

## **THE SOUTH AFRICAN CONSTITUTION IS IN THE DOCK**

CASAC together with Democratic Alliance have respectively instituted high court proceedings to review and set aside the Public Protector's Vrede Dairy Farm Report No. 31 of 2017/18. CASAC is an acronym which stands for Council for the Advancement of the South African Constitution, founded by eminent South Africans among whom are advocates and politicians. The thrust of their grief is that the Report 31 of 2017/18 is a whitewash and exonerates politicians, Messrs Ace Magashule and Mosebenzi Zwane from liability for corruption to the tune of R250 million.

During Public Protector, Adv. Busisiwe Mkhwebane's last appearance before the Portfolio Committee on Justice and Correctional Services (PCJC), a request was made that she investigate the involvement of politicians in the dairy farm project. Adv. Mkhwebane has since resolved to undertake such investigation under a new file and separate from the initial one to which a report has already been rendered. The latest investigation seeks to establish if there were any relations between politicians and the suppliers appointed to implement the project, also, to find out if the beneficiaries of the project were in any way prejudiced.

Following the filing (in terms of Rule 53 of the High Court Rules) by the Public Protector of the record of decision in the Vrede Dairy Farm Report 31 of 2017/18 against which the said court applications are brought, CASAC amended its Notice of Motion and formulated fresh Orders they wish the court to make. Contrary to the PCJC request to Adv. Mkhwebane which she accepted, CASAC now wants the court to prevent Adv. Mkhwebane from further investigating the matter of the Vrede Dairy Farm on the basis that Mkhwebane "apparently attempted to protect implicated officials" and "has not been candid with Parliament", further, "she has shown herself to be incapable of doing so", therefore there would be no purpose in asking her to investigate the matter again. With the amended prayers they also want the court to make a punitive order for cost payable from her personal pocket.

The Public Protector has convincingly refuted CASAC's media claims, has shown beyond doubt that nothing is further from the truth in the allegation that she protected certain implicated officials. Quite opposite in fact and flying in the face of these allegations are the Presidency letters confirming that certain Ministers were removed from Cabinet on the basis of the Public Protector's findings in a separate matter. The purported provisional report has been posted on the Public Protector's website for everyone to see that the purported provisional report allegedly altered by Adv. Mkhwebane never mentioned any politician. Of course the investigation in this matter was completed in 2015, any draft provisional report prepared by Adv. Mkhwebane's predecessor was part of the matter but with no legal force. It had not been issued to any implicated party. The practice of issuing provisional reports was actually discontinued and replaced with Section 7(9) notices. This was after leakage problems were experienced with the so called provisional reports practice.

The Public Protector is a Chapter 9 institution, established to strengthen Constitutional Democracy. Section 181 of the Constitution broadly provides the following about the Chapter 9 institutions: The institutions are independent and subject only to the Constitution and the law. They must exercise their powers and perform their functions without fear, favour or prejudice. Other organs of state must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of these institutions.

Viewed from the above mentioned provisions of Section 181 this state of affairs has brought to the fore the following interesting questions, namely (1) whether it was legally and/or Constitutionally correct in the first place for the PCJC to request Adv. Mkhwebane to institute a further investigation with particular focus on the politicians.

Can for example the Public Protector in future, without fear, favour or prejudice issue a report which is not in line with a particular political narrative?; (2) whether in the light of PCJC accepted request CASAS's prayer to prevent Mkhwebane from further investigating the matter is legitimate and sustainable in law; (3) whether the prayer for personal cost order is appropriate against an incumbent of a Chapter 9 institution. It is without doubt that CASAC's prayer for personal cost order arises from and is fortified by the *de boni propriis* cost order against the Public Protector issued by the North Gauteng High Court in the CIEX/Absa judgment delivered on the 28 February.

That CIEX judgment is presently under appeal process. The Public Protector has petitioned the Supreme Court of Appeal and Constitutional Court simultaneously, mainly on the ground that the personal cost order instills fear on her thus obstructing the unfettered discharge of the Constitutional mandate her Office carries. Left unchallenged the CIEX judgment means the Public Protector, irrespective of who she/he is will in future be incapable of investigating any complaint against or involving the SARB without investigation result possibly being construed by the public as having negatively been influenced by this personal cost order.

In its prime project of advancing the Constitution CASAC has pitted the arms of state against each other - it wants the Judiciary to consider the Parliamentary request to the Public Protector and overrule it. CASAC is primarily questioning the competence of the legislator and this it does by invoking another arm of government the Judiciary.

Further, despite having initially followed the proper legal process in exercising its Constitutional right to challenge the Public Protector's Vrede Dairy Farm Project Report, and, while the matter is still to be decided by the courts CASAC, through its CEO Mr. Lawson Naidoo on eNCA, went public and castigated the Public Protector ostensibly "in advancement of the South African Constitution".

The legal fraternity is very much aware of the dangers of publicly expressing views on matters that are *sub judice*, the key downside of such conduct being watering down, undermining the expected court decisions on the pending matter. Speaking on an issue ahead of the court does, wittingly or unwittingly create impression that the party doing so is seeking to unduly influence the court's outcome. Upholding rules and etiquettes against such behaviour ensures the survival of the rule of law, democracy and constitutionalism. The Constitution (the entire legal system in fact)

obtains its force of law from and dependent upon the generally held societal belief that it is objective and without favour.

Perhaps this conduct betrays the dilemma CASAC finds itself in, viz. that of advancing the Constitution or political agendas. It is not apparently clear why CASAC had to even disrespect legal profession ethics as if the politicians they allege have been shielded are out of the woods.

The machinery of the state is still at work to uncover whatever impropriety that might have been committed. The Commission on State Capture under Deputy Chief Justice Zondo has been set up. Its terms of reference are wide enough to give hope of sufficient funding, thereby remedying the financial limitations which prevented Adv. Mkhwebane from leaving no stone unturned.

In conclusion it will be interesting to note what role CASAC will in future play in its course of advancing the Constitution. There is already a massive upsurge that cannot be ignored which begins to question whether this Constitution is serving the interest of everyone.

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