



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others**

**CCT 232/19 and CCT 233/19**

**Date of hearing: 28 November 2019**

**Date of judgment: 29 May 2020**

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### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Friday, 29 May 2020 at 10h00, the Constitutional Court handed down judgment in two applications for direct leave to appeal against a judgment of the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court had granted an interim interdict to suspend the operation of the Public Protector's remedial action contained in her report entitled '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 Services' (the SARS Report), pending the final determination of the review of that report. The central question before the Constitutional Court was the appropriate test to be applied when granting interim interdicts against the Public Protector.

The Public Protector issued the SARS Report on 5 July 2019. It directed the President to take note of the findings of maladministration, corruption and improper conduct and take appropriate disciplinary action against Mr Gordhan. Mr Gordhan launched an urgent application in the High Court on 10 July 2019 for an order temporarily suspending this remedial action and interdicting the Public Protector from enforcing it, pending the finalisation of a judicial review in which Mr Gordhan sought to set aside the SARS Report. The EFF applied for, and was granted, leave to intervene in the High Court proceedings. The President supported Mr Gordhan's approach and the relief sought.

The High Court held that Mr Gordhan had fulfilled the requirements for an interim interdict as set out in *National Treasury v Opposition to Urban Tolling Alliance (OUTA test)*. The High Court thus granted the relief sought by Mr Gordhan and suspended the remedial action contained in the SARS Report, pending the judicial review of the Report. In addition, the High Court awarded costs against the Public Protector and the EFF. Costs were also awarded

against the Public Protector in her personal capacity. Aggrieved by this outcome, the EFF and the Public Protector each filed separate urgent applications for leave to appeal directly to the Constitutional Court against the judgment and order of the High Court.

In the Constitutional Court, the EFF argued that the High Court judgment impermissibly interfered with the accessibility and efficacy of the Office of the Public Protector, that the *OUTA* test was inapposite for an interim order against a Chapter 9 institution and that a new, stricter test for interim interdicts against the Public Protector ought to be developed. It also sought to appeal against the costs order of the High Court.

The Public Protector's arguments before the Court included that the High Court applied the incorrect legal standards in granting the interim interdict. Further, the Public Protector submitted that the High Court failed to have due regard to the constitutional status of her Office and the effect that an interdict would have on her powers and functions. She also sought to appeal against the personal costs order of the High Court.

Mr Gordhan submitted that leave to appeal should not be granted because the applications did not engage the jurisdiction of the Court; the applications were not urgent; and it would not be in the interests of justice to grant leave to appeal.

The President contended that the appeals raised important issues of a constitutional nature, particularly concerning the principle of separation of powers. The President submitted that it would be in the national interest for the Court to pronounce on these issues, but that the applications for leave to appeal bore no reasonable prospects of success, that the High Court's interim order was correct and the applications for leave to appeal ought to be dismissed.

In a unanimous judgment penned by Khampepe ADCJ (Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring) (main judgment), the Constitutional Court held that the central concern in this matter was the appropriate test to be applied when granting interim interdicts against the Public Protector. It emphasised that what was not in issue was whether interim interdicts could be granted against the Public Protector or whether the reports of the Public Protector could be reviewed, as our law perspicuously allows for both of these. Further, the matter did not concern the merits of the pending review application against the SARS Report.

The first hurdle concerned whether or not the applications for leave to appeal engaged the jurisdiction of the Court. With regards to the EFF's application, the main judgment held that the Court had yet to pronounce on whether interim interdicts against the Public Protector constitute an improper interference with her powers and that this determination raised important separation of powers considerations which engaged the jurisdiction of the Court. Further, it held that the EFF's submission that a new, stricter test ought to be applied to interdicts against the Public Protector also engaged its jurisdiction as it required the Court to consider the constitutional role and functions of the Public Protector. Concerning the application by the Public Protector, the main judgment held that the essence of the Public Protector's pleadings was that the High Court failed to have due regard to the important constitutional considerations related to her Office and the impact that an interim interdict may have on her ability to carry out her constitutional functions. The Court thus found that its jurisdiction was also engaged in this application.

With regard to the second hurdle, the interests of justice, the main judgment highlighted that the applications for leave to appeal concerned the appeal of an interim interdict, which is purely interlocutory in nature. The main judgment held that the EFF's argument for a stricter test for interim interdicts against the Public Protector, although novel and interesting, was without merit. The *OUTA* test already provides that courts must only grant interim orders in exceptional circumstances. The main judgment held that the *OUTA* test is flexible enough to take into account the constitutional role of the Public Protector and that it has sufficient safeguards to protect the powers and functions of the Public Protector when an interim order is sought. Therefore, there is no compelling reason to create a special test applicable to the Public Protector. Furthermore, it held that the High Court specifically took into account whether the interim interdict would interfere with the Public Protector's constitutional powers. The main judgment agreed with the High Court's conclusion that the interdict would not interfere with the duties of her Office in any way as, once a report is published, her duties and functions have been performed and her effectiveness would therefore not be hindered.

In addition, the main judgment emphasised that direct appeals are not merely available for the asking, but that exceptional circumstances ought to exist. The main judgment held that these were not present in this case and this militated against granting leave to appeal. The main judgment therefore held that the applications did not satisfy the interests of justice criteria regarding the appealability of interim orders and accordingly leave to appeal against the merits in both applications was not granted.

However, the main judgment granted leave to appeal against the costs orders of the High Court. It reaffirmed that an appeal court should not lightly interfere with the costs order of a lower court. However, the main judgment found that the High Court's decision as to costs was influenced by a misdirection on the applicable principles and that this warranted the Court's interference. The matter was of a constitutional nature and the High Court therefore erred in not applying *Biowatch* to the question of costs. The cost order of the High Court against the EFF was therefore set aside. Furthermore, the main judgment also set aside the personal costs order against Ms Mkhwebane. This was also done on the basis that there was a material misdirection by the High Court which warranted an interference by the Court. Personal cost orders are punitive in nature and the High Court failed to provide any reasons to justify an order of this nature.

Lastly, the main judgment noted that the considerable public interest in this matter had attracted significant criticism against both the courts and the Public Protector, which is to be encouraged in our constitutional democracy. However, there was a danger that unreasoned and unsupported criticism against the courts and the Public Protector may undermine that same constitutional democracy.

A second judgment, penned by Jafta J (Khampepe ADCJ, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring), concurred with the main judgment that leave to appeal against the merits should be refused and provided additional reasons on why it is not in the interests of justice to decide the merits in the present circumstances. The second judgment held that even if it could be said that there were prospects against the grant of the interdict, the applicants would still be faced with the question whether there were prospects against the suspension order by the High Court. The second judgment held that the power to suspend the operation of the Public Protector's remedial action is sourced from section 172(1)(b) of the Constitution. Therefore, the *OUTA* test did not apply as requirements for suspension differ from those needed for an interim interdict. The second judgment

concluded that in the circumstances it was just and equitable for the High Court to suspend the remedial action and the application for leave to appeal against the merits must fail.