

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE  
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)  
OF THE PUBLIC PROTECTOR ACT, 1994**



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**INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE  
PRESIDENT, MR CYRIL RAMAPHOSA RELATING TO THE DISCHARGE FROM  
OFFICE OF JUDGE CM SARDIWALLA**

	<b>TABLE OF CONTENTS</b>	
<b>ITEM</b>	<b>DESCRIPTION</b>	<b>PAGE NO.</b>
	<b>LIST OF ACRONYMS AND ABBREVIATIONS</b>	<b>3</b>
	<b>EXECUTIVE SUMMARY</b>	<b>4</b>
<b>1</b>	<b>INTRODUCTION</b>	<b>8</b>
<b>2</b>	<b>THE COMPLAINT</b>	<b>9</b>
<b>3</b>	<b>POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</b>	<b>10</b>
<b>4</b>	<b>ISSUES IDENTIFIED FOR INVESTIGATION</b>	<b>11</b>
<b>5</b>	<b>THE INVESTIGATION</b>	<b>11</b>
<b>6</b>	<b>THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS</b>	<b>15</b>
<b>7</b>	<b>FINDINGS</b>	<b>26</b>
<b>8</b>	<b>CONCLUSION</b>	<b>27</b>

## LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS/ ABBREVIATIONS	DESCRIPTION
Constitution	Constitution of the Republic of South Africa, 1996
Investigation Team	Investigation Team of the Public Protector
JSC	Judicial Services Commission
Judges Remuneration and Conditions of Employment Act	Judges Remuneration and Conditions of Employment Act, 2001
OCJ	Office of the Chief Justice
Public Protector	Public Protector of the Republic of South Africa
Public Protector Act	Public Protector Act, 1994
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2020, as amended

## EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, 1994 (Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of maladministration regarding the process followed when Judge CM Sardiwalla (Judge Sardiwalla) was discharged from duty by the President, Mr Cyril Ramaphosa (the President).
- (iii) The investigation originates from a complaint lodged on 04 December 2023, with the Public Protector by the Director of the Institute for Accountability in South Africa, Adv. P Hoffman (the Complainant).
- (iv) In the main, the Complainant alleged that:
  - (a) The President unilaterally terminated the services of Judge Sardiwalla of the Gauteng High Court by issuing an “*order*” to that effect;
  - (b) Given the wording of section 177 of the Constitution and in particular the use of the word “*only*” in sub-section (1), the President has no power to remove a judge, in the absence of a finding by the Judicial Service Commission (JSC) that the judge is suffering from some relevant incapacity and a call by the National Assembly, via a resolution supported by a two thirds majority;

- (c) The media article by Mr Kevin Bloom dated 04 December 2023, in the Daily Maverick is silent on the activities of the JSC and he is quite sure that no such resolution of the National Assembly has been taken by the special majority that the law requires;
- (d) There is a long running pending matter, in which damages of approximately R1 billion are being claimed by Mr Fred Daniel (Mr Daniel), before Judge Sardiwalla and “*there are several judgements by him that were handed down after the President purported summarily to terminate his services as a judge.*” The prejudice and impropriety in all of these matters is self-evident. If Mr Daniel is obliged to start his case *de novo*, the prejudice would be dire; and
- (e) The minute of the decision by the President signed by him on 24 July 2023 is void for vagueness as it does not identify whether it is the body or mind of the judge that caused him to be incapable of performing his official duties. The section of the Act referred to in the minute is unconstitutional because it has the effect of by-passing section 177.
- (v) Based on the analysis of the complaint, the following issue was considered and investigated:
  - (i) Whether the process followed by the President when he discharged Judge Sardiwalla from duty was in violation of applicable legal prescripts, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.

- (vii) Notice in terms of rule 41(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2020* as amended (the Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act, 1994 (Public Protector Act) as amended, dated 20 May 2024 were sent to Ms Phindile Baleni (Ms Baleni), Director General in the Presidency and Secretary of Cabinet; Judge D Mlambo (Judge Mlambo), Judge President of the Gauteng Division of the High Court of South Africa, Office of the Judge President; Judge CM Sardiwalla (Judge Sardiwalla) of the Gauteng Division of the High Court and Mr P Hoffman (Complainant) respectively, to afford them an opportunity to make representations in connection with the intended closure of the complaint.
- (viii) An e-mail acknowledging receipt of the notice in terms of rule 41(1) the Public Protector Rules as amended, was received on 21 May 2024 from Mr G Mphaphuli (Mr Mphaphuli), Principle State Law Adviser - the Presidency, on behalf of Ms Baleni, Ms Leonora Mckenzie (Ms Mckenzie), Personal Assistant of Judge Sardiwalla, the Complainant and on 04 June 2024 from Judge Mlambo.
- (ix) The response received from the Complainant on 21 May 2024 was noted and considered by the Public Protector.
- (x) A further response was received on 04 June 2024 from Mr Mphaphuli and also from Judge Mlambo. The contents thereof were noted and considered by the Public Protector.
- (xi) Having regard to the evidence and regulatory framework determining the standards that the President should have complied with, the Public Protector closes this investigation based on the following findings:

- (i) **Whether the process followed by the President when he discharged Judge Sardiwalla from duty was in violation of applicable legal prescripts, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994**
- (aa) The allegation that the process followed by the President when discharging Judge Sardiwalla from duty was in violation of applicable legal prescripts, is **unsubstantiated**.
- (bb) The evidence before the Public Protector indicates that the President discharged Judge Sardiwalla from service in terms of section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, which provides for the discharge of a Judge by the President from active service if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties.
- (cc) The evidence further indicates that the process was initiated following a report from Judge Sardiwalla's medical doctor which recommended that he should be medically boarded. The President in the circumstances acted in terms of section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act that empowered the President to discharge Judge Sardiwalla from active service on medical grounds.
- (dd) The Public Protector accordingly does not make a determination on the constitutionality of section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, 2001, as it does not fall within the mandate of the Public Protector to test the constitutionality of legislation.
- (ee) The conduct of the President in this regard does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## **1. INTRODUCTION**

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 This report is submitted to the following persons in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties, for such persons to note the outcome of the investigation:
- 1.2.1 Ms Phindile Baleni (Ms Baleni), Director General in the Presidency and Secretary of Cabinet;
- 1.2.2 Judge R MM Zondo (Judge Zondo), Chief Justice of the Republic of South Africa and Chairperson of the Judicial Service Commission;
- 1.2.3 Judge D Mlambo (Judge Mlambo), Judge President of the Gauteng Division of the High Court of South Africa, Office of the Judge President;
- 1.2.4 Judge CM Sardiwalla (Judge Sardiwalla) of the Gauteng Division of the High Court; and
- 1.2.5 Adv. P Hoffman, the Complainant.
- 1.3 The report relates to an investigation into allegations of maladministration regarding the process followed when Judge Sardiwalla was discharged from duty by the President, Mr Cyril Ramaphosa (the President).



## 2. THE COMPLAINT

- 2.1 The investigation originates from a complaint lodged on 04 December 2023, with the Public Protector by the Director of the Institute for Accountability in South Africa, Adv. Hoffman (the Complainant).
- 2.2 The Complainant alleged, *inter alia*, that:
- 2.2.1 The President unilaterally terminated the services of Judge Sardiwalla of the Gauteng High Court by issuing an “*order*” to that effect.
- 2.2.2 Given the wording of section 177 of the Constitution, and in particular the use of the word “*only*” in sub-section (1), the President has no power to remove a judge, in the absence of a finding by the Judicial Service Commission (JSC) that the judge is suffering from some relevant incapacity and a call by the National Assembly, via a resolution supported by a two thirds majority.
- 2.2.3 The media article by Mr Kevin Bloom dated 04 December 2023 in the Daily Maverick is silent on the activities of the JSC and he is quite sure that no such resolution of the National Assembly has been taken by the special majority that the law requires.
- 2.2.4 There is a long running pending matter, in which damages of approximately R1 billion are being claimed by Mr Fred Daniel (Mr Daniel), before Judge Sardiwalla and “*there are several judgements by him that were handed down after the President purported summarily to terminate his services as a judge*”. The prejudice and impropriety in all of these matters is self-evident. If Mr Daniel is obliged to start his case *de novo*, the prejudice would be dire.

- 2.2.5 The minute of the decision by the President signed by him on 24 July 2023 is void for vagueness, as it does not identify whether it is the body or mind of the judge that caused him to be incapable of performing his official duties. The section of the Act referred to in the minute is unconstitutional because it has the effect of by-passing section 177 of the Constitution.

### 3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

- 3.2 Section 182(1) of the Constitution provides that:

*“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”.*

- 3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

- 3.4 The President is the Head of State as envisaged in section 83(a) of the Constitution and his conduct amounts to conduct in state affairs, as a result,

the Public Protector is satisfied that the complaint falls within its competency to investigate as envisaged in section 182(1)(a) of the Constitution and section 6(4) of the Public Protector Act.

#### **4. ISSUES IDENTIFIED FOR INVESTIGATION**

4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

4.1.1 Whether the process followed by the President when he discharged Judge Sardiwalla from duty was in violation of applicable legal prescripts, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.

#### **5. THE INVESTIGATION**

##### **5.1 Methodology**

5.1.1 The investigation is conducted in terms of section 182 of the Constitution read with sections 6 and 7 of the Public Protector Act.

5.1.2 The Public Protector Act confers on the Public Protector, the sole discretion to determine how to investigate with due regard to the circumstances of each case.

##### **5.2 Approach to the Investigation**

5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 The investigation was approached using an enquiry process that seeks to determine:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?
- (d) In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry, relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities. In this case, the factual enquiry principally focused on whether the alleged conduct of the President was inconsistent with the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law and/or rules that regulate the standards that should have been met by the President in the execution of his duties in relation to the subject of the complaint.

### **5.3 Key sources of information**

#### **5.3.1 Documents and Correspondence**

5.3.1.1 Complaint email from Adv. P Hoffman to the Public Protector, dated 04 December 2023;

5.3.1.2 Allegations letter from Public Protector to Judge Zondo, dated 11 January 2024;

- 5.3.1.3 Letter from Mr A Slingers, Director: Executive Support, Private Office of the Chief Justice, to Public Protector responding to the allegations, dated 18 January 2024;
- 5.3.1.4 Letter from Public Protector to Judge Sardiwalla, advising him of the investigation and requesting inputs, dated 09 April 2024;
- 5.3.1.5 Allegations letter from the Public Protector to Ms Baleni, Director General in the Presidency and Secretary of Cabinet, dated 09 April 2024; and
- 5.3.1.6 Letter from Judge Mlambo responding to the allegations, dated 02 May 2024.

### 5.3.2 **Legal Framework**

- 5.3.2.1 Constitution of the Republic of South Africa, 1996;
- 5.3.2.2 Judges' Remuneration and Conditions of Employment Act, 2001; and
- 5.3.2.3 Public Protector Act, 1994.

### 5.3.3 **Case Law**

- 5.3.3.1 *South African Reserve Bank v Public Protector & Others* 2017(6) SA 198 (GP); and
- 5.3.3.2 *President of the Republic of South Africa & Another v Public Protector and Others* (55578/2019) [2020] ZAGPGHC 9, 10 March 2020.

### 5.3.4 **Notices issued in terms of rule 41(1) of the Public Protector Rules**

- 5.3.4.1 Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding a complaint by means of a closing report, the Complainant shall be informed in writing accordingly and be given an

opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notification.

5.3.4.2 Rule 41(1) notices dated 20 May 2024 were issued to the following persons on 21 May 2024 to the Complainant, Ms Baleni, Judge Mlambo and Judge Sardiwalla to afford them an opportunity to make representations thereto.

5.3.4.3 An e-mail acknowledging receipt of the notice issued in terms of Rule 41(1) of the Public Protector Rules was received from:

- (a) Mr Mphaphuli, Principal State Law Adviser, the Presidency on 21 May 2024;
- (b) Ms Leonora Mckenzie (Ms Mckenzie), Personal Assistant of Judge Sardiwalla on 21 May 2024;
- (c) The Complainant, on 21 May 2024; and
- (d) Judge Mlambo on 04 June 2024.

5.3.4.4 The response received from the Complainant on 21 May 2024 was noted and considered by the Public Protector.

5.3.4.5 Responses were received on 04 June 2024 from Mr Mphaphuli and Judge Mlambo, respectively. The contents thereof were also noted and considered by the Public Protector.

**6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS**

**6.1 Whether the process followed by the President when he discharged Judge Sardiwalla from duty was in violation of applicable legal prescripts, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994**

*Common cause*

- 6.1.1 The President's minute number 220/2023 was signed on 24 July 2023, stating that under section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Judges' Remuneration and Conditions of Employment Act), Judge Sardiwalla was discharged from active service as a Judge with effect from 01 August 2023.

*Issue in dispute*

- 6.1.2 The issue for the Public Protector's determination is whether due process was followed by the President in discharging Judge Sardiwalla from active service.

*The Complainant's version*

- 6.1.3 The Complainant contended that the President unlawfully terminated the services of Judge Sardiwalla.

- 6.1.4 The President failed to adhere to the guidelines as set out in section 177 of the Constitution, which sets out the procedure to be followed for the removal of a judge from office.
- 6.1.5 There is a long running pending matter, in which damages of approximately R1 billion are being claimed by Mr Daniel before Judge Sardiwalla and *“there are several judgements by him that were handed down after the President purported summarily to terminate his services as a judge”*. The prejudice and impropriety in all of these matters is self-evident. If Mr Daniel is obliged to start his case *de novo* the prejudice would be dire.

*Response by the Office of the Chief Justice (OCJ)*

- 6.1.6 The Public Protector issued an allegations letter dated 11 January 2024, to Justice RMM Zondo, the Chief Justice of the Republic of South Africa and Chairperson of the Judicial Services Commission. On 18 January 2024, Mr A Slingers, Director: Executive Support from the Private Office of the Chief Justice responded indicating that:
- 6.1.6.1 There was no basis for raising the allegations of the Complainant with the Chief Justice as he did not play any role in the discharge of Justice Sardiwalla; and
- 6.1.6.2 There is a difference between the removal of a Judge from office and the discharge of a Judge from active service, these two concepts are different and do not follow the same process.

*Response from the Office of the Judge President*

- 6.1.7 On 09 April 2024, the Public Protector issued an allegations letter to Judge Sardiwalla.



- 6.1.8 On 02 May 2024, Judge Mlambo, the Judge President of the Gauteng Division of the High Court of South Africa (Judge Mlambo), responded to the Public Protector on behalf of Judge Sardiwalla, at the behest of Judge Sardiwalla's wife. The response received from Judge Mlambo stated *inter alia* that:
- 6.1.8.1 It was not correct that the President unilaterally terminated the services of Judge Sardiwalla;
- 6.1.8.2 Judge Sardiwalla was discharged by the President from active service in terms of Section 3(2)(c) of the Judges Remuneration and Conditions of Employment Act. Section 3(2)(c) provides that a Judge who holds office in a permanent capacity, may at any time be discharged by the President from active service as a Judge if he or she is afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties;
- 6.1.8.3 The President's decision to discharge Judge Sardiwalla, was in response to Judge Mlambo's letter to Mr RO Lamola (Mr Lamola), Minister of Justice and Correctional Services (Minister) dated 09 June 2023, wherein he recommended that the Minister should request the President to discharge Judge Sardiwalla;
- 6.1.8.4 Judge Mlambo based his recommendation on two (02) reports received from Judge Sardiwalla's medical doctor. The first medical report dated 13 October 2022, outlined his medical condition and the second report dated 05 May 2023, recorded the progression of his condition and recommended that he be medically boarded; and
- 6.1.8.5 At the time that Judge Mlambo requested Judge Sardiwalla's medical boarding, he was seized with a long running civil trial i.e. *Grand Valley Estates (Pty) Ltd & Others Vs Mpumalanga Tourism Park Agency & 24*

*Others: Case number. 34502/2010.* Due to his medical condition, he was unable to continue presiding in this matter and the legal representatives of all parties involved in the matter were informed accordingly. Subsequently, a recommendation was made by Judge Mlambo and the Deputy Judge President that the matter be allocated to another Judge to handle.

*Documents obtained from Judge Mlambo*

- 6.1.9 In addition, Judge Mlambo attached copies of the following documents:
- 6.1.9.1 The President's minute 220/2023, stating that under section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, Judge Sardiwalla was discharged from active service on the basis of becoming permanently incapable of performing his official duties with effect from 01 August 2023; and
- 6.1.9.2 The letter dated 10 August 2023, from Mr Lamola to Judge Sardiwalla informing him of his discharge from service and thanking him for his valuable service as a member of the Judiciary.

*Allegations letter to the Presidency*

- 6.1.10 On 09 April 2024, the Public Protector issued an allegations letter to Ms Phindile Baleni, Director General in the Presidency and Secretary of Cabinet, however, no response was received.

**Responses to the notice issued in terms of Rule 41(1) of the Public Protector Rules**

*Response from Complainant*

- 6.1.11 A notice in terms of rule 41(1) of the Public Protector Rules, dated 20 May 2024, was issued to the Complainant on 21 May 2024, affording him an opportunity to make representations in connection with the intended closure of the complaint. The Complainant responded on 21 May 2024 and indicated that:
- 6.1.11.1 The Public Protector is thanked for the comprehensive and careful report on the boarding of Justice Sardiwalla;
- 6.1.11.2 The only aspect not addressed is the constitutionality of the legislation purporting to give the President untrammelled discretion to board judges. Given the need for an independent judiciary, it is desirable that this provision be revisited in order to build in checks and balances that will serve to preserve judicial independence and prevent possible abuse of the power the section affords the President; and
- 6.1.11.3 He accordingly suggested that the report of the Public Protector be drawn to the attention of the National Assembly in the seventh parliament as well as the Office of the Chief Justice.

*Response from the Presidency*

- 6.1.12 A notice in terms of rule 41(1) of the Public Protector Rules as amended, dated 20 May 2024, was also issued to Ms Baleni on 21 May 2024. Mr Mphaphuli responded on behalf of the Presidency on 21 May 2024 and indicated that they have no objection to the proposed closure of the investigation and align themselves with the account of events as explained by the office of the Chief Justice and Judge President Mlambo.
- 6.1.13 On 04 June 2024 a further response was received from Mr Mphaphuli stating that:

- 6.1.13.1 It is not correct that the President unilaterally terminated the services of Judge Sardiwalla, by issuing an order to that effect. Judge Sardiwalla was discharged from active service in terms of section 3(2)(c) of the Judges Remuneration and Conditions of Employment Act, 2001 as per his own request;
- 6.1.13.2 This provides that a judge who holds office in a permanent capacity may at any time be discharged by the President from active service as a judge if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties; and
- 6.1.13.3 They agree with the preliminary findings of the Public Protector as contained in the Rule 41(1) notice.

*Documents obtained from the Presidency*

- 6.1.14 In addition, Mr Mphaphuli attached copies of the following documents:
- 6.1.14.1 The President's minute 220/2023, stating that under section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, Judge Sardiwalla was discharged from active service on the basis of becoming permanently incapable of performing his official duties with effect from 01 August 2023;
- 6.1.14.2 The President minute, countersigned by Ms Baleni, dated 18 June 2023;
- 6.1.14.3 A letter from the Minister of Justice and Correctional Services to the President giving a brief to the matter and requesting the President to sign the President's minute, dated 26 June 2023; and

- 6.1.14.4 A letter from Judge Mlambo to the Minister of Justice and Correctional Services, communicating the request by Judge Sardiwalla to be discharged from active service, dated 09 June 2023.

*Response from Judge Sardiwalla*

- 6.1.15 A notice in terms of rule 41(1) of the Public Protector Rules as amended, dated 20 May 2024, was also issued to Judge Sardiwalla on 21 May 2024. On 07 June 2024, a response was received from Ms Mckenzie, indicating that the notice was sent to the Judge President.

*Response from the Judge President*

- 6.1.16 A notice in terms of Rule 41(1) of the Public Protector Rules as amended, dated 20 May 2024, was also issued to the Judge President on 21 May 2024. On 04 June 2024, the Judge President's responded to the Public Protector, indicating that the process was transparent and he is of the opinion that nothing untoward was done; and
- 6.1.17 He welcomes the findings to this effect made by the Public Protector and the complaint, in his view was unfounded.

*Applicable law*

**The Constitution of the Republic of South Africa, 1996 (the Constitution)**

- 6.1.18 Section 177 of the Constitution provides that:

(1) A Judge may be removed from office only if –

- (a) The Judicial Service Commission finds that the Judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
- (b) The National Assembly calls for that Judge to be removed by a resolution adopted with a supporting vote of at least two thirds majority of its members.
- (c) The President must remove a Judge from office upon adoption of a resolution calling for that Judge to be removed.
- (d) The President, on advice of the Judicial Service Commission, may suspend a Judge who is the subject of a procedure in terms of subsection (1).

### **Judges' Remuneration and Conditions of Employment Act, 2001**

- 6.1.19 Section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act provides that a Judge who holds office in a permanent capacity, may at any time be discharged by the President from active service as a Judge if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties.

### **Case law**

- 6.1.20 In *South African Reserve Bank v Public Protector & Others*<sup>1</sup>, the court held that:

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<sup>1</sup> 2017(6) SA 198 (GP) para [43].

*“[...] The Public Protector does not have the power to prescribe to Parliament how to exercise its discretionary legislative powers.”*

- 6.1.21 In *President of the Republic of South Africa & Another v Public Protector and Others*<sup>2</sup> the Court held that:

*“[164] However, the Public Protector is an organ of state and must abide by the constitutional principal of separation of powers. She must give due deference to the expertise within other organs of state.*

*[...]*

*[175] Discretionary powers are generally left to the holder of the power to exercise. While there may be instances where the Public Protector is lawfully entitled to encroach on a discretionary power, and to direct that it should be exercised and in what fashion, such remedial measure must be necessary and appropriate to remedy the prejudice associated with the complaint. Too quick a resort to this type of measure may infringe the separation of powers. It was, in our view, simply beyond the Public Protector’s competence to issue such a directive to the Speaker.*

#### *Analysis*

- 6.1.22 Section 177 provides that a Judge may be removed from office by the President only in instances where the JSC finds, *inter alia* that there is incapacity and through a two thirds majority resolution of the National Assembly. The evidence before the Public Protector indicates that the process set out in section 177 of the Constitution is not applicable as Judge Sardiwalla was not removed from office but rather discharged from active service due to ill health.

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<sup>2</sup> (55578/2019) [2020] ZAGPGHC 9, 10 March 2020.

- 6.1.23 Accordingly, the applicable legal prescript followed in this instance is section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, which provides for the discharge of a Judge by the President from active service if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties.
- 6.1.24 The evidence before the Public Protector reveals that the President discharged Judge Sardiwalla, following the recommendation made by his medical doctor that he should be medically boarded. The President in the circumstances was empowered in terms of section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act to discharge Judge Sardiwalla from active service.
- 6.1.25 The Complainant in his response to the notice issued in terms of rule 41(1) of the Public Protector Rules, indicated that the only aspect not addressed in the notice is the constitutionality of the legislation purporting to give the President untrammelled discretion to board judges. He further stated that given the need for an independent judiciary, it is desirable that this provision be revisited in order to build in checks and balances that will serve to preserve judicial independence and prevent possible abuse of the power the section affords the president.
- 6.1.26 In his response he further suggested that the report of the Public Protector be drawn to the attention of the National Assembly in the seventh parliament as well as the Office of the Chief Justice.
- 6.1.27 As stated above, the evidence before the Public Protector indicates that the process set out in section 177 of the Constitution is not applicable as Judge Sardiwalla was not removed from office but rather discharged from active service due to ill health. This was also confirmed in the response to the



Rule 41(1) notice by Adv Mphaphuli from the Presidency, that Judge Sardiwalla was discharged from active service in terms of section 3(2)(c) of the Judges Remuneration and Conditions of Employment Act, 2001 as per his own request.

- 6.1.28 On the strength of this evidence, there is no basis for the Public Protector to pursue the investigation any further into the alleged constitutionality of the legislation purporting to give the President untrammelled discretion to medically board judges as Judge Sardiwalla was discharged from active service in terms of section 3(2)(c) of the Judges Remuneration and Conditions of Employment Act, 2001, as per his own request supported by medical evidence.
- 6.1.29 Furthermore, it is not the mandate of the Public Protector to make a determination on the constitutionality of legislation as this falls within the purview of the Constitutional Court. From the jurisprudence quoted above in the cases of ***South African Reserve Bank v Public Protector & Others***<sup>3</sup>, and ***President of the Republic of South Africa & Another v Public Protector and Others***<sup>4</sup> the doctrine of separation of powers by the different organs of state is amplified. It is clear from this that the Public Protector does not have the powers to prescribe how discretionary legislative powers, entrusted to certain functionaries, must be exercised, and thus cannot intervene any further in this matter.

### *Conclusion*

- 6.1.8 Having considered the evidence before the Public Protector, it is concluded that the President's decision to discharge Judge Sardiwalla from active

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<sup>3</sup> 2017(6) SA 198 (GP) para [43].

<sup>4</sup> (55578/2019) [2020] ZAGPGHC 9, 10 March 2020.

service was taken based on the provisions of the Judges' Remuneration and Conditions of Employment Act and supported by the medical reports from his medical doctor.

## **7. FINDINGS**

Having regard to the evidence, the regulatory framework determining the standards that the President should have complied with, the Public Protector makes the following findings:

### **7.1 Whether the process followed by the President when he discharged Judge Sardiwalla from duty was in violation of applicable legal prescripts, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994**

7.1.1 The allegation that the process followed by the President when discharging Judge Sardiwalla from duty was in violation of applicable legal prescripts is **not substantiated**.

7.1.2 The evidence before the Public Protector indicates that the President discharged Judge Sardiwalla from service, in terms of section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, which provides for the discharge of a Judge by the President from active service if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties.

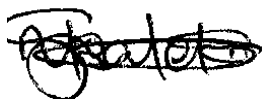
7.1.3 The evidence further indicates that the process was initiated following a report from Judge Sardiwalla's medical doctor which recommended that he should be medically boarded. The President in the circumstances acted in terms of section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act that empowered the President to discharge Judge Sardiwalla from active service on medical grounds.

7.1.4 The Public Protector accordingly does not make a determination on the constitutionality of section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act, 2001, as it does not fall within the mandate of the Public Protector to test the constitutionality of legislation.

7.1.5 The conduct of the President in this regard does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## **8. CONCLUSION**

8.1 The Public Protector considers this matter as finalised and cannot take it further.



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**ADV. KHOLEKA GCALEKA**  
**PUBLIC PROTECTOR**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE: 30 JUNE 2024**

*Assisted by: Ms Ponatshego Mogaladi*  
*Executive Manager: Investigations*