an investigation into allegations [of] maladministration and impropriety in the approval of Mr Ivan Pillay's early retirement with full pension benefits and subsequent retention by the South African Revenue Service, Report No 24 of 2019/2020.

of Mr Pillay's early retirement and the failure to uphold the values and principles of public administration as entrenched in the Constitution. The President was further directed to furnish the Public Protector with a plan within 30 days from the date of the issuance of the report, outlining how the remedial action mandated by the Pillay Report was to be implemented (Implementation Plan). This Implementation Plan was to be approved by the Public Protector.

[9] On 28 May 2019, Mr Gordhan instituted review proceedings in the High Court challenging the legality of the Pillay Report and seeking to have it set aside. Nevertheless, on 19 June 2019, the President wrote to the Public Protector informing her of the Implementation Plan. The President noted both the adverse findings made by the Public Protector against Mr Gordhan and the allegations raised by Mr Gordhan in his review application which labelled the Pillay Report as being irregular and *ultra vires*. The President further recorded that the Public Protector's remedial action, which directed the President to take disciplinary action against Mr Gordhan was vague and impossible to implement in the absence of an employment relationship between the President and Mr Gordhan.

[10] The President informed the Public Protector that, in light of the factual and legal dispute between Mr Gordhan and the Public Protector in the pending review action and the allegations made therein, he was of the opinion that it would be inappropriate to take disciplinary action against Mr Gordhan at that point in time. In the President's view, the remedial action and the disciplinary action would be best served by waiting until the outcome of the review application. Accordingly, the President deferred taking disciplinary action against Mr Gordhan until the determination of the review application.

[11] In her response on 26 June 2019, the Public Protector insisted that the remedial action outlined in the Pillay Report be implemented, unless it was interdicted by an interim order. In further correspondence, she perspicuously stated her position as follows:

> "I therefore plead with the Honourable President to avert the constitutional crisis alluded to above by taking heed of my advice and implementing the remedial action as set out in the [Pillay] Report or obtaining a court interdict to stay the implementation pending the outcome of the review proceedings or even causing the implicated and/or affected officials to do so."

[12] As a consequence, Mr Gordhan instituted interim proceedings seeking to interdict the action required by the Pillay Report. The High Court granted an interim interdict, pending the finalisation of the review of that report.

[13] The Public Protector issued another report on 5 July 2019. The report alleged infractions of the Executive Ethics Code by Mr Gordhan, maladministration, corruption and improper conduct by SARS (the SARS Report).[5] The SARS Report deals with, *inter alia*, the alleged establishment of an intelligence unit by SARS in violation of South African intelligence prescripts. The SARS Report found that SARS acted inconsistently with section 41(1)(e) of the Constitution[6] by not "respecting the constitutional status, power and functions of the National Intelligence Agency". The SARS Report further found that SARS irregularly procured intelligence-gathering equipment for the intelligence unit. The SARS Report includes several other findings which need not be canvassed here.

[14] In the remedial action contained in the SARS Report, the Public Protector directed the President to take note of the findings contained in the SARS Report as far as they related to Mr Gordhan, to take appropriate disciplinary action against

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[5] Report on an investigation into allegations of violations of the Executive Ethics Code by Mr Pravin Gordhan, MP as well as allegations of maladministration, corruption and improper conduct by the South African Revenue Service, Report 36 of 2019/2020.

[6] Section 41 of the Constitution states that:

> "(1) All spheres of government and all organs of state within each sphere must—
>
> . . .
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres."

Mr Gordhan for these infractions of the Constitution and the Executive Ethics Code, and to furnish an Implementation Plan within 30 days from the date of issuance of the SARS Report.[7] A closer reading of the Public Protector's answering affidavit in the

[7] The remedial action of the Public Protector is set out in the SARS Report above n 5 at para 8 which is headed 'Remedial Action' and reads as follows:

> "The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following:
>
> 8.1 The President of the Republic of South Africa:
>
> 8.1.1 To take note of the findings in this report in so far as they related to the erstwhile Minister of Finance, Mr Gordhan and to take appropriate disciplinary action against him for his violation of the Constitution and the Executive Ethics Code within 30 days of issuing of this report.
>
> 8.2 The Speaker of the National Assembly:
>
> 8.2.1 Within 14 working days of receipt of this Report, refer Mr Gordhan's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members' interests for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics.
>
> 8.3 The Minister of State Security to:
>
> 8.3.1 Within 90 days of the issuing of this Report, acting in line with Intelligence Services Amendment Act, implement, in totality the OIGI report dated 31 October 2014.
>
> 8.3.2 Within 30 days ensure that all intelligence equipment utilised by the SARS intelligence unit is returned, audited and placed into the custodian of the State Security Agency.
>
> 8.3.3 Within 14 days of the issuing of this Report avail a declassified copy of the OIGI report dated 31 October 2014.
>
> 8.4 The National Director of Public Prosecutions to note:
>
> 8.4.1 That I am aware that there are currently criminal proceedings underway against implicated former SARS officials and that therefore effective steps should be taken to finalise the court process as the matter has been remanded several times.
>
> 8.5 The Commissioner of the South African Police Service to:
>
> 8.5.1 Within 60 days, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, for violation of section 209 of the Constitution and section 3 of the National Intelligence Act including Mr Magashula's conduct of lying under oath."

Further, the SARS Report at para 9, which is headed 'Monitoring' reads as follows:

> "9.1 The President of the Republic of South Africa must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.1 of this Report will be implemented.
>
> 9.2 The Speaker of the National Assembly must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.2 of this Report will be implemented.

High Court makes it plain that the President was required to commence and complete the disciplinary process within 30 days and report to the Public Protector.

[15] On 10 July 2019, Mr Gordhan launched an urgent application in the High Court seeking an order temporarily suspending the remedial action contained in the SARS Report and interdicting the Public Protector from enforcing it (Part A of the proceedings), pending the finalisation of a judicial review in which Mr Gordhan seeks to set aside the SARS Report (Part B of the proceedings).

[16] The President expressed markedly similar views on this review application to those he expressed in the review proceedings relating to the Pillay Report. Accordingly, he supported Mr Gordhan's right to approach the Court for a review and deferred instituting any disciplinary action until the resolution of the review application.

[17] During the review proceedings, the EFF brought an application to intervene in the application, which was not opposed. The EFF was thus granted leave to intervene, hence their participation in this matter.[8]

9.3 The Minister of State Security must, within thirty (30) days from the date of the issuing of this Report and for approval by the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.3 of this Report will be implemented.

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

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

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

[8] High Court judgment above n 1 at para 2.

Litigation history

High Court

[18] In adjudicating the interim order sought by Mr Gordhan in relation to the SARS Report, the High Court identified the central legal question as whether it could grant an interim interdict to suspend the operation of the Public Protector's remedial action, pending the final determination of the review.[9]

[19] The High Court noted that an interlocutory interdict, by its very nature, is granted *pendente lite* (during litigation) and is intended to protect the rights of an aggrieved party pending an application to establish the respective rights of the litigating parties. Its purpose is to provide the successful party with adequate and effective relief until the finalisation of the main application.[10]

[20] The High Court relied on this Court's judgment in *OUTA* for the relevant test for granting an interim interdict. The High Court proceeded to cite, with approval, the following statements from *OUTA*:

> "It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a Court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."[11]

[21] In terms of this test, an applicant has to establish:

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

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

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[9] Id at para 10.

[10] Id at para 7.

[11] Id at para 8 referring to *OUTA* above n 3 at para 45.

(c) the balance of convenience; and

(d) the applicant must have no other satisfactory remedy.[12]

[22] The High Court remarked that interim interdicts against the Public Protector are commonplace in the High Courts and that the remedial actions directed by the reports of the Public Protector are often suspended by interim orders pending judicial reviews.[13] The normality of this practice was conceded by the Public Protector's counsel, who acknowledged that the Public Protector did not ordinarily oppose interim orders of this nature.[14] However, counsel posited that the Public Protector was opposing this particular interim interdict because she was of the opinion that the allegations and statements contained in the founding affidavit of Mr Gordhan constituted an attack on her integrity and dignity and that of her Office. Perforce, she was of the view that it was necessary to oppose the granting of the interim relief. As the incumbent, she believed she had a duty to defend the independence, impartiality and dignity of her Office as well as her own.[15]

[23] In the High Court, the EFF and the Public Protector raised a further ground on which she opposed the interim interdict. This argument was that there is no basis for the intrusion by the Judiciary, through the granting of an interim interdict, into the exclusive terrain of the Public Protector.[16] The High Court summarised the argument thus:

[12] *OUTA* above n 3 at para 41. These criteria were first alluded to in *Setlogelo v Setlogelo* 1914 AD 221. Although *Setlogelo* concerned the granting of a final interdict, these criteria have been applied to interim interdicts for the past 100 years or so following Innes JA's judgment. This approach has been refined into the current version of the test through case law. See *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 464, *Molteno Brothers v South African Railways* 1936 AD 321, *Webster v Mitchell* 1948 (1) SA 1186 (W), *Gool v Minister of Justice* 1955 (2) SA 682 (C) and, more recently, *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC).

[13] High Court judgment above n 1 at para 9.

[14] Id.

[15] Id at para 12.

[16] Id at para 13.

> "[I]n terms of the *OUTA* decision this Court will intrude in entering the exclusive terrain of another branch of government, will negate the separation of powers and [it] is not the clearest of cases wherein an interim order should be granted. The EFF expanded hereon in that this application does not warrant judicial intrusion into the exclusive terrain of a Chapter 9 Institution."[17]

[24] In analysing the facts and applying the requirements of an interim interdict, the High Court found that the various grounds of review advanced by Mr Gordhan were sufficient to constitute a prima facie right to the relief sought.[18] The harm to Mr Gordhan lay in the fact that he was to be disciplined by the President, appear before the Parliamentary Ethics Committee and be criminally investigated by the Commissioner of Police, all of which had serious consequences for him. The High Court highlighted that the SARS Report "malign[ed] him as being untruthful and a spy and would impact his political career and his personal circumstances."[19] The harm would be irreparable if the interdict was not granted and thus the harm to the Public Protector in awaiting the outcome of the review decision weighed against the harm that would befall Mr Gordhan if the interdict was not granted resulted in the balance of convenience favouring the granting of the interdict.[20] It was also found that there was no satisfactory alternative remedy available to Mr Gordhan in view of the binding nature of the remedial action.

[25] The EFF and the Public Protector argued that, should they be unsuccessful, they should not be mulcted with costs in light of the *Biowatch* principle.[21] To this end, the High Court found that although the EFF and the Public Protector had attempted to characterise the matter as constitutional, the character of the litigation before it was not of parties claiming their constitutional rights, but rather concerned the enforcement of

[17] Id.

[18] Id at paras 14-44.

[19] Id at para 45.

[20] Id at paras 51 and 54-5.

[21] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

the right to prevent a harm flowing from a report that is in the process of being challenged. Thus, *Biowatch* did not apply and the High Court awarded costs against the Public Protector and the EFF.

[26] Aggrieved by this outcome, the EFF and the Public Protector filed urgent applications to this Court for leave to appeal directly against the judgment and order of the High Court. On two occasions, the Public Protector purported to withdraw her application, but this was opposed by the President who insisted on a hearing due to the extraordinary circumstances of this case.

[27] It would be remiss of me not to address why, if the Public Protector sought to withdraw her application for direct leave to appeal, this Court set her application down for hearing. The reason for this can be found in the four corners of the Rules of this Court.

[28] In particular, rule 27 of the Rules of this Court provides in unequivocal terms that:

> "Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter."

[29] It is evident that rule 27 confers a discretion on the Chief Justice, and thus this Court, to withdraw a matter. However, this discretion can only be exercised if there is an agreement by all parties that the matter should be withdrawn and that the costs of the application will be tendered. However, in this case, the President's opposition renders the Public Protector's attempt to withdraw the application of no effect. Put differently, the President's opposition means that there is no unanimity on the purported

withdrawal, rendering the Public Protector's request that the application be withdrawn nugatory.[22]

Leave to appeal

Jurisdiction

[30] This Court holds a special place in the appellate hierarchy as a super appellate court, and therefore it offers litigants the opportunity of a super-appeal.[23] However, not all litigants who knock on this Court's doors will be given the opportunity to argue their case, either orally or in writing. We are directed by the Constitution as to which matters should be adjudicated by this Court. In particular, section 167(3)(b) provides that this Court may decide—

> "(i) constitutional matters; and
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[31] In light of this, do these applications engage our jurisdiction? It bears repeating that the matters were not consolidated and, accordingly, jurisdiction in the applications must be independently established.

[32] In relation to CCT 232/19, the EFF argued that this matter raises a constitutional issue as it concerns the powers of the Public Protector, which are derived from the Constitution. It argued that the High Court judgment impermissibly interferes with the twin promises of her Office (that is, accessibility and efficacy) as mandated by the Constitution. Thus, the EFF contended that our jurisdiction is engaged on two bases. First, it submitted that the granting of interim interdicts is a constitutional matter as it

[22] However, I must add as a caveat that this Court can still exercise its power, as set out in section 173 of the Constitution, to allow a withdrawal of an application on good cause shown even if there has been no compliance with rule 27.

[23] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC) at para 23.

implicates the remedial powers of the Public Protector as being "valid and binding until set aside" as this Court confirmed in *EFF I*.[24] The second constitutional issue, the EFF submitted, is what the appropriate test should be for granting interim interdicts against the Public Protector, which is a novel question with which this Court has yet to grapple. In this regard, the EFF argued that the test, as endorsed in *OUTA*, is inapplicable to interim interdicts against a Chapter 9 Institution like the Public Protector. It argued that a new test needs to be developed that gives careful consideration to the potential impact that interdicts may have on the efficacy of the Public Protector's performance of her constitutional duties and the accessibility of her Office to the public.

[33] The EFF further asserted that this Court's jurisdiction is engaged as the matter raises an arguable point of law of general public importance which ought to be considered by this Court. The arguable point of law, it was submitted, is whether the High Court applied the correct test when it granted an interim interdict, or whether a stricter test should have been preferred, which would have taken into account the twin promises of the Office of the Public Protector and her role in the Republic's constitutional democracy.

[34] I note that, in *OUTA*, this Court held that our constitutional jurisdiction was engaged on the basis that the pending judicial review posed the question whether the relief sought by that review constituted an improper interference in the Executive domain.[25] Furthermore, the application for an interim interdict before the Court in *OUTA* raised the important issue of whether the grant of the interim interdict impermissibly trenched upon the constitutional precept of separation of powers.[26] Both of these bases were held to be "constitutional issues of considerable importance."[27] This Court has yet to pronounce on whether interim interdicts against the Public Protector

[24] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (*EFF I*).

[25] *OUTA* above n 3 at para 22.

[26] Id.

[27] Id.

constitute an improper interference with her powers. Naturally, there are also novel separation of powers concerns that are relevant here. Moreover, whether interim interdicts against the Public Protector ought to be subject to a stricter test than that endorsed in *OUTA* grounds our jurisdiction as it requires this Court to consider the constitutional role and functions of the Public Protector. Accordingly, in CCT 232/19, our jurisdiction is engaged.

[35] I turn now to CCT 233/19. It has been repeatedly stated by this Court that jurisdiction is determined on the basis of the pleadings.[28] This was unequivocally stated in *Chirwa*.[29] Further, this Court in *Jiba* stated that "for a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter".[30]

[36] As a result, the crucial question is whether the Public Protector raises a claim that requires this Court to consider or apply a constitutional rule or principle.

[37] This Court in *OUTA* established that when granting an interim interdict against a state entity – and, in effect, restraining the use of public power – courts should adroitly "consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought".[31] The main thrust of the arguments in the Public Protector's founding affidavit and written submissions is that the High Court failed to have due regard to pivotal constitutional considerations related to her Office and the impact that an interdict would have on her ability to carry out her functions.

[28] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

[29] In *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 169 this Court stated that "a court must assess its jurisdiction in light of the pleadings".

[30] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) (*Jiba*) at para 38.

[31] *OUTA* above n 3 at para 46.

[38] In an attempt to illustrate how the High Court had failed to apply the *OUTA* interdict test properly, the Public Protector stated in her answering affidavit that the proper approach in assessing the balance of convenience would have been the following:

> "The court must also weigh up the constitutional scheme under which the Public Protector has been granted 'broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution' in deciding whether the balance of convenience favours the applicant. In evaluating where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of constitutional and statutory power within the exclusive terrain of the Public Protector. It must assess carefully how and to what extent its interdict will disrupt the constitutional functions conferred by the law and thus whether its restraining order will hamper the Public Protector's duties to fight and remedy maladministration and corruption.
>
> . . .
>
> A court must in this context carefully consider to which extent an interim order will intrude into the exclusive terrain of a constitutional body entrusted with the responsibility to remedy maladministration and corruption. . . . An interim interdict is supposed to be granted only in the clearest of cases and after a careful consideration of what the Constitutional Court referred to as separation of powers harm."

[39] This Court has cautioned that it will not grant leave to appeal merely because an applicant is aggrieved by a lower court's application of the law. In *Mankayi*, it was observed that "this Court has refused to entertain appeals that seek to challenge only factual findings or the incorrect application of the law by the lower courts".[32] Thus, for this Court to adjudicate on the merits of a matter, that matter must "not merely involve the application of an uncontroversial legal test to the facts".[33] Similarly, in *Jiba*, this

[32] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 12. See also *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (2) SA 106 (CC); 2007 (3) BCLR 287 (CC) at para 27; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[33] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33.

Court held that the application of an established legal test does not raise an arguable point of law which would ground our jurisdiction.[34]

[40] However, the Public Protector's argument goes further than mere disgruntlement with the conclusion of the High Court. The interim interdict test, as set out in *OUTA*, enjoins a court before granting an interdict against an organ of state to ensure that the order "promotes the objects, spirit and purport of the Constitution."[35] This invariably attracts various constitutional issues into adjudication, including possible issues regarding separation of powers, the constitutional duties of the parties that may be frustrated by the order and any constitutional rights implicated in the matter. That the High Court had those considerations in mind is evidenced by Potterill J's conclusion that:

> "This matter constitutes a clear case where judicial interference is warranted. The [Public Protector] and her Office can fulfil their constitutional duties in her Office with the suspension order not interfering with her constitutional duties at all. Suspension 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 [Public Protector]."[36]

[41] The Public Protector pleads for this Court to reach the opposite conclusion to the High Court; namely, that the grant of the interdict impermissibly interferes with her constitutional duties. Importantly, she argues that for this Court to do so, we must have proper cognisance of her constitutional role and function. This is a determination that the High Court, in her view, failed to do. That undoubtedly raises matters of deep constitutional import.

[42] In addition, before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The

[34] *Jiba* above n 30 at para 59.

[35] *OUTA* above note 3 at para 45.

[36] High Court judgment above n 1 at para 51.

claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. The rationale is that an interdict which prevents a functionary from exercising public power conferred on it impacts on the separation of powers and should therefore only be granted in exceptional circumstances.

[43] The High Court evaluated the review grounds advanced by Mr Gordhan and concluded that a strong case had been established and therefore the interim interdict was warranted. Assessing this exercise alone raises a constitutional issue.

[44] In the event, the Public Protector's matter also engages our jurisdiction.

Interests of justice

[45] Although there are constitutional issues at play in both CCT 232/19 and CCT 233/19, this does not automatically mean that leave to appeal must be granted. To this end, this Court enjoys the discretion to decide whether to grant leave to appeal. The criterion is whether it would be in the interests of justice to grant leave to appeal. As this Court held in *Boesak*:

> "A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court and, in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry."[37]

[46] Likewise, this was reaffirmed in *Magajane*, where this Court held that it will employ its discretion, based on the interests of justice, to grant leave to appeal when a

[37] *S v Boesak* above n 32 at para 12.

constitutional issue has been raised.[38] A litigant is not entitled, as a right, to insist that their matter be heard by this Court on the basis of jurisdiction only, absent the interests of justice.[39] In order to grant leave to appeal, the relevant factors must be weighed up and carefully considered.[40] The prospects of success on appeal, as well as the public interest in the subject matter of the appeal constitute some of these factors.[41] However, these factors are not exhaustive. The importance of the interests of justice criterion in this matter is further entrenched by section 167(6) of the Constitution.[42]

[47] Turning to the present matter, it should be borne in mind that both applicants seek urgently to appeal an interim interdict, which is purely interlocutory in nature. An interim interdict is a temporary order that aims to protect the rights of an applicant, pending the outcome of a main application or action.[43] It attempts to preserve or restore the status quo until a final decision relating to the rights of the parties can be made by the review court in the main application. As a result, it is not a final determination of the rights of the parties. It bears stressing that the grant of an interim interdict does not, and should not, affect the review court's decision when making its final decision and should not have an effect on the determination of the rights in the main application. The purpose of an interdict is to provide an applicant with adequate and effective temporary relief.[44]

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[38] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 29. Also see *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 29-30.

[39] *S v Pennington* [1997] ZACC 10; 1997 (4) SA 1076; 1997 (10) BCLR 1413 at para 11.

[40] *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

[41] *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at para 17.

[42] Section 167(6) of the Constitution provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

[43] See the remarks of Van Heerden JA in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban* 1986 (2) SA 663 (A) at 681D-F and *Pikoli v President of the Republic of South Africa* 2010 (1) SA 400 (GNP) at 403I.

[44] *Pikoli* id at 404A.

[48] We were cautioned by this Court in *OUTA* that, where Legislative or Executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle.[45] Essentially, a court must carefully scrutinise whether granting an interdict will disrupt Executive or Legislative functions, thus implicating the separation and distribution of power as envisaged by law.[46] In that instance, an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out.[47]

[49] The law concerning the appealability of interim interdicts is settled. Interim interdicts are generally not appealable.[48] This is because interim interdicts are not final in nature; they are not determinative of the rights of the parties and do not have the effect of disposing of a substantial portion of the relief claimed.[49] However, these reasons are not exhaustive.[50] There are various other sound policy reasons for the general non-appealability of interim interdicts. One of these is that appeals are not entertained in a piecemeal fashion, as that would prolong the litigation, resulting in the wasteful use of judicial resources and incurrence of legal costs.[51]

[50] However, an interim order may be appealed if the interests of justice so dictate.[52] Accordingly, the paramount test for the appealability of a particular interim interdict is

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[45] *OUTA* above n 3 at para 47.

[46] Id at para 65.

[47] Id at para 44.

[48] *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation* [2017] ZASCA 134; 2018 (6) SA 440 (SCA) (*Cipla*) at para 19.

[49] *Nova Property Group Holdings v Cobbett* [2016] ZASCA 63; 2016 (4) SA 317 (SCA) at para 8. This principle was authoritatively set out in *Zweni v Minister of Law* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J-533A. See also *Cipla* id at para 18 and *S v Western Areas Ltd* [2005] ZASCA 31; [2005] (5) SA 214 (SCA) (*Western Areas*) at para 20.

[50] *Moch v Nedtravel (Pty) Ltd. t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 10E-G.

[51] *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) (*Informal Traders*) at para 20(g).

[52] *OUTA* above n 3 at para 24. See also *Informal Traders* id at para 17 which states that:

whether it would be in the interests of justice for that interim interdict to be appealed in light of the facts of its specific case.[53] As stated in *South Cape Corporation*, a court has a wide general discretion in granting leave to appeal in relation to interim interdicts.[54] The appropriate test for the appealability of an interim interdict was perspicuously laid out by Moseneke DCJ in *OUTA* where he affirmed that—

> "[t]his Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is 'the interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable."[55]

[51] Accordingly, in determining what the interests of justice demand, a court must have regard to, and carefully weigh, all relevant circumstances and factors. Undoubtedly, the relevant factors will differ based on the facts of each case. These non-exhaustive factors include:

(a) The kind and importance of the constitutional issue raised;[56]

(b) the potential for irreparable harm if leave is not granted;[57]

> "Provided a dispute relates to a constitutional matter, there is no general rule that prevents this Court from hearing an appeal against an interlocutory decision such as the refusal of an interim interdict. However, it would be appealable only if the interests of justice so demand."

And also *Philani-Ma-Afrika v Mailula* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) at para 20.

[53] *Informal Traders* above n 51 at para 20.

[54] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534 (A) (*South Cape Corporation*) at 545B-546C.

[55] *OUTA* above n 3 at para 25.

[56] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 55.

[57] *Machele v Mailula* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) at paras 23-8.

(c) whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review;[58]

(d) whether there are prospects of success in the pending review;[59]

(e) whether, in deciding an appeal against an interim order, the appellate court would usurp the role of the review court;[60]

(f) whether interim relief would unduly trespass on the exclusive terrain of the other branches of government, before the final determination of the review grounds;[61] and

(g) whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or legal costs.[62]

[52] As outlined earlier, the EFF argues for a stricter test for interim interdicts against the Public Protector than that outlined in *OUTA*, which would require extraordinary circumstances. This is because the Public Protector exists for a "special reason" in our constitutional democracy and, according to the EFF's argument, "routine" interim interdicts would undermine her accessibility and effectiveness. The nub of the stricter test posited is that "an interdict-applicant must positively demonstrate that an interim interdict will not unreasonably undermine the Constitution's twin promises of an accessible and effective Public Protector".

[53] This argument, while novel and interesting, has no merit. The *OUTA* test patently underscores that courts should be slow to grant interim orders against the Executive and that interim orders must be granted only in exceptional circumstances and in the clearest of cases. I cannot conceive of any reason why this rationale should not apply to interim interdicts against the Public Protector. I am of the view that the

[58] *OUTA* above n 3 at para 25.

[59] Id at para 26.

[60] Id.

[61] Id.

[62] *Informal Traders* above n 51 at para 20(g).

OUTA test is flexible enough to take into account the constitutional role of the Public Protector and it is evident that the *OUTA* test cautions courts not to lightly grant interim orders – especially because of the separation of powers consideration. The President, Executive and Parliament all exercise and source their powers and functions from the Constitution, like the Public Protector. The argument that the Public Protector exercises a constitutional power does not render her unique to the extent that a stricter test is required, which allows the granting of interim interdicts only in 'extraordinary circumstances'.

[54] There seems to be no compelling reason to create a special test applicable to the Public Protector. The interim interdict test, which has been developed through case law – culminating in the *OUTA* test – is sound and has sufficient safeguards to ensure that the Public Protector is not denuded of her powers when an interim order is granted against her. In light of *OUTA*, it is evident that the interim interdict test must be informed by the normative scheme and democratic principles buttressed by the Constitution. This test is broad and supple enough to take into account the constitutional role and functions of the Public Protector and to ensure that she is not inadvertently stripped of her powers.

[55] I cannot think of a situation where it would be "constitutionally appropriate"[63] to grant an interdict against the Public Protector that would "impermissibly hinder the accessibility and effectiveness of the Public Protector". A constitutionally inappropriate interdict would not satisfy the *OUTA* test, especially if that interim interdict would have the effect of stripping the Public Protector of her constitutionally-sourced powers.

[56] The Public Protector does not advocate explicitly for a stricter test but submits that the High Court did not have due regard to the constitutional status of her Office and the effect that an interdict would have on her powers and functions. Further, she

[63] *OUTA* above n 3 at para 66.

contends that consideration should be given to the fact that section 181(3) of the Constitution creates an obligation on other organs of state to assist and protect the Office of the Public Protector and to ensure its independence, impartiality, dignity and effectiveness.[64] In addition, section 181(4) of the Constitution creates a principle of non-interference with the Office of the Public Protector.[65] The Public Protector contends that the upshot of these provisions is that Mr Gordhan "must face insurmountable obstacles in any application for an interim interdict" as the interdict he sought could potentially hamper and frustrate the exercise of her duties. However, this argument too has little prospects of success. As has been noted, the High Court, in applying the *OUTA* test, specifically took into account whether the interim interdict would interfere with the Public Protector's constitutional powers and remarked:

> "The [Public Protector] and her Office can fulfil their constitutional duties in her Office with the suspension order not interfering with her constitutional duties at all. Suspension 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 acquiescence to the remedial orders of the [Public Protector]."[66]

[57] This evinces that not only can the *OUTA* test readily accommodate the particular constitutional considerations attendant to the Public Protector but that, on the facts of this case, the High Court accommodated these considerations. In my view, this approach was correct and the finding by the High Court in this regard cannot be faulted.

[58] Once a report is published and made available for public consumption, it is difficult to understand how an interim interdict against the enforcement of the remedial action hinders the effectiveness of the Public Protector. How would an interim interdict

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[64] Section 181(3) of the Constitution provides:

> "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."

[65] Section 181(4) of the Constitution provides: "No person or organ of state may interfere with the functioning of these institutions."

[66] High Court judgment above n 1 at para 51.

hinder the Public Protector in the exercise of her powers, or prevent her from exercising her functions once the report is released and in the public domain? Counsel for the EFF put forward the argument that the enforcement of the order, including the monitoring of the implementation regime allied to the remedial steps, is part of the Public Protector's duties and that an interim order therefore has the effect of "stopping dead" its fulfilment. However, this argument is weak. The Public Protector is not rendered ineffective since the investigation has been completed, the SARS Report has been finalised and published and the interim interdict is sought merely to protect the prima facie rights of an applicant.

[59] While I acknowledge that *OUTA* is distinguishable on the facts from the present matter, it is this very distinction that highlights the lack of prospects of success in the present case. In *OUTA*, this Court held:

> "The order prohibits SANRAL from exercising statutory powers flowing from legislation whose constitutional validity is not challenged. In particular, the order prevents it from raising revenue through tolls, a power the statute vests in it. . . . At the behest of a court order, the National Executive is prevented from fulfilling its statutory and budgetary responsibilities for as long as the interim order is in place."[67]

[60] What is evident from the above is that the interim order sought in *OUTA* would thwart the Executive from carrying out its statutory and budgetary duties as required by statute. Plainly put, it would prevent the Executive from doing what it was meant to do. Here, the interim interdict sought is different. The Public Protector has already performed the duties and functions that the Constitution requires of her. As I have stated before, the SARS Report has been completed. Her powers have been exercised and the SARS Report has been published. The interim interdict sought in the High Court therefore did not have the effect of subverting her constitutional powers. This amplifies the lack of prospects of success.

[67] *OUTA* above n 3 at para 27.

[61] The accessibility leg of its argument does not help the EFF either. The public can still lodge complaints and access the Public Protector. The argument that the granting of interim interdicts would discourage people from approaching the Public Protector appears ill-conceived especially when one has regard to the fact that, almost every day, court orders are suspended in much the same fashion when a judgment is appealed.[68] The public still approaches the courts even though there is an automatic suspension of court orders in the event of an appeal. This, in fact, gives the public confidence that, should the court make an incorrect decision, that decision will be appealed and the incorrect decision will not be enforced against them. It cannot be that the Public Protector is rendered inaccessible because an interim interdict against the enforcement of her remedial action is granted in the clearest of cases where a strong and compelling case has been made.

[68] Section 18 of the Superior Courts Act 10 of 2013 provides:

> "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
>
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
>
> (4) If a court orders otherwise, as contemplated in subsection (1)—
>
> (i) the court must immediately record its reasons for doing so;
>
> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
>
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
>
> (iv) such order will be automatically suspended, pending the outcome of such appeal.
>
> (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules".

[62] The concession made in the High Court and repeated in this Court by counsel for the Public Protector, that the Public Protector seldom opposes interim interdicts, illustrates that interim interdicts do not have an effect on her powers or the accessibility of her Office.

[63] Thus, in light of the above, it is evident that neither application in CCT 232/19 nor CCT 233/19 bear any reasonable prospects of success.

[64] Furthermore, it does not appear that the High Court made a final determination on the rights of the parties. The High Court judgment on the interdict application therefore does not usurp the role of the review court in Part B.

[65] I am also not persuaded that the High Court misdirected itself on the facts. I am of the opinion that it struck a fair balance between the rights and interests of all the parties concerned. It identified the correct test, applied this test to the facts, and then arrived at a conclusion at which any reasonable court would have arrived.

[66] There is no foreseeable irreparable harm that the Public Protector would suffer. The interim interdict would not thwart her constitutional mandate and it would not offend any of her powers and functions as set out in the Constitution. The investigation into SARS has been completed and the SARS Report has been published. There are no findings by the High Court in its order that would be considered as causing irreparable harm to the Office of the Public Protector, nor would the effect of the findings cause irreparable harm.

[67] On the other hand, Mr Gordhan may suffer discernible irreparable harm and prejudice should the interim interdict not be granted. The reasonable apprehension of irreparable harm to Mr Gordhan lies in the fact that, if the remedial action is not suspended, he would be disciplined by the President, appear before the Parliamentary Ethics Committee, and be criminally investigated by the Commissioner of Police, all of which could have serious consequences for him. According to the High Court, the

SARS Report maligned him as being untruthful and a spy. It is therefore a reasonable apprehension that the remedial action contained in the SARS Report would impact his political career and his personal circumstances. These fears are not misplaced, and the full effect of these potential consequences should be held in abeyance until the review application is completed.

[68] A further factor that militates against us hearing this matter is that it is a direct appeal to this Court.

[69] The applicants seek leave to appeal directly to this Court, bypassing the Full Court and the Supreme Court of Appeal. In CCT 232/19, the EFF contends that it is in the interests of justice for this Court to grant direct leave to appeal on an urgent basis. The main justification for this argument is the fact that by the time an appeal to a Full Court or the Supreme Court of Appeal is heard, the interim interdict may have fallen away with the determination of the main review. During the hearing, the EFF argued that it would be nonsensical to wait until the finalisation of Part B for the argument on the propriety of interim interdicts to be advanced. The only time a case of this sort can be heard by this Court is, as a matter of timing, immediately after the granting of the interim interdict. Further, it argued that the interests of justice warrant the hearing of this matter, as interim interdicts against the Public Protector at the behest of members of the Executive are relatively new and this Court has never had to grapple with this issue before.

[70] To the contrary, Mr Gordhan argued that there is no justification for granting leave to appeal directly to this Court. If an appeal were allowed at all, the most appropriate forum would have been a Full Court or the Supreme Court of Appeal.

[71] The President argued that a judgment by this Court will end this constitutional controversy and will assist the speedy resolution of a vituperative public dispute that is harmful to our constitutional democracy. He maintains that while this Court's

jurisdiction may be engaged, and although it is in the public interest for a hearing to be held, the appeal has no prospects of success.

[72] As a direct appeal is not merely available for the asking, exceptional circumstances must exist before this Court can condone the bypassing of the channels of appeal in the lower courts.[69] Where the lower courts have been bypassed, the interests of justice considerations weigh heavily in the determination of whether or not leave to appeal ought to be granted.

[73] Although this Court has recently granted leave to appeal directly in *Public Protector*, that matter bore prospects of success, as is evident from the majority and minority judgments.[70] Whilst the judgments may have differed on the merits, the Court unanimously agreed that leave to appeal should be granted. That is not the case here. As has been shown, the principles set out in *OUTA* in relation to interim interdicts adequately safeguard the constitutional powers of the Public Protector. The twin constitutional promises of the Public Protector are not thwarted by the interim interdict granted by the High Court, nor does the interim interdict impermissibly interfere with her powers.

[74] In view of the preceding discussion, I reach the unavoidable conclusion that the character of these appeals as direct appeals further militates against entertaining the applications, as it is plainly not in the interests of justice to do so. The reasons that have been advanced by the applicants have not been persuasive enough to compel this Court to deviate from the normal appeal procedure and permit a direct appeal.

[69] *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 23.

[70] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC).

[75] Accordingly, these applications do not satisfy the interests of justice criterion concerning the appealability of interim orders, and leave to appeal, as it relates to the merits, is not granted.

Costs in CCT 232/19

Applicability of the Biowatch principle

[76] The High Court ordered the Public Protector, Ms Mkhwebane, and the EFF to pay the respondents' costs.[71] In this regard, the EFF argued that the High Court erred as it should have held that it was protected by the *Biowatch* principle.[72] Briefly, the purpose of the *Biowatch* principle is to protect unsuccessful litigants from the obligation of paying costs to the State in genuine constitutional litigation.

[77] This Court has reiterated on numerous occasions that the crucial consideration in determining whether the principle set out in *Biowatch* should apply is not the character of the parties, but the nature of the litigation at issue. This Court in *Biowatch* succinctly stated the principle 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 to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken."[73]

[78] The EFF contends on appeal that the High Court erred in finding that the litigation at issue was not of a constitutional nature but an ordinary interdict application. In relation to this aspect, the High Court found that:

[71] The High Court judgment above n 1 at para 62.4 ordered that the first, second and tenth respondents (in that Court) were, 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.

[72] *Biowatch* above n 21 at paras 21-5.

[73] Id at para 20.

"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 [Public Protector have] 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 [Public Protector] and her Office that this is normal practice; to now assert that suspension threatens the Office of the [Public Protector] as a Chapter 9 institution is far-fetched, disingenuous and insubstantive and does not raise truly constitutional considerations relevant to the adjudication of Part A."[74]

[79] This Court in *Public Protector* held that:

"An important principle in this appeal is that courts exercise a true discretion in relation to costs orders. A true discretion exists where the lower court has a number of equally permissible options available to it. An appeal court will not lightly interfere with the exercise of a true discretion. Ordinarily, it would be inappropriate for an appeal court to interfere in the exercise of a true discretion, unless it is satisfied that the discretion was not exercised judicially, the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There must have been a material misdirection on the part of the lower court in order for an appeal court to interfere. It is not sufficient, on appeal against a costs order, simply to show that the lower court's order was wrong."[75]

[80] The reason for this was articulated by Moseneke DCJ in *Florence*:

"Where a court is granted wide decision making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial

[74] High Court judgment above n 1 at para 60.

[75] *Public Protector* above n 70 at para 144.

> comity. It fosters certainty in the application of the law and favours finality in judicial decision making."[76]

[81] The High Court held that the crux of the matter was whether Mr Gordhan was entitled to an interim interdict and that the mere consideration of the Public Protector's constitutional role in applying the test for interim interdict did not elevate the matter into a constitutional issue.

[82] Whilst this Court must be slow to interfere in the exercise of a true discretion, which includes the granting of a costs order, here it is entitled to interfere. That is so because the High Court's decision was influenced by a misdirection on the applicable principles on the matter.[77] For the reasons already advanced above, these matters are of a constitutional nature. That much is perspicuous from the High Court's careful engagement with the principles set out in *OUTA*. Therefore, the High Court erred in not applying *Biowatch* to the question of costs.

[83] Regardless of the EFF's motivation to involve itself in these proceedings, as a private party acting seemingly in the public interest, it pursued arguments of genuine constitutional concern. Although those arguments have been unsuccessful in both the High Court and on appeal before this Court, it would be parsimonious to contend that the constitutional arguments the EFF raised were of a specious or opportunistic calibre. The EFF therefore should have received the benefit of the *Biowatch* principle and should not have had costs awarded against it.

[84] Accordingly, as far as the order of the High Court instructed the EFF to pay Mr Gordhan's, Mr Pillay's and Mr Magashula's costs that part of the order should be set aside.

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[76] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 113.

[77] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 88 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

[85] As the Public Protector is a State institution, it is clear that the *Biowatch* principle was not applicable to her Office and, in that regard, those portions of the order directing the Office of the Public Protector to pay the costs of Mr Gordhan, Mr Pillay and Mr Magashula in the High Court should stand. However, there is something further amiss about the costs order in the High Court, which requires this Court's assessment.

Costs in CCT 233/19

Personal costs order against Ms Mkhwebane

[86] The High Court ordered Ms Mkhwebane in her personal capacity, as she was cited, to pay the costs of Mr Gordhan. The High Court also ordered costs against the Office of the Public Protector. Thus, upon a reading of the High Court judgment, it is evident that the costs were granted against Ms Mkhwebane in both her capacities. In her founding affidavit, the Public Protector deposed as follows on this aspect:

> "Potterill J granted cost orders against the Office of the Public Protector and myself in my personal capacity. This is perplexing considering the fact that none of the parties in the application sought any such costs order. I have serious concerns about the cost order directed at me personally and in previous court hearings I have submitted on the adverse effect such orders will have on the proper constitutional functioning of the Office of the Public Protector."

[87] Was this a material misdirection by the High Court that would warrant the interference of this Court? The answer is yes. In the costs section of the High Court judgment, the High Court solely focused on the question of whether the *Biowatch* principle applied in this matter. It did not furnish any reasons to justify a personal costs order against Ms Mkhwebane. In fact, the High Court disavowed any reliance on the adverse allegations made by Mr Gordhan, which could have possibly grounded a personal costs order. To be precise, the High Court stated:

> "Mr Gordhan in no uncertain terms avers that the Public Protector is incompetent, irrational and negligent in the performance of her duties.

> 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 Trengove on behalf of Mr Gordhan did not argue this issue because this debate is not relevant to the determination of Part A."[78]

[88] What is evident from the statements above is that the High Court did not take into account the adverse allegations advanced by Mr Gordhan against the Public Protector, as those allegations were not relevant to the determination of the granting of the interim order. Thus, absent reasons for granting a personal costs order against the Public Protector and disavowing the adverse allegations, there seems to be no factual basis for making a personal costs order.

[89] Our jurisprudence on personal costs orders is clear. On numerous occasions, this Court has affirmed that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in particular instances.[79] The power of courts to make and impose personal costs against public officials is sourced from the Constitution.[80] Recently, this Court in *SASSA* held:

> "It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation."[81]

[90] The common law rules in relation to the ordering of personal costs orders are well-established, and, as *Black Sash* tells us, are buttressed by the Constitution.[82] Thus,

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[78] High Court judgment above n 1 at paras 39-40.

[79] *Black Sash Trust v Minister of Social Development (Freedom Under Law intervening)* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash*) at paras 5-9 and *Swartbooi v Brink* [2003] ZACC 25; 2006 (1) SA 203 (CC); 2003 (5) BCLR 502 (CC) at para 7.

[80] *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus Curiae)* [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) (*SASSA*) at para 38.

[81] Id at para 37.

[82] *Black Sash* above n 79 at para 7 and *Public Protector* above n 70 at para 154.

the Constitution must inform and permeate the long-established common law tests of bad faith and gross negligence.[83]

[91] Personal costs orders against a public official are primarily aimed at vindicating the Constitution.[84] They protect the Constitution, its values and its vision. They ensure that public officials who impermissibly flout the Constitution are held accountable.[85] It is a constitutional demand that public officials are held accountable and observe heightened standards in litigation and in the execution of their duties. Recognising this, Froneman J stated that:

> "Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order."[86]

[92] It cannot be gainsaid that personal costs orders are punitive in nature and a court must be satisfied that the conduct of a particular incumbent, in the execution of their duties or conduct in litigation, warrants the ordering of a personal costs order. This cannot be done in the abstract and the facts must plainly support an order of this nature. A court would be derelict in its duties if it imposed a personal costs order where the facts do not justify that. Similarly, a court would be derelict in its duties if it failed to furnish the reasoning for imposing a personal costs order.

[93] The High Court ordered costs against Ms Mkhwebane in her personal capacity without furnishing any reasons for that portion of the costs order. Furthermore, the High Court expressly disavowed any reliance on the allegations made by Mr Gordhan in reaching its decision. There is evidently no factual basis to support a costs order of this nature. It appears to me that the High Court plainly ordered a costs order against

[83] *Black Sash* above n 79 at para 8 and *Public Protector* above n 70 at para 154.

[84] *Black Sash* above n 79 at para 8 and *Public Protector* above n 70 at para 153.

[85] *Public Protector* above n 70 at para 153.

[86] *Black Sash* above n 79 at para 9.

Ms Mkhwebane on the basis that she was cited in her personal capacity, as well as her official capacity and thus applied the usual costs-should-follow-the-result principle. This was a material misdirection by the High Court, which warrants the interference of this Court in the personal costs order against Ms Mkhwebane.

[94] I must stress again that the High Court refused, by disavowing a reliance on the allegations made by Mr Gordhan, to make findings or pronouncements in relation to Ms Mkhwebane in her personal capacity. The judgment of the High Court concerned an interim interdict against the Public Protector. The traditional tests of bad faith or gross negligence, albeit with a constitutional flavour, were not satisfied. Ordering personal costs where there is no factual basis to support this may have a deleterious effect on the Public Protector's discharge of her vital constitutional mandate, whoever the incumbent might be.

[95] Accordingly, to the extent that the High Court ordered costs against Ms Mkhwebane, that order is also set aside.

[96] In this Court, each party is to pay their own costs, as this is in accordance with the dictates of fairness and equity.

Concluding remarks

[97] This matter has garnered much public interest and criticism. It is a matter which has a political bite to it. It is thus understandable why the public would have an interest in it. However, it must at all times be remembered that courts must show fidelity to the text, values and aspirations of the Constitution. A court should not be moved to ignore the law and the Constitution, and merely make a decision that would please the public. The rule of law, as entrenched in the Constitution, enjoins the judiciary, as well as everyone within the Republic, to function and operate within the bounds of the law. This means that a court cannot make a decision that is out of step with the Constitution and the law of the Republic. It must impartially apply the law to the prevailing set of facts, without fear, favour or prejudice.

[98] With that said, courts should not be immune to reasoned criticism. In fact, in a constitutional democracy like ours, criticism of the courts and other public offices is strongly encouraged. There should be robust debate in the public domain on pertinent issues that affect it. However, there is danger in following populist rhetoric and labelling courts as captured and corrupt, without sound reasons or evidence. This undermines one of the core tenets of our constitutional democracy.

[99] Similarly, the Public Protector is a constitutional servant, like the courts, and her Office should be afforded respect. It is an office of fundamental constitutional significance and her powers are not only desirable but also necessary for the purpose, *inter alia*, of holding public office bearers accountable. Her role in our constitutional democracy cannot be gainsaid. While she may be criticised, these comments should not be perceived as undermining her Office and its constitutional powers. To mount a bad faith attack on her Office would surely work to undermine the constitutional project of the Republic.

[100] It must be noted that the President did not second-guess or ignore the Public Protector's remedial action. If that was so, he would have been acting contrary to the decision in *EFF I*, where this Court held that the remedial actions of the Public Protector are binding and cannot be ignored unless they are set aside by a court of law. The President explained that he deferred taking the action directed in the SARS Report because its lawfulness was being challenged and the question of whether he can take disciplinary action, absent an employment relationship, is yet to be decided.

[101] This was the correct approach by the President as it is in line with the decision in *EFF I*. The President has undertaken to act as directed, should the SARS Report withstand judicial review. The interim interdict serves an important purpose – it suspends the binding effect of the Public Protector's remedial action until finalisation of the review proceedings. This is not an act that undermines the Public Protector. Rather, it preserves the interdict-applicant's rights while showing due respect to the binding powers of the Public Protector.

Order

[102] Accordingly, the following order is made:

1. In CCT 232/19:
    a. The application for leave to appeal against the merits is dismissed.
    b. Leave is granted against the costs orders.
    c. To the extent that the High Court of South Africa, Gauteng Division, Pretoria, ordered costs against the Economic Freedom Fighters, that costs order is set aside and replaced with:
    "The Public Protector is ordered to pay Mr Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs, including the costs consequent upon the employment of two counsel."
    d. Each party is to pay its own costs in this Court.

2. In CCT 233/19:
    a. The application for leave to appeal against the merits is dismissed.
    b. Leave is granted against the costs orders.
    c. To the extent that the High Court of South Africa, Gauteng Division, Pretoria, ordered personal costs against Ms Busisiwe Mkhwebane, that costs order is set aside and replaced with:
    "The Public Protector is ordered to pay Mr Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs, including the costs consequent upon the employment of two counsel."
    d. Each party is to pay its own costs in this Court.

JAFTA J (Khampepe ADCJ, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

[103] I have had the pleasure of reading the judgment prepared by my colleague Khampepe ADCJ (first judgment). I agree that leave to appeal against the merits should be refused for lack of prospects of success, as it is not in the interests of justice to entertain the appeal. I also support the granting of leave to the limited extent of adjudicating the appeal against the costs order issued by the High Court. There are reasonable prospects of success against the costs order and therefore it is in the interests of justice to determine whether it was properly granted.

[104] I write separately to give additional reasons on why it is not in the interests of justice to decide the merits in the present circumstances. The lack of prospects of success is not limited to the question whether the High Court was right to issue an interim interdict. Even if it were to be said that prospects against the granting of an interdict were reasonable, the applicants would still be required to show that they had reasonable prospects against the suspension order issued by the High Court.

Determination of prospects

[105] To determine whether there are reasonable prospects against the impugned order, it is necessary to take a step back and trace the genesis of the power to control the exercise of public power by judicial review. The review power comes from the Constitution itself.[87] The exercise of public power, regardless of whether it flows from the Constitution or legislation is subject to judicial scrutiny. This is what the Constitution proclaims. It is the judiciary which is charged with the function of determining whether other organs of state have complied with the Constitution and other relevant laws, in exercising public power given to them.[88] And if the exercise of

[87] See section 1(c) of the Constitution, which provides for the supremacy of the Constitution and the rule of law as well as section 33 of the Constitution which entrenches the right to just administrative action, which is given further effect to by the enactment of the Promotion of Administrative Justice Act 3 of 2000.

[88] See *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1(CC); 1999 (10) BCLR 1059 (CC) at para 38.

power is inconsistent with the Constitution, the court before which the challenge is competently brought is obliged to declare such exercise to be invalid.[89]

[106] When the Public Protector conducts an investigation, renders a report and takes remedial action, following the findings made in that investigation, there can be no doubt that she exercises public power which is subject to review by the courts.[90] Indeed in *EFF I*[91] this Court made it plain that those against whom remedial action is taken are not free to ignore the action at will. If they want to avoid the legal consequences of that remedial action, they should approach a court to review and set aside the remedial action.[92]

[107] That ruling was followed in this matter and the institution of review proceedings engaged the High Court's review powers. The applicant in those proceedings deemed it necessary to divide, for practical convenience, his application into two parts. The first part catered for an interim remedy that he asked the Court to grant to protect his rights pending a final decision on the review challenge. The second part was devoted to challenging the Public Protector's decisions, including the remedial action taken.

[108] When the High Court determined the first part of the application, it was exercising powers conferred on it by section 172(1) of the Constitution. On the

[89] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[90] *Minister of Home Affairs v Public Protector of the Republic of South Africa* [2018] ZASCA 15; 2018 (3) SA 380 (SCA) at para 56.

[91] *EFF I* above n 24 at paras 74–5.

[92] Id at para 81.

authority of *Hoërskool Ermelo*,[93] the power to make a just and equitable order does not depend on first declaring law or conduct invalid. Considerations of justice and equity permeate every order made in a constitutional matter. I say a lot more about this later.

[109] Therefore, the High Court erred in concluding that "Part A of the application before this court does not constitute constitutional litigation."[94] The fact that an interim interdict may be granted in non-constitutional litigation does not mean that if sought in a constitutional litigation like a review, it is not part of that litigation. In fact, the conclusion reached by the High Court in this regard contradicts its own judgment. Earlier, and relying on the decision of this Court in *OUTA*,[95] the High Court held that the purpose of the interdict was to protect the rights yet to be determined in the review application and further that the interdict it was minded to grant should also promote the spirit, purport and objects of the Constitution.

[110] The *OUTA* standard which the High Court embraced and applied, is applicable to constitutional matters. It is triggered only where the effect of the interdict is to prevent the exercise of public power. This standard may not be invoked in a commercial or contractual matter that has nothing to do with the exercise of public power.

[111] But the question that remains is whether there are reasonable prospects of success in the appeal, in the event that leave is granted. I agree with the first judgment that the judgment of the High Court with regard to the grant of the interim interdict is unassailable. This means that there are no prospects of success against that part of the order.

[112] However, the High Court did not limit the remedy it granted to an interim interdict. It went further and suspended the operation of the remedial action pending

[93] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*) at para 97.

[94] High Court judgment above n 1 at para 60.

[95] *OUTA* above n3 at para 45.

the final determination of Part B of the review application. The order issued by the High Court reads:

> "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."[96]

[113] Therefore, even if it could be said that there were prospects against the grant of the interdict, the applicants for leave would still be faced with the question whether there were prospects against suspension. Requirements for suspension differ from those needed for an interim interdict. The *OUTA* standard does not apply to suspension.

[114] The power to suspend the operation of the Public Protector's remedial action is sourced from section 172(1)(b) of the Constitution. If in a matter like the present, it is considered just and equitable to suspend a remedial action pending a determination of the review in which the validity of the remedial action is impugned, a court may grant the suspension. Guidance for issuing the suspension is derived from considerations of justice and equity.

[115] A determination of a just and equitable order of necessity requires a careful consideration of interests of parties on both sides of the litigation.[97] The order must be fair and just when all relevant factors are taken into account. What is just and equitable

[96] High Court judgment above n 1 at para 62.

[97] *Hoërskool Ermelo* above n 93 at para 96.

in a given case, depends on the facts of that particular case. This sort of enquiry entails a flexible approach in pursuit of justice and equity in every matter.

[116] As the first judgment observes, the enforcement of the remedial action before the review is determined would be prejudicial to the applicant for review. It would mean that he has to be punished in terms of the remedial action which he had successfully demonstrated was likely to be set aside as not meeting the requirements of the Constitution and the relevant legislation. This would be the position where the record shows no potentiality of prejudice to the Public Protector, should the enforcement of the remedial action be put on hold until the finalisation of the review application. Its immediate execution would serve no purpose other than short term expediency. The remedial action we are concerned with here does not address or promote the rights or interests of a particular person, let alone interests that require preservation pending the determination of the review application.

[117] In these circumstances it was just and equitable for the High Court to suspend the remedial action. This is a further reason that supports the conclusion that there are no prospects of success on the merits. And since no other reasons compel the granting of leave, the applications for leave to appeal against the merits must fail.

For the Applicant in CCT 232/19 and the Ninth Respondent in CCT 233/19:	T Ngcukaitobi and J Mitchell instructed by Ian Levitt Attorneys
For the Second and Third Respondents in CCT 232/19 and the First and Second Applicants in CCT 233/19:	T Masuku SC and B Matlhape instructed by Seanego Attorneys Incorporated
For the First Respondent in CCT 232/19 and CCT 233/19:	W Trengove SC, M le Roux and O Motlhasedi instructed by Malatji & Co Attorneys
For the Fourth Respondent in CCT 232/19 and the Second Respondent in CCT 233/19:	M Chaskalson SC and B Lekokotla instructed by the State Attorney
For the Ninth Respondent in CCT 232/19 and the Seventh Respondent in CCT 233/19	R Hutton SC and C van Castricum instructed by Werksmans Attorneys
For the Tenth Respondent in CCT 232/19 and the Eighth Respondent in CCT 233/19	PPJ de Jager SC instructed by Savage Jooste & Adams