

REPORT ON INVESTIGATION INTO MR ABRAMJEE'S SMS OF 24 April 2022

TO ADV BREITENBACH S C

Introduction

[1] On 4 February 2022 the Constitutional Court dismissed an application lodged by the Public Protector, Advocate Busisiwe Mkhwebane, in terms of which she sought to challenge one of the Rules introduced by Parliament and aimed at regulating the removal of office-bearers of Chapter 9 Institutions.¹ On 11 March 2022 the Public Protector brought an application for rescission of parts of the order of the Constitutional Court made on 4 February 2022.

[2] It is not in dispute that on Sunday, 24 April 2022 and while the matter of the *Public Protector v Speaker of the National Assembly and others* was pending before the Western Cape High Court, to be heard on 26 and 27 April 2022, Advocate Andrew Breitenbach SC, lead counsel for the Speaker of the National Assembly, received a message by way of short-message service (sms) via a telephone number that, he later learned, belonged to a Mr Ismail Abramjee of Pretoria. The message read:

'Hello Adv. Breytenbach SC, Re: The Public Protector case tomorrow. I have it on very good authority that the ConCourt has declined to hear the Public Protector's rescission application. The decision will be made known sometime this coming week but not later than Friday. I thought I'd just share this with you on a strictly confidential basis. Thanks.'

¹ Chapter 9 of the Constitution of the Republic of South Africa.

[3] On Friday, 3 June 2022, I was requested by Chief Justice Zondo to investigate 'whether there is any evidence that somebody within the Court gave confidential information to Mr Ismail Abramjee concerning Adv Busisiwe Mkhwebane's application for rescission.' For this purpose, I was given a free hand to conduct the investigation in any manner I deem appropriate. The Chief Justice gave the undertaking that he and his colleagues on the Constitutional court, their clerks and secretaries may all be questioned. In addition, copies of emails sent to the Chief Justice by the other Justices of that Court, in response to a question 'whether they and their clerks had had any communication with Mr Abramjee'. All the other Justices, namely, Madlanga J, Mhlantla J, Theron J, Tshiqi J, Majiedt J, Mathopo J, bar Kollapen J and Mlambo AJ, confirmed that they did not know Mr Abramjee and had not had any communication with him. Also, their clerks.

[4] In his response to the Chief Justice's enquiry Justice Kollapen said when the question of the 'sms' arose he immediately brought to the attention of his colleagues that he knows Mr Abramjee; that they both live in the same community in Laudium, Pretoria and that both are members of the Pretoria Legacy Foundation, which undertakes various activities and programmes; that they would accordingly interact with each other, including telephone calls. In providing some context to the telephone calls he mentioned, Justice Kollapen said that on 4 March 2022 the Foundation hosted a celebratory function, a joint Human Rights seminar on 21 March and presentations at certain schools on Freedom Day. During these occasions he needed to and did in fact interact with Mr Abramjee in his capacity as fellow member of the Foundation. He also mentioned, in his email to the Chief Justice, that Mr Abramjee has an interest in

law, having studied it for a while and was very supportive of his (Justice Kollapen 's) appointment to the Constitutional Court. However, he never disclosed to him any confidential information in their interaction with each other.

[5] In a follow-up email of 9 May 2022 Justice Kollapen stated, once more, that he knows Mr Abramjee, but that he did not divulge to him, or any other person, any confidential information. There are other instances mentioned by Justice Kollapen where there was communication with Mr Abramjee, one such being a family event on 23 April 2022, but I consider it unnecessary to elaborate on them, except to confirm that no confidential information was divulged to Mr Abramjee at any stage, according to Justice Kollapen.

[6] In his response by email to the Chief Justice's enquiry Justice Mlambo stated that he met Mr Abramjee for the first time on the occasion of Justice Kollapen's function, when, it is now common cause, he was honoured by his Laudium community. Ever since that function he has not communicated with Mr Abramjee regarding any case before the Constitutional Court, nor the case that gave rise to the 'sms' in issue. The only communication they had, he said, was when Mr Abramjee informed him about an article by the Economist, which dealt with threats against the South African Judiciary.

[7] Justice Mlambo also reported that he had engaged both his law clerks regarding the matter. They assured him that neither knew Mr Abramjee and that neither had had any communication with him in relation to the matter, or any other matter whatsoever.

[8] The Chief Justice also indicated that he did not know Mr Abramjee and had never communicated with him. Similarly, his clerks informed him that they had never communicated with Mr Abramjee.

Interviews with Justices Madlanga, Mhlantla and Kollapen

[9] I had a short interview with Justice Madlanga over the telephone on 7 June 2022. Upon my request he informed me about the process applicable after an application has been filed at the Registrar's office. As I understand it the file or papers are sent to the Chief Justice, who will allocate it to one of the Justices to prepare a judgment or order (he or she is commonly referred to as 'the scribe'). If the scribe considers that the matter does not warrant a hearing, as in the case at hand, he or she prepares a draft order and a memorandum explaining the proposed order. These are circulated to all the other Justices, who will signify their agreement, or disagreement, usually by email to the scribe. Where all agree the scribe prepares a final order which the clerks will deliver to the Registrar for signature and publication.

[10] To a question whether there is a possibility that an order may be leaked before delivery or publication Justice Madlanga said that is possible through hacking or someone giving the information to another. In the present case, however, not all the Justices had responded at the time the 'sms' was sent to Adv. Breitenbach at 17:13 on 24 April 2022. There could therefore not have been an order at that stage.

[11] I also had a short interview with Justice Kollapen during the evening of 9 June 2022. He advised that having received the memorandum prepared by the scribe on 21 April 2022, he forwarded his view to the scribe on the same day,

supporting the recommendation. His clerks were copied as is the norm. Six (6) Justices in total had signified their support for the recommendation to dismiss the Public Protector's rescission application on 21 April 2022. The final decision, however, was to be taken at conference, the last of which was scheduled for 4 May 2022. Thus, no final decision was possible before that date, Justice Kollapen reasoned.

[12] In our interview Justice Mhlantla confirmed that she had sent out her memorandum on 21 April 2022 and that on the same day she received six (6) significations. The final conference was held on 4 May 2022 and the order issued on 6 May 2022. Therefore, although the 'sms' was correct regarding the refusal by the Court to hear the rescission application, the suggestion as to when the order could be announced was pure speculation, since no order was possible before the final conference on 4 May 2022.

Interview with Mr Mathiba

[13] Mr Mathiba is a Registrar's clerk in the office of the registrar of the Constitutional Court. He is one of three Registrar's clerks, the other two being Ms Ngobeni and Ms Magda Visagie. They deal with case-flow management receiving documents and forwarding them to the Justices. They also issue orders to parties after same have been signed by the registrar. Mr Mathiba was adamant that they do not know the contents of an order before it has been received in their office. There is therefore no chance of a leak before an order comes to their office. The registrar signs the orders upon receipt of an email from the judges' clerks with instructions. After the registrar has signed an order

the registrar's clerks will send it to the parties on the same day. They do not discuss any pending cases at all.

Interview with Mr Ismail Abramjee

[13] On 3 June 2022 the Chief Justice forwarded to me several documents, among which was an affidavit deposed to by Mr Abramjee on 28 April 2022. Mr Abramjee states under oath that: at no stage did he discuss, nor was he alerted to, or given any information by any judge, registrar's clerk, or any employee of the Constitutional Court, in relation to the rescission application brought by the Public Protector before that Court, or any other case pending before any other court. He states further that he became aware 'on twitter' earlier in April that the Constitutional Court 'was likely to hand down its decision on the Public Protector's rescission application on 30 April 2022. From his own knowledge, based on authorities 'placed before the Constitutional Court' in previous rescission applications, he concluded that the Court 'would not entertain the said application. He continued that this was what he had intended to convey in the text message (sms) and regrets the 'incorrect [impression created] that he was privy to inside information'. Finally, Mr Abramjee takes full responsibility for the impression that flows from his text message.

[14] In a short telephonic interview with him on 14 June 2022 Mr Abramjee informed me that he is the spokesperson for the Legacy Foundation and that Justice Kollapen is their deputy chairperson. He said that on Sunday, 24 April 2022 he was very sick; he remained in bed and slept the whole day.

[15] Another document forwarded to me by the Chief Justice on 3 June 2022 is headed:

‘CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT IN CONNECTION WITH THE IMPARTING OR COMMUNICATING OF INFORMATION REGARDING PENDING JUDICIAL PROCEEDINGS BY A MEMBER OF EITHER THE ADMINISTRATION OR THE JUDICARY IN THE CONSTITUTIONAL COURT, PRIOR TO THE OFFICIAL AND PUBLIC RELEASE OF SUCH INFORMATION.’

The Public Protector initiated her own investigation in the ‘sms’ saga, with the view, it seems, to establishing the identity of the role-players. Paragraph 2.1 of the closing report reads:

‘2.1 On 4 May 2022, the Public Protector of the Republic of South Africa: Adv Busisiwe Mkhwebane (the Public Protector) initiated an own investigation in connection with suspicions of maladministration or improper conduct by one or more unidentified employees of the Constitutional Court for unlawfully communicating and/or leaking of information concerning pending judicial proceedings thereby bringing the administration of justice by the courts into disrepute and maladministration.’

The method of investigating included the issue and service of subpoenas against certain individuals, including the two Justices Kollapen and Mlambo. I shall refrain from entering the debate as to whether the Public Protector had the authority to investigate sitting members of the judiciary.

[16] In any event, the Public Protector reached the following conclusion from her investigations:

'Conclusion

5.1.55 *The weight of available circumstantial evidence established in this preliminary investigation appear to tilt the scales towards an ineluctable conclusion that the sources of Mr Abramjee may well be members of the administrative staff or judicial official based at Constitutional Court and the weight leans more towards members of the judiciary.*

5.1.56 *The cumulative weight of this evidence as highlighted above namely, the SMSes sent to Adv Breitenbach by Mr Abramjee, the frequency of telecommunication or close association between Mr Abramjee and the judicial officer(s), are all sufficient to lay a foundation of a belief upon which to invoke section 14(1) of the Judicial Service Commission Act by the office of the Public Protector.*

5.1.57 *Equally, the motive behind the unsolicited SMSes sent by Mr Abramjee to Adv Breitenbach is emblematic of a nefarious intention and effort to commit a criminal conduct in terms of Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PRECCA) or in terms of other statutory or common law crime offences. Accordingly, this aspect triggers a referral to the 33 Directorate for Priority Crimes Investigation (DPCI) for criminal investigation against Mr Abramjee and his accomplice(s).*

5.1.58 *It can therefore be concluded that the suspicions referred to are, in the circumstances and until the investigation shows otherwise, justifiable and reasonable.'*

[17] Although the rest of the Justices and all the clerks were available for interviewing, I considered it unnecessary to add to the list that so keenly

participated and gave their versions on the issues at hand. To my mind, no purpose would have been served by calling more people only to repeat what is already on record.

[18] A further document that was made available to me is a report on the findings of a cyber-security assessment conducted on the network and domain of the Constitutional Court. It appears that the assessment was commissioned by the Secretary-General in the Office of the Chief Justice. She appointed the Director: Facilities and Security to conduct the assessment. The background to the assessment is set out in paragraph 2 of the report. It reads:

‘2 BACKGROUND/DISCUSSION

2. 2.1 The SG made a request for the investigation of a potential information breach within the Office of the Chief Justice with specific reference to claims made in the media relating to a pending Constitutional Court judgement;

2.2 Media reports started from 24 April 2022 while the Western Cape Division of the High Court, Cape Town, (WC HC) was hearing a matter brought by the Public Protector (PP);

2.3 At the time of the media reports going public, the PP had a pending matter at the Constitutional Court which matter had a bearing on the matter being heard at the WC HC and other processes pending at the Parliament;

2.4 The media reports were triggered by the release of a ‘text message’ allegedly sent by a Mr Ismail Abramjee to Advocate Andrew Breitenbach SC who is the Senior Council for the Speaker of the National Assembly.

2.5 The nature and content of the text message was alleged to suggest that Mr Abramjee had inside knowledge of the matter in the Constitutional Court and its

pending judgement which was yet to be delivered which suggested further that information was leaked to Mr Abramjee;

2.6 The investigation was executed to determine if indeed there may have been a leak through electronic email communication from the court to Mr Abramjee.'

[19] The ultimate finding of the exercise was that: 'An assessment of the Constitutional Court domain and network revealed that there was no email communication to the effect that will support the allegations of an information leak in the form of an email from the Constitutional Court users.

Discussion

[20] It seems clear to me that in arriving at her conclusion that the sources of Mr Abramjee may well be members of the administrative staff or judicial official based at the Constitutional Court with the weight leaning towards members of the judiciary, the Public Protector considered the 18 telephone calls made or exchanged between Abramjee's mobile phone and Justice Kollapen's. Justice Mlambo's uncontested version was that he had communicated with Mr Abramjee on, at most, only two occasions. There is, in my view, no evidence whatsoever, that he was, or could have been, a source of confidential information for Abramjee. There is also no evidence of a close association between them. The frequency of calls between Justice Kollapen and Mr Abramjee was fully explained by both. They are members of the same organisation that undertakes a lot of activities which requires them, by virtue of their position in the organisation, to communicate frequently. This was ignored by the Public Protector.

[21] The other messages sent by Mr Abramjee to Adv Breitenbach SC do not constitute evidence, or proof, that Justice Kollapen, or anyone at the Constitutional Court, had been passing on confidential information to Mr Abramjee, but merely show that the latter had communicated with Adv Breitenbach SC in the past.

[22] As to the employees of the Constitutional Court, Mr Mathiba's version was very clear: they do not know the decision of the Court before it is brought to them to issue. The Judges' clerks could also not have been in a position to leak the final decision to Mr Abramjee, since it was to be finalised only at the final conference on 4 May 2022, while the controversial sms was sent to Adv Breitenbach SC on 24 April 2022.

[23] I accordingly answer the question posed in the negative.



L Mpati

(Former President of the Supreme Court of Appeal)

15 June 2022