IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2021.07.16 _____

DATE SIGNATURE

CASE NUMBER: 84074/19
DATE: 15 July 2021

PUBLIC PROTECTOR SOUTH AFRICA Applicant

V

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE First Respondent

JACOB GEDLEYIHLEKISA ZUMA Second Respondent

MMUSI MAIMANE Third Respondent

ROYAL SECURITY CC Fourth Respondent

JUDGMENT

MABUSE J

[1] Before me are two applications brought by the Applicant ("the Public Protector"). The first application is for condonation for the late filing of the application for leave to appeal. The

second one is for leave to appeal against the judgment and order that this Court handed down on 23 March 2020 ("the High Court judgment"). The order of the High Court judgment reads as follows:

"1. It is hereby declared that a South African Revenue Service Official is permitted and is required under the provision of "just cause" contained in section 11(3) of the Public Protector Act 23 of 1994 read with section 69(1) of the Tax Administration Act 28 of 2011 to withhold taxpayer information as defined in section 67(1)(a) of the Tax Administration Act 28 of 2011;

2. It is furthermore hereby declared that the Public Protector's subpoena powers do not extend to the taxpayer information;

3. The First Respondent's counter application is hereby dismissed, with costs;

4. The First Respondent is hereby ordered to pay the costs of this application, which costs shall include costs consequent upon the employment of two counsel;

5. The First Respondent is hereby ordered to pay de bonis propiis 15% of the Applicant's taxed costs."

The above order was granted against the Public Protector, in favour of the Commissioner for the South African Revenue Service.

[2] In this judgment I will from time to time refer to the two judgments, one by the Constitutional Court (the ConCourt judgment) and the other by the Gauteng Division handed down on 23 March 2020, to which I shall refer to for purposes of convenience as the High Court judgment. I propose in this judgment to deal with both applications.

THE APPLICATION FOR CONDONATION

[3] In terms of Rule 49(1) of the Uniform Rules of Court:

"(b) When leave to appeal is required and it has not been requested at the time of the judgment, or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against: Provided that when the reasons or the full reasons for the Court order are given on a later date

than the date of the order such application may be made within 15 days after such later date: Provided further that the Court may, upon good cause shown, extend the aforementioned periods of 15 days."

The judgment and order were made in the High Court matter on 23 March 2020. The Public Protector should therefore have filed her application for leave to appeal within 15 days of the High Court judgment. She did not do so hence this application for condonation brought in terms of Rule 49(1)(b) of the Uniform Rules of Court.

[4] The applications for condonation and for leave to appeal are predicated on the founding affidavit of the Public Protector. It is common course, as demonstrated by the heads of argument of both counsel, that to succeed with her application for condonation, the Public Protector must satisfy the following requirements:

4.1 prospects of success on appeal.

She must satisfy the Court that she has prospects of success on appeal if granted leave to appeal;

4.2 an explanation for the delay.

She must furnish a reasonable and acceptable explanation for failing to launch the application for leave to appeal within the period of 15 days set out above in Rule 49 (1)(b);

4.3 the duration of the delay.

She must explain why it took her so long, after the judgment and order, to approach the Court with an application for condonation and for leave to appeal.

4.4 prejudice.

She must satisfy the Court that no prejudice, that cannot be compensated by an order of costs, will be suffered by the Commissioner.

The Public Protector must satisfy all the four requirements. It is not enough to satisfy 2 or 3 of such requirements. An application for condonation may be refused on failure to satisfy any one of the said requirements. The grounds I have set out above are at the same time the grounds upon which the Commissioner opposed the application for leave

to appeal. Since the failure of an application for condonation and for leave to appeal may be determined based on one requirement, I intend, in these applications, to confine this judgment to only one requirement and that is the prospects of success. I do not think that I am called to discuss all the points raised.

THE APPLICATION FOR LEAVE TO APPEAL

[5] The test regarding the application for leave to appeal is as set out in s 17 of the Superior Courts Act No. 10 of 2013 (Superior Courts Act). That section governs the applications for leave to appeal. It provides as follows:

"17(1) Leave to appeal may only be given where the judge or judges concerned are of opinion that -

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

As I understand s 17, for purposes of this judgment, the inquiry as to whether leave should be granted is twofold. The first step that a Court seized with such an application should do is to investigate whether there are any reasonable prospects that another Court seized with the same set of facts would reach a different conclusion. If the answer is in the positive, the Court should grant leave to appeal. But if the answer is in the negative, the next step of the inquiry is to determine the existence of any compelling reason why the appeal should be heard.

[6] Section 17(1) sets out an inflexible threshold to grant leave to appeal. Therefore, the Public Protector must, meet this stringent threshold set out in s 17 of the Superior Courts Act to succeed with her respective application for leave to appeal. This threshold set out in s 17(1)

of the Superior Courts Act is now even more stringent than when the now repealed Supreme Court Act 59 of 1959 was still applicable. This is aptly demonstrated by the **S v Notshokovu & Another [2016] ZA SCA 112 par 2 [7 September 2016]** where Shongwe J, as he then was, writing for the Court, had the following to say:

"The applicant, on the other hand, faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959."

Section 17(1) uses the word *"only"*. It provides that:

"17(1) Leave to appeal may "only" be given…" and then proceeds to set out the circumstances under which leave to appeal may be given. For instance, in **South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Services (SARS) [2017] 2 AGPPHC 340 (28 March 2017) para [5],** the Court cited with approval the following passage from **Mont Chevaux Trust v Tim Goosen & 18 Others, 2014 JDR 2325 [LCC] para [6]**:

*"It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was reasonable prospect that another court might come to a different conclusion. See **Van Heerden v Cronwright & Others 1985 (2) SA 343(T) at 34H**. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."* Accordingly, the Public Protector must be certain that another tribunal would decide the same issues that the High Court grappled with differently. Quite clearly the Legislature intended to limit the number of cases which might be taken on appeal. It would have defeated the purpose of s 17 of the Superior Courts Act in that direction if in all but hopeless cases leave to appeal is granted. Concerning this requirement, Mr Gauntlett referred this Court in his heads of argument to the judgment of **Acting National Director of Public Prosecutions v Democratic Alliances In Re; Democratic Alliance v Acting National Director of Public Prosecutions [2016] ZAPPHC 489 at para 25**, which was cited with approval in **Fair-Trade Independent Tobacco Association v President of the Republic of South Africa 2020 JDR 1435 (GP).** This was in support of his argument that

a reasonable prospect of success calls for a measure of certainty that the appellate division would reach a different outcome.

Finally, on the rigidity of the threshold, Plaskett AJA, as he then was, wrote the following in the judgment in which Cloete JA and Maya JA, as they then were, concurred in **S v Smith 2012(1) SACR 567, 570 par [7]**:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. See S v Mabena & Another 2007(1) SACR 482 (SCA) para [22]. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[7] The requirement of prospect of success is a common requirement in respect of both applications. Briefly the Public Protector states that the reason why she launched this application for leave in this matter after the date on which the judgment was handed down by the High Court was that on or about 14 April 2020 and acting in terms of Rule 19 of the Constitutional Court Rules, she launched an application for direct appeal to the ConCourt in respect of both the merits of the application as well as costs.

[8] Judgment by the ConCourt was delivered on 15 December 2020. The applications to this Court for condonation and leave to appeal were only launched after the ConCourt had concluded the hearing of the application for leave to appeal directly to it and had handed down its judgment. It is the Public Protector's case therefore that the ConCourt ruled only on the issue of a personal costs order that the High Court had granted against her in the High Court judgment and that the Concourt refused to deal with the other aspects of the application to appeal because such issues did not engage the jurisdiction of the ConCourt. According to

the Public Protector the ConCourt refused to deal with the other issues raised in the Public Protector's application for leave to appeal directly as it saw no reason why the Public Protector overlooked the procedure of appealing first to the Full Court of this Division or Supreme Court of Appeal instead of going directly to it. It is for that reason that the ConCourt refused to deal with issues in the application for to appeal that should have been referred to either the Full Court of this Division or the Supreme Court of Appeal. The Public Protector approached the Concourt seeking leave to appeal directly to it against the High Court judgment on the questions of her subpoena powers and costs, and the dismissal of her conditional counterclaim.

[9] The fact that the Public Protector first approached the Constitutional Court for leave to appeal before approaching this Court is the only reason that the Public Protector gave for the delay in bringing the application for condonation before the High Court. Procedurally, is the application for the delay the only reason a Court should consider in deciding the issue of condonation? It is clearly not the only factor that a Court dealing with an application for condonation should consider. I understand it and I am of the view that the explanation given by the Public Protector is reasonable and acceptable. The Public Protector should not be penalised for an error of judgment.

[10] **NO PROSPECT OF SUCCESS**

10.1 The Commissioner stated in his answering affidavit, and it was also so argued by Adv. J J Gauntlett SC QC, counsel for the Commissioner, that the Public Protector has no prospect of success on appeal and that her prospects of such success are so remote as to be unappreciable. The argument by the Commissioner's counsel is that the Public Protector's application for condonation may be refused on this ground alone. This argument was not disputed. Mr Gauntlett argued furthermore that there will be no point, in the circumstances, to grant the application for condonation.

10.2 Reference in this regard was made to the unanimous judgment of the ConCourt, written for the Court by Madlanga J. I was referred to paragraph [27] of the ConCourt

judgment where it was conclusively held that the Public Protector has no prospects of success. I do not think that it is necessary for me to re-write in this judgment the judgment of the ConCourt.

[11] It will be recalled that the issue that the High Court had to decide in the High Court application was whether a South African Revenue Service official was permitted and required under the provision of *"just cause"* contained in s 11(3) of the Public Protector Act 23 of 1994 ("the PPA") read with section 69(1) of the Tax Administration Act 28 of 2011 ("the TAA") to withhold taxpayer information (as defined in s 67(1)(a) of the TAA) and that the Public Protector's subpoena powers did not extend to the taxpayer's information.

[12] The question that the Court had to decide was also set out clearly in par. 3.1 of the judgment of the High Court. That was also the view of counsel for the Commissioner, Adv. JJ Gauntlet SC QC. The Public Protector persisted with her claim that she was entitled to access taxpayer information in the possession of the Commissioner for SARS. She seemed to argue that because the Public Protector derived her powers to investigate any conduct in state affairs from the Constitution, her power to subpoena witnesses to provide documents in terms of s 7(4) of the PPA trumped the provisions of the TAA. The core of the Public Protector's contention was that the Public Protector's powers trumped all laws. In the judgment, the High Court dismissed her arguments and ruled against her.

CONCOURT JUDGMENT

[13] The Public Protector sought leave to appeal directly to the Constitutional Court against the judgment of the High Court on the questions of her power to subpoena witnesses as envisaged by s 7(4) of the PPA; costs and the dismissal of her conditional counterclaim. The ConCourt heard the matter on 3 September 2020 and handed down its judgment on 15 December 2020. It made the following order:

"1. Leave to appeal against the declarator by the High Court of South Africa, Gauteng Division, Pretoria, that a South African Revenue Service official is entitled to withhold

taxpayer information in terms of s 11(3) of the Public Protector Act 23 of 1994 read with s 69(1) of the Tax Administration Act of 2011 is refused.

2. Leave to appeal against the High Court's dismissal of the Public Protector's counterapplication is refused.

3. Leave to appeal against the High Court order that the Public Protector must pay de bonis propiis 15% of the taxed costs of the Commissioner of the South African Revenue Service is granted.

4. The appeal is upheld, and the High Court order referred to in paragraph 3 is set aside.

5. Each party must pay his or her costs in this Court."

[14] The Public Protector, in applying for leave to appeal against the judgment of the High Court, had contended that she had strong prospects of success in that regard. The ConCourt analysed the Public Protector's arguments and interpretation of s 7(4) of the PPA; her understanding and interpretation of s 182 of the Constitution; the Public Protector's interpretation of s 69(1) of the TAA and found that the Public Protector's argument and interpretation of the said section 69(1) was not viable. It emphasized that SARS' officials are thus enjoined to withhold taxpayer information even in the face of such subpoena. This statement by the ConCourt is the reason why leave to appeal against the declarator of the High Court, that a South Africa Revenue Service official is entitled to withhold taxpayer information in terms of s 11(3) of the PPA read with section 69(1) of the TAA, was refused. It went further and stated sooner thereafter that:

"Any other interpretation is at odds with the clear wording of section 69(1)."

By this statement, the ConCourt implied that no other Court seized with the interpretation of s 69(1) of the TAA will interpret it in any way than the way in which the Con Court has interpreted it. The ConCourt made it truly clear that:

"The interpretation of section 69(1) of the TAA advocated by the Public Protector is not viable." See par [28] of the judgment.

[15] The ConCourt furthermore analysed the Public Protector's argument that s 69(1) of the TAA was Constitutionally invalid. It stated that even though the Public Protector did not expressly argue that s 69(1) of the TAA was constitutionally invalid, the effect of her argument was however the same. The ConCourt found that *"her case that she was entitled as of right to taxpayer information upon the issue of a subpoena, her case was fundamentally flawed."* It continued and stated that: *"Section 69(1) can only not have its force-which is to deny the Public Protector access to the taxpayer information- if it is invalid.*

[16] By its analysis of s 69(1) of the TAA, as it currently stands and as it stood at the time the Commissioner brought his application before the High Court, the Concourt made it truly clear that there can be no penumbral zone of uncertainty regarding the interpretation of the said section. It confirmed the literal message conveyed by s 69(1) that a person who was a current or former SARS official **must** preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official. We know that the Public Protector is not a SARS official. The words of the said section 69(1) of the TAA do not, in my view, suffer from any ambiguity, vagueness, over-precision or unintended generality. As the provisions of s 69(1) of the TAA now stand, there are no ambiguities of a semantic type that can be encountered in them. Therefore, where the wording of a section is clear, its interpretation requires no more than the application, in my view, of the ordinary grammatical rules. The section uses the word "must", which imposes a legal obligation on current or former official of SARS never to disclose any taxpayer information, not even to the Public Protector. The Rues of Interpretation of Statutes, which are what the Concourt presumably employed regarding its interpretation of s 69(1) of the TAA, essay to us the true intention of the Legislature. It was never the intention of the Legislature that the Public Protector should be given access to the taxpayer information by a current or former official of SARS. In Venter v R 1907 TS 910 at 913, the Court, as per Innes CJ, had the following to say:

"By far most important rule to guide court in arriving at that intention [of the Legislature] is to take the instrument [in other words s 69(1) of the TAA], as a whole; and, when words are clear and unambiguous, to place upon them their grammatical construction and give them

their ordinary effect." [My own underlining]. The Public Protector was however not prevented by the TAA from getting that taxpayer information somehow. I do not intend traversing those other avenues available to the Public Protector.

[17] The ConCourt commented that s 69(1) stood in her way. She could not wish it away. She should have brought a direct frontal challenge to the constitutionality of the section for including her office within its sweep, or the TAA for failing to include the office in the exceptions it has created. The Court found that the Public Protector's reliance on EFF v Speaker, a case that, according to the Constitutional Court, never suggested that there should not be a Constitutional challenge where necessary, was misplaced.

[18] The ConCourt did not only refuse leave to appeal. It made it clear that no leave to appeal against the declarator of the High Court would be granted. It specifically refused to grant the Public Protector leave to appeal against the declarator by the High Court of South Africa, Gauteng Division, Pretoria that a South African Revenue Service official is entitled to withhold taxpayer information in terms of the PPA read with s 69(1) of the TAA is refused. By this order the Constitutional Court confirmed the High Court's interpretation of s 69(1) of the TAA. This order was issued by the Concourt after it had analysed the Public Protector's interpretation of s 69(1) of the TAA. It disagreed with the Public Protector's interpretation of this s 69(1) of the TAA and agreed with the High Court's interpretation of the same section. In the circumstances it is highly unlikely that another Court can deviate from the Concourt's interpretation of s 69(1) of the TAA. All the other Courts are bound by the Concourt's interpretation of s 69(1) of the TAA. It is accordingly based on the Concourt's interpretation of s 69(1) of the TAA that, in my view, the Public Protector does not have any reasonable prospects of success, if leave to appeal is granted.

[19] The Court then ruled in paragraph [27] of its judgment that *"as a result, absent a direct frontal challenge to the validity of section 69(1), there was no reasonable prospects of success."* I

accept this finding by the ConCourt that in the absence of a direct frontal challenge to the validity of the s 69(1) there are no reasonable prospects of success.

[20] Adv Mpofu SC seemed to argue that when the ConCourt found that in the absence of a challenge to the validity of s 69(1) there were no reasonable prospects of success, the ConCourt was merely expressing its displeasure at being directly approached by the Public Protector for leave to appeal and that it did not deal with the merits of the issues before it. That may be so. But the fact of the matter is that it did so after analysing the provisions of s 69(1) of the TAA. I disagree with Adv Mpofu SC's interpretation of the ConCourt's judgment. I find that after analysing s 69(1) of the TAA it made dispositive findings and remarks.

RES JUDICATA

[21] One of the arguments raised by the Public Protector's counsel in his heads of argument is that the Respondent's approach is based on the false premise that the merits of the issues in dispute between the parties are somehow *res judicata* because they have supposedly been finally decided by the ConCourt. The contention by counsel for the Public Protector is that the ConCourt only refused leave to appeal; that the merits of the appeal were only considered in relation to the main appeal even there, so it is contended, the merits were only conceded obiter and in the context of the prospects of success. I have pointed out somewhere *supra* that in respect of bringing the application for condonation that the Public Protector must prove that she has prospects of success, and furthermore that in respect of the application for leave to appeal the Public Protector must still satisfy the requirements of s 17(1)(a)(i) *"that the appeal would have a reasonable prospect of success"* or *"there is some compelling reason why the appeal should be heard, including conflicting judgment on the matter under consideration."* It is of paramount importance to point out that, irrespective of the purpose for which the comments were made by the ConCourt, the finding has been made that the Public Protector had no prospects of success.

[22] It is not correct that what the Constitutional Court stated in its judgment was an *obiter dictum*. In my view, it was a ruling on a question of law, which is then applied to the facts as found to determine the outcome of the issue.

[22] The Public Protector did not concede the interpretation of s 69(1) of the TAA by the ConCourt. The ConCourt gave a considered opinion on the point of law involved, in other words, on s 69(1) of the TAA. The decision of the ConCourt was supported by the full court's considered opinion on the law. The ConCourt considered the provisions of s 69(1) of the TAA and pronounced that *"such officials are thus enjoined to withhold taxpayer information even in the face of such subpoena. (Referring to the Public Protector's subpoena in terms of section 7(4)(a) of the PPA). Any other interpretation is at odds with the clear wording of section 69(1)."*

[23] The following paragraph shows what a ratio decidendi is:

"We would describe the principle of the case as the necessary connection between the facts of the case treated by the Judge as material and his decision thereon. The Judge's decision, in turn, justifies the ultimate order the Court makes to determine the case. In other words, the reason for the ratio decidendi suggests an analysis of the material facts of the case, the reasons for the decision and the way the issue was actually decided."

About the reasons for the decision Schreiner JA held in **Pretoria City Council v Levinson 1949(3) SA 305 (A) at page 317** that:

"The reasons given in the judgment … do constitute a ratio decidendi, originating or following a legal rule provided.

(a) That they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles;

(b) That they were not merely a cause for reasoning on the facts (cf. Tidy v Battman (1934, L.J.K.B. 158 at p. 162)) and (c) (which may cover (a) that they were necessary for the decision, not in the sense that it could not have been reached along other lines but, in

the sense that along the lines actually followed in the judgment the result would have been different but for the reasons."

[25] In my view, statements made by the ConCourt regarding s 69(1) of the TAA are not *orbiter dictum. Obiter dictum is said to be a "statement not necessary for the decision of the case"* See **R v Nkwali 1925, A.D. 578;** or is *"an excrescence on the reasoning", see* ***R v Crause 1959*** **(1) S.A.272 (A.D.) at 281, per Schreiner A.C.J.** They are *ratio decidendi.* I am bound by such statements. As I pointed out *supra* whether such statements were made by the ConCourt to determine whether it was a matter falling under its jurisdiction or whether it was considering the issue relating to prospects of success, the analysis of the sections by the ConCourt would not have been any different. It would have been the same. It is therefore highly unlikely that the ConCourt, having found that the Public Protector does not have any reasonable prospects of success, this Court would, on the same set of facts, find that the Public Protector has any reasonable prospects of success, if the application for condonation is granted or if the application for leave to appeal is granted.

[27] The Public Protector contended before the Constitutional Court that she had strong prospects of success in her application for leave to appeal. The Constitutional Court then went about to investigate the strong prospects of success which the Public Protector claimed she had. The Constitutional Court then assessed her argument in terms of:

27.1 section 7(4) of the PPA;

27.2 s 69(1) of the TAA.

27.3 In my view, the findings of the ConCourt on the interpretation of s 69(1) of the TAA sounded a death knell to the Public Protector's prospects of success in an application for condonation and an application for leave to appeal. These findings were made by the ConCourt in an application for leave to appeal, the same as this is an application for leave to appeal where the Public Protector's view that she was entitled to issue the subpoena regardless of the prohibition in s 69(1), is misguided. Based on the analysis of s 69(1) of the TAA by the ConCourt I am satisfied that the Public Protector has failed to satisfy this Court

that she has any prospects of success both in respect of her application for condonation and her application for leave to appeal. There is no realistic chance of the appeal succeeding. I have carefully considered all the contentions this Court has been urged to consider in support of the contention that another Court might take a different view or in support of the contention that the Public Protector has reasonable prospects on appeal if leave to appeal is granted. Suffice it to state that there is not sufficient prospect of success on appeal on the legal issues relative to the grounds of appeal under consideration. The applications must, on this point alone, fail.

[28] I do not deem it necessary to traverse the other requirements to the granting of an application for condonation or leave to appeal. I pointed earlier that failure to satisfy any one requirement meant that the whole application will not succeed.

[29] I now turn to the grounds of appeal raised by the Public Protector in her application for leave to appeal:

THE SUBPOENA POWERS OF THE PUBLIC PROTECTOR

[29.1] The learned Judge erred in entertaining and deciding the irrelevant sections 11(3) and 11(4) of the PPA when the matter simply involved the scope and ambit of the specific powers contained in s 7(4) of the PPA *vis-a-vis* the renewed prohibition in s 69(1) of the TAA.

[29.2] I disagree with the Public Protector's view that ss 11(3) and 11(4) of the PPA were irrelevant. Firstly, it must be recalled that the Commissioner approached the Court that SARS' officials are permitted under the proviso of "just cause" in s 11(3) of the PPA read with s 69(1) of the TAA to withhold information and that the Public Protector's subpoena powers did not extend to the taxpayer information. For that reason, the Court had to analyse the provisions of s 11(3) of the PPA read with the provisions of s 69(1) of the TAA to establish the powers of the PPA and their limits. The provisions of s 11(3) of the PPA and s 69(1) of the TAA are central to the relief that the Commission sought. The Court's analysis and finding on s 11(3) of the PPA and s 69(1) of the TAA were therefore relevant and crucial to the determination of the issues before the Court could determine the declarator that the

Commissioner sought. The Public Protector must have seen the issues in dispute differently but that did not relieve the Court from dealing with s 11(3) of the PPA and s 69(1) of the TAA.

[29.3] Secondly, I pointed out in paragraph 3.1 of the Judgment that I agreed with Adv JJ Gauntlett SC that the real dispute between the Commissioner and the Public Protector in the original application was whether SARS, or its officials are by law prohibited and required under the provision of "just cause" as envisaged by the provisions of the PPA read with s 69(1) of the TAA to withhold taxpayer information as ordained in s 69(1) of the TAA or whether the Public Protector's subpoena power claim such priority on the detailed information under the TAA.

[29.4] In paragraph 3.3 I pointed out that the real issues of dispute between the parties in the application could be established from the relief that the Commission sought. That relief did not include the scope and ambit of the basic powers contained in s 7(4) of the PPA *vis-a-vis* the general prohibition contained in s 69(1) of the TAA as claimed by the Public Protector.

[29.5] This Court sees no reason why it should be said that the learned Judge erred. It was the duty of the Court to decide the issues brought before Court. The Public Protector's point is that the reasoning of what precisely the point of dispute was, was reasoned wrongly. No appeal lies against reasons in a judgment. See **Pretoria Gladyson Institute v Danish Variety Products (Pty) Ltd 1948(1) SA 839 (A)**. I am therefore not persuaded that when the correct principles are applied to the present facts the relief sought by the Commissioner ought not to have been granted.

[29.6] The High Court's analysis of s 69(1) of the TAA is the same as the analysis by the Concourt. The High Court dealt with the issue regarding the Public Protector's powers in paragraph [36] of its judgment. In my view, no other Court will decide this issue any differently.

[29.7] The learned Judge erred in holding that the powers of the Public Protector emanate from the PPA and not from the Constitution. This issue was comprehensively dealt with in paragraphs [35] and [37] of the judgment of the High Court. I am not satisfied that there could be another interpretation of the Public Protector's powers as contained in those

paragraphs. In the circumstances I have not been persuaded that there is any reasonable prospects of success on appeal if leave to appeal is granted.

UNDUE ELEVATION OF THE RIGHT TO PRIVACY

[29.8] No other Court seized with the same issue will decide it differently. This issue was fully dealt with in paragraphs [3.4.3], [22] and [29] of the judgment. I pointed out in the High Court judgment that the Public Protector did not challenge the statement made in paragraph [3.4.3] of that judgment. In fact, I pointed out in the same paragraph that instead of disputing the statement contained in the said paragraph [3.4.3] of the High Court judgment, the Public Protector admitted it. The Public Protector has not withdrawn that admission about the right to privacy.

A3 CONSTITUTIONAL SUPREMACY *VIS-A-VIS* PARLIAMENTARY SUPREMACY

[29.9] This statement by Adv Gauntlett SC constitutes an argument and not a court order. No litigant may appeal against an argument (see in this regard **paragraph [59] of Mass Stores v Pick-a-Pay Retailers 2017(1) SA 613 CC**).

A4 JUST CAUSE

[29.10] The Public Protector in this regard wants to note an appeal against an argument raised by Adv. Gauntlett SC. The Public Protector admits that she offered no argument in connection with "*just cause*" which was at the heart of s 11(3) of the PPA.

A5 THE MAENETJE OPINION

[29.11] Again the Public Protector is grappling with an argument in this paragraph. *"She desires leave to appeal against an argument instead of an order."*

A6 THE COUNTER APPLICATION

[29.12] The counter applications were extensively dealt with in paragraphs [40] to [46] of the judgment. No other Court would have granted it based on the reasons set out in the judgment.

[30] **B GROUNDS OF APPEAL BASED ON S 17(1)(a) OR (k)(ii) OF THE ACT**

B1 INSTITUTIONAL BIAS

[30.1] I agree with Mr Gautlett SC that the point that the learned judge advertently or inadvertently allowed himself to be unduly influenced by previous decisions and/or alleged conduct of the Public Protector in respect of irrelevant past decisions in respect of not only the question of costs but the entire approach to the matter is an afterthought. In fact, it amounts to guesswork. Furthermore, I agree with counsel for the Commissioner that the contention of institutional bias is simply confused.

[30.2] According to Mr Gauntlett SC, "institutional bias" means that the adjudicator is influenced by the bias derived from or related to, the institution to which they belong. He referred the Court to **Council of Review, SADF and Others v Mönnig & Others 1992 (3) SA 482** as a classic example of a military court marshall. The Public Protector has, in the afore going allegation, failed to prove institutional bias. This point of institutional bias, which is raised for the first time in this application for leave to appeal, is not supported by any objective facts. It is not alleged that the High Court supported its findings with royal judgments. The ConCourt did not observe the institutional bias. It was never raised in the ConCourt. In the circumstances, I have not been satisfied that leave to appeal on this institutional bias point should be granted.

[31] B2 INTENDED CONSTITUTIONAL CHALLENGE TO S 69(1) OF THE TAX ADMINISTRATION ACT 28 OF 2011 AS AMENDED

31.1 The Public Protector states that it was proposed or suggested by the ConCourt to challenge the constitutional validity of s 69(1) of the TAA. This is not true. The Constitutional

Court only pointed out that the provisions of s 69(1) of the TAA stood in her way and furthermore that the application for leave would not succeed if she would not bring a frontal challenge to s 69(1) of the TAA. In fact, the fact that the Public Protector had not challenged the validity of s 69(1) of the TAA was the main reason why her application for leave to appeal directly to the ConCourt was refused.

[31.2] This forum that is seized with two applications, one for condonation and the other for leave to appeal, is not a proper forum where leave is sought to challenge the constitutionality of s 69(1) of the TAA. The Constitutionality of s 69(1) of the TAA was never an issue at the hearing of the application by the High Court. The Constitutionality of s 69(1) of the TAA was never addressed by the parties. Quite correctly so, as argued by Mr Gauntlett SC, this new constitutional challenge of s 69(1) of the TAA has not been articulated. It is highly unlikely that this Court may grant leave to appeal in respect of the cause of action that was not articulated at the hearing of the application before the High Court or the cause of action whose elements have not been clearly set out.

[31.3] The Public Protector actually made it clear that she "intends to launch a constitutional challenge to s 69(1) of the TAA". This Court should therefore not regard the application for leave to appeal containing the Public Protector's intention to challenge the constitutionality of the section 69(1) of the TAA as any challenge. The Court cannot grant leave to appeal in this respect.

[32] I am not satisfied that the Public Protector has passed the test set out in s 17(1) of the Superior Courts Act. I am not satisfied that another tribunal seized with the same set of facts will arrive at a different conclusion.

I make the following order:

Both applications for condonation and for leave to appeal are refused, with costs which costs shall include the costs consequent upon the employment of two counsel.

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv DC Mpofu (SC)
	Adv T Motloenya
Instructed by:	Seanego Attorneys Inc
	c/o SV Nagkabgy Attirbets
Counsel for the First Respondent:	Adv JJ Gauntlett (SC) QC
	Adv FB Pelser
Instructed by:	Da Silva Attorneys
	c/o Gildenhuys Malatji Inc
Date heard before Mabuse J:	17 June 2021
Date of Judgment:	15 July 2021