THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 308/2017

In the matter between:

MINISTER OF HOME AFFAIRS	**FIRST APPELLANT**
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**SECOND APPELLANT**

and

THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA	**RESPONDENT**

Neutral citation: *Minister of Home Affairs v The Public Protector* (308/2017) [2018] ZASCA 15 (15 March 2018)

Coram: Lewis, Majiedt and Willis JJA and Plasket and Mothle AJJA

Heard: 28 February 2018

Delivered: 15 March 2018

Summary: Constitutional and administrative law – review of investigative, reporting and remedial powers of the Public Protector – such powers not of an administrative nature – may not be reviewed in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 – may be reviewed in terms of the principle of legality – no ground of review established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Plasket AJA (Lewis, Majiedt and Willis JJA and Mothle AJA concurring)

[1] Mr Reginald Ananius Marimi (Marimi), the second respondent in the court below, was employed by the Department of Home Affairs (the Department) and stationed at the South African embassy in Cuba, where he held the position of first secretary. As a result of complaints concerning his conduct, made by the Cuban government to the South African ambassador, he was recalled to South Africa. One consequence of this was that his cost of living allowance (COLA) was stopped. He was also threatened with disciplinary proceedings, which never materialised.

[2] He lodged a complaint with the Public Protector, the respondent in this appeal and the first respondent in the court below, against the Department, alleging maladministration on its part in relation to his transfer from Cuba to South Africa. The Public Protector investigated Marimi's complaint. She produced a preliminary report which she provided to the parties for comment. Then she produced a final report in which she found that the Department was indeed guilty of maladministration in relation to Marimi. She directed that the Department take certain remedial action to redress Marimi's grievance.

[3] The political and administrative heads of the Department – the Minister of Home Affairs and her Director-General – brought an application, as first and second applicants, in the Gauteng Division of the High Court, Pretoria, to review and set aside the Public Protector's report, entitled 'Unjust Forfeiture', or its findings and the remedial action that it directed the Department to take. The application was dismissed with costs by Prinsloo J. He nonetheless granted leave to appeal to this court.

[4] When the application was launched and when it was argued, the effect of the Public Protector's power to order remedial action to be taken by errant organs of state had not been definitively decided. The only judicial pronouncement on the issue was the judgment in *Democratic Alliance v South African Broadcasting Corporation Ltd & others*.[1] It had held that the Public Protector's 'orders' were little more than recommendations.

[5] This issue has now been determined in this court in the appeal from that decision, in *South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others*,[2] and by the Constitutional Court in *Economic Freedom Fighters v Speaker, National Assembly & others*.[3] In effect, the *SABC (SCA)* held, and the *Economic Freedom Fighters* case confirmed, that the *Oudekraal* principle[4] applies to decisions of the Public Protector: her decisions cannot be ignored (or trumped by parallel processes) and unless they are set aside on review, they must be obeyed and given effect to. In this sense, they are binding and not mere recommendations.

[6] In what follows, I shall set out the facts; consider the powers and functions of the Public Protector, as well as their source; determine whether the Public Protector's exercise of power in this case is to be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) or the principle of legality that is part of the founding constitutional value of the rule of law; consider the grounds of

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[1] *Democratic Alliance v South African Broadcasting Corporation Ltd & others* 2015 (1) SA 551 (WCC).
[2] *South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA); [2015] ZASCA 156. This case will be referred to below as *SABC (SCA)*.
[3] *Economic Freedom Fighters v Speaker, National Assembly & others* 2016 (3) SA 580 (CC); [2016] ZACC 11.
[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA); [2004] ZASCA 48 para 26.

review relied upon by the appellants and decide whether any of them have been established; and make the appropriate order consequent on the last-mentioned findings.

The facts

[7] On 17 February 2010, while Marimi was stationed in Cuba, the Cuban Deputy Minister of Foreign Affairs met with the South African ambassador. He complained about the conduct of Marimi and a second South African diplomat who occupied the position of second secretary at the embassy. The complaints were reduced to writing in an *aide memoire* dated 20 February 2010.

[8] The allegations made against the two were serious but lacked detail. In respect of Marimi, the a*ide memoire* stated that he had been 'involved', with the second secretary, in an incident in the city of Cienfuegos on 15 March 2009 when the second secretary 'in a state of intoxication, insulted a group of citizens' and threw a can of beer at them, refused to identify himself and was disrespectful to and insulted two 'patrol officers'; that Marimi had been 'involved in other serious traffic laws violations'; that he had 'tried to go through an unauthorised area and he had to be detained by State Security agents'; and that in December 2009, he had 'attacked physically and insulted in a disrespectful manner an Airport Customs official'.

[9] The *aide memoire* proceeded to record that '[i]n recognition of the excellent relations between Cuba and South Africa, Deputy Minister Rodriguez informed that the Ministry of Foreign Affairs had agreed that the Deputy Minister summon the Ambassador with all these elements and, without requesting him to get them out of the country or to declare them *personae non grata*, point out to him emphatically that new incidents would not be tolerated'. It concluded by stating that the Cuban Ministry of Foreign Affairs 'hopes that measures deemed appropriate will be taken in order to prevent the recurrence of such deplorable events'.

[10] Despite the fact that the Cuban government did not insist that action should be taken against Marimi, he was nonetheless recalled to South Africa. The letter

informing him of his recall gave him notice that disciplinary action would be taken against him.

[11] When, about a month after his return to South Africa, Marimi had heard nothing further from the Department, he instructed an attorney to write to it to ascertain progress in the disciplinary action that had been threatened. That and further letters received no response from the Department. About four months after his return to South Africa, however, he received a letter from the Department that gave him five days to make representations as to why disciplinary action should not be taken against him. He made his representations promptly. He heard nothing further from the Department.

[12] Eventually, he lodged a complaint with the Public Protector. Essentially, his complaint was that the process followed by the Department when he was recalled from Cuba was unfair, the withdrawal of his COLA on his return was improper and the Department's failure to initiate and finalise disciplinary action against him had caused prejudice to his reputation.

[13] In the Public Protector's final report, she concluded that: (a) Marimi's recall from Cuba was procedurally flawed and constituted maladministration; (b) the delay in taking disciplinary action against Marimi violated a provision of the Public Service Disciplinary Code and Procedures, was unreasonable and improper, and constituted maladministration; (c) the decision to stop paying Marimi his COLA contravened a provision of the Foreign Service Dispensation, was improper and constituted maladministration; and (d) Marimi had been prejudiced by the Department's maladministration in that he had been treated unfairly, had been unfairly denied payment of his COLA, his name and reputation had been tarnished and his human dignity had been impaired.

[14] The remedial action that the Public Protector directed the Department to take was the following: (a) the Director-General was to ensure that Marimi's COLA was paid to him, together with interest, from the date of his recall from Cuba until the date of his transfer from the Department to the Department of Correctional Services; (b) the Director-General was to investigate the reasons for Marimi's case not being dealt

with properly and was to take action against anyone who was at fault; and (c) the Director-General was to ensure that a letter was written to Marimi to apologise to him for the prejudice he suffered as a result of the Department's maladministration.

The Office of the Public Protector

[15] The Office of the Public Protector was first created by the interim Constitution of 1993.[5] What was envisaged was an ombud-type institution to investigate and report on maladministration and other similar maladies within the government and its public service with the aim of ensuring ethical governance.[6] While the institution created by the interim Constitution certainly had more extensive powers than a previous, similar body – the Advocate-General created after the Information Scandal of the 1970s[7] – the powers of the Public Protector were further enhanced by the 1996 Constitution.

[16] Section 181(1) of the Constitution established a number of institutions, generally referred to as Chapter 9 institutions, which were to strengthen constitutional democracy. They are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.

[17] In terms of s 181(2) all of the Chapter 9 institutions are 'independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Section 181(3) places an obligation on other organs of state to 'assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions'. Section 181(4) prohibits persons or organs of state from interfering with the functioning of any Chapter 9 institution. Section 181(5) provides that they are accountable to the National Assembly and that they are each required to report to it on the fulfilment of their mandates annually at least.

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[5] Section 110.
[6] Michael Bishop 'Public Protector' in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (2 ed) (Vol 2) at 24A-1 to 24A-2.
[7] Lawrence Baxter *Administrative Law* at 233-235.

[18] Sections 182 and 183 of the Constitution deal specifically with the Public Protector. Section 182(1) provides:

'The Public Protector has the power, as regulated by national legislation-

(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;

(b) to report on that conduct; and

(c) to take appropriate remedial action.'

[19] Section 182(2) allows for these powers to be supplemented by national legislation. Section 182(3) places only one limit on the Public Protector's power: she may not investigate 'court decisions'. Section 182(4) places an obligation on the Public Protector: her office must be 'accessible to all persons and communities'. Section 182(5) requires the Public Protector's reports to be 'open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential'.

[20] Section 183 prescribes the Public Protector's tenure of office: a person may be appointed as Public Protector for a non-renewable term of seven years.

[21] While the primary source of the Public Protector's powers is the Constitution, the Public Protector Act 23 of 1994 is the legislation contemplated by s 182(2) that supplements her powers.[8]

[22] Section 6 is the heart of the Public Protector Act. It adds to the matters that the Public Protector may investigate, specifies matters that she cannot investigate or may decline to investigate and specifies the procedure for the making of complaints to the Public Protector.

[23] Section 6(4)(a) sets out the matters that the Public Protector may investigate. It provides:

'The Public Protector shall, be competent-

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[8] *SABC (SCA)* (note 2) para 43.

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged-

(i) maladministration in connection with the affairs of government at any level;

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.'

Section 6(5) empowers the Public Protector to investigate similar misconduct within institutions in which 'the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999)'; and s 6(7) allows her to investigate attempts to commit the types of misconduct specified in ss 6(4) and (5).

[24] Even if a complaint made to the Public Protector falls within her jurisdiction, she may refuse to entertain the complaint in certain circumstances. Section 6(3) provides:

'The Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is-

(a) an officer or employee in the service of the State or is a person to whom the provisions of the Public Service Act, 1994 (Proclamation 103 of 1994), are applicable and has, in connection with such matter, not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act, 1994; or

(b) prejudiced by conduct referred to in subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.'

In terms of s 6(9), generally speaking, a complaint that is within the Public Protector's jurisdiction will not be entertained 'unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned'.

She has a discretion, however, where special circumstances exist, to entertain complaints that are older than two years.

[25] Section 6(1) specifies the way in which an investigation by the Public Protector may be initiated. It provides:

'Any matter in respect of which the Public Protector has jurisdiction may be reported to the Public Protector by any person-

(a) by means of a written or oral declaration under oath or after having made an affirmation, specifying-

(i) the nature of the matter in question;

(ii) the grounds on which he or she feels that an investigation is necessary;

(iii) all other relevant information known to him or her; or

(b) by such other means as the Public Protector may allow with a view to making his or her office accessible to all persons.'

Section 6(2) requires the Public Protector and her staff to 'render the necessary assistance, free of charge, to enable any person to comply with subsection (1)'.

[26] In *Public Protector v Mail and Guardian Ltd & others*[9] Nugent JA stressed the importance of the office of the Public Protector, which he described as an 'indispensable constitutional guarantee', stating that it 'provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation'.

The basis for the review – the PAJA or the principle of legality?

[27] Review in terms of both the PAJA and the principle of legality stems from the rule of law. Section 33(1) and (2) of the Constitution as well as the PAJA gives effect to the rule of law in respect of only administrative action. The principle of legality gives effect to the rule of law in relation to all other exercises of public power, such as executive power. Woolf, Jowell and Le Sueur make this point when they say that as a general principle, the rule of law 'has provided the major justification for

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[9] *Public Protector v Mail and Guardian Ltd & others* 2011 (4) SA 420 (SCA); [2011] ZASCA 108 para 6.

constraining the exercise of official power, promoting the core institutional values of legality, certainty, consistency, due process and access to justice'.[10]

[28] An applicant for judicial review does not have a choice as to the 'pathway' to review: if the impugned action is administrative action, as defined in the PAJA, the application must be made in terms of s 6 of the PAJA; if the impugned action is some other species of public power, the principle of legality will be the basis of the application for review.[11]

[29] In the *SABC (SCA)* case,[12] this court was not required to determine definitively whether the remedial action taken by the Public Protector constituted administrative action. It left the issue open. In the court below in this matter, Prinsloo J held that the Public Protector's exercises of power were subject to review in terms of the PAJA.[13] In *South African Reserve Bank v Public Protector & others*,[14] Murphy J concluded that the PAJA applied to a review of remedial action ordered by the Public Protector. In the most recent pronouncement on the issue, a full court in *Absa Bank Limited & others v Public Protector & others*,[15] also concluded that the remedial action ordered by the Public Protector was subject to review in terms of the PAJA.

[30] Administrative action is defined in s 1 of the PAJA to mean:

'. . . any decision taken, or any failure to take a decision, by-

(*a*) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(*b*) . . .

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[10] Harry Woolf, Jeffrey Jowell and Andrew Le Sueur *De Smith's Judicial Review* (6 ed) para 11-059. See too William Wade and Christopher Forsyth *Administrative Law* (10 ed) at 29 who say: 'Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law.'

[11] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC); [2005] ZACC 14 paras 95-97; *State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA); [2016] ZASCA 143 paras 33-38.

[12] Note 2.

[13] *Minister of Home Affairs & another v Public Protector & another* 2017 (2) SA 597 (GP); [2016] ZAGPPHC 921 para 47.

[14] *South African Reserve Bank v Public Protector & others* 2017 (6) SA 198 (GP); [2017] ZAGPPHC 443.

[15] *Absa Bank Limited & others v Public Protector & others* [2018] ZAGPPHC 2.

which adversely affects the rights of any person and which has a direct, external legal effect . . .'

A number of types of public powers, such as executive, legislative, judicial and prosecutorial powers, to name but four, are excluded from the definition.

[31] The definition refers at the outset to 'a decision'. This term is defined, also in s 1, to mean:

'. . . any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

. . .

(g) doing or refusing to do any other act or thing of an administrative nature'.

[32] The elements of the definition contemplate (a) a decision of an administrative nature (b) taken by an organ of state (c) when it exercises either a constitutional power or a public power in terms of legislation (d) that adversely affects rights and (e) has a direct, external legal effect.

[33] Section 239 of the Constitution defines an organ of state to mean:

'(*a*) any department of state or administration in the national, provincial or local sphere of government; or

(*b*) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer.'

[34] The Office of the Public Protector is not a department of state or administration and neither can it be said to be part of the national, provincial or local spheres of government: it is an independent body that is answerable only to the National Assembly.[16] It is therefore not an organ of state as contemplated by

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[16] *SABC (SCA)* (note 2) para 24-25; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); [2001] ZACC 23 para 27 in which it was held that the Independent Electoral Commission, also a Chapter 9 institution, was not an organ of state 'within the national sphere of government'.

subsection (*a*) of the definition. It is, however, an institution that exercises both constitutional powers and public powers in terms of legislation. It is, consequently, an organ of state as contemplated by subsection (*b*) of the definition.

[35] The completed process[17] of an investigation by the Public Protector that has found official misconduct and ordered remedial action will usually adversely affect rights and have a direct, external legal effect.[18] The investigative, reporting and remedial powers of the Public Protector are public powers[19] that derive from both the Constitution and ordinary parliamentary legislation. None of the express exclusions from the definition apply to the Public Protector.

[36] Administrative action concerns the taking of a decision. The type of decision envisaged is a decision 'of an administrative nature'.[20] This is so because administrative action generally involves 'the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State'.[21] While I accept that public administration in a modern state encompasses an extremely wide range of activities, including investigative functions and the exercise of powers of compulsion,[22] I am of the view that the factors listed below distinguish the decisions of the Public Protector from decisions of an administrative nature.

[37] First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them. Secondly, it is a purpose-built watch-dog

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[17] I express no view on whether rights may be adversely affected prior to the completion of an investigation or whether an incomplete investigation can have an external, legal effect.
[18] As to which, see *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA); [2005] ZASCA 43 para 23.
[19] As to which, see *Police and Prisons Civil Rights Union & others v Minister of Correctional Services & others* 2008 (3) SA 91 (E); [2006] ZAECHC 4 paras 52-53.
[20] As to which see *Grey's Marine Hout Bay* (note 18) para 22; *Sokhela & others v MEC for Agriculture and Environmental Affairs & others* 2010 (5) SA 574 (KZP); [2009] ZAKZPHC 30 paras 60-61.
[21] *Grey's Marine Hout Bay* (note 18) para 24.
[22] See Beinart 'Administrative Law' (1948) 11 *THRHR* 204 AT 212-213 who said of the functions given to state functionaries: 'To carry out these functions, the public service has been given powers of intervention, powers of compulsion, powers of inspection, powers of decision, usually of a wide discretionary nature, which have a constant impact on the person, property, labour and trade of the individual. What is more they are supplemented by powers to make rules and regulations in relation to those powers, and often to conduct investigations and decide disputes . . '. See too Marinus Wiechers *Administrative Law* (2 ed) at 18; Wiechers 'Administrative Law and the Benefactor State' 1993 *Acta Juridica* 248 at 251.

that is independent and answerable not to the executive branch of government but to the National Assembly. Thirdly, although the State Liability Act 20 of 1957 applies to the Office of the Public Protector to enable it to sue and be sued,[23] it is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and hence constituting administrative action. That being so, the PAJA does not apply to the review of exercises of power by the Public Protector in terms of s 182 of the Constitution and s 6 of the Public Protector Act. That means that the principle of legality applies to the review of the decisions in issue in this case.

The review

[38] It does not matter in this case that the application for the review is based on the principle of legality rather than on the PAJA. No procedural differences arise[24] and the grounds of review that apply in respect of both pathways to review derive ultimately from the same source – the common law – although, in the PAJA, those grounds have been codified.[25]

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[23] Public Protector Act, s 5(2).
[24] In cases involving undue delay and the exhaustion of internal remedies, for instance, different procedural rules apply.
[25] Cora Hoexter *Administrative Law in South Africa* (2 ed) at 118-119. At present, in respect of the principle of legality, not every ground of review has been defined by the courts with the precision one finds in the PAJA. That said, however, broad grounds going to the lawfulness, procedural fairness and reasonableness of official decisions have been recognised. See for instance *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC); [1999] ZACC 11 para 148*; Pharmaceutical Manufacturers Association of SA & others: in re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC); [2000] ZACC 1 paras 82-86. The only difference in the grounds of review that I can discern at present is that those exercising executive power have been exempted from having to act fairly (*Masethla v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC); [2007] ZACC 20 para 77) and disproportionality (as an aspect of unreasonableness) has not yet been recognised as a ground of review, except in a minority judgment in the Constitutional Court (*Minister of Health & another NO v New Clicks South*

[39] The appellants attack the Public Protector's decision to entertain the complaint made by Marimi on two principal grounds: first, that the complaint was not made on oath; and secondly, that the Public Protector entertained the complaint despite Marimi not having exhausted his remedies in terms of the Public Service Act (Proclamation 103 of 1994) or other legislation. During the course of argument a third ground was raised that attacked the remedial action of requiring the Department to pay Marimi's COLA.

The complaint was not made on oath

[40] In terms of s 6(1) of the Public Protector Act a complaint may be reported to the Public Protector by means of a 'written or oral declaration under oath'[26] or by 'such other means as the Public Protector may allow with a view to making his or her office accessible to all persons'.[27]

[41] The Public Protector has a choice as to the form of the complaint. In some instances, the nature of the complaint may be such that she takes the view that it must be made on oath, while in other matters, a more informal procedure may be followed. In this case, the Public Protector obviously took the view that there was no need to take a declaration on oath from Marimi. She was entitled to hold that view and always could have required the complaint to be made on oath at a later stage if it became necessary. As it happened, there was no need for this because the facts upon which the complaint was based were common cause. In any event, in terms of s 6(4), as soon as the Public Protector heard Marimi's version of events, she could have instituted an investigation on her own initiative.

[42] In order to succeed, the appellants must establish that the Public Protector acted irregularly in taking Marimi's complaint otherwise than on oath. She had the power to do exactly that. It does not avail the Department to say that it would have been better or wiser to have exercised her discretion differently. That is not the test

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Africa (Pty) Ltd & another (Treatment Action Campaign & another as amici curiae) (note 11) paras 633-637).

[26] Section 6(1)(*a*).

[27] Section 6(2)(*b*).

on review. No irregularity and hence no ground of review has been established to justify the attack on the procedure followed by the Public Protector in taking the complaint.

Alternative remedies

[43] The second ground of attack relates to s 6(3) of the Public Protector Act. In terms of this provision, the Public Protector may decline to investigate a complaint of maladministration if the complainant is 'an officer or employee in the service of the State or is a person to whom the provisions of the Public Service Act' apply and who has not 'taken all reasonable steps to exhaust the remedies conferred' on him or her by that Act, or any other available remedy.

[44] This attack has two legs. The first is that because Marimi's complaint was that he was the victim of an unfair labour practice, he had to seek his remedy in the Labour Relations Act 66 of 1995: in the same way as the Labour Court has exclusive jurisdiction in labour matters at the expense of the high courts,[28] so too the Public Protector's jurisdiction was ousted in this case. There is no merit in the argument. The Public Protector is not a court, does not exercise judicial power and cannot be equated with a court. Her role is completely different to that of a court and the jurisdictional arrangements of the courts are entirely irrelevant to a determination of the Public Protector's jurisdiction. It is necessary to look to s 182 of the Constitution and the Public Protector Act to ascertain the bounds of the Public Protector's jurisdiction. Neither excludes labour matters from her jurisdiction.

[45] I turn now to the second related attack. As with s 6(1), the Public Protector had a discretion as to whether to take Marimi's complaint or not. The nature of this discretion and the way in which it is to be exercised is shaped by the nature and scope of her mandate as provided for in the Constitution and the Public Protector Act. Section 182 of the Constitution makes it clear that she has the mandate 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

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[28] *Chirwa v Transnet Lt & others* 2008 (4) SA 367 (CC); [2007] ZACC 23; *Gcaba v Minister of Safety and Security & others* 2010 (1) SA 238 (CC); [2009] ZACC 26.

impropriety or prejudice';[29] and to report on that conduct and 'take appropriate remedial action'. The Public Protector Act widens this already wide mandate even more, extending the Public Protector's remit to investigation, on her own initiative, of maladministration and similar maladies in respect of, for instance, 'the affairs of government at any level',[30] or by 'a person performing a public function,'[31] and also in respect of state owned enterprises and other public entities.[32]

[46] The only express exclusion of the Public Protector's investigative jurisdiction is in relation to decisions of courts. For the rest, her jurisdiction is extremely wide and her mandate is clear: she must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance. Seen in this context, and the wide discretion vested in her to enable her to achieve this end, the functioning of s 6(3) becomes clear: it provides an opt-out for the Public Protector in the circumstances contemplated by that section. In other words, it allows the Public Protector to decline to take a complaint that is within her jurisdiction if she has reason to do so. The acceptance of a complaint, when the circumstances envisaged by s 6(3) are present, is the default position.

[47] The appellants have failed to establish any ground of review in terms of which the Public Protector's decision not to opt-out, and instead to investigate Marimi's complaint, may be set aside.

Payment of the COLA

[48] The two points that I have dealt with above were the only issues canvassed in the appellants' heads of argument and in a summary of their argument handed to the court at the hearing of the matter. During the course of his address, however, Mr Cassim, who appeared with Ms Freese for the appellants, also submitted that the Public Protector's decision to order the remedial action of payment of Marimi's COLA was reviewable on the basis of an error of law, unreasonableness and because it 'induced a sense of shock'. (The last ground can be left out of account, not being a

[29] Emphasis added.
[30] Section 6(4)(*a*).
[31] Section 6(4)(*b*).
[32] Section 6(5).

ground of review but a measure of misdirection when a sentence is appealed against.)

[49] In the founding affidavit, the Director-General of the Department stated:

'117 The Public Protector misconstrued the purpose of a cost of living allowance and understood it to be a benefit. The cost of living allowance is not a benefit but an allowance to an employee who is posted in a foreign country by the Department. The allowance is due to an employee as long as that employee is resident in a foreign country as part of a foreign mission. When an employee is in the Republic he is not entitled to COLA.

118 The finding by the Public Protector that the second respondent was entitled to COLA despite that he was not in Cuba for the 6 month period between June and November 2010 is factually and legally incorrect. It is a finding that no reasonable person in the position of the Public Protector could have made.'

[50] The Public Protector explained her decision in detail in her final report. She said:

'7.4.4 In its response to the provisional report, the Department did not dispute that in terms of Paragraph 6.2.1(iii) of the Foreign Service Dispensation, 2010, the DPSA letter dated 22/02/2006, which provides that: "<u>if an official is recalled due to a Labour Relations action he/she is regarded as being on official duty and hence paragraph 6.2.1(iii) of COLA will apply</u>", is applicable to the complainant. (own emphasis).

7.4.5 Paragraph 6.2.1(iii) of COLA provides that a designated official absent from Mission on official duty for a period of 1 to 60 days is entitled to 100% of the applicable COLA amount payable whether Accompanied COLA (AC) or Unaccompanied COLA (UC). Further that a designated official absent from the Mission on official duty for a period of 61 days and more is entitled to 50% of the applicable COLA amount payable whether AC or UC.

7.4.6 The Department has not provided any evidence to suggest that the Complainant was recalled or withdrawn for any other reason(s) except for a labour relations action on the basis of his alleged misconduct. The fact that the Department contended in its response to the provisional report that the Complainant knew or reasonably ought to have known that he would not be sent back to Cuba, if he had to collate all his personal effects, does not detract from the fact that he was withdrawn on account of a labour relations action.

7.4.7 On proper construction Clause 6.2.1 of the Foreign Service Dispensation does not support the Department's contention that once withdrawn from a Foreign Service mission as in the circumstances of the Complainant, COLA does not become applicable, except for providing that in the case of the Head of Mission who is absent from the mission because of

being recalled after 31 days and more and a designated official absent from duty on unpaid leave, 0% COLA is payable. Clause 6.2.1 does not make reference to a person in the circumstances of the Complainant other than the reference made by the DPSA letter dated 22/02/2006 as alluded above.'

[51] In the founding affidavit, no basis is laid for the assertion that the Public Protector's conclusion is factually and legally incorrect as well as unreasonable. As the onus rests on an applicant in judicial review proceedings to establish the grounds of review upon which he or she relies,[33] the Director-General's bare averments of irregularity are insufficient.

[52] The least I would have expected to sustain the allegation of error of law is to be provided with paragraph 6.2.1 of the Foreign Service Dispensation, so that we could determine whether an error of law had been committed. That was not done and in the face of that omission, the Public Protector's interpretation of it stands unchallenged.

[53] As for the allegation that the Public Protector committed an error of fact, I am not sure what that error of fact might have been because it has not been identified. In any event, it is only errors of fact (of a non-jurisdictional nature) in a very narrow band that are reviewable (as an incidence of the principle of legality):[34] generally speaking, errors of fact are not reviewable.[35]

[54] Finally, no attempt has been made to identify the basis for the allegation of unreasonableness. If it is alleged that the decision is irrational, that, in the light of the passage in the final report that I have quoted, is unsustainable. If the unreasonableness is said to lie in the effect of the decision, no factual foundation has been laid for any suggestion that it is disproportional.

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[33] Lawrence Baxter *Administrative Law* at 738-739; *Bangtoo Bros. & others v National Transport Commission & others* 1973 (4) SA 667 (N) at 676F-677A..

[34] *Pepcor Retirement Fund & another v Financial Services Board & another* 2003 (6) 38 (SCA); [2003] ZASCA 56 paras 47-49; *Dumani v Nair & another* 2013 (2) SA 274 (SCA); [2012] ZASCA 196 para 30.

[35] *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C) at 1084E-H.

[55] In the result, the challenge to the ‘award’ of Marimi’s COLA is devoid of merit and the appellants have not established a ground of review to justify its setting aside.

Conclusion

[56] I have concluded that the constitutional and statutory powers and functions vested in the Public Protector to investigate, report on and remedy maladministration are not administrative in nature and so are not reviewable in terms of s 6 of the PAJA. This being so, the Public Protector’s exercise of her core powers and functions is reviewable on the basis of the principle of legality that stems from the founding constitutional value of the rule of law. On the facts, however, I have found that the appellants have failed to establish any ground of review. That being so, the appeal must fail.

[57] I make the following order.
The appeal is dismissed with costs, including the costs of two counsel.

C Plasket
Acting Judge of Appeal

APPEARANCES

For the appellants:	N A Cassim SC and S Freese
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For the first respondent:	P Kennedy SC and L Zikalala (heads of argument drafted by N H Maenetje SC and L Zikalala)
Instructed by:	Adams and Adams, Pretoria
	Honey Attorneys, Bloemfontein