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Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)

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Readers of the judgment in *Public Protector v South African Reserve Bank* will be taken aback by evidence that the South African intelligence services got involved in efforts to change the core mandate of the country's central bank. This involvement of the state's security arm, together with the country's ombudsman (i.e., the Public Protector), brings up several questions. What connects central banking to national security? What did the Public Protector mean by the central bank's "vulnerability", a concept that she used to justify her investigation into the central bank and her meetings with the President and the intelligence services?[2] If the Public Protector had misgivings about the central bank's mandate, why not simply suggest to the national executive to initiate legislation to amend the relevant provisions in the Constitution and the South African Reserve Bank Act? Perhaps, most disturbingly during litigation, why did the Public Protector lie under oath?[3]

This case has created a great puzzle difficult to piece together. Even the judges of the Constitutional Court who decided this case split 8-2 on this issue. Chief Justice Mogoeng and Goliath AJ saw nothing sinister or inappropriate in the Public Protector meeting with the national intelligence agency, known as the State Security Agency, since that agency virtually initiated the investigation that eventually landed in the Constitutional Court.[4] They also rejected the High Court judge's description of those meetings as 'secretive' since the Public Protector voluntarily waived the classification of the record of her discussion with the State Security Agency.[5]

However, the majority of the bench, represented by Khampepe J and Theron J, did not agree with the Chief Justice on this score. They claimed that, despite the general practice within the Public Protector's office of producing transcripts of all meetings conducted during an

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[2] See *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) [67].
[3] See ibid [237], read with [219] (Khampepe J and Theron J).
[4] ibid [67]. See also ibid [99].
[5] ibid [67].

investigation, the Public Protector did not furnish any transcripts of her meetings with the Presidency and the State Security Agency,[6] and failed to explain timeously and intelligibly why she discussed SARB's vulnerability with them.[7]

Even if these events unfolded in the background of the case, they nonetheless rekindle the debate about how independently from the state should a central bank operate. And, although the Chief Justice saw nothing sinister or cynical about the involvement of the intelligence services, this presence – far from being a sideshow – gives a new twist to governments' misgivings about central-bank orthodoxy in developing countries.

The facts

In this case, the Constitutional Court of South Africa primarily dealt with cost orders issued against the Public Protector. It also dwelt on a secondary problem yet worthy enough for society and the economy to warrant greater attention: the independence of the central bank.

In *Public Protector v South African Reserve Bank* (hereinafter referred to as '*PP v SARB'*), the Constitutional Court had to determine whether the Public Protector conformed to the Constitution in the way she handled a matter involving a loan granted by the central bank. Between 1986 and 1995, the country's central bank, known as the South African Reserve Bank (SARB), lent to Bankorp an amount of 3.2 billion Rand. Bankorp appeared financially destitute. In 1992, a commercial bank, Absa, acquired Bankorp. SARB extended its Bankorp loan to Absa "as a consideration" for the acquisition of Bankorp.

As it turned out, however, and contrary to the terms of its agreement with SARB, Bankorp never paid back that loan. Later in 1997, the South African government – represented by the director of its national intelligence agency – hired CIEX, an entity based in the United Kingdom (UK) and specializing in recovering assets. CIEX investigated the loan and reported that corruption, fraud, and maladministration marred that lending to Bankorp/Absa.

CIEX also found that the government could recover the loan from Absa. Between 1998 and 2000, both the government and SARB mandated certain persons to investigate how the government could recover those ill-gotten gains by Bankorp/Absa. However, these efforts did

[6] See ibid [175]-[176], [183]. See also ibid [217] (remarking that the Public Protector could not explain the absence of any transcripts of the meetings with the Presidency and the State Security Agency).
[7] ibid [180]-[181].

not bear fruit. In 2010, a representative of a non-governmental organization formally complained to the Public Protector about the alleged failure by the government to recover the Bankorp/Absa loan.

Following the complaint, the then Public Protector, Ms Thuli Madonsela, launched an investigation into the Bankorp/Absa matter and consulted with several parties, including Absa and SARB. Seven years later, while the investigation was still pending, Ms Busisiwe Mkwebane succeeded Madonsela as Public Protector. The new Public Protector issued the pre-existing provisional report and consulted with Absa and SARB once again.

Interestingly, Ms Mkwebane went on to consult with the Presidency, the national intelligence agency (known as the State Security Agency), and the minister responsible for that agency. She also consulted with an economist and Black First Land First, a Black consciousness, pan-Africanist and revolutionary socialist political movement. SARB lamented that these consultations showed that the new Public Protector failed to investigate the matter fairly and in an unbiased fashion. In the final report that she published, Ms Mkhwebane made recommendations that differed from those put forth in the provisional report drafted by her predecessor.

Specifically, the Public Protector's final report recommended, among others, that:

- SARB fully cooperate with investigating authorities in the recovery of misappropriated public funds; and
- Parliament initiate "a process that will result in the amendment of s224 of the Constitution, in pursuit of improving socio-economic conditions of the citizens".

The court battle

In 2018, SARB asked the North Gauteng High Court to review the Public Protector's final report. The court reviewed the report and the amendment to the Constitution that the report recommended.[8] The Court observed that, with her report, Public Protector Busisiwe Mkhwebane aimed to "amend the Constitution to deprive the Reserve Bank of its independent power to protect the value of the currency."[9] SARB asked the court for punitive costs against

[8] *Absa Bank Ltd v Public Protector* [2018] 2 All SA 1 (GP) [85].
[9] ibid.

the Public Protector in her personal capacity and it prayed the court for a declaration that she abused her office.

The High Court set aside the Public Protector's recommendations almost entirely, but rejected SARB's application for a declaration that the Public Protector abused her office. Nonetheless, the court awarded punitive costs against the office of the Public Protector and ordered 15% of punitive costs against the Public Protector in her personal capacity.[10]
The Public Protector appealed to the Constitutional Court against the High Court's order that she pays punitive costs in her personal capacity. In essence, the Court sought to determine whether the High Court relied on the correct principles for awarding costs on an attorney and client scale.

The Constitutional Court upheld the High Court's decision. Moreover, the majority of judges did not make any order as to costs, such that the order made the High Court regarding the costs stood unchanged after the Constitutional Court's final ruling in *PP v SARB*.
Khampepe J and Theron J, who wrote for the majority, noted the "higher standard of conduct expected from public officials" and observed that, in the course of litigation, the Public Protector had put forth a number of falsehoods and misstatements.[11] They observed that the Public Protector's "entire model of investigation was flawed":[12]

> She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report.

Thus, for only the second time in South Africa's history,[13] the court ordered a senior constitutional office bearer (i.e., Public Protector Mkhwebane) to pay personal costs while litigating on the state's behalf.

Significance of the judgment

While the Constitutional Court weighed most heavily on the issue of the cost orders against the Public Protector, the real action lay elsewhere. Researchers and the legal profession will likely

[10] ibid [131].
[11] *PP v SARB* (n 2) [237].
[12] ibid [207].
[13] ibid [95] (Mogoeng CJ).

remember the *PP v SARB* case much less for its rulings on cost orders than for its foray into the independence of a central bank.

This case matters also because it deals with efforts by the Public Protector to change the core mandate of the central bank from "protecting the value of the currency" to "promot[ing] balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected."[14] However, unlike the question of SARB's core mandate, the independence of the central bank formed part of the Court's deliberations, especially from Chief Justice Mogoeng.

Independence of the central bank

Like almost every central bank in the world, SARB's primary mandate is to ensure monetary stability. Section 224 of the South African Constitution reads 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.
> (3)

The Constitution obliges SARB, when it pursues its primary objective of stabilizing the currency, to "perform its functions independently". Although it qualifies this obligation by requiring SARB to consult with the Cabinet member responsible for national financial matters (i.e., the Finance Minister), the Constitution expects SARB to fulfil its mandate "without fear, favour or prejudice". In short, the Constitution consecrates the principle of central bank independence.

Mogoeng CJ held that SARB must be trusted to perform its functions independently and that no reason exists to believe that this "constitutionally-ordained facilitator" of "balanced and sustainable economic growth" favours some players in the economy, thus disregarding its

[14] See Public Protector – South Africa, *Alleged Failure to Recover Misappropriated Funds: Report on an Investigation Into Allegations of Maladministration, Corruption, Misappropriation of Public Funds and Failure by the South African Government to Implement the CIEX Report and to Recover Public Funds From Absa Bank* page (Public Protector – South Africa 2018) 55.

mandate, and that it could even as much as consider entering into an unlawful contract at a great financial loss, thus prejudicing the interests of the general public.[15]

He noted, however, that the seriousness of the allegations of corruption, illegality or impropriety, especially those relating to an amount exceeding R1 billion, warranted a thorough investigation.[16] In the process, the Chief Justice took issue with SARB's behaviour, which he denounced as exuding an air of "untouchability".

Challenging the sacrosanct central bank's independence

Mogoeng CJ observed that, unlike Absa, SARB behaved as an untouchable institution and sought to intimidate and exact vengeance on the Public Protector for daring to question its independence:[17]

> The Reserve Bank comes across so strongly against the Public Protector, unlike Absa, as to give credence to a belief that it is a vindictive litigant that seems to yearn for untouchability. It comes across as wanting to teach the Public Protector and others an unforgettable lesson. And the message apparently sought to be communicated, through that lesson, is "you hold the Reserve Bank accountable like all others or subject it to public scrutiny at your peril".

Mogoeng CJ pushed back against such comportment and reaffirmed that nobody and no institution could use the courts to entrench a culture of impunity or untouchability for itself.[18] He warned people against handling SARB so as to exempt it from "scrutiny and accountability regardless of what it might have done – under the ever-lurking subtle threat of potential harm to the economy or the displeasure of market forces."[19]

Mogoeng CJ noted that "[n]othing sinister or anything that smacks of lack of impartiality or independence ought to flow so effortlessl" from the Public Protector's meeting with the President.[20] He reminded the parties of section 85(2)(d) of the Constitution,[21] which vests in the executive, headed by the President, the authority to prepare and initiate any legislation,

[15] *PP v SARB* (n 2) [62].
[16] ibid.
[17] ibid [123]. See also ibid [125].
[18] ibid [123].
[19] ibid.
[20] ibid [76]. See also ibid [67].
[21] Section 85(2)(d) of the Constitution provides that "[t]he President exercises executive authority, together with the other members of the Cabinet, by preparing and initiating legislation".

including a constitutional amendment. The Chief Justice therefore dismissed as incorrect SARB's argument that the Presidency would have no role to play in a possible amendment of the Constitution intended to modify the SARB's mandate and that the entire process falls under the exclusive domain of the legislature.[22]

This perspective on the place of the central bank within the new constitutional order accords with Keynesian economic theory. Keynesian policymakers propose that the law subjects the central bank to some measure of democratic control by the government. Keynesians think that, taking monetary policy away from politicians by brandishing the doctrine of central-bank independence (CBI), can conflict with fundamental democratic values.[23]

Mogoeng CJ underlined that, precisely because of its critical role in securing the wellbeing of the economy, SARB must remain transparent and clean.[24] He added that, though the Public Protector's investigation into the Bankorp/Absa matter could "scratch [SARB's] institutional ego the wrong way", the "overwhelming public interest" for it to clear its name in this investigation and preserve public confidence or the confidence of reasonable market forces should impel SARB to welcome and make the most of the opportunity.[25]

Mogoeng CJ concluded by rejecting SARB's claim for a declaratory order that the Public Protector abused her office during the investigation that produced the final report in question. He justified his conclusion by insisting that, however imperfect, the Public Protector's attempts to investigate SARB and recover the money in the Bankorp/Absa matter cannot amount to abuse of office.[26]

That said, the Chief Justice's position on SARB's independence from the state sharply contrasts with the 'new consensus' in macroeconomics and established practice in most developing nations. Central banks are often the institutions who import CBI from the global sphere to the

[22] *PP v SARB* (n 2) [63].
[23] John Maynard Keynes [1932], 'The Monetary Policy of the Labour Party' Reprinted in Donald Moggridge (ed), *Collected Writings of John Maynard Keynes*, vol 21 (Macmillan 1982) 131; Jörg Bibow, 'A Post Keynesian Perspective on the Rise of Central Bank Independence: A Dubious Success Story in Monetary Economics' (2010) Levy Economics Institute of Bard College Working Paper 625/2010, 4 <https://www.econstor.eu/bitstream/10419/56966/1/637218744.pdf> accessed 28 December 2020.
[24] *PP v SARB* (n 2) [124].
[25] ibid [124]-[125].
[26] ibid [124].

local sphere, demanding its adoption as mandatory.[27] They use neoliberal globalization and scientific models as key political resources to push back contending actors, usually other state-owned agencies,[28] like SARB tried to resist the Public Protector's efforts to investigate the Bankorp/Absa deal.

CBI also represents the archetype of the doctrine for depoliticizing economic policy in that it intends to transfer policy-making from politicians to the closed circle of notionally apolitical experts.[29] The South African Constitution entrenches CBI in section 224(2), where it lays down that, in pursuing its primary object, the SARB must "perform its functions *independently* and without fear, favour or prejudice" (emphasis added). In *PP v SARB,* the SARB contended that the President of the Republic would have no role to play if Parliament moved to amend or reconfigure the SARB's mandate – a contention that Chief Justice Mogoeng rejected in his dissenting opinion. The SARB's contention embodies the CBI doctrine.

Independence as vulnerability

SARB feared that the Public Protector failed to explain her meetings with the Presidency and the State Security Agency because she was biased against it.[30] The record contained handwritten notes which show that, on 3 May 2017, the Public Protector discussed the 'vulnerability' of SARB with the State Security Agency.

SARB did not also seem to understand what the whole notion of 'vulnerability' means. When referring to that notion of vulnerability, SARB expressly wondered 'vulnerability to whom?'[31] The central bank became concerned that the Public Protector sought to undermine it.[32] However, in a reply that the majority of the court found "unintelligible",[33] the Public Protector purported to explain that the notion signifies "SARB's vulnerability with regard to its mandate".[34]

[27] Daniel Maman and Zeev Rosenhek, *The Israeli Central Bank: Political Economy, Global Logics and Local Actors* (Routledge 2011) 28.
[28] ibid 29.
[29] Maman and Rosenhek (n 25) 17 and 21.
[30] *PP v SARB* (n 2) [177]-[178].
[31] ibid [178].
[32] ibid [179].
[33] ibid [181]-[182] (Khampepe J and Theron J).
[34] ibid [181].

Conclusion

It is a pity that the parties did not have the opportunity to ventilate at length the question of central-bank independence. Mogoeng CJ's dissenting judgment did offer some food for thought, but the Chief Justice did not go deep enough to provide clear guidance for future policy makers on how to deal with this burning CBI issue.

On the other hand, the question for lawyers is whether the judiciary should get involved, given that they seem to lack the expertise and the resources to delineate the proper level of independence of a central bank, let alone the incredibly difficult task of setting monetary policies. Or so the neoliberal orthodoxy would have us believe, the idea being that policy making in the area of monetary policies should remain confined to a select group of technocrats and insulated from the vagaries of the politicians' calculations.

In any event, this case should become a classic in finance, finance law, and central banking. It sets the principle that people must refrain from "cloth[ing]" the central bank "with the mystified but real and highly undesirable mantle of untouchability or impunity."[35] At the same time, Mogoeng CJ acknowledged that the Public Protector "got the law completely wrong when acting as if it was open to her to direct Parliament to amend the Constitution and even in a specific way."[36] Though she, like any other citizen, can make suggestions to Parliament, she cannot take remedial action to direct Parliament to amend the Constitution.[37]

The majority court held that SARB has the right to know why the Public Protector discussed its vulnerability with the security arm of the state. Is it a coincidence that both Public Protector Ms Mkhwebane[38] and then-President Jacob Zuma[39] notoriously worked as former spies? This

[35] ibid [123].
[36] ibid [63]. See also ibid [65] (qualifying the Public Protector's direction to Parliament to amend section 224 of the Constitution as "ill-advised" and "over-zealous", Mogoeng CJ held that not even the Constitutional Court, with all its extensive powers, may effectively direct Parliament to amend the Constitution.)
[37] See ibid [64].
[38] Sinikiwe Mqadi, 'New Public Protector Candidate Busisiwe Mkhwebane Is Zuma's Spy Says DA' *CapeTalk* (6 September 2016)(reporting that some opposition members objected to Mkhwebane's former experience as an 'analyst' for the State Security Agency) <http://www.capetalk.co.za/articles/16391/new-public-protector-candidate-busisiwe-mkhwebane-is-zuma-s-spy-says-da> accessed 28 December 2020; News24 and amaBhungane, 'How the State Security Agency "Instructed" Busisiwe Mkhwebane to Make Reserve Bank, Absa Findings' *News24* (15 December 2019) <https://www.news24.com/news24/SouthAfrica/News/state-capture-20-part-1-spies-instructed-public-protector-on-sarb-report-20191215> accessed 28 December 2020.
[39] In the late 1980s, Jacob Zuma headed the intelligence department of the African National Congress (ANC), which became the ruling party after democratization in 1994. See South African Government, 'Jacob Gedleyihlekisa Zuma, Mr' <https://www.gov.za/about-government/contact-directory/jacob-gedleyihlekisa-zuma-mr> accessed 28 December 2020.

case leaves many such questions unanswered. For example, given that the ruling party enjoys a majority in Parliament, the government could have simply passed a law to amend section 224 of the Constitution instead of working with the Public Protector to achieve the same result, albeit obliquely.

The Constitutional Court sighed that, in the absence of explanation from the Public Protector as to why she convened those meetings with security arm of the state, the court could not speculate on the reasons for those discussions with the President and the intelligence services.[40] Maybe some things are best kept secret.

[40] *PP v SARB* (n 2) [206].