IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 15 August 2017

CASE NO: 43769/17

In the matter between:

SOUTH AFRICAN RESERVE BANK	Applicant

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

15/08/2017 .....
DATE SIGNATURE
F. Murphy

and

PUBLIC PROTECTOR	First Respondent
SPEAKER OF PARLIAMENT	Second Respondent
CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
SPECIAL INVESTIGATING UNIT	Fourth Respondent
ABSA BANK LIMITED	Fifth Respondent
NATIONAL TREASURY	Sixth Respondent

JUDGMENT

MURPHY J

1. The applicant, the South African Reserve Bank, ("the Reserve Bank") seeks urgent relief setting aside the remedial action taken by the first respondent, the Public Protector, in her Report 8 of

2017/1018 into the Alleged Failure to Recover Misappropriated Funds ("the final report"). The final report followed an investigation and a preliminary report by the Public Protector into a complaint about the alleged failure by government in 1999 to implement the recommendation of a covert UK based asset recovery agency, CIEX, suggesting that the government recover monies paid by the Reserve Bank to Bankorp, a private commercial bank. The funds were provided to Bankorp between 1985 and 1995 by the Reserve Bank acting as a lender of last resort.

2. Chapter 9 of the Constitution establishes various independent and impartial state institutions with the aim of strengthening constitutional democracy in the Republic. One of them is the Public Protector, who is constitutionally mandated to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice. The Constitutional Court recently described the Public Protector as "one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs, and for the betterment of good governance".[1] The person occupying the office is required by the governing legislation, the Public Protector Act[2] ("the Act"), to be "a fit and proper person to hold such office" and to be a Judge or to have substantial experience in the administration of justice or public affairs.[3]

3. Section 182(1) of the Constitution is the primary source of the powers of the Public Protector. It reads:

> "The Public Protector has the power, as regulated by national legislation –
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> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
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> (b) to report on that conduct; and
>
> (c) to take appropriate remedial action."

Section 182(2) of the Constitution provides that the Public Protector has the additional powers and functions prescribed by national legislation. These are contained in the Act.

An overview

4. On 19 June 2017, Ms Busisiwe Mkhwebane, the incumbent Public Protector, acting in terms of section 182(1)(b) of the Constitution, issued the final report directing certain remedial action to be taken. Paragraph 7.1 of the final report orders the fourth respondent, the Special Investigating Unit ("the SIU"), to re-open earlier investigations into the issue with the aim of recovering the "misappropriated public funds", while paragraph 7.2 instructs the third respondent, the Chairperson of the Portfolio Committee on Justice and Correctional Services, Dr Mathole Motshekga, ("the Chairperson of the portfolio committee") to take certain steps to amend the Constitution to alter the constitutional mandate of the Reserve Bank.

5. This urgent application is not concerned with the remedial action in paragraph 7.1 of the final report, which, I was informed from the bar, is the subject of other review proceedings. This

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[1] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 52
[2] Act 23 of 1994
[3] Section 1A of the Act

application is concerned solely with the remedial action directed at the Chairperson of the portfolio committee requiring him to initiate a process that will result in an amendment of section 224 of the Constitution with a view to altering the primary object of the Reserve Bank. The exact terms of the remedial action are set out later in this judgment. It is sufficient now to mention that the Public Protector ordered that section 224 of the Constitution be amended to change the primary object of the Reserve Bank from the protection of the value of the currency in the interest of balanced and sustainable economic growth to the promotion of balanced and sustainable economic growth, "while ensuring that the socio-economic well-being of the citizens are protected (sic)".

6. The Public Protector released the final report to the public at a press conference convened by her office on 19 June 2017. Her instruction to amend the constitutionally mandated primary object of the Reserve Bank was received with dismay and consternation, and as might reasonably have been predicted, had immediate negative consequences for the economy and investor confidence. The currency instantly depreciated by 2.05%; R1.3 billion worth of South African government bonds were sold by non-resident investors; and banking sector shares were negatively impacted. The next day, 20 June 2017, Standard & Poor Global Ratings warned that South Africa's credit rating could be downgraded further if government were to give effect to the remedial action. After this warning, the currency depreciated further. As the Governor of the Reserve Bank, Mr. Lesetja Kganyago, pointed out in the founding affidavit, the ratings agencies have made it clear that the independence of the Reserve Bank and its policy framework are among "the strongest pillars supporting the South African economy and underpinning their rating assessment".

7. In view of the immediate economic damage caused by the final report, the Reserve Bank filed this urgent application to review and set aside both the remedial action in paragraph 7.2 of the final report and the consequent obligation placed on the Chairperson of the portfolio committee and the Reserve Bank by paragraph 8.1 of the final report to submit action plans to the Public Protector in relation to the remedial action in paragraph 7.2 of the final report. The Governor maintains that the remedial action is a "gross overreach" that must be stopped in its tracks so that certainty and predictability about the Reserve Bank's role is affirmed. The remedial action is binding[4] and has had a serious and detrimental effect on the economy and according to the Governor for as long as it remains in place, it holds the risk of causing further currency depreciation, further ratings downgrades and significant capital outflows. Uncertainty now pervades the markets and the South African economy suffers. The Governor urges that it be set aside without delay as a matter of urgency.

8. The Reserve Bank cited the Speaker of Parliament, the Chairperson of the portfolio committee and ABSA Bank ("ABSA" -the successor of Bankorp) as second, third and fifth respondents respectively in this urgent application. The Speaker, Ms Baleka Mbete, filed an affidavit on her own behalf and on behalf of the Chairperson of the portfolio committee supporting the application of the Reserve Bank and requesting an order directing that they be permitted to act as co-applicants. The Chief Executive Officer of ABSA, Ms Maria Ramos, did likewise. She too requested a directive that ABSA be treated as a co-applicant rather than a respondent. At the hearing, Mr Maenetjie SC, who

[4] In *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 76 the Constitutional Court held that the remedial action of the Public Protector is binding and cannot be ignored. It must be complied with or acted upon unless it is set aside by an order of court.

appeared for the Public Protector, confirmed that the Public Protector had no objection to such an order being made.

9. Despite initially opposing the application, the Public Protector filed an answering affidavit in which she conceded the merits and consented to all the relief sought. She has agreed that her remedial action is unlawful in that only Parliament has the power to amend the Constitution and that she has no power to dictate to Parliament. The Reserve Bank, however, in view of the importance of the matter, requested this court to give full consideration to the issues and to satisfy itself that the order is competent and accords with the Constitution and the law. A full ventilation of the issues is necessary in the interests of justice and it will be in the public interest to clarify the nature and scope of the Public Protector's powers and functions. None of the key factual averments in the founding affidavits has been disputed and consequently they may be accepted as the proven facts.

The preliminary report

10. Prior to issuing the final report, the Public Protector in December 2016, as is her practice, issued a preliminary report ("the preliminary report") dealing with the complaint and inviting representations in relation to her findings and proposed remedial action. The complaint investigated by the Public Protector was lodged in 2010 by Adv Paul Hoffman SC, the Director of the Institute for Accountability in Southern Africa, a public interest organisation devoted to upholding constitutionalism. The main focus of the complaint appears to have been the so-called "lifeboat" extended initially by the Reserve Bank to Bankorp some years before the advent of democracy in South Africa in 1994. The CIEX report commissioned by the government in 1999 alleged impropriety and irregularity in relation to these transactions. However, the contract with CIEX was cancelled by government and no steps were taken by the government or the Reserve Bank to recover the purportedly misappropriated funds. Mr Hoffman alleged that the government had been advised by CIEX about steps it could take to recover an amount of approximately R3.2 billion from ABSA and its shareholders, and that criminal charges could be brought against relevant individuals for "major acts of insider trading and false accounting". Mr Hoffman contended that the government had failed in its duties by not implementing the CIEX report and sought remedial action directing recovery of the funds from ABSA.

11. It is not entirely evident from the preliminary report how it came to be that the Public Protector only issued it 6 years after the complaint was lodged. The complaint was lodged before Ms Mkhwebane was appointed as the Public Protector, when her predecessor, Ms Thuli Madonsela, was in office. In paragraph (xviii) of the Executive Summary prefacing the preliminary report, Ms Mkhwebane offers the following explanation for the delay:

> "When the Complaint was initially lodged, I had initial rejected to investigate the matter due to lack of evidence and unavailability of resources, after further submission from the Complainant suggesting that ABSA had made a provision for payment in R100k tranches but Government failed to follow up, I was persuaded that the matter deserves to be looked at (sic)."

12. In engagements with the Public Protector prior to the preliminary report being issued, the Reserve Bank and ABSA both submitted that the Public Protector did not have power to investigate the matters as the impugned conduct had transpired before the Act was enacted in 1994 and was referred to the Public Protector more than two years after the occurrence of the conduct. The Public

Protector rejected this submission. In paragraph 7.1.1.2 of the preliminary report, she identified the impugned conduct to be "the alleged failure to recover the loan" - in 1999, although in other paragraphs of the preliminary report she refers to the non-implementation of the CIEX report by government as the impugned conduct. The failure to recover the loan, she held, happened a few years after the Act was enacted. As regards the fact that the matter was only reported in 2010 or 2011, more than two years after the non-recovery of the loan, the Public Protector relied on section 6(9) of the Act to assume jurisdiction. The subsection provides:

> "Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned."

The Public Protector was persuaded that she should assume jurisdiction within her discretion because "the matter deserved to be investigated with finality as the uncertainty it cast on the integrity of the Government, the SARB and financial services sector regulation was not good for the country." In making this finding, the Public Protector made no mention of the fact that the matter had been the subject of two independent judicial investigations, both of which had concluded that recovery was not feasible.

13. As mentioned earlier, the Public Protector's findings regarding the lifeboat and the remedial action in relation to them are the subject of other review proceedings. Those findings are nonetheless of relevance to the present review and require some consideration as they define and impact upon the issues related to the remedial action ordered in paragraph 7.2 of the final report. The Reserve Bank, the Speaker and ABSA strongly criticise the preliminary report and the final report for their forensic weakness, incoherence, confusion and basic misunderstanding of the applicable contractual, constitutional and administrative law principles. The reports, they argue, fall short of what might reasonably be expected in a matter of such economic, political and constitutional importance, with reputational implications and interest to key stakeholders domestically and internationally.

14. The Public Protector's essential findings are distilled and set out clearly enough in paragraph 7 of the preliminary report. The preliminary report explains that in October 1997, the South African government entered into an agreement with CIEX to investigate alleged apartheid corruption, which later furnished a report. The cost of the CIEX report was 600 000 pounds sterling. The work to be done by CIEX, referred to as "Project Spear", was concerned with "tracking public funds allegedly stolen", which included an alleged R3.2 billion offered to Bankorp "in the disguise" of a distressed bank lifeboat, R100 million given to Nedbank and "several billions siphoned to offshore illicit deals". The Public Protector found that despite the Presidency (under President Mbeki), National Treasury (under Minister Trevor Manuel) and the Reserve Bank having an obligation to process the CIEX report, no evidence could be found that any action was specifically taken in pursuit of the CIEX report or that it was properly deliberated on by either a Cabinet committee or the board of the Reserve Bank or "any other legitimate structure". The Public Protector thus concluded that the failure to implement the CIEX report by the government and the Reserve Bank was inconsistent with the "duties of government under the Constitution". The conduct of the Presidency, National Treasury and the Reserve Bank for "failing to process" the CIEX report, she held, was in violation of various constitutional and statutory provisions and amounted to improper conduct and maladministration as contemplated in section 182 of the Constitution and section 6 of the Act.

15. Regarding the amount of money which the Public Protector believes the Reserve Bank and the government ought to have recovered, she found that in 1997 an amount of R1,5 billion plus 16% interest was owed to "the state of South Africa" and the Reserve Bank. She found further that only an amount of R1,5 billion, the capital value of the lifeboat, was repaid in October 1995 without interest. In her opinion, the terms of the lifeboat contract between ABSA (Bankorp) and the Reserve Bank required ABSA to pay R225 million annually for a period of five years "with interest and government bonds to secure it." These amounts had neither been paid nor written off by March 1998 when the CIEX report was handed to government; and that therefore the failure to recover the outstanding R1,125 billion was prejudicial to the public of South Africa because "the capital amount of the loan that was offered to Bankorp later ABSA bank belongs to the people of South Africa including the interest". The Public Protector rejected the concerns of the government and the Reserve Bank about the negative systemic impact of any attempted recovery, on the grounds that no attempt was made to test a proposal in the CIEX report that the outstanding amount plus interest (approximately R3.2 billion) if recovered periodically would have no negative systemic impact. She held (incorrectly as it turns out) that ABSA had made contingent provision for the re-payment of the amount. For reasons I will discuss later, the Reserve Bank and ABSA maintain that the Public Protector's reasoning and findings are based on a misunderstanding of the contractual terms of the financial assistance package provided to Bankorp.

16. In paragraph 8 of the preliminary report the Public Protector sets out the remedial action she originally intended to take, but which she later abandoned. Paragraph 8.2 of the preliminary report stipulates remedial action aimed at the National Treasury and the Reserve Bank. It reads:

> "8.2.1 To ensure that systems, regulations and policies are put in place within 90 days to prevent this anomaly in providing loans/lifeboat (sic) to banks in future;
>
> 8.2.2 South African Reserve Bank should consider reviewing its lending policies in order to avoid similar situations in future;
>
> 8.2.3 The National Treasury together with SARB to institute legal action against ABSA in order to recover 16% interest accumulated over period of five years amounting to R1,125 billion plus interest, further ensure that the interest is not more than the capital value of the loan and the in duplum rule which states that unpaid interest on a money debt owing ceases to accumulate once it reaches the amount of the capital sum (sic)."

17. Paragraph 8.3 of the preliminary report specifies remedial action intended for the President. He is directed *inter alia* to consider whether it is necessary to appoint a Commission of Inquiry to "investigate alleged apartheid corruption as outlined in the CIEX report and take necessary measures with the exception of ABSA bank lifeboat (sic)."

18. Paragraph 8 of the preliminary report notably proposed no remedial action for the amending of section 224 of the Constitution in relation to the primary object of the Reserve Bank to protect the value of the currency. The only observation on the object of the Reserve Bank I am able to find in the preliminary report is a factual statement in paragraph (xii) of the Executive Summary prefacing the preliminary report. The statement does not interrogate the underlying policy regarding the primary object of the Reserve Bank to protect the currency, nor does it comment on or take issue with the desirability or otherwise of the mandate. It reads:

"The primary function of the South African Reserve Bank is to protect the value of South Africa's currency. In discharging this role, it takes responsibility for ensuring that the South African money, banking and financial system as a whole is sound, meets the requirements of the community and keeps abreast of international developments; assisting the South African government, as well as other members of the economic community of Southern Africa, with data relevant to the formulation and implementation of macroeconomic policy; and informing the South African community and all stakeholders abroad about monetary policy and the South African economic situation."

The Reserve Bank's response to the preliminary report

19. The preliminary report was submitted to President Zuma, the Governor of the Reserve Bank, the then Minister of Finance, Mr Pravin Gordan, former Governors of the Reserve Bank and Ms Ramos, the CEO of ABSA. It is not clear from the final report which of these persons responded to the preliminary report. However, the Reserve Bank's submissions are annexed to the founding affidavit in this application as Annexure LK2. They offer a comprehensive critique of the reasoning and findings of the preliminary report. The Reserve Bank commenced its response with a salutary admonition to the Public Protector in the following terms:

"The preliminary report is fundamentally flawed. It is beyond the jurisdiction of the Public Protector; it is based on incorrect facts; it confuses the roles of government and the Reserve Bank; and the remedial action it proposes is constitutionally invalid.

As a result, the preliminary report should not be finalised in its current form. The errors in the report are so serious that if they remain in the final report, they will likely bring instability to the South African financial markets and will require the Reserve Bank to take immediate urgent action in the courts to prevent the implementation of the remedial action pending a review of the final report."

20. The Reserve Bank's response sets out the factual background in some detail. Given the confusion on the part of the Public Protector, it bears repeating. Bankorp first approached the Reserve Bank in 1985-1986 with a request for special assistance to enable it to cope with bad investments and other non-performing assets it had inherited when it took over Trust Bank in 1977 and Mercabank in 1985. The request was made at a time when the South African banking sector was exposed to international sanctions. If Bankorp failed there was a real risk of a run on the banks. The Reserve Bank provided three assistance packages to Bankorp and later to ABSA as part of its duty to act as a lender of last resort. The Reserve Bank, like other central banks around the world, is involved is systemic risk management. Increased market volatility often results in financial instability, leading to institutional distress, increased credit risks and insolvencies. As lenders of last resort, central banks may be required to provide assistance to support banks facing liquidity difficulties in order to create enough base money to off-set the public desire to switch into cash in a time of financial crisis. The assistance is generally provided when central banks fear that a loss of confidence in a particular institution could prompt systemic failure in the banking system. It was in this capacity that the Reserve Bank provided financial assistance to Bankorp and then later to ABSA. The solvency problems that prompted Bankorp to approach the Reserve Bank in 1985 worsened during the course of the assistance being given.

21. The financial assistance package comprised three agreements. The first confirmed that the Reserve Bank had loaned an amount of R1 billion to Bankorp of which R600 was used to purchase government bonds and R400 million was invested at the Reserve Bank at 16% per annum. An

additional R500 million was loaned to purchase further government bonds in the name of Bankorp. All the rights to the bonds and the deposit were ceded to the Reserve Bank as collateral for the loan. The loans were at an interest rate of 1% per annum and Bankorp was entitled to the interest on the deposit and the bonds (which would not be more or less than R225 million being some 15% on R1.5 billion). The total amount of the interest to be earned by Bankorp was capped at R1125 million. The second agreement with effect from 1 April 1992 substituted ABSA as a party in the place of Bankorp. ABSA agreed to repay the loan by set-off of the deposit of R400 million, sale of the government bonds and to pay the proceeds to the Reserve Bank. If the proceeds of the bonds exceeded R1100 million, the excess would be for the benefit of the Reserve Bank. The third agreement in 1995 provided for the Reserve Bank to acquire the deposit and for the Reserve Bank to purchase the bonds from ABSA at a price of R1,1 billion which amount ABSA deposited at the Reserve Bank at 16% per annum. The Reserve Bank made a profit of about R125 million on the sale of the bonds, enabling it to recoup some of the interest paid to Bankorp and ABSA.

22. The lifeboat thus was in the form of the interest differential. Bankorp and ABSA earned 16% on the bonds and deposit and paid 1% for borrowing the capital. The differential was used to discharge Bankorp's bad book. The total amount of the loan of R1,5 billion, plus the 1% interest was repaid to the Reserve Bank prior to 1995 and R125 million profit was realised by the Reserve Bank on the sale of the bonds.

23. In the early 2000s, members of the public raised concerns about the lifeboat. The then Governor of the Reserve Bank, Mr Tito Mboweni, commissioned a panel of experts headed by Judge Dennis Davis to investigate the matter.[5] The panel concluded, inter alia, that, although in some respects flawed, the financial assistance was justified in the interest of protecting the stability of the domestic banking system and that the Reserve Bank's principles and practices relating to distressed banks and reform in related areas of financial architecture were comparable to the highest international standards. Insofar as there was unjustified enrichment of insurance policy holders and minority shareholders in related financial institutions, the difficulties pertaining to the quantification of the enrichment and identity of the beneficiaries rendered the enforcement of an enrichment claim problematic. ABSA could not be regarded as a beneficiary of the package as it had paid fair value for Bankorp. After the panel concluded its work, the Reserve Bank regarded the matter as closed and no further action was taken.

24. There was no further engagement on the issue until July 2011 when the Reserve Bank learnt through the media that the Public Protector intended to launch a preliminary investigation into the financial assistance package. Various interactions ensued intermittently between officials of the Reserve Bank and the Public Protector over the following 6 years. In 2013 the then Public Protector informed the Reserve Bank that the investigation was concerned exclusively with the propriety of government's decision not to implement the CIEX report and not the legality or propriety of the Bankorp lifeboat. The Reserve Bank informed the Public Protector that it had not been involved in any way in the CIEX investigation and had no knowledge of the CIEX report before 2013. Nothing happened thereafter for three years until after the appointment of Ms Mkhwebane as Public Protector in 2016. Further exchanges took place before the preliminary report was issued on 20 December 2016.

[5] The matter was also investigated by the SIU under Judge Heath.

25. The Reserve Bank complained in its response to the preliminary report that the scope of the investigation was unclear. The preliminary report is incoherent, confused and confusing. In some places, it speaks of an investigation into the failure by government to implement the CIEX report at others it criticises the Reserve Bank for failing to recover funds supposedly owing to it. Despite earlier indications and assurances given to Reserve Bank by the erstwhile Public Protector, Ms Madonsela, that the investigation was not concerned with the lifeboat, the preliminary report issued by Ms Mkhwebane made findings in relation to the lifeboat and proposed remedial action designed to recover what is allegedly still owing on the lifeboat.

26. The Reserve Bank maintains that no money is owed under the lifeboat as it has been repaid in accordance with the terms of the governing contracts. Thus the investigation by the Public Protector of the lifeboat, it says, proceeded on a flawed factual premise that ABSA still owed the Reserve Bank money. Additionally, ABSA made no contingent provision for repayment, as is apparent from its public financial statements, which the Public Protector failed to consider. Moreover, the Public Protector's finding that it is common cause that Bankorp and ABSA paid back the capital but not the interest, is incorrect. The 16% earned on the government bonds was never owing to the Reserve Bank. Bankorp and ABSA paid the interest they were contractually obliged to pay. The Reserve Bank concluded on this issue as follows:

> "The scope of the Public Protector's investigation determines the scope of her remedial powers. The Public Protector's power to make findings and recommendations under section 8(1) of the Public Protector Act 23 of 1994 is limited to matters she has investigated. Throughout her engagements with the Reserve Bank, the Public Protector made it clear that she was not investigating the ABSA lifeboat. It is clear from the preliminary report itself that no proper investigation was conducted into the lifeboat. No competent remedial action concerning the lifeboat can therefore follow from this inadequate and incomplete investigation."

27. The Reserve Bank went on to remind the Public Protector that, in terms of section 224(2) of the Constitution, the Reserve Bank must perform its functions independently and without fear, favour or prejudice. The Reserve Bank is not part of government or the National Treasury. Despite explaining such during the numerous engagements preceding the preliminary report, the Public Protector repeatedly confuses government and the Reserve Bank and finds that the Reserve Bank had an obligation to deliberate upon and implement the CIEX report. The Reserve Bank had nothing to do with the CIEX report and was not aware of its existence until about a decade after it was made. It played no role in procuring the CIEX report. The Reserve Bank accordingly submitted to the Public Protector that her finding that it breached various constitutional and statutory duties in not deliberating on and implementing the CIEX report is not sustainable.

28. The Reserve Bank's submissions on the remedial action proposed in paragraph 8.2 of the preliminary report possibly had some influence on the Public Protector's decision to order an amendment to section 224 of the Constitution in the final report. Its submissions in this regard bear repeating in full. They read:

> "The Reserve Bank is constitutionally mandated to protect the currency in the interest of balanced and sustainable growth in the country. It is empowered under....the SARB Act to grant loans and advances as well as perform such other functions of bankers and financial agents as central banks customarily may perform respectively.

Acting in terms of these powers, the Reserve Bank has stepped in to provide financial assistance to distressed banks where their liquidity concerns threaten to undermine stability in the financial sector. It is both constitutionally mandated to perform this function in order to protect the currency and statutorily empowered to do so under the SARB Act. When it acts to provide discretionary liquidity to banks in distress, the Reserve Bank is performing a common function of central banks around the world.

The Public Protector's proposed remedial action that would require the Reserve Bank to put in place regulations that would prevent "this anomaly" from recurring is unfounded. Central bank assistance to failing institutions is not an anomaly; it is a core function of their stabilising role in society. The remedial action is therefore unlawful. It is in conflict with the Reserve Bank's constitutional obligation to protect the currency and it is at odds with the Reserve Bank's role in maintaining financial stability in the country.

The Reserve Bank cannot be required to take steps to remove the powers and duties that have been conferred on it under the Constitution and the SARB Act.

It is also legally untenable to require the Reserve Bank to take steps to avoid this type of situation in the future. The Reserve Bank must respond swiftly to concerns about bank liquidity as and when they arise.....Remedial action which is designed to remove these powers from the Reserve Bank to respond quickly and decisively in the event of a crisis, would be unlawful. If remedial action of this sort is to be retained in the final report, the Reserve Bank requests that the Public Protector give it fair warning, before publication of the final report, so that it may take steps to obtain urgent interdictory relief from the courts to prevent the implementation of the remedial action pending a review.

The Reserve Bank requires this forewarning because it cannot risk being placed in a situation where it is duty bound to act to save a failing institution, while at the same time being bound to comply with the Public Protector's remedial action which strips it of this power."

The final report and the impugned remedial action

29. The final report does not refer to or discuss the submissions made by the Reserve Bank or any other person in response to the preliminary report. The final report mostly restates the analysis and findings of the preliminary report, but in paragraph 2 offers a fuller and clearer analysis of the lifeboat.

30. In paragraphs 4.2.9 and 4.2.10 of the final report, the Public Protector altered the scope of the investigation as identified in paragraph 4.2.5 of the preliminary report. The original scope comprised an investigation of the lifeboat while the scope of the final report focused in the first instance on the CIEX report and the failure to act on its recommendations. Paragraph 4.2.5 of the preliminary report reads:

> "The substantive scope of the investigation focused on compliance with the concluded contract between SARB and ABSA bank, laws and prescripts regarding a decision to not recover an alleged amount of R3,2 billion and Government bonds used as security in respect of loans made to ABSA bank, allegedly owed to the Government of the Republic of South Africa and SARB."

This paragraph was amended by paragraph 4.2.9 of the final report to read as follows:

> "The substantive scope of the investigation focused on compliance with laws and prescripts regarding a decision to not recover misappropriated funds allegedly owed by Bankorp Limited, now ABSA bank, if any, by the Government of the Republic of South Africa and the South African Reserve Bank in relation to what was reported in the CIEX report."

31. More importantly, the Public Protector without notice to any affected person broadened the scope of the investigation in the final report by adding a further leg to the investigation which had not been presaged in any way in the preliminary report. Paragraph 4.2.10 of the final report provides:

> "The report in the circumstances seeks also to look into reform of the Republic's monetary system in order to realise government's commitment in improving socio-economic inequalities in society and solicit an amendment to the Constitution in respect of the South African Reserve Bank to create inclusive economic benefits to the people of the Republic."

The Public Protector offers no reasons for expanding the scope of the investigation in this manner and does not explain whether it was done at her own instance or at the instance of another interest group. The final report discloses that in the period between the release of the preliminary report on 20 December 2016 and the release of the final report on 19 June 2017, the Public Protector conducted only two interviews: one with unidentified officials of the Department of State Security on 3 March 2017 and another with Mr Stephen Mitford Goodson on 23 April 2017. It is not clear whether these persons raised the question of the Reserve Bank's mandate or if any written submissions were made on the matter by other interested persons. Judicial notice may be taken of the fact that there has been some debate in the public arena about the primary object of the Reserve Bank which may have influenced the Public Protector's unexplained decision to expand the scope of the investigation.[6]

32. The body of the final report deals mostly with the alleged failure of the government and the Reserve Bank to recover the 15% interest differential. The final report is largely dismissive of the apprehension of the officials of government and the Reserve Bank about the lack of a legal basis for recovery, the systemic risks and the identified difficulties in pursuing a matter long regarded as closed. After making various negative findings against the Ministry of Finance, the Reserve Bank and the Special Investigating Unit, the Public Protector concluded that the Reserve Bank had a responsibility to apply public funding to the benefit of the South African economy and its people and the non-recovery of any repayment of the lifeboat was improper irregular and unjust. Consequently, as she sees it, the Reserve Bank and the government have a duty to recover public funds which were "misappropriated". She also found that the 600 000 pounds spent on the CIEX investigation was wasteful expenditure as "there was no value for money in the exercise". As explained, the sustainability of these conclusions is not the subject of this application, which is concerned exclusively with the directive to Parliament to amend the Constitution, and thus I make no finding in relation to them.

33. In paragraph 5.3 of the final report, the Public Protector addresses the question: "whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank and if so, what would it take to ensure justice." She incorrectly describes as "common cause" her belief that the lifeboat "belonged to the people of South Africa as it was in a

[6] The Public Protector admits as much in paragraph 5.3.26 of the final report and in her answering affidavit.

form of public funds irregularly advanced to Bankorp Limited/ABSA bank". She then added inaccurately that it is not in dispute that the failure to recover the lifeboat amounted to a loss by the public, as the lifeboat benefitted a few individuals who were shareholders of Bankorp, which funds "could have been used for the betterment of society."

34. The Public Protector's conclusions on the question of prejudice to the public are contained in paragraphs 5.3.20 – 5.3.28 of the final report. It is here that one encounters for the first time some indication of her rationale favouring the constitutional amendment she ordered. These paragraphs read:

> "5.3.20 The South African Government and the South African Reserve Bank did not protect the interest of the public in regard to the irregular and unlawful "lifeboat" granted to Bankorp Limited/ABSA Bank.
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> 5.3.21 The Ministry of Finance failed to exercise their obligation in terms of section 37 of the South Reserve Bank Act of 1989 by ensuring that there is compliance of the Act (sic) by the South African Reserve Bank.
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> 5.3.22 Evidence indicates that the South African Reserve Bank and the South African Reserve Bank (sic) had an opportunity to recover but decided not to.
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> 5.3.23 It is evident that the status of the South African Reserve Bank as the lender of last resort has commercial benefits only in respect of the financial sector market. The benefit which involves vast amounts of public money does not improve the socio-economic conditions of ordinary citizens of the Republic but of a particular financial sector.
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> 5.3.24 Leading authors advocating and promoting the ideology of state banks and nationalization of monetary currency believe that the notion of a lender of last resort's status that is inherent to central banks internationally would cease to exist if governments take sole power in creating money through the establishment of state banks.
>
> 5.3.25 It is in this belief that once the state takes control of creating money and credit, numerous benefits aimed at alleviating economic ails of ordinary economically disadvantaged people may be achieved, unlike our current purely commercial transaction system which only seeks to improve a particular financial sector.
>
> 5.3.26 The debate on nationalization of monetary currency and creation of state banks is one that has found its way in to our democratic society and is a debate which must reach its conclusion by the people of South Africa.
>
> 5.3.27 The Republic has an obligation in terms of the Constitution and international instruments to improve socio-economic conditions of its citizens through legislative and other measures to alleviate poverty and ensure social justice for all. The South African Government must realise economic rights to its people.
>
> 5.3.28 The decision not to recover seriously prejudiced the people of South Africa in particular the poor who would have benefited through social development programs."

35. The Public Protector without any explanation then jettisoned most of the remedial action proposed in the preliminary report. Instead, in paragraph 7.1 of the final report, she ordered the SIU to take steps to recover the allegedly misappropriated funds and in paragraph 7.2 directed the

amendment of the Constitution. This application, as explained, is concerned solely with the directive made to the Portfolio Committee on Justice and Correctional Services in paragraph 7.2 of the final report. It reads:

> "The Chairperson of the Portfolio Committee on Justice and Correctional Services must initiate a process that will result in the amendment of section 224 of the Constitution, in pursuit of improving socio-economic conditions of the citizens of the Republic, by introducing a motion in terms of section 73(2) of the Constitution in the National Assembly and thereafter deal with the matter in terms of section 74(5) and (6) of the Constitution[7]:
>
> Section 224 of the Constitution should thus read:
>
> > (1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are (sic) protected.
> >
> > (2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socio-economic transformation."

36. Section 224 of the Constitution as it currently reads is as follows:

> "(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.
>
> (2) The South African Reserve Bank in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters."

37. The Public Protector's amendment, if given effect, therefore, would introduce three significant changes. First, the primary object of the Reserve Bank would no longer be to protect the value of the currency but to promote balanced and sustainable growth to ensure the socio-economic well-being of the citizens. Second, the Bank would be required to regularly consult Parliament and not the Minister of Finance. Third, the purpose of any consultation with Parliament would be to achieve meaningful socio-economic transformation. Furthermore, as pointed out by Ms Baleka Mbete, the Speaker, in her founding affidavit, the remedial action removes the primary object of the Reserve Bank to protect the value of the currency without allocating this function to anybody else. It leaves the currency unprotected.

38. In paragraph 8.1 of the final report the Public Protector ordered the Reserve Bank and the Chairman of the portfolio committee to submit an action plan within 60 days of the final report (18 August 2017) on the initiatives taken in regard to the remedial action.

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[7] Section 73(2) provides inter alia that only a Cabinet member or a Deputy Minister or a member of the committee of the National Assembly may introduce a Bill in the Assembly. Sections 74(5) and (6) govern the procedure for the introduction of Bills amending the Constitution and lay down requirements for publication and public participation.

Legality, ultra vires and the separation of powers

39. The complaint filed by Mr Hoffman was concerned broadly with whether the Reserve Bank had recovered what was owed to it under the terms of the financial assistance package. From the point of view of the Reserve Bank, the CIEX report was wrong to conclude that there was any amount still owing to the Reserve Bank after the repayment of the financial assistance. All amounts due and owing were fully paid up before the Office of the Public Protector was created. Yet, despite the evidence and explanations provided to her, the Public Protector is not persuaded and continues to maintain that there is still money to be recovered. The correctness or rationality of that finding, as I have indicated more than once, is a matter to be determined in the other review application. The point though for present purposes, is that the original complaint was limited to that question. Mr Hoffman made no complaint about the primary object of the Reserve Bank. His complaint and the initial investigation of it were not concerned with the Reserve Bank's constitutionally entrenched powers. Moreover, given that the impugned remedial action did not overtly flow from any identified aspect of the investigation in either the preliminary or final report, it is difficult to discern precisely the rationale for the remedial action. This brings into question the appropriateness and legality of the remedial action.

40. The Speaker, Ms Baleka Mbete, offers trenchant criticism of the Public Protector on this score. She states:

> "In this case, the improper conduct found by the Public Protector is that the South African Government and the Reserve Bank failed to recover money from a bank.
>
> The Public Protector's order that the Constitution be amended to strip the Reserve Bank of its primary function of protecting the value of the currency is entirely unrelated to the improper conduct that she has found to have been committed. Nobody can rationally suggest that the one is a remedy for the other. The Public Protector does not even do so. Her order that the Reserve Bank be stripped of its primary function of protecting the currency seems little more than a personal predilection wholly unrelated to the improper conduct that she found in this case.
>
> The Public Protector's order is thus beyond the scope of her remedial powers because it is not designed or intended to remedy the improper conduct that she found in this case. If, in fact, she designed and intended it to be such a remedy, her order would in any event be wholly irrational. Nobody can rationally suggest that the failure by the South African Government and the Reserve Bank to recover money from a bank is appropriately remedied by stripping the bank of its primary object of protecting the value of the currency."

41. As I understand it, the Speaker's argument, besides challenging the rationality of the remedial action rests, on a proper interpretation of the powers of the Public Protector under section 182(1) of the Constitution. Section 182(1)(a) gives the Public Protector power to investigate improper conduct in state affairs or in the public administration. Section 182(1)(b) requires the Public Protector to report on "*that*" conduct, that is, the conduct that has been investigated. Section 182(1)(c) empowers the Public Protector to take *appropriate* remedial action. Interpreted contextually and purposively, the latter provision means that the Public Protector may take such action as is appropriate to remedy the improper conduct she has found to be committed in state affairs or in the public administration. The interpretation is reinforced by section 6 (4) of the Act which provides that the Public Protector shall be competent to investigate any *alleged* maladministration etc. Nothing in

the final report reflects that any allegation was made by any person in relation to the Reserve Bank's mandate. Moreover, and in any event, it is doubtful whether the constitutional definition of the Reserve Bank's primary object can ever constitute maladministration, improper or prejudicial conduct as contemplated in section 182(1) of the Constitution or section 6 of the Act.

42. The Speaker's argument is accordingly well-founded and was in any event not challenged (wisely I might add) by the Public Protector. The remedial action should be set aside on this ground alone in terms of section 6(2)(a)(i) of the Promotion of Administrative Justice Act[8] ("PAJA") on the ground that the Public Protector was not authorised by section 182(1) of the Constitution to take such action. However, given the importance of the matter and the interest of the financial markets in the resolution of the questions raised, it is necessary to consider the other grounds of review raised by all the parties.

43. The Governor, ABSA and the Speaker all challenge the constitutionality of the remedial action. The Public Protector's order trenches unconstitutionally and irrationally on Parliament's exclusive authority. The enactment of national legislation is within the exclusive constitutional domain of Parliament. Sections 43 and 44 of the Constitution vest legislative authority in Parliament, including the power to amend the Constitution; and sections 55(1) and 68 vest the National Assembly and the National Council of Provinces respectively with the exclusive responsibility to initiate or prepare legislation and to consider, pass amend or reject legislation. The Public Protector does not have the power to prescribe to Parliament how to exercise its discretionary legislative powers. As the Speaker puts it, the Public Protector is a creature of the Constitution, her remedial powers are derived from the Constitution, and hence she operates under the Constitution and not over it. She has no power to order an amendment of the Constitution. Section 74 of the Constitution prescribes the conditions for its own amendment. Section 224 can only be amended with a supporting vote of at least two thirds of the members of the National Assembly.[9]

44. The remedial action therefore violates the doctrine of the separation of powers guaranteed by section 1(c) of the Constitution. The principle requires constitutionally established institutions to respect the confines of their own powers and not to intrude into the domain of others. An order directing Parliament to amend the Constitution and going so far as to prescribe the wording of that amendment offends the principle of the separation of powers mostly by seeking to fetter in advance the legislative discretion vested in Parliament. It removes from the members of Parliament their right and obligation to exercise an independent judgement when voting on proposed legislation. It potentially compels them to vote against their conscience and possibly breach their oath of office. Worse still, it forces the legislature to adopt an amendment to the Constitution which may circumvent the constitutional procedures enacted for that purpose.

45. Furthermore, as the Speaker points out, the remedial action would pervert the separation of powers in another respect. The Public Protector's amendment of section 224 would vest the Reserve Bank with the primary functions of promoting balanced and sustainable economic growth; and ensuring that the socio-economic well-being of the citizens is protected. It would moreover entrench the Reserve Bank's independence in the performance of these functions, meaning that the Reserve Bank would be entitled to perform these functions without interference from anybody else. These

[8] Act 3 of 2000
[9] Section 74(3)(a) of the Constitution

functions are quintessential national executive functions. In terms of section 85 of the Constitution it falls to the President and Cabinet in the exercise of their executive functions to implement national legislation and to develop and implement national policy. It is inappropriate to entrust the broader management of socio-economic development to the Reserve Bank when the Constitution envisages its function being restricted to a narrower purpose.

46. The impugned remedial action may accordingly be reviewed and set aside under section 1(c) of the Constitution for violating the doctrine of the separation of powers and under section 6(2)(i) of PAJA on the ground that it is unconstitutional. In her answering affidavit, the Public Protector has conceded as much.

Rationality and reasonableness

47. In the founding affidavit, Mr Kganyago, the Governor of the Reserve Bank, is scathing in his criticism of the irrationality of the remedial action. He explains that the key function of central banks in protecting the value of the currency is recognised worldwide because there is general consensus that stable and low inflation provides the foundation for high, sustainable real growth. Central banks enjoy autonomy in protecting the value of currency because this form of long term price stability may, at times, come into conflict with a government's shorter-term goals.

48. In an affidavit filed on behalf of ABSA, Dr Iraj Abedian, an acknowledged expert in economics and finance, elaborated on the role of central banks in the current world order. With widespread financialisation of economic activities, the role of the central bank is to conduct monetary policy in a policy framework that is conducive to stability and economic growth. Over the past century, a variety of monetary regimes were piloted across the globe under varying socio-political dispensations. The choice of monetary policy regime was closely interrelated with the prevailing global exchange rate regimes. All these policy experimentations were in search of the policy framework which would best enable the central bank to promote economic growth, job creation and development. After nearly a century of exploration, theoretical modelling and operational experimentations, it emerged that protecting the value of the currency (price stability) was the best intermediate variable that a central bank could focus on so as to achieve the objectives of growth and job creation. This was primarily due to the fact that, by prioritising price stability, the monetary authority created predictability and accountability. The Public Protector's remedial action, in his opinion, ignores the outcomes of policy experimentation across the world over the past century.

49. Balanced growth, the Governor argues, is also about seeing to it that the value of the currency allows both exporters and importers to engage productively in the economy and keeping control of inflation. Inflation-targeting further secures price stability. The empirical record provides compelling evidence that inflation-targeting works better in achieving economic growth and job creation than any other known alternative. Low inflation helps maintain the value of money mainly for the benefit of the marginalised and the poor and ensures the competitiveness of South African goods and services in foreign markets. By pursuing price stability within an explicit target range, the central bank makes its policy preferences accountable, transparent and largely predictable. To achieve the goals of credibility, predictability and accountability, it is critical that the central bank is left free of political interference in its operations.

50. The Public Protector's amendment to the Constitution would change all this. Her remedial action, if implemented, will take this core function away. The only reasons she provides for this drastic move are to improve the socio-economic conditions of South Africans. Dr Abedian submits that the remedial action is both unscientific and irrational because it ignores the fact that the central bank is limited to financial markets, and its toolbox of policy variables comprises two interrelated instruments: interest rates and money supply. To change the primary object of the bank to the promotion of balanced and sustainable economic growth would require a central bank to have control over an array of additional policy variables including: industrial policy, fiscal subsidies and taxation powers. Dr Abedian further points to what he sees as a fallacy underpinning the remedial action. The Public Protector's wishes to change the Reserve Bank mandate to ensure that the socio-economic well-being of the citizens is protected. The socio-economic well-being of the poor, Dr Abedian argues, on a survey of the empirical data, is best safeguarded if the Reserve Bank remains focused on protecting the value of the currency and maintaining price stability.

51. Both the Governor and Dr Abedian reflect upon the implications of implementing the remedial action. As mentioned earlier, the release of the final report, which took place without the Reserve Bank having sight of it, despite its requests to be given notice, led immediately to a significant depreciation in the value of the currency and a warning from the rating agencies that South Africa risked further downgrades. Standard & Poor Global indicated that it considered it critical for the operational independence of the Reserve Bank to remain untouched in order to avoid weakening policy flexibility in monetary affairs.

52. According to the Governor, the negative effects of a further downgrade of the currency rating cannot be overstated. Financial stability in any country hinges on its sovereign rating which reflects its credit worthiness. A downgrade would risk South Africa's expulsion from the major global bond indices. The country's inclusion in the international financial market bond indices increases the value of our government bonds thus lowering the borrowing costs of the government. If South Africa is expelled from international bond indices, such as the Barclays Group Index and the Citi Bank World Index, a distinct possibility if the Reserve Bank's mandate is perceived to be facing an injudicious political challenge, approximately R139 billion will immediately be disinvested from South Africa causing a loss of investor confidence, currency weakness, inflation and reduced purchasing power among poorer households. Government will have higher debt servicing costs resulting in the diverting of tax revenue from social programmes such as the welfare grants to 17 million people. The impact on confidence and growth in the South African economy is likely to be permanent. There will be capital and skills flight and unemployment will grow. The Public Protector's remedial action hence will have the exact opposite effect of what it hopes to achieve. Far from protecting the socio-economic well-being of our disadvantaged citizens, the remedial action, the Governor and Dr Abedian argue, is likely to radically damage it and lead to extensive impoverishment. In their view, the policy of inflation targeting is the most effective monetary policy tool for protecting national welfare in the short term and improving the socio-economic conditions of South Africans for long term sustainable economic transformation.

53. Dr Abedian is especially critical of the Public Protector's statement in paragraph 5.3.24 that "leading authors" advocating and promoting the ideology of state banks and nationalization of monetary currency believe that the notion of a lender of last resort's status would cease to exist if

governments take sole power in creating money through the establishment of state banks. His critique is worth repeating in full. He says:

> "The Report does not identify any of these "leading authors" by name or institutional affiliation. The views attribute to these "leading authors" do not constitute a coherent, let alone an accepted ideology in the economic field.
>
> As a professional in the field of economics, I am not aware of an "*ideology of state banks and nationalization of monetary currency*". Ever since the advent of 'national states' currency has always been a prerogative. In modern times, that is ever since the age of mercantilism of the 17th century, I am not aware of any case or an ideology that promotes the privatisation of monetary currency. So, monetary currency by definition is a national currency. It cannot be nationalised.
>
> The reference to an ideology of "state banks" is a reference to the ownership structure of a given bank and has nothing to do with the sovereign currency. The fact that a government may own a number of banks does not mean that each bank can print its own money. Yet the Report states: "*...if governments take sole power in creating money through the establishment of state banks.*" By way of example, the South African government owns the Land Bank, the Development Bank of South Africa, the Post Bank and the Ithala Bank. But such sole ownership does not mean that government can create money via such banks.
>
> In my view these unmotivated statements by the Public Protector display a fundamental lack of understanding of the monetary system and the operations of banking institutions.
>
> The views expressed provide no rational basis for a change to the object of the SARB."

54. The Public Protector filed an answering affidavit on 10 July 2017. In it she consents to the order sought by the Reserve Bank and tenders the costs of the application up until the filing of the answering affidavit, which the Reserve Bank has accepted. As mentioned earlier, she agrees that her powers are subject to the Constitution and that there is no power for the Public Protector "to undermine the other provisions of the Constitution". She concedes that "the power to amend the Constitution is exercised at the discretion of Parliament and not under dictation by any other body" and further that "[t]o this extent, the remedial action in paragraph 7.2 of the Report trenches on the powers of Parliament". She, however, seems less convinced about the challenges to rationality and appears to take no heed of the allegations of procedural unfairness, discussed later in this judgment. In paragraph 36 of the answering affidavit she makes it plain that she is prepared to accede to a consent order "for only the reasons" set out in her affidavit – being those in relation to the constitutionality issue. She thus holds firm to her belief about the Reserve Bank's mandate and that the remedial action was reasonable and rational. However, she does not discuss or deal with the averments of the Governor and Dr Abedian regarding the likely harmful impact of her remedial action on the economy and the poor and marginalised members of our society. In paragraphs 27-30 of the answering affidavit, she furnishes a limited explanation for her decision to impose the remedial action as follows:

> "The mandate of the SARB is narrowly stated in section 224(1) of the Constitution. There are central banks in other countries that have relatively multiple or broader mandates, such as to include, as primary objects and not as consequential or secondary objects, the promotion of full employment (job creation) and balanced economic growth, or other socio-economic objectives. The US central

bank is one such example. Others, such as China, India and United Kingdom have additional mandates other than just price or currency stability.

From the investigation conducted, it appeared to the Public Protector that the major motivation for the "lifeboat" was the fear of a "*run on the banks*", which could result in adverse financial impacts and uncertainty amongst local investors and depositors. It is not evident that the socio-economic objectives featured in the assessment of whether or not the "lifeboat" ought to have been extended.

In the view of the Public Protector, such a failure to assess the other socio-economic objectives was probably enabled, and could continue to be enabled, by the narrowly stated mandate of the SARB. If left unchanged, this narrowly stated mandate could continue to enable decisions to be taken that prejudice the socio-economic interests of ordinary South Africans, including as to the realisation of full employment or job creation. It was for this reason that the Public Protector considered that a possible review and broadening of the SARB mandate would provide a long-term effective remedy to possible prejudicial decisions by the SARB underpinned by the narrowness of its mandate. The ambit of the mandate of the SARB is, as it is, a matter of public debate.

The remedial action for Parliament to consider review (sic), as opposed to peremptory amendment of the Constitution, might have passed constitutional muster, which is what was intended to be the case."

55. The attempt to pass off the remedial action as a mere recommendation is disingenuous. The language in which the remedial action is formulated is peremptory. The Public Protector's somewhat unrepentant alignment with one side of the public debate, besides ignoring much of the criticism of the Speaker and the Governor, was censured by counsel as heedless of its likely impact. In the replying affidavit, the Governor is equally unsparing in his criticism. The explanation for the remedial action, he says, reveals the Public Protector's lack of understanding of the ambit of the Reserve Bank's powers. He states:

"The Public Protector's impugned remedial action had immediate and damaging consequences for the country. It is clear from her answering affidavit that she had no regard to the inevitable and serious impact of her Report before releasing it. The Report was reckless. The Public Protector's explanation for it is based on a clear lack of understanding of the Constitution. It perpetuates a fundamental misunderstanding of the Bank's powers and functions."

56. Insofar as the Public Protector's explanation amounts to a defence of the rationality of her decision, the Governor obviously felt constrained to put the issue beyond doubt. He states that it is not good enough for the Public Protector to concede the merits and consent to the remedial action being set aside "when her explanation for her conduct, instead of offering a retraction and apology, perpetuates the damage." The basis of the remedial action is that the Reserve Bank's mandate is too narrow and is deficient. This is incorrect and "a grave and rudimentary error". The Governor explains that the Reserve Bank's mandate is not limited to "currency or price stability". It must conduct its mandate, as required by section 224 of the Constitution, like the central banks in India, China and the United Kingdom, "in the interest of balanced and sustainable economic growth". The Governor thus questions the comprehension of the Public Protector and adds that it is not befitting of a Chapter Nine institution, tasked with upholding the Constitution, "to investigate a matter, prepare a report, direct remedial action to be taken, all without having come to grips with what the Constitution provides." In conclusion, he contends that the Public Protector failed to take account of the detailed submissions of the Reserve Bank and misconstrues the ambit of the Reserve Bank's

mandate. The explanation for the remedial action, he submits, does not bear scrutiny on any reasonable basis.

57. The Governor and ABSA accordingly submit that the remedial action is irrational in that it is not rationally connected to the evidence and information before the Public Protector and the reasons given for it. I understand them also to contend that the decision is so unreasonable that no reasonable person could have taken it. The Public Protector's superficial reasoning and erroneous findings on the issue, as appear in the final report and the answering affidavit, do not provide a rational basis for the remedial action and hence the criticisms of it are well-founded. The remedial action must be reviewed and set aside under section 6(2)(f)(ii) and section 6(2)(h) of PAJA.

Procedural fairness

58. Finally, the remedial action should also be reviewed and set aside under section 6(2)(c) of PAJA on the ground that it was procedurally unfair. The preliminary report was issued to allow interested parties to comment before final remedial action was ordered. Nowhere in the preliminary report did the Public Protector disclose that she was considering remedial action that would amend the primary object of the Reserve Bank. Given the far-reaching nature of the impugned remedial action and the reasonably foreseeable material impact it would have on the Reserve Bank and the stability of the financial sector, it was incumbent upon the Public Protector to have given notice to the Reserve Bank of this intended action and to have called for comment on it. She amended the scope of the investigation and the remedial action without notice to any person likely to be affected. Section 3 of PAJA obliges the Public Protector to give a clear statement of any remedial action she proposes to take, adequate notice of its nature and purpose, and a reasonable opportunity to affected persons to make representations regarding it. The Public Protector failed in her duty in this respect with consequences that were severely damaging not only to the economy but to the reputation of her own office. She furthermore failed to honour an agreement made with the Reserve Bank to make her final report available to the Reserve Bank five days before its release. The Reserve Bank only received a copy after the press conference on 19 June 2017 where the final report was released. The Reserve Bank was denied an opportunity to explain the importance of its mandate to ensure price stability as an integral part of sustainable and balanced economic growth. In the result the Public Protector's announcement of the remedial action was insufficiently informed.

Conclusion

59. In view of the various grounds upon which the remedial action can and must be set aside, there is no need to pronounce conclusively on the validity of all of the Governor's many criticisms. Suffice it to say, the Public Protector's explanation and begrudging concession of unconstitutionality offer no defence to the charges of illegality, irrationality and procedural unfairness. It is disconcerting that she seems impervious to the criticism, or otherwise disinclined to address it. This court is not unsympathetic to the difficult task of the Public Protector. She is expected to deal with at times complex and challenging matters with limited resources and without the benefit of rigorous forensic techniques. It is easy to err in informal alternative dispute resolution processes. However, there is no getting away from the fact that the Public Protector is the constitutionally appointed custodian of legality and due process in the public administration. She risks the charge of hypocrisy and incompetence if she does not hold herself to an equal or higher standard than that to which she holds those subject to her writ. A dismissive and procedurally unfair approach by the Public

Protector to important matters placed before her by prominent role players in the affairs of state will tarnish her reputation and damage the legitimacy of the office. She would do well to reflect more deeply on her conduct of this investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament.

The orders

60. For the above reasons, the following orders are made:

60.1 The second, third and fifth respondents are joined as applicants.

60.2 The remedial action in paragraph 7.2 of the Public Protector's Report 8 of 2017/1018 into the Alleged Failure to Recover Misappropriated Funds, issued on 19 June 2017, is reviewed and set aside.

60.3 The obligation placed upon the Chairperson of the Portfolio Committee on Justice and Correctional Services and the South African Reserve Bank under paragraph 8.1 of the Report to submit an action plan to the Public Protector in relation to remedial action in paragraph 7.2 of the Report is reviewed and set aside.

60.4 The Public Protector is ordered to pay the costs of the application up to and including the filing of her answering affidavit, such costs to include the costs of employing two counsel.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	1 August 2017
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